Dispute Resolution

July 2015

DISPUTE RESOLUTION BULLETIN

Welcome to the July edition of our Dispute Resolution Bulletin.

This month, the first two articles come from our insurance group. First, Partner Paul Wordley and Associate Ciara Jackson look at dispute resolution in the insurance industry and in particular, the impact of the Insurance Act 2015.

Next, Partner Costas Frangeskides and Associate Ben Atkinson consider why the choice of place of arbitration should not be considered a purely logistical matter and in particular, its important consequences in terms of both applicable procedural law and enforcement.

Finally, Jessica Crozier, an Associate in our Dubai office looks at attaching assets in the UAE, an effective tool for claim creditors.

Should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact any of the contributors to this bulletin, or your usual contact at HFW.

Damian Honey, Partner, damian.honey@hfw.com
Amanda Rathbone, Professional Support Lawyer, amanda.rathbone@hfw.com

holman fenwick willan hfw

The impact of the Insurance Act 2015 on insurance dispute resolution

In this article, Partner Paul Wordley and Associate Ciara Jackson look at dispute resolution in the insurance industry and, in particular, the impact of the Insurance Act 2015.

The use of arbitration as a means of dispute resolution in the insurance and reinsurance markets is increasing, particularly on an international level. A number of mainstream arbitration forums have seen a significant increase in insurance activity, namely ICC, SIAC, DIFC and LCIA. In addition, there are specialist insurance and reinsurance arbitration forums such as ARIAS.

What has not changed is the law parties choose to govern their disputes. In the context of global insurance programmes, facultative reinsurance and business in expanding markets (Latin America, Middle East, Africa and Asia), where permitted, English law is the law of choice for insurance and reinsurance contracts. This is because there is a well-defined body of statute and case law supporting interpretation.

The Insurance Act 2015 (the **act**), which received Royal Assent on 12 February 2015, is the first full review of English insurance law for over 100 years. It applies to insurance contracts entered into from 12 August 2016. It brings in significant changes to English insurance contract law, with reforms in areas such as pre-contractual disclosure, conditions, warranties and fraudulent claims. It will impact the resolution of insurance and reinsurance disputes significantly. Some key changes are outlined below.

Fair presentation of risk

The current duties regarding disclosure and representations are replaced by a new requirement for the insured to make a "fair presentation of the risk". Disclosure must be made in a manner that would be "reasonably clear and accessible to a prudent insurer", the intention of which is to prevent the practice of "data dumping" on insurers.

The insured must disclose every material circumstance which it knows or ought to know, or alternatively must give the insurer "sufficient information to put a prudent insurer on notice that it needs to make further enquiries" to reveal such material circumstances. The definition of "material circumstance" remains the same:

1. Something that would affect the judgement of a prudent insurer in deciding whether to accept the risk and if so on what terms.
2. Something that induced the actual insurer to accept the risk.

There are certain exceptions to the duty of disclosure, such as where the insurer knows, ought to know or is presumed to know something.

Importantly, the act introduces proportionate remedies for breach of the duty of fair presentation: if the insurer would not have written the risk, the remedy of avoidance is still available; if the insurer would have imposed additional terms and conditions, these are deemed incorporated into the contract; if the insurer would have charged a higher premium, the insurer is entitled to a pro rata claim reduction.

Basis of contract clauses and warranties

In terms of warranties, one of the key changes under the act is the abolition of the use of "basis of contract" clauses. These clauses elevated all information provided to insurers to material significance.

There is also a significant change to insurers' remedy for breach of warranty. The current law provides for a complete discharge of the insurer's liability from the time of the breach of warranty. Under the act, breach of warranty will suspend an insurer's liability from the time of the breach until such time as the breach is remedied. The insurer will not be liable for any loss which occurs during this period, or which can be attributed to something which occurs during this period. However, provided the breach is capable of being remedied, the insurer's liability will be reinstated once the breach is remedied.

Where a term is designed to reduce the risk of a particular kind of loss, or loss at a particular place or time, an insurer will only have a remedy if the loss suffered is of the particular kind, or at the particular time or place, contemplated by the term.

Fraudulent claims

The act provides that an insurer is liable for losses up to the time of the fraudulent act, but can treat the policy as terminated from the time of the fraudulent act. Previously, fraudulent acts voided the insurance from the outset.

Knowledge regime

The most complex part of the act concerns the introduction of a new "knowledge regime" in terms of new legal and factual tests for both insureds and insurers. An individual insured is treated as knowing (and must therefore disclose) what he knows and what is known to the individuals responsible for his insurance. An insured who is not an individual must disclose what is known to senior management and

Importantly, the act introduces proportionate remedies for breach of the duty of fair presentation: if the insurer would not have written the risk, the remedy of avoidance is still available; if the insurer would have imposed additional terms and conditions, these are deemed incorporated into the contract; if the insurer would have charged a higher premium, the insurer is entitled to a pro rata claim reduction.

PAUL WORDLEY, PARTNER

to the individuals responsible for its insurance. The individuals responsible for insurance include employees of the insured (such as risk managers and those involved in negotiating the insurance) as well as the insured's agents (such as brokers).

Knowledge deemed to be held by insurers does not need to be disclosed. An insurer is deemed to know:

1. What is known to the individuals who decide whether to accept the risk.
2. Information which is held by the insurer and readily accessible by the individual underwriter.
3. Common knowledge and information which an insurer offering the particular class of business would reasonably be expected to know.

Proportionality

The act introduces features from many international insurance regimes and negates some of the draconian features of current English insurance law. The "all or nothing" nature of insurer remedies is replaced by one which provides remedies that are proportionate to the breach. Many of these new provisions have been incorporated into bespoke policy wordings for corporate insureds and cedants over the last 15 years as brokers/insurance lawyers have seen the benefit of proportionate regimes in other jurisdictions.

Conclusion

Although the act does not come into force until August 2016, insureds, insurers and brokers should be seeking to adopt its provisions now and should be considering the impact it is likely to have on the outcome of any disputes they may enter. Parties should also be prepared for an inevitable lack of certainty while the new provisions are clarified by case law, particularly as regards the new remedy regimes and the knowledge regime.

For more information, please contact Paul Wordley, Partner, on +44 (0)20 7264 8438 or paul.wordley@hfw.com, or Ciara Jackson, Associate, on +44 (0)20 7264 8423 or ciara.jackson@hfw.com, or your usual contact at HFW.

The significance of the place of the arbitration in international arbitration

It is common for international commercial agreements to include arbitration clauses by which the parties agree that their disputes will be resolved by way of arbitration, sometimes according to a particular set of institutional rules, such as ICC, LCIA or SIAC. As well as stating which (if any) institutional rules will apply, such clauses also commonly specify a place of the arbitration.

The choice of the place of the arbitration should not be considered a purely logistical matter. It has important consequences in terms of both the applicable procedural law and enforcement of any award.

Applicable procedural law

The applicable procedural law will govern issues such as the constitution of the tribunal, challenges to arbitrators, and the requirements of due process. Save in exceptional circumstances, these matters will be dealt with by the courts and according to the governing law of the place of the arbitration. In other words, in agreeing the place of the arbitration, the parties are agreeing that the procedural law of that place shall apply to the arbitration.

This principle is reflected both in the wording of various international conventions and in the drafting of arbitration law itself in certain countries. For example, the 1923 Geneva Protocol states that *"The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place".* Equally, the English Arbitration Act 1996 is drafted so that certain of its provisions apply only where the seat of the arbitration is in England, Wales or Northern Ireland.

While there are broad similarities between arbitration law in developed legal systems, some differences do exist, for example as to the extent of the court's supportive powers. Less developed legal systems may have very unusual arbitration laws, or none at all.

COSTAS FRANGESKIDES, PARTNER

The procedural law of the place of the arbitration applies even where the parties have chosen to arbitrate according to a particular set of institutional rules. The choice of a particular set of rules does not do away with the need for a governing procedural law. The precise relationship between the chosen set of arbitration rules and the governing procedural law will vary.

Generally, at least in major centres of arbitration, the approach to arbitration law is not unduly prescriptive or interventionist. For example, the English Arbitration Act 1996 enshrines the principles of party autonomy and limited court intervention. However, by the same token, even where the local arbitration law gives the parties relatively free rein, it is unlikely that any of the main sets of institutional rules will cater for every possible procedural eventuality which may arise (this is, after all, not the function of such rules) so it is likely that there will be scope for both the chosen rules and local arbitration law to operate.

While there are broad similarities between arbitration law in developed legal systems, some differences do exist, for example as to the extent of the court's supportive powers. Less developed legal systems may have very unusual arbitration laws, or none at all. Equally, just as the content of arbitration law will differ between jurisdictions, so will the approach of the courts in interpreting it. Ideally, the parties should seek to agree a place of arbitration with a modern, well-developed arbitration law and a supportive court system.

Enforcement

The second major significance of the place of the arbitration is in determining the "nationality" of an arbitration award, which may be relevant in relation to enforcement. This is because when ratifying the New York



Convention (which provides a regime for the enforcement and recognition of arbitral awards within contracting states), many states chose to make a reciprocity reservation, meaning that they will enforce awards only if the place of the arbitration was within another ratifying state. Although a high number of states – more than 150 – are parties to the New York Convention, this should be checked before agreeing a place of the arbitration.

Further, article V(1)(a) of the New York Convention requires that an award complies with "the law of the country where the award was made". This means that it will only be possible to enforce the award in a country other than the place of the arbitration, if it can be shown that the award complies with the law of the place of the arbitration.

Location

Perhaps somewhat counter-intuitively, the place of the arbitration does not conclusively determine where the proceedings will take place. Although the choice of a place of arbitration indicates a geographical choice as regards the location for hearings etc, this does not mean as a matter of international arbitration law that the parties have limited themselves to that place. There may be practical reasons why it is more convenient and/or efficient to hold hearings somewhere else. This is reflected in, for example, both the ICC and LCIA rules, which allow the tribunal to determine where hearings will take place, unless the parties have gone further than specifying the place of the arbitration and have also agreed a particular hearing venue. However, even where hearings take place elsewhere, the parties' choice of the legal place of the arbitration retains its significance in the ways discussed above.

Conclusion

Rather than being simply a logistical matter of the geographical location of the proceedings, the choice of the place of an international arbitration is important both in terms of applicable procedural law and enforcement. This is the case even where the tribunal rules that, for practical reasons, hearings should in fact take place somewhere else. Parties negotiating international contracts containing arbitration clauses should take these factors into account when agreeing a place of arbitration. In particular, parties should be seeking to agree a place with a modern, well-developed arbitration law and a supportive court system, in respect of which no issues of enforcement under the New York Convention are likely to arise.

For more information, please contact Costas Frangeskides, Partner, on +44 (0)20 7264 8244 or costas.frangeskides@hfw.com, or Ben Atkinson, Associate, on +44 (0)20 7264 8238 or ben.atkinson@hfw.com, or your usual contact at HFW.

Attaching assets in the UAE: an effective tool for claim creditors

There is a wide range of precautionary attachment options in the UAE which creditors in the region should take into account.

Precautionary attachments are governed by the UAE Civil Procedure Law (CPL). Article 252 is the main provision granting provisional attachment rights. A creditor may apply to the UAE courts for a precautionary attachment order over the real estate and/or moveable assets of the debtor if he fears he will not be able to secure his claim or enforce his arbitration award/judgment against the debtor's assets. Article 252 provides that in order to obtain an attachment, one of the following requirements (which are not an exhaustive list of examples) must apply:

1. The debtor has no permanent residence in the country.
2. The creditor fears that the debtor will escape, or will smuggle out or conceal his properties.
3. The securities of the debt are under threat of loss/dissipation.

An award creditor can seek a precautionary attachment order before ratifying its arbitration award. Furthermore, if the creditor holds a cheque or bill of exchange issued by the debtor, the attachment order should be granted by the court without needing to show that there is a fear that assets will be dissipated (Article 252(2) of the CPL).

Article 253 provides that a creditor can attach his own assets, if held by a third party, if these assets are at risk. Article 257 of the CPL also provides the option of securing the debtor's assets


that are in a third party's custody (for example in a warehouse).

In practice, bank accounts and real estate properties are the most common form of assets attached. Other options include attachments of equipment, cargoes, cars/vehicles, furniture, shares and office equipment. Because there are a lot of expatriate owned businesses in the UAE, precautionary attachment orders are commonly obtained against foreign owned assets.

Article 252 of the CPL does not govern precautionary attachments of vessels. These are governed by the UAE Maritime Law (Article 115).

Evidentially, the onus is on the claimant to specify or identify the assets for which an attachment order is sought and to present a credible claim against the defendant.

It is worth highlighting that certain assets may not be attached. Firstly, it is not possible to obtain an attachment order against state owned assets (Article 274 of the CPL). It is also difficult to obtain an attachment order against a UAE national. This is due to the difficulty in establishing the risk of dissipation of such assets, as such debtors have a permanent address in the UAE and are not likely to leave the country (Article 252 of the CPL).

Further, the debtor's home and anything in the home that the debtor and his legal dependents reasonably need, for example land or agricultural equipment necessary for a farmer to earn a sustainable living, or books and equipment necessary for the debtor to perform his profession, cannot be attached.

Before an attachment order is executed, a judge may prescribe certain conditions for enforcement. These typically include proof of ownership of the asset or a copy of the trade licence to prove that the business being attached belongs to the defendant. Sometimes the judge may order that the claimant provides countersecurity or an undertaking to cover any damages that the defendant may suffer should the action prove unjustifiable.

If a precautionary attachment is granted, the applicant must commence the substantive proceedings for confirmation of his right within eight days of obtaining the attachment order, otherwise if the debtor challenges the order by filing a grievance, the court will probably revoke it.

JESSICA CROZIER, ASSOCIATE

If a precautionary attachment is granted, the applicant must commence the substantive proceedings for confirmation of his right within eight days of obtaining the attachment order, otherwise if the debtor challenges the order by filing a grievance, the court will probably revoke it. Moreover, the substantive claim before the UAE court can be stayed in favour of foreign or local arbitration proceedings. In addition, where the UAE court does not consider that it has jurisdiction to hear the underlying claim, it should in theory be possible to stay the substantive proceedings in favour of a foreign court's jurisdiction.

Lastly, if the defendant fails to pay the amount awarded by the court after final judgment, the creditor can request that the enforcement court sells the attached assets through public auction, the proceeds of which will be distributed to the creditors.

In summary, a precautionary attachment order in the UAE is a quick and effective tool by which a creditor can protect its rights and put pressure on the debtor to make settlement.

For more information, please contact Jessica Crozier, Associate, on +971 4423 0552 or jessica.crozier@hfw.com, or Rami Al Tal, Associate, on +971 4 423 0514 or rami.altal@hfw.com, or your usual contact at HFW.

hfw Conferences and events

HFW Sanctions Update Seminar (as part of London International Shipping Week)
HFW London
8 September 2015
Presenting: Daniel Martin and Anthony Woolich

Dispute Resolution Seminar
Dubai
8 September 2015
Presenting: Damian Honey, Simon Cartwright, Yaman Al Hawamdeh and Sam Wakerley

11th Annual International Colloquium - The Institute of International Shipping and Trade Law
Swansea
10 -11 September 2015
Presenting: Damian Honey

MLAANZ 2015 Annual Conference
Perth
17 – 18 September 2015
Presenting: Hazel Brewer and Gavin Vallely

Nic van der Reyden will chair a session.

Lawyers for international commerce hfw.com

São Paulo London Paris Brussels Geneva Piraeus Dubai Shanghai Hong Kong Singapore Melbourne Sydney Perth