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"PLANE" ENGLISH: COURT OF APPEAL HOLDS NO ASSIGNMENT CLAUSE DOES NOT PREVENT TRANSFER OF CLAIM TO INSURER

In the recent case of *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* the English Court of Appeal had to consider the issue of whether a no-assignment clause in a sale contract for two aircraft applied when the insured's rights had been assigned to its insurer under an insurance policy. Overturning the first instance decision, the Court of Appeal held that the clause did not apply and that the insurer could pursue a claim under the sale contract.

Background

Dassault Aviation SA as seller (Dassault) entered into a sale contract dated 6 March 2015 with a buyer (the Sale Contract). The Sale Contract was subject to English law and provided that Dassault would construct and supply two Dassault Falcon surveillance aircraft and associated parts and services to the buyer. Separately, the buyer contracted with the Japanese Coast Guard to supply the aircraft to them.

Clause 15 of the Sale Contract was headed "Assignment-Transfer". Clause 15 provided, with limited express exceptions, that the parties were prohibited from transferring or assigning rights, as follows:

> "*.. this Contract shall not be assigned or transferred in whole or in part by any Party to any third party, for any reason whatsoever, without the prior written consent of the other Party and any such assignment, transfer or attempt to assign or transfer any interest or right hereunder shall be null and void without the prior written consent of the other Party*….".

The buyer obtained an insurance policy (the Policy) from Mitsui Sumitomo Insurance Co Ltd (the insurer) (without informing Dassault) covering its liability to pay damages to the Coast Guard if the aircraft were delivered late. The Policy was subject to Japanese law.

Delivery of both aircraft was considerably delayed and the Japanese Coast Guard did claim damages from the buyer, which then claimed an indemnity for those damages under the Policy. The insurer accepted and paid the indemnity.

Under insurance policies subject to English law (and the law of many other jurisdictions), the principle of subrogation enables an insurer to "step into the shoes" of its insured when an insurer pays an indemnity to an insured and allows the insurer to pursue any third party which was responsible for the insured loss. The recovery action then proceeds in the name of the insured, although in practice it is usually directed by insurers, given that the insured is already indemnified. However, in this case, the Policy was subject to Japanese law. Under Article 25 of the Japanese Insurance Law, the insured's rights are automatically assigned to the insurer by operation of law, when an insurer indemnifies its insured.

The insurer sought to pursue Dassault for damages for late delivery in its capacity as assignee of the buyer's rights. The Sale Contract provided for ICC arbitration. Dassault argued that the arbitral tribunal had no jurisdiction to hear the matter on the ground that the buyer had breached the Sale Contract, which prohibited assignment. However, Dassault's argument was unsuccessful and the majority of the tribunal held that it did have jurisdiction over the matter. Dassault then made an application to the English Commercial Court under section 67 of the Arbitration Act 1996 to set aside the partial award. Section 67 allows parties to challenge an award on the ground that an arbitral tribunal lacked "substantive jurisdiction".

The case was then heard by Mrs Justice Cockerill in the Commercial Court. The Court held that the question was whether the transfer had occurred outside the voluntary control of the transferring party and it was necessary to consider whether there was a sufficient "degree" or "taint" of voluntariness in the transfer. Considering the particular facts of this case, the Court held that the assignment of the buyer's rights to the insurer was a consequence of

voluntary acts because the buyer had deliberately taken out the insurance policy and submitted an insurance claim. The Judge found the decision difficult, and noted that she had reached it "*with an unusual degree of hesitation*".

Court of Appeal decision

Sir Geoffrey Vos giving judgment (with which the other judges agreed) found the matter more straightforward than at first instance and allowed the appeal, finding that Clause 15 did not prevent the insurer from pursuing the claim against Dassault under the Sale Contract. The Court held that the meaning of Article 15 was clear. It prohibited transfers "**by** any Party" (our emphasis) and not transfers as a consequence of certain actions taken by the buyer. The arbitrators had found that the buyer's claims against Dassault were transferred by operation of law under Article 25 of the Japanese Insurance Act, not by the buyer itself, so the no-assignment prohibition did not bite. The first instance judge had reached her conclusion by considering old insolvency cases but these did not set out a general principle applicable to non-assignment clauses in commercial contracts. In these circumstances it was not necessary to consider the factual background to the matter, nor whether Article 15 would have prevented a claim by insurers in English subrogation law had it applied (although the parties accepted that it would not have done.)

Discussion

The judgment at first instance included discussion of English law subrogation, and how it operates, and the differences compared to Japanese law. The Court of Appeal held that it was not necessary to address this aspect, in view of the clear wording of the non-assignment clause.

Nonetheless, the judgment still demonstrates the importance of considering how the policy operates in connection with the relevant commercial contract. It is possible that in a different fact pattern the non-assignment clause might be drawn more widely, or perhaps just more ambiguously (leaving the door open to arguments about what the provision means). This may then present issues for an insurer seeking to exercise rights of subrogation, whether under English law or the law of another jurisdiction, which, even if ultimately resolved in the insurer's favour, still add to the costs of a dispute.

For liability insurers, it remains important to give careful consideration where possible to commercial contracts entered into by its insureds regarding issues such as assignment, governing law and any contractual provisions about obtaining insurance and risk allocation.

For policyholders, it demonstrates that no-assignment clauses should be drafted as clearly as possible and therefore a policyholder may wish to take appropriate legal advice to ensure that the wording of such provisions adequately reflects their intentions.

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