

Weekly update



Welcome to the seventeenth edition of Clyde & Co's (Re)insurance and litigation caselaw weekly updates for 2012.

These updates are aimed at keeping you up to speed and informed of the latest developments in caselaw relevant to your practice.

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Sulamerica CIA v Enesa

Governing law and scope of arbitration agreement/whether a binding obligation to mediate first

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/638.html>

Clyde & Co (Peter Hirst and Richard Butt) for respondents

The first instance decision in this case was reported in Weekly Update 03/12. Cooke J granted the continuation of an anti-suit injunction restraining the insured from pursuing proceedings in Brazil (in which it sought a declaration that it was not bound to arbitrate the dispute in London). The insured appealed and the Court of Appeal has now held as follows:

(1) The governing law of the arbitration agreement. The policy contained an express choice of Brazilian law as the law governing the policy and an exclusive jurisdiction clause in favour of the courts of Brazil. Moore-Bick LJ (having reviewed prior caselaw) agreed that, in the absence of any indication to the contrary, an express choice of law governing the substantive contract is a “strong indication” of the parties’ intention in relation to the arbitration agreement (which is separable from the rest of the contract). However, in this case, two important factors pointed the other way:

(a) the parties had expressly chosen England as the seat of the arbitration. That choice “invariably imports” an acceptance that English law and the Arbitration Act 1996 will apply to any arbitration commenced under the policy: “This tends to suggest that the parties intended English law to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators”; and

(b) if Brazilian law were to govern the arbitration agreement, it would arguably be enforceable only with the consent of the insured. That was a “powerful” factor since there was nothing to indicate that the parties had intended to enter into a one-sided agreement of that kind. Accordingly, the choice of Brazilian law would significantly undermine the arbitration agreement. The Court of Appeal concluded that the system of law with which the arbitration agreement had the closest and most real connection was English law.

(2) Whether there was a binding obligation to mediate before arbitrating. The policy contained a mediation clause by which the parties had agreed to “seek to have the dispute resolved amicably by mediation”, failing which the dispute could then be referred to arbitration. The insured argued that this was an enforceable obligation and that compliance with its terms was an essential pre-condition to arbitration. The Court of Appeal accepted that the parties intended the mediation clause to be enforceable and the court should be slow to hold that they had failed to achieve that objective. Nevertheless, each case must be considered on its own terms and, in this case, the clause was not effective in law because it failed to define the parties’ rights and obligations with sufficient certainty. In particular, the clause did not set out any defined mediation process and

nor did it refer to the procedure of any specific mediation provider. Instead, it merely contained an undertaking to seek to have the dispute resolved amicably by mediation. At most, therefore, the clause imposed an obligation on a party contemplating arbitration to invite the other side to an ad hoc mediation, but even that was not an enforceable obligation here.

(3) The scope of the arbitration agreement. This provided that if the parties failed to agree “as to the amount to be paid under this Policy” through mediation, the dispute would be referred to arbitration. The insured sought to argue that the dispute between the parties - essentially, whether the insurers are liable to indemnify the insured under the policy - fell outside the scope of this provision which is limited to disputes about quantum. The Court of Appeal rejected that argument. It agreed with the finding of Cooke J. that as a matter of language, a failure to agree “as to the amount to be paid under this policy” includes disputes about whether any sum is due under the policy at all, and thus includes matters of liability and coverage. It also said that it would be very surprising if the parties had intended to limit the scope of the agreement in this way: “It would be unusual for parties to a contract of this kind to establish separate and distinct procedures for resolving what in many cases are likely to be different aspects of the same dispute, and there is no indication that they had that in mind”.

COMMENT: This case therefore highlights that the courts will strive to ascertain the intention of the parties where clauses in a policy potentially conflict with each other or are uncertain. In the case of mediation, it again stresses the importance of setting out a clear mediation process in order to ensure that the mediation clause in a contract will be enforceable.

European Group & Ors v Chartis

Two possible causes of loss/inherent vice

<http://www.bailii.org/ew/cases/EWHC/Comm/2012/1245.html>

Much of this case, concerning a dispute about which insurance policy responded to a claim, turns on its particular facts but the following is of general interest:

(1) Two rival theories for the loss of certain blocks were advanced and the parties agreed that these exhausted all possible causes. Popplewell J rejected the argument that, having ruled out one possible cause, he should inevitably conclude that the only other possible cause must have been what occurred. It is possible for a court to be “left in doubt, such that even if it rejects the insurer’s explanation, it can not say that the assured’s explanation is more probable than any alternative (uninsured) explanation. In those circumstances the assured’s claim fails on the burden of proof”. However, on the facts of the case, there was sufficient evidence to support the other theory for the loss (ie that loss was caused during transit).

(2) One insurance policy expressly excluded cover for inherent vice. Although the judge had found that vibration during transit was a cause, it was argued that there was an additional proximate cause of the loss which amounted to inherent vice. If that was correct, the loss would be excluded because where a loss has two proximate causes - one being within the policy and the other being excluded - the exclusion takes effect to exempt the insurer from liability. The judge rejected that argument because, on the facts, the blocks could reasonably have been expected to survive transportation at the time they first left the factory.

Furthermore "it is clear from the authorities that where it is established that a proximate cause of the loss is a fortuity occurring during the period of cover, there is no room for inherent vice to be treated as another proximate cause of the loss. This is because a loss by inherent vice is a loss caused by the inherent characteristics of the cargo **not involving any fortuitous external accident or casualty**" (emphasis added by the judge).

In this case, damage occurring during transportation was proximately caused by vibration which was an external fortuitous accident or casualty. There was therefore no room as a matter of law for inherent vice to be an additional proximate cause.

COMMENT: In *Global Process v Berhad* (see Weekly Update 05/11) the Supreme Court approved Lord Diplock's definition of inherent vice (quoted above by the judge). In this case the judge has confirmed again that it is not possible for a loss to be caused both by an external fortuitous event and inherent vice as well.

Yeates v Aviva Insurance

Application for extension of time to appeal/ insurers' argument that claim is fraudulent

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/634.html>

At first instance, the judge found that the insured intended to (and did) give the impression to his insurers that he had no involvement with a company which he had in fact set up (and which project managed repairs to his property which had been damaged by flood). Although the insured was given permission to appeal (on the basis that the law as to fraudulent claims and devices was in a state of development), he did not serve his notice of appeal until the time for service had expired. Accordingly, he sought an extension of the time for appealing from the Court of Appeal.

The Court of Appeal has now dismissed the application. It noted the "new and stricter criteria which apply to extensions of time" and the need to follow the check-list laid down in CPR r3.9. That check-list makes no reference to the merits of the appeal and the Court of Appeal (following an earlier Court of Appeal decision in *Sayers v Clarke Walker* (2002)) confirmed that the merits need only be taken into account if the question of whether to extend time is difficult to resolve. That was not the case here, especially as the insured has not been full and frank with the court.

In any event, the merits of the proposed appeal were "highly debatable". The insured had sought to argue that he had had a genuine insurance claim and the claim for the project management fee (which was in fact never paid) was for only 3 per cent of the claim and so should be treated as immaterial. Longmore LJ said that although the insured "in theory" had certain legal arguments, they were arguments "of doubt and difficulty which start from a distinctly unmeritorious premise".

COMMENT: Although the Court of Appeal did not need to further consider the underlying appeal, it is worth recalling that in the recent case of *Aviva Insurance v Brown* (see Weekly Update 09/11), an (eventually aborted) attempt to claim approximately £6,500 per month for accommodation costs in relation to a property which the insured in fact owned as part of a genuine total claim of over £230,000 (ie under 3 per cent of the claim, per month) was not viewed as "immaterial" either.

Western Bulk v Carbofer Maritime

Worldwide freezing orders where party not subject to English law/jurisdiction

<http://www.bailii.org/ew/cases/EWHC/Comm/2012/1224.html>

Clarke J found that there was no risk of dissipation in this case and so discontinued a worldwide freezing injunction against the two defendants (although one defendant had been incurring debts to the other in an "inexplicable" way and at an "astonishing rate" (the two defendants being managed by the same personnel), that was not proof of dissipation, the debt having been certified by accountants). Although not necessary to do so, Clarke J also considered whether the court had jurisdiction to make a freezing injunction against one of the defendants pursuant to section 44 of the Arbitration Act 1996, even though it was not a party to a London arbitration governed by English law (the relevant contract which that defendant had entered into contained a Greek law and arbitration clause).

Clarke J found that section 44 plainly gave the court jurisdiction even when the seat of the arbitration is outside England and Wales and so the court has the power to grant permission to serve an arbitration claim form out of the jurisdiction wherever the seat of the arbitration is and regardless of which law applies if the claim is for an order under section 44. However, it was "highly material" that no Greek arbitration had in fact been commenced here and no undertaking had been given to commence one: "In the absence of either it would not be appropriate to grant relief against [the defendant] in support of any substantive claim against it".

The claimant also sought to rely on the case of *TSB Private Bank v Chabra* [1992] to argue that the court had jurisdiction to grant relief against a third party, against whom it does not have a cause of action, if that third party is holding the assets of someone against whom it does have a cause of action. The defendant sought to argue that the court would

not have any basis for granting permission to serve it (as a third party) out of the jurisdiction since it was not a party to a London arbitration.

There is prior caselaw both for and against that argument and although Clarke J declined to resolve “this controversy”, he said he would be inclined to follow the decision of the Court of Appeal in *Tedcom Finance v Vetabet* [2011] that there was an “arguable case” that the court would have jurisdiction to grant permission to serve out in order to preserve assets which were the subject matter of the proceedings.

(1) JSC BTA v Ablyazov

Whether solicitors had to disclose client contact details/privilege issues

<http://www.bailii.org/ew/cases/EWHC/Comm/2012/1252.html>

Weekly Update 09/12 reported how the defendant in this case had been ordered to surrender to the tipstaff following his sentencing for contempt of court. The court subsequently ordered the defendant’s solicitors to disclose all contact details which they had for their client. In so doing, the court relied on the decision of *JSC BTA Bank v Solodchenko* (see Weekly Update 30/11). The defendant’s solicitors had established a “conference call facility” whereby the defendant dialled in every day to talk to his solicitors, as well as setting up an email account (the “email facility”) which could be accessed by the defendant and to which the solicitors sent documents for him to look at. The claimant wished to obtain further details of the conference call facility and the email facility in order to seek to track down the defendant’s location (by obtaining Norwich Pharmacal orders against the service providers).

Teare J held that he did have jurisdiction to make the order sought (pursuant to section 37 of the Senior Courts Act 1981). However, he went on to find that the telephone number and email address in this case were protected from disclosure by legal professional privilege. The lines of communication here were used solely for the purpose of giving and receiving legal advice: “The connection between the telephone number and the email address and the seeking and receiving of legal advice in the present case is clear and manifest”. Furthermore, there is a “prior right” to the right to seek and receive legal advice - namely, the right of access to a solicitor.

COMMENT: It will be recalled that in the *Solodchenko* case, Henderson J had found that “the committal order makes all the difference”. Although the judge accepted here that the defendant was in an “unattractive position and not deserving of sympathy” he added that “if anyone needed legal advice”, it was him. Furthermore, the defendant was currently exercising his right to appeal the court’s decision to commit him for contempt. He concluded that “A contemnor is as much entitled to the right of access to legal advice as a law abiding citizen. Ensuring that he has such right ought not to be regarded as bringing the administration of justice into disrepute”.

(2) JSC BTA v Ablyazov

Whether defendant should surrender to custody as a pre-condition to having his appeal heard

<http://www.bailii.org/ew/cases/EWCA/Civ/2012/639.html>

In this case, the Court of Appeal considered whether the defendant mentioned above should be required to surrender to custody in order to be allowed to continue his appeal against the committal order. Although it noted that there were strong grounds for believing that the defendant was in wilful default of various orders of the court and was doing his best to frustrate the claimant’s attempt to enforce any judgment which it may obtain against him, it was concluded that the order should not be made. Moore-Bick LJ said that “However badly he may have behaved, [the defendant] is seeking to challenge an order which directly affects his personal liberty. As Potter L.J. observed in *Motorola v Uzan* (No. 2), the circumstances will be rare indeed where it will be right to shut a contemnor out from arguing an appeal against an order of committal”. It would be a disproportionate response to impose a condition requiring him to surrender as the price of being allowed to pursue his appeal. Furthermore, if his appeal against the committal order were to succeed, the requirement to surrender would disappear. The position might, however, be different should the appeal fail. Moore-Bick LJ also held that it would not be appropriate to require the defendant to satisfy an earlier order for an interim payment or to provide security for costs as pre-conditions to continuing his appeal.

Further information

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