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CLYDE&CO

Weekly update

Welcome to the second edition of Clyde & Co's (Re)insurance and litigation caselaw weekly updates for 2013.

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

This week's caselaw

Arsanovia Ltd & Ors v Cruz City

Court determines the governing law of an arbitration agreement.

Fortress Value v Blue Skye

Whether the claimant should pay the costs of discontinuance.

Sear v Kingfisher

Court decides the discretionary rate of interest for an individual claimant.

Linuzs & Ors v Latmar Holdings

Court of Appeal decision on Article 6 of Regulation 44/2001 and default judgment against the "anchor" defendant.

Other News

Regulation (EC) 44/2001 has been recast into a new Regulation (1215/2012), which will apply from 10 January 2015.

Arsanovia Ltd & Ors v Cruz City

Court determines the governing law of an arbitration agreement

http://www.bailii.org/ew/cases/EWHC/Comm/2012/3702.html

The parties entered into an agreement which provided for LCIA Arbitration in London in the event of a dispute between the parties. The arbitration agreement did not refer to the governing law of the arbitration but the agreement itself was expressly governed by Indian law. Following a dispute between the parties, an arbitration took place. One of the parties challenged the arbitration award before the English courts on the ground that the tribunal did not have substantive jurisdiction. The English court was therefore required to decide whether the scope of the arbitration agreement was governed by English law or Indian Law.

In *C v D* (see Weekly Update 47/07), Longmore LJ commented that if there is no express law of an arbitration agreement, the law with which that agreement has its closest and most real connection is more likely to be the law of the seat of arbitration rather than the law of the underlying contract. In the recent case of *Sulamerica CIA v Enesa* (see Weekly Update 17/12) the Court of Appeal held that the governing law of an arbitration agreement was English law even though the policy in which it was found had an express choice of Brazilian law as its governing law. The two important factors which the Court of Appeal referred to were the choice of England as the seat of the arbitration and the possible unenforceability of the arbitration agreement if it was governed by Brazilian law. In this case, Smith J said that he did not understand the Court of Appeal in *Sulamerica* to have found that each of those factors "by itself would displace the indication of choice implicit in the express choice of a law to govern the "Policy"". An important additional factor here was the fact that the arbitration agreement expressly excluded the application of certain parts of the Indian Arbitration and Conciliation Act and so the "natural inference is that [*the parties*] understood and intended that otherwise that law would apply".

Smith J noted that the courts should consider whether the parties have made an express or implied choice of law before considering which system of law has the closest and most real connection with the arbitration agreement. Here, no argument had been run that an express choice of Indian law had been made but Smith J, noting that the agreement itself was subject to Indian law, said that he thought it was "strongly arguable" that this indicated an express agreement that Indian law should govern the arbitration agreement as well. He said that "Express terms do not stipulate only what is absolutely and unambiguously explicit, and it seems to me strongly arguable that that is the ordinary and natural meaning of the parties' express words (notwithstanding relatively recent developments in the English law about the separability of arbitration agreements from the substantive contract in which it was made and assuming that these foreign companies are to be taken to have known about the developments in 2008 when they concluded the [agreement]". He drew a distinction with earlier cases (such as *Sulamerica* and *C v D*) on the basis that they had involved insurance policies and so a reference to the governing law of a policy "might naturally be taken to connote to obligations and rights more directly relating to the insurance than the arbitration agreement".

In any event, he thought an implied choice of Indian law had been made in relation to the arbitration agreement. (Had there been no express/implied choice, though, he accepted that English law would have had the most real connection with the arbitration agreement). He also held that a party who had signed the underlying agreement, but only in relation to certain clauses in the agreement (not including the arbitration agreement), was not a party to the arbitration agreement and hence not bound by it.

COMMENT: Smith J's comments that it is strongly arguable that a choice of governing law for the underlying contract amounts to an express (and not just an implied) choice of law for the arbitration agreement contained in that contract are noteworthy. In practice, though, they may not make much difference to the outcome of a case, since an argument regarding the choice of law for an arbitration agreement is only likely to arise in the absence of an express reference to a specific system of law in the clause and hence a finding of implied choice would usually suffice. His judgment recognises that there is a general presumption that the law of the arbitration agreement is the same as that specified in the agreement in which it is found (although that presumption can be rebutted in appropriate cases - as it was in *C v D* and *Sulamerica*). His distinction between insurance and non-insurance cases in this context is interesting, although it is difficult to see why obligations and rights relating to insurance cover should be treated differently from any other contractual obligations and rights.

Fortress Value v Blue Skye

Costs of discontinuance

http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2013/14.html&query=fortress&method=boolean

One of the issues in this case was the costs of discontinuance of part of the claim. CPR r38.6 provides that, unless the court orders otherwise, a claimant who discontinues his action is liable for the defendant's costs incurred on or before the service of the notice of discontinuance. A claimant can apply to the court for a different order, but the presumption in CPR r38.6 is hard to displace. In *Teasdale v HSBC Bank* (see Weekly Update 12/10) the court summarised the principles which would apply on such an application and these included the following: (1) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for displacing the presumption and (2) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption in CPR r38.6.

In this case, though, Flaux J said that "In my judgment, where a claim is discontinued, the liability of the claimants to pay the defendants' costs in the usual way under CPR 38.6 cannot depend upon whether it was a good claim or a bad claim". The claimants had chosen to make a claim which they now sought to withdraw and it was not necessary to investigate whether those claims had been good or bad.

The judge also rejected an argument that the claimants should not have to pay the costs of the discontinued claims because, on the facts, it may well turn out that the defendants would have had to incur those costs anyway. Flaux J said that that was an argument which was relevant to the assessment of costs (at the end of the case) but not to whether the defendants were entitled to an order for costs in principle.

Sear v Kingfisher

Discretionary rate of interest for an individual claimant

http://www.bailii.org/ew/cases/EWHC/TCC/2013/21.html

When the defendant builders failed to complete certain works for the claimant, he was forced to take out a personal loan in order to cover his increased costs. One of the issues in this case was the rate of interest which he should receive pursuant to section 35 of the Senior Courts Act 1981. Ramsey J held that, as he was an individual, he should receive interest at the rate which he actually paid (5.19%) rather than the higher rates of interest which would have been charged on personal loans at the time (April 2009).

COMMENT: The discretionary rate of interest awarded in this case to an individual is similar to that awarded in *Attrill & Ors v Dresdner Kleinwort* (see Weekly Update 20/12) where a rate of 5% over Barclays Bank base rate was awarded - notwithstanding a fall in the base rate to 0.5% following the global financial crisis. *Attrill* and this case show that the courts recognise that the fall in the base rate did not result in a similar fall in the cost of unsecured borrowing by individuals.

Linuzs & Ors v Latmar Holdings

Article 6 of Regulation 44/2001 and default judgment against "anchor" defendant

http://www.bailii.org/ew/cases/EWCA/Civ/2013/4.html

Article 6 of Regulation 44/2001 provides that a defendant who is one of a number of defendants may be sued in the country where any one of the defendants is domiciled, provided that the claims are so closely connected that it is expedient to hear them all together. One of the issues in this case was whether it was material that the claimant had obtained judgment in default against the "anchor" defendant (an English company). The Court of Appeal confirmed that it was not. In *Canada Trust Co v Stolzenberg (No 2)* [2002], the House of Lords confirmed that the relevant date for the determination of the domicile of the defendant domiciled in England is the date of the issue of proceedings against him. The ECJ has also reached the same conclusion. Thus, it was held in *Canada Trust* that the other defendants could be added even if the anchor defendant subsequently became domiciled outside England.

Applying the same principle in this case, the Court of Appeal held that it was immaterial that the anchor defendant had not responded to the proceedings and default judgment had been obtained against it. Toulson LJ pointed out that: "It is just that it should be so, for it would have been absurd if the proper construction of the Regulation had required [*the claimant*] to withhold from obtaining judgment against [*the anchor defendant*] solely in order for the court to retain its jurisdiction in relation to other defendants".

Other News

Regulation (EC) 44/2001 has been recast into a new Regulation (1215/2012). The recast Regulation was published in the Official Journal on 20 December 2012 and came into force 20 days later. The recast Regulation restates the arbitration exception and confirms that proceedings relating to arbitration fall outside of its scope. This has the effect of reversing the ECJ's *West Tankers* decision (see Weekly Update 06/09), which had found that an English court may not grant an anti-suit injunction to restrain the breach of an arbitration agreement. It may be recalled that the ECJ had accepted that the application for the injunction did not fall within the scope of the Regulation but it had gone on to hold that an injunction would undermine the effectiveness of the Regulation (because the court first seised could not rule on its jurisdiction). The recast regulation also clarifies that any court proceedings brought in order to support an arbitration (including enforcing or challenging an award and deciding the validity of an arbitration agreement) fall outside the scope of the Regulation (and hence the court first seised can decide these matters). However, although the recast Regulation is now in force, it will not apply until **10 January 2015** (with the exception of Articles 75 and 76 (which require Member States to make certain notifications to the Commission) which will apply from 10 January 2014). For a copy of the recast Regulation please email publications@clydeco.com.

Further information
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