

ARIAS (UK)
ANNUAL GENERAL MEETING
20 MAY 2011

CASE NOTES



Arbitration

We thought it would be useful to highlight four cases decided in the last twelve months considering the relationship between the judicial and arbitral processes. The first three involve challenges to arbitration Awards while the fourth considers the courts' jurisdiction to order pre-action disclosure in arbitral proceedings.

IRB Brasil Resseguros v CX Reinsurance

Commercial Court

Burton J

CX Re settled various US liability claims which it then sought to recover from its excess of loss reinsurer, IRB Brasil. When IRB refused to pay, the dispute went to arbitration and the arbitrators found in favour of CX Re. IRB challenged the Award on the ground that there had been an error of approach in law by the arbitrators, even though the parties had been agreed on the legal principles.

Three main issues fell to be determined by Mr Justice Burton. First, the reinsurance policy contained a 'double proviso' following the settlements clause of the type described in *Hill v Mercantile & General*¹, namely that settlements would be binding on reinsurers provided they were (1) within the terms and conditions of the original policies and/or contracts and (2) within the terms and conditions of the reinsurance. In *Equitas v R&Q*² (see the 2010 Case Notes), Mr Justice Gross had held that both provisos had to be proved "on the balance of probabilities." Here, the arbitrators had referred in parts of the Award to settlements being "arguably" within the terms of the insurance and reinsurance. Burton J found, however, that notwithstanding this "infelicitous language", the arbitrators had applied the law correctly to find in favour of CX Re.

The second issue related to allocation. Burton J held that the arbitrators' lack of express reference to the decision in *Municipal Mutual Insurance v SEA Insurance*³ (in which Hobhouse LJ stated that "in order to recover, the plaintiffs must satisfy the court that there has been physical loss or damage which has occurred in the year covered by the relevant contract of reinsurance") did not mean that they had adopted an approach which was inconsistent with that case.

Finally, the "Each and Every Loss" clause in the reinsurance referred to a loss or series of losses arising out of one **event**. The arbitrators had committed what Burton J described as a "howler" by referring to whether the loss stemmed from a single **cause**. It will be recalled that in *Axa Reinsurance UK v Field*⁴, Lord Mustill noted that "cause" and "event" are "not at all the same." However, Burton J found that the arbitrators had in fact meant to say "event" and not "cause". IRB's challenge to the Award therefore failed on all three counts.

Guangzhou Dockyards v ENE Aegiali

Commercial Court

Blair J

This case arose from a shipbuilding dispute, but is of much wider application. Guangzhou Dockyards, having lost in arbitration, sought to appeal an Award on questions of fact because, so it contended, the arbitration clause exceptionally permitted it to do so. ENE Aegiali in response contended that the court had no jurisdiction to hear an appeal against factual findings by arbitrators, that the parties could not by agreement confer such jurisdiction on the court and, moreover, that on the true construction of the agreement in question, the parties had not sought to do so in this case.

Section 69 of the Arbitration Act 1996 provides that, "Unless agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings." Concurring with ENE Aegiali, Mr Justice Blair concluded that the words "Unless agreed by the parties" referred to agreements relating to appeals on a question of law, and could not be construed as permitting the parties to expand the court's jurisdiction to include an appeal on a question of fact. He indicated that it was "very doubtful" whether the English courts had any jurisdiction to entertain an appeal on a factual issue, even if the parties had agreed to it.

As to the construction of the agreement, the relevant clause had provided, "The Parties agree that either Party may appeal to the English High Court on any issue arising out of any award." Blair J held that clear provision would have to have been made before it could be concluded that the parties had intended to agree to an appeal of any factual issue. Given he had already found that an appeal on fact was "unheard of in modern times" he found there was no such wording here. The parties had intended to dispense with the need for permission to appeal on a point of law and there was nothing in the language of the clause to warrant giving it a wider construction.

B v A

Commercial Court

Tomlinson J

B sought to challenge an Award on the basis that the majority of the tribunal had failed to decide the dispute in accordance with the applicable law as chosen by the parties, namely Spanish law. The application was made under sections 67 and 68 of the Arbitration Act 1996, which relate to 'lack of substantive jurisdiction' and 'serious irregularity' respectively.

Mr Justice Tomlinson dismissed the application, holding that a challenge based on a failure to apply the governing law would be sustainable only if there were some impropriety on the part of the tribunal, in the sense of a conscious disregard of the governing law. Nothing short of this would suffice. Here, B had expressly disclaimed any allegation of impropriety and in the circumstances the challenge to the Award was hopeless.

¹ [1996] 5 Re LR 461

² [2010] LRIR 600

³ [1998] LRIR 421

⁴ [1996] 5 Re LR 184

Travelers Insurance Company v Countrywide Surveyors

TCC

Coulson J

A clause in an insurance policy provided that the insurer, Travelers, would not avoid for non-disclosure or misrepresentation in the absence of fraud and that any dispute regarding the application of the clause was to be referred to arbitration. Other disputes were to go to court. Travelers applied to the court for pre-action (or strictly 'pre-arbitration') disclosure of documents in the possession of the defendant surveyors, Countrywide, who, Travelers alleged, had fraudulently withheld information.

Mr Justice Coulson held that the court did not have jurisdiction to hear the application. The power to order pre-trial disclosure conferred by section 33(2) of the Senior Courts Act 1981 and Civil Procedure Rule 31.6 was confined to cases in which the ultimate claim was to be resolved in the courts and not in arbitration. A number of "*subsidiary matters*" supported that construction in Coulson J's view, including the fact that the courts have repeatedly held that arbitration under the Arbitration Act 1996 is an entirely separate dispute resolution process in respect of which the courts have extremely limited powers of intervention and control. Accordingly, in the absence of clear words, it would be contrary to the policy to find that the court had jurisdiction to make an order for potentially wide-ranging pre-action disclosure in an arbitration case.

Inducement

Since *Pan Atlantic v Pine Top*⁵, it has been essential in any avoidance case to consider whether the underwriter was induced to enter into the contract by the alleged misrepresentation(s) and/or non-disclosure(s). The first case below considers what is actually meant by inducement, while the second illustrates the importance of proving it.

Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland

Commercial Court

Christopher Clarke J

In the course of giving judgment in a heavy banking dispute, Mr Justice Christopher Clarke paused to consider, in some detail, what is meant by inducement. It was, he found, already recognised in ordinary contract law that the misrepresentation need not be the sole reason for deciding to contract, but it had to play a real and substantial part in the decision taken; it was not enough to show that it merely supported a decision which would have been made anyway. What, then, did "*a real and substantial part*" actually mean? Christopher Clarke J considered the representation must be causative of the decision, and that involves the "*but for*" test. If the representee would have made the same contract for other reasons then that test is not fulfilled. What, he next asked, does "*but for*" mean in the context of representations? Does one ask what would have happened if no representation was made? Or does one ask what would have happened had the truth been told? Christopher Clarke J indicated, "*The relevant test is what would*

have been done in the absence of the misstatement and a relevant question is what would the representee have done if given sufficient information to dispel its inaccuracy."

Of course, in an insurance law context, the duty to disclose may make the insurer's reaction to the truth relevant in any event. If one claims an excellent loss record when the truth is that one's record is very poor, one conceals the latter by representing the former. But for the purpose of proving inducement, the truth must still be that there is something unattractive about the risk. As the next case shows, the courts take the view that the insurer still has to prove that being told the truth would have made a difference.

⁵ [1994] 2 LLR 427

Synergy Health (UK) v CGU Insurance

Commercial Court

Flaux J

Synergy claimed against CGU for material damage and business interruption losses following a fire. CGU avoided for material misrepresentation on the basis of a letter written by Synergy's Operations Director on 8 December 2005 which stated, "*Intruder Alarm. This will be completed by end December.*" The letter, dated 13 December, was forwarded by brokers to the underwriting agent on 28 December. In fact, due to a "*comedy of errors*" on Synergy's part, nothing had been done to put installation of the alarm in hand and it was still not installed by inception, many weeks later.

Mr Justice Flaux found that there had been a misrepresentation on 28 December. In short, CGU was told, '*We are installing an alarm*' when what it should have been told was, '*We would be installing an alarm except we are rather disorganised.*' CGU's case came unstuck, however, at the stage of proving that its underwriter had been induced by that misrepresentation. If reliance is placed on a misstatement, one way to assess its effect is to ask what the underwriter would have done had the misstatement been corrected so that he had an accurate picture at placement. In his witness statement the underwriter addressed that question but focussed on the wrong factual assumptions as to the explanation he might have been given. He certainly explained what his reaction would have been if told the non-installation was beyond Synergy's control, which was to be reasonably understanding. He also explained what his attitude would have been had the non-installation arisen from Synergy's unwillingness to spend what needed to be spent to get the alarm installed. There he would have been much firmer. But neither of those was relevant; what his statement did not deal with was how he would have reacted to the true explanation, namely that the failure was attributable to Synergy's disorganisation. His oral evidence to fill this gap was that he would have imposed a condition of installation before renewal. That evidence was not, however, borne out when tested against his more lenient prior underwriting practice, when faced with similar issues in the past. Therefore Flaux J found that there had been no inducement.

This is another example of the importance of inducement evidence and of the care with which the courts will approach it; material inaccuracy is not sufficient unless the impact of it can be shown to be significant and the evidence of that is capable of withstanding close scrutiny.

Reinsurance

Very few reinsurance cases have reached the courts over the last twelve months. However, a decision concerning the proper forum for resolution of a reinsurance dispute merits some attention.

Stonebridge v Ontario Municipal Insurance Exchange

Commercial Court

Christopher Clarke J

Even though it rarely, if ever, falls to reinsurance arbitrators to rule on disputes as to which of two competing courts have jurisdiction over a dispute, it does from time to time fall to them to decide the proper law of the dispute before them. Although this is a judgment on the former issue, it provides guidance as to the latter and is therefore worthy of consideration.

The case concerned an application by Ontario Municipal for an order that the service on it of a claim form in Ontario by Stonebridge, a Lloyd's underwriter, for a declaration of non-liability under an excess of loss reinsurance contract, be set aside on the ground that England was not the proper forum for the dispute. The contract had no express choice of law or jurisdiction clause. However, Mr Justice Christopher Clarke concluded that Stonebridge had "*much the better argument*" for saying that the parties had impliedly chosen English law as the governing law of the contract. Citing the decision of Lord Justice Hobhouse in *Forsikringsaktieselskapet Vesta v Butcher*,⁶ he noted that there would be something surprising about a policy broked on a Lloyd's slip, through a Lloyd's broker with a Lloyd's underwriter on behalf of a Lloyd's syndicate, being governed by a law other than that of England, particularly when the contract was "*replete with references*" to Lloyd's market clauses (themselves likely to be habitually used in contracts governed by English law) and when the characteristic performance of the contract was to be by an English underwriter.

In this case, the implied choice of English law was of considerable significance when determining the proper forum (found to be England), not least because if the dispute were to be determined in the rival venue – Ontario – there was a risk that Stonebridge may be deprived of the benefit of English law with regard to its defence that Ontario Municipal was in breach of a claims co-operation clause. It seems that, where there has been "*imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter required*

to be done or omitted by the insured with respect to the loss.."; the Ontario Insurance Act gives the courts discretion to grant relief against forfeiture or avoidance on such terms as it considers just.

⁶ [1986] 2 Lloyd's Rep 179

And finally....

For any member occasionally troubled by the thought that reinsurance law operates in something of a vacuum, resounding proof to the contrary came in the judgment in *Bloomsbury International Ltd v Sea Fish Industry Authority*,⁷ a matter which recently detained the Court of Appeal.

The parties were at odds over the meaning of sea fish "*landed*" in the UK. This, it seems, is a question of central significance under section 4(3) of the Fisheries Act 1981, and in particular the Sea Fish Industry Authority (Levy) Regulations 1995, SI 1995/160. Determining the answer to that question involved citing a reinsurance case.

The member of the society attending the AGM who first correctly identifies the case cited wins a bottle of champagne, all members on their honour being disbarred from conducting any form of electronic research. Please supply your name and answer on a scrap of paper to David Holmes.

⁷ [2010] 3 All ER 126

Notes prepared by Alan Weir and Kate Buttrey of Ince & Co's Insurance and Reinsurance Group.

alan.weir@incelaw.com
kate.buttrey@incelaw.com

Ince & Co International LLP, and its affiliated entities of commercial law firms together form the Ince & Co network with offices in Dubai, Hamburg, Hong Kong, Le Havre, London, Paris, Piraeus, Shanghai and Singapore. Ince & Co network firms practise in seven strands:

Aviation Business & Finance Commercial Disputes Energy & Offshore Insurance & Reinsurance
International Trade Shipping

**E: firstname.lastname@incelaw.com
incelaw.com**

24 Hour International Emergency Response Tel: + 44 (0)20 7283 6999

LEGAL ADVICE TO BUSINESSES GLOBALLY FOR OVER 140 YEARS

The information and commentary herein do not and are not intended to amount to legal advice to any person on a specific matter. They are furnished for information purposes only and free of charge. Every reasonable effort is made to make them accurate and up to date but no responsibility for their accuracy or correctness, nor for any consequences of reliance on them, is assumed by the firm. Readers are firmly advised to obtain specific legal advice about any matter affecting them and are welcome to speak to their usual contact.

© 2011 Ince & Co International LLP, a limited liability partnership registered in England and Wales with number OC361890. Registered office and principal place of business: International House, 1 St Katharine's Way, London, E1W 1AY.