English Jurisdiction Clauses in Insurance Policies – The European Court's view

These are uncertain times for the UK citizen. As the Brexit talks intensify and each side's bargaining chips are carefully played, the "*great unbundling*" of 44 years of accumulated legislation and regulations in just two years means decisions on certain matters seem to have been put on the backburner.

In the legal landscape, the future role in the UK of some important institutions is an unknown, and none more so than that of the Court of Justice of the European Union, more commonly known in the UK as the ECJ. The Luxembourg based ECJ interprets and enforces EU law, sanctioning EU institutions, ensuring the EU takes action and annulling EU legal acts. It is the highest Court of the EU in matters of EU law.

So does this uncertainty matter? An important decision of the ECJ handed down on 13 July 2017 in relation to an English law marine policy written by a UK based insurer demonstrates the far-reaching, practical implications of the Court's findings and why, therefore, it is important to know how significant the ECJ's rulings will be post-Brexit.

Assens Havn v Navigators Management (UK) Limited – Case C – 368/16 – The Facts

A Swedish company, Skane Entreprenad Service AB ("Skane") chartered a number of tugs and lighters in 2007, including the tug Sea Endeavour I, to transport a cargo of sugar beet between the ports of Assens and Nakskov in Denmark. Skane took out liability insurance with Navigators to cover the transport. The policy wording contained an English choice of law and jurisdiction clause in the clearest terms, as follows:-

> *"Choice of law and jurisdiction*
>
> *This insurance shall be governed by and construed in accordance with the law of England and Wales and each party agrees to submit to the exclusive jurisdiction of the courts of England and Wales".*

Furthermore, Navigators' conditions of insurance contained the following:-

> *"(7) Law, practice and dispute resolution*
>
> *This insurance shall be governed by and construed in accordance with English law and, in particular, be subject to and incorporate the terms of the Marine Insurance Act 1906 … This insurance, including any dispute arising under or in connection with it shall also be subject to the exclusive jurisdiction of the High Court in London".*

When Sea Endeavour I arrived in Assens on 24 November 2007, damage was caused to the quay. The parties disputed how the damage arose and who was liable for it.

During the course of the dispute, Skane went into liquidation. As it is entitled to do under Article 95 of the Danish law on insurance contracts, the port owner, Assens Havn, brought an action directly against Navigators as the insurer of the party, now insolvent, that allegedly caused the harm. It sought an order that Navigators pay it compensation for the damage done. The action was brought in Denmark.

The Danish Maritime & Commercial Court dismissed the action at first instance. It did so on the ground that the Danish Courts did not have jurisdiction, as the agreement on jurisdiction concluded between the parties to the insurance contract (Skane and Navigators) was binding on Assens Havn, that company having effectively stepped in to the shoes of Skane.

Assen Havn disagreed. The issue was brought before the Danish Supreme Court for a preliminary ruling. The Supreme Court stayed the proceedings and referred the question to the ECJ, whose decision was finally issued some 10 years after the incident.

The Decision

The Brussels I Regulation of 2001 (now itself repealed by the 2012 Restated Brussels Regulation) superseded the Brussels Convention. It contains the rules regulating what Courts have jurisdiction in legal disputes of a civil or commercial nature between individuals resident in different Member States of the EU and EFTA (Denmark having become party to it by a separate EC-Denmark Agreement that came in to force in 2007).

Fundamental to the Regulation are the underlying objectives set out at Recital 11:-

> (11) *"The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile …"*

and Recital 13:-

> *"(13) In relation to insurance … the weaker party should be protected by rules of jurisdiction more favorable to his interests than the general rules provide for."*

The ECJ relied heavily on these objectives in reaching its decision. It made plain that it considered actions involving insurance as characterised by an **imbalance** between the parties that the Regulation sought to correct by giving the weaker party the benefit of laws of jurisdiction more favourable to his interests than the general rule. What had effectively been established by the EU in enacting the Brussels I Regulation, therefore, was an autonomous system for conferring jurisdiction in insurance matters to address these objectives.

As such, the ECJ pointed out that the provisions of the Regulation enabled the victim of insured damage to sue the insurer before the courts of the place where the harmful event had occurred. In doing so, it made clear that it considered the third party victim of insured damages far removed from the contractual relationship between an insured and an insurer. The victim had not expressly consented to the agreement on jurisdiction. It could not therefore be invoked against him and he was therefore not bound by it.

This finding was so, despite the fact that the Regulation expressly provided for agreements on jurisdiction to be entered into for damage arising from the use or operation of vessels.

What is the effect?

The English law equivalent of the Danish law giving rise to a third party direct action against insurers, is the Third Parties (Rights against Insurers) Act 2010. What is now clear from this ruling is that where there are jurisdictional issues regarding where a claim by a third party should be brought, those issues are governed by the Brussels I Regulation.

So, although insurers might attempt to contract out of the jurisdictional rules, and might do so in the clearest manner, and although it might be expected that a third party has no better right than an insured into whose shoes they step, that third party is not in fact bound by the jurisdictional contracting out, even where the risk is marine, aviation or another "large risk".

Conclusion

Uncertainty over the significance of the ECJ in the UK in the future was placed firmly in the news in August by the President of the Supreme Court, Lord Neuberger, who made what some hailed "*an extraordinary intervention*", stating:-

> *"… If the Government doesn't express clearly what the Judges should do about decisions of the ECJ after Brexit … then the Judges will simply have to do their best".*

So far, the Government's Repeal Bill has been limited to suggesting that Judges would be free to take European case law into account, but not forced to do so, leaving it at their discretion. One can see how future battle lines might be drawn in relation to controversial ECJ decisions like this, that impact on UK companies.

In circumstances where they have already been branded *"enemies of the people"* in certain tabloid newspapers for daring to challenge on Brexit, this lack of clarity could put Judges truly at the heart of a political battle.

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