The house doesn't always win

By Laura Payne and Richard Wise

An arbitration clause omitted in error was valid: it had been agreed pre-contract

Markel Bermuda Ltd v Caesars Entertainment, Inc [2021] EWHC 1931 (Comm)

Headline summary

The Commercial Court held that an insurance policy would be reformed to include a typical 'Bermuda Form' arbitration provision. It therefore granted a permanent antisuit injunction against proceedings brought in breach of that provision. The arbitration had been agreed in pre-contractual negotiations, but was inadvertently omitted when the policy was issued.

Commentary

This is one of several decisions in recent years issued by the English Court in support of London arbitrations where excess liability / Bermuda Form policies are concerned.

Although successful claims to rectify (or 'reform') insurance policies are rare, this decision also confirms that the English Court is willing – in certain circumstances – to order the rectification of an insurance policy once issued.

The finding that, in this case, the policy incorporated a morning email exchange is significant. It confirms that the English court can find that an insurance policy is concluded through communications between the parties, rather than merely on the issuing of the policy itself. In practice, this means that insurers and insureds should consider the content of their pre-issue communications very carefully. Both parties should also be aware that pre-contractual duties (including of disclosure / fair presentation of risk) might end before a policy is issued.

Factual background

Caesars Entertainment Inc (**Caesars**), a well-known American casino operator, took out insurance cover for business interruption losses.

In the relevant policy year, Caesars had a large business interruption insurance portfolio comprising 76 policies at various attachment points. Two of those were issued by the Bermudian insurer, Markel Bermuda (**Markel**) (1) the 'Eldorado' policy (issued by Markel to Caesars under its previous name, Eldorado Resorts Inc); and (2) the 'Caesars' policy. Both provided first party property cover in differing amounts.

Caesars suffered (alleged) property damage and business interruption losses arising out of the global Covid-19 pandemic, and sought an indemnity for those losses. Its indemnity claim led to Caesars issuing a claim against Markel in Nevada, USA, pursuant to the terms of the Eldorado policy, which provided that "*this insurance shall be governed by and construed in accordance with the state of Nevada and each party agrees to submit to the exclusive jurisdiction of the courts of the USA*."

Caesars had agreed to insurances before and after the Eldorado policy which contained provisions providing for dispute resolution by arbitration in London, governed by New York Law (including policies issued by other Bermudian insurers for the relevant policy year, and the Caesars policy). This provision is typical of Bermuda Form insurance policies. And in those policies it is typical for arbitration agreements to be recorded by way of endorsement rather than by amendment to the policy documents. For example, the policy held by the Eldorado entity for the previous policy year had included the same Nevada jurisdiction clause as outlined above, but this was trumped by an express Arbitration and Choice of Law Endorsement No 8, which provided that "*notwithstanding anything to the contrary in the Policy*" any dispute would be determined by arbitration in London, and would be governed by New York law. There was no such endorsement to the Eldorado policy.

In placing the Eldorado policy, Markel had provided an initial quote for cover on 12 April 2019 and an amended quote on 18 April 2019 – both of which contained the endorsement with the Bermuda Form arbitration clause. On 30 April 2019, the parties reached agreement regarding the price, and Markel arranged for the policy to be bound. The endorsement with the Bermuda Form arbitration clause was not included in the issued version of the policy.

Markel claimed that the Eldorado policy should have included an arbitration agreement. It therefore sought an antisuit injunction from the Commercial Court in England to prevent Markel pursuing the Nevada proceedings. An interim antisuit injunction was granted.

The central issue was whether the parties intended to refer disputes under the policy to London arbitration, and therefore whether Markel was entitled to a permanent antisuit injunction in respect of the Nevada proceedings.

Key legal points

Markel argued that the policy was incomplete and/or deficient, and that it did not accurately reflect the terms agreed. It therefore argued that the policy should be "reformed" under New York law (or, if English law applied, for rectification).

Caesars argued that the quotes were superseded by the terms of the policy; or that reformation / rectification should not be granted on the basis that Markel did not have 'clean hands', because (i) when Markel became aware of the alleged mistake, Markel should have raised it with Caesars but did not, and (ii) of the way in which Markel presented its application for the interim injunction.

Decision

Had an agreement been reached on 18 April 2019 on the basis of the wording that included the Bermuda Form arbitration clause?

Bryan J considered in detail communications between the parties at the time and subsequently. Significantly, on the morning of 30 April 2019, Caesars requested a change to the price of one of the options. This change was accepted on the same morning by Markel; there was no suggestion that any of the other terms of the 18 April 2019 quote were discussed or renegotiated. Further, Markel's responded: "*we are willing to reduce our price to $2.5m net. All other terms and conditions as per previously agreed.*" The policy was issued later in the evening of 30 April 2019.

Bryan J held that on the morning of 30 April 2019 Caesars had accepted the terms of the quote made by Markel on 18 April 2019, with the only variation being the price. As such, the Bermuda Form arbitration clause had been agreed between the parties. By the time the policy wording was issued later that same day, the parties were already bound to its terms.

Had this agreement been overridden by the subsequent terms?

Bryan J concluded it was not, for three main reasons:

- This was not a case where there were general terms in a slip / binder to be expanded upon in detailed wording in the issued policy.
- The issued policy included the policy wording that preceded (not superseded) the 12 April 2019 quote and the 18 April 2019 quote.
- The methodology used in previous and subsequent policies was that the policy wording would refer to Nevada

law and jurisdiction, but that would be trumped by the Bermuda Form arbitration clause.

Bryan J observed that *"there is nothing in the authorities relied upon by CEI that would support the (bizarre) conclusion that despite the parties contractually agreeing London arbitration and New York law, this was superseded without discussion or negotiation or agreement, between the parties with an entirely different jurisdictional and law regime."*

Therefore, there was a valid London arbitration agreement.

As New York law applied to the agreement (albeit recognising that there were no material differences between the application of "rectification" under English law and "reformation" under New York law), Bryan J (1) ordered reformation of the Eldorado policy, and (ii) granted an anti-suit injunction in respect of the Nevada proceedings (and proceedings in any other jurisdiction). Caesar's allegations that Markel acted with 'unclean hands' were rejected.

About the authors

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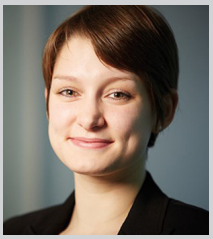

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