ARTICLE

English High Court finds that assignment of arbitration clause by operation of law prohibited by anti-assignment clause

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The English High Court has concluded that an anti-assignment clause can prevent the assignment of an arbitration clause to an insurer pursuing subrogation rights by operation of law.

The decision in *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2022] EWHC 3287 (Comm) concluded that the relevant test for whether an assignment is in breach of an anti-assignment clause depends on whether the purported assignment by law is the result of voluntary decisions of the assigning party.

In this case, the assignor acted voluntarily in bringing about the assignment by operation of law, resulting in a breach of the anti-assignment clause. Consequently, the insurer could not establish jurisdiction for the arbitral tribunal to hear the subrogated claim.

While the judgment was specific to the construction of the clause in the case, it has significant ramifications for arbitration practitioners and the insurance industry. We note that permission to appeal has been granted.

Background

The case concerned an English law contract to sell aircraft from Dassault to Mitsui Bussan Aerospace Co Ltd ("**MBA**"), with both an anti-assignment clause and an arbitration clause.

Without notice to Dassault, MBA entered into a separate contract of insurance with Mitsui Sumitomo Insurance Co Ltd ("**MSI**") to insure against delayed delivery to MBA's end customer. Delivery was delayed resulting in an insured event. Japanese statute provided for an automatic subrogation of any claim arising from the insured event upon the payment of the insurance proceeds from MSI to MBA. MSI subsequently filed a Request for Arbitration against Dassault.

When considering its own jurisdiction, the arbitral tribunal found in favour of MSI, holding that the anti-assignment clause was not breached by an assignment by operation of law. The dissenting arbitrator found the operation of law

to arise from voluntary acts of MBA (i.e. by entering into the insurance policy) and thus inconsistent with the anti-assignment clause. Dassault brought a jurisdictional challenge under s67 of the English Arbitration Act.

Decision

The High Court concluded that: (i) a purported assignment of contractual rights in breach of contract is void; (ii) there is no blanket rule that an anti-assignment clause cannot apply to assignments by operation of law; (iii) the question is essentially one of construction of the anti-assignment clause itself; and (iv) where there is a clear textual construction – as was considered to be the case here – this generally takes precedence over commercial purpose or public policy.

Cockerill J took a broader approach when assessing the assignment in question, by looking beyond just the immediate cause of the assignment (such as whether it was by operation of law or not), and instead examined the level of voluntariness displayed by the assignor. The judge acknowledged that there was some uncertainty regarding the required level of voluntariness, but determined that in this case, the threshold was met by MBA voluntarily entering into the insurance contract, which ultimately led to the possibility of Japanese-law subrogation (i.e. the assignment by operation of law). This approach was deemed the general rule in English law and consistent with the specific clause at issue in this case.

The judge also considered MSI's argument that if this had been an English law subrogation, then the anti-assignment clause may not have been applicable, as subrogation under English law is generally not seen as requiring a transfer or assignment. The judge accepted this potential divergence but did not consider it necessary to decide what the outcome would have been in that scenario. Cockerill J did however suggest that in certain cases, such as those with significant commercial or security concerns, even if the subrogation does not involve a legal transfer, the parties' intentions and public policy may weigh more heavily against the assignability of the claim, including an arbitration clause, to a third party.

However, the assignment by operation of law in this case was prohibited by the anti-assignment clause and therefore the arbitral Tribunal possessed no jurisdiction to decide the dispute. The tribunal's arbitration award on jurisdiction (which was dealt with as a preliminary issue) was to be varied accordingly.

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Comment

The endorsement of the 'voluntariness' test for anti-assignment clauses in the context of arbitration is significant, and parties should be encouraged to review their anti-assignment provisions to explicitly include or exclude assignments by operation of law (whether voluntary or not).

The impact of this decision on subrogation under English law is uncertain, as the judge did not fully address the effects of anti-assignment clauses on subrogation under English law. However, parties who anticipate subrogating rights (including to insurers) should take care in assessing how the mechanisms in their contract will enable those rights to take effect. Similarly, parties (such as insurers or indemnifying parties) who are looking to rely on subrogation rights need to assess how any anti-assignment provisions might impact upon such subrogation.

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Craig leads Herbert Smith Freehills' international arbitration group in London. He also has extensive experience in litigation, expert determination and mediation with a particular focus on disputes in the energy, leisure, construction, engineering, defence and telecommunications industries. His practice comprises multi-jurisdictional work subject to a wide range of governing laws. Craig has acted in arbitrations as counsel, advocate and arbitrator in ad hoc proceedings and before all of the major arbitral institutions. His broader contribution to the arbitral community includes appointments to the ICC UK National Committee for Arbitration, to the ICC Commission upon the nomination of the ICC UK National Committee, and to the Advisory Committee of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), and Deputy Chairman at the Advisory Committee to the Oman Arbitration Centre (OAC).

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This article was first published on the Herbert Smith Freehills blog on 6 March 2023 available here*. The authors would like to thank Dan Huang for his assistance in preparing this blog post. For more information please contact Craig Tevendale, Partner and Charlie Morgan, Partner, or your usual Herbert Smith Freehills contact.*