

August 2022

English High Court grants anti-suit injunction against direct action claim by a third party in an EU member state

QBE Europe SA/NV and QBE (UK) Ltd v Generali España de Seguros y Reaseguros [2022] EWHC 2062 (Comm)

The English Commercial Court granted yesterday an anti-suit injunction to restrain a third party from pursuing a direct action claim against the liability insurer of the alleged wrongdoer before the Courts of an EU Member State in favour of the arbitration clause contained in the underlying liability policy. It is the first decision from an English Court on the availability of such relief post-Brexit.

Background facts

On 3 July 2016, the motor yacht Angara (the "Yacht") allegedly caused damage to an underwater power cable linking the islands of Mallorca and Menorca, leading to hydrocarbon pollution to the local area (the "Incident"). Upon payment of the cable owner's claim under its civil liability and property damage policy, Generali España (Generali) became subrogated to the rights which its insured could potentially have against the Yacht's owners.

On 23 February 2022, seemingly unable to make a recovery against the Yacht's owners, Generali brought a direct action claim before the Spanish Courts against QBE UK, the Yacht's P&I insurer, seeking indemnity for the loss/damage arising from the Incident. Generali asserted that such an action could be pursued pursuant to a provision of the Spanish Maritime Navigation Act (MNA) 2014 (a statute which builds upon the Spanish Insurance Act 1980 that had been at the heart of the argument before the English Courts in *The Prestige*).

In response, QBE UK, and QBE Europe as the transferee of the P&I policy (altogether, QBE), made an urgent application to the English Property and Business Court seeking an anti-suit injunction (ASI) to restrain Generali from pursuing the foreign proceedings. QBE relied on a provision in the P&I policy which made any dispute relating to its liability

thereunder subject to English law and (ultimately) London arbitration.

Commercial Court's Decision

Based on the established authorities, including notably a previous decision of the Court of Appeal in *The Prestige*, the primary issue before the Commercial Court revolved around the proper characterisation as a matter of English conflicts of law principles of the direct action right asserted by Generali under Spanish law.

Generali alleged that the MNA 2014 created a right of direct action against the liability insurer independent of the underlying contract of insurance and that the direct action should not, therefore, be viewed as, in substance, a statutory right to enforce contractual obligations under the P&I policy.

On the other hand, QBE contended that the Spanish legislation simply conferred on Generali a right to enforce the contractual rights arising under the P&I policy. As such, QBE argued, Generali had to abide by the arbitration clause contained in the insurance contract when seeking to enforce its terms.

Following a careful review of the evidence presented by both parties on the nature of the relevant terms of the MNA 2014, Foxton J held that QBE made out a very strong case, to "a very high level of probability" (with the relevant test being that of "high degree of

probability"), that the Spanish legislation provided Generali with a right directly to enforce the contractual promise of indemnity created by the insurance contract. The Judge considered the fact that the MNA 2014 arguably prevented the liability insurer from relying on certain defences, i.e. those based on the insured wrongdoer's conduct, did not alter that conclusion as these exceptions were not sufficient to change the essential nature of the direct action right such that it could not longer be regarded as being, in substance, a contractual right. Foxton J's decision in this respect is entirely in line with the decision in *The Prestige* where the English Courts considered the position under the Spanish Insurance Act 1980 which Spain alleged there applied then in the maritime context.

Having reached that conclusion, the Judge moved on to consider whether there were any strong reasons to refuse the ASI relief and whether the ASI, being an equitable remedy, should be granted as a matter of the Court's discretion. Generali raised a number of arguments in these respects, including the allegedly restrictive wording of the arbitration agreement in the P&I policy, which referred to the "Insurer" and the "Assured" only, and considerations of comity and Spanish public policy. All of these arguments were, however, dismissed by the Judge.

Accordingly, Foxton J proceeded to grant QBE's application for the ASI against Generali.

Comment

The judgment will be a much-welcomed confirmation of the availability of an ASI relief in the post-Brexit landscape for liability insurers faced with a direct action claims in EU jurisdictions pursuant to local direct action legislation. Although the Judge did not have to go that far to decide the matter in question, Foxton J usefully confirmed that it will indeed be only in a very rare case where the foreign legislation deprives the third party's direct action right of its contractual nature such as to militate against the grant of the ASI relief in favour of the jurisdiction or arbitration clause in the underlying liability policy.

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