

DIRECT ACTIONS AGAINST P&I CLUBS. A NEW DIRECTION?

A recent decision of the European Court of Justice (“ECJ”) has caused consternation and alarm in shipping circles in London. The judgment of the ECJ of July 2017 in the matter *Assens Havn Sea Endeavour 1* held that the High Court jurisdiction clause in the rules of the Navigators UK P & I policy was not binding on a Claimant pursuing a direct action before the Danish Courts. The facts were simple. The vessel insured by Navigators caused damage to the port installations of Assens Havn in Denmark. The charterers of the vessel insured by Navigators were in liquidation. Danish law allowed victims of damage caused by the ship in these circumstances to bring a direct action against its liability insurers before the Danish courts. That is what the Danish port authority did but the first instance court declined jurisdiction in view of the Navigator’s High Court jurisdiction clause in their policy.

The ECJ was invited to determine whether the specific rules of the EU Regulation on jurisdiction (Regulation 44/2001 now recast Regulation 1215/2012) concerning insurance allowed proceedings to be brought against a liability insurer before the courts of the domicile of the victim Claimant notwithstanding a jurisdiction clause to the contrary in the conditions of the relevant insurance policy. The Court held that in interpreting the rules of the Regulation in relation to insurance it was important to bear in mind that their objective in this field was to protect a weaker party. It was true that the Regulation allowed insurers in specific branches (maritime and aviation risks in particular) to agree different jurisdictions from those set out in the Regulation. But the ECJ noted that the specific rules in the Regulation concerning liability insurance made no reference to the right of the insurer to conclude jurisdiction clauses with an insured. The EJC therefore decided that jurisdiction clauses agreed between an insured and the insurer should not be binding on parties pursuing direct actions against liability insurers. In the opinion of the ECJ allowing liability insurers to impose jurisdiction clauses agreed with their insured on the victims pursuing direct actions would compromise the objective of protecting a weaker party in this area. It followed that when the law of the EU Member State where the victim was domiciled allowed direct actions against a liability insurer before its courts, a jurisdiction clause in the policy agreed between the insurer and insured was not binding on the victim.

The decision has been greeted with dismay by English legal commentators who have pointed to the serious potential consequences for the P & I Clubs mostly based in London. The Clubs may no longer be able to rely on jurisdiction clauses in their rules and could be sued in various foreign jurisdictions. Some reviewers have even warned that this could be a step towards the ECJ deciding that the ubiquitous “pay to be paid” rule invoked by Clubs could not be binding on EU Claimants. The decision has, interestingly, attracted less critical attention in France where it has largely met with approval. To the thinking of a French civil

lawyer there is nothing unusual or inherently unacceptable in the concept of commencing direct actions against liability insurers before the same court seized with proceedings against their insured even if that is in breach of a jurisdiction clause in the policy. The predictable attitude of a French lawyer to the question of whether such a jurisdiction clause in a policy is binding on the victim claimant would be the question has it been accepted by the victim. If not why should it apply? Direct actions against liability insurers in France are very common unlike in England.

The debates on the likely consequences of this decision continue on both sides of the Channel. On behalf of the English common law camp, the following are the chief arguments levelled against the ECJ decision. The rules in the recast EU Regulation 1215/2012 expressly allow insurers in specialist fields – and maritime risks is one such exception- to agree jurisdiction clauses for different courts than provided by the Regulation. There is no reason to consider that the insurance provisions in the Regulation protecting the weaker party should not be included among those exceptions. And it is submitted that in many cases the victims of damage caused by vessels insured by P & I Clubs will themselves be insurers subrogated to the rights of the victim. It follows that if the subrogated insurer and the liability insurer are both active in the same field they cannot be qualified as weaker or stronger parties. In support of the latter view there is a recent decision of the ECJ in January 2018 holding that a company which takes assignments of claims against negligent drivers of road vehicles is not a weaker party than a liability insurer for a similar reason. The other argument most advanced is that many Club rules provide for dispute resolution by arbitration and not court proceedings. Consequently in view of the “arbitration exception” which is repeated in the re cast Regulation 1215/2012 the arbitration clause falls outside of the scope of the rules allowing insurers to be sued before the EU courts.

In defence of the position of the ECJ the French civil lawyer would no doubt make the following points. It is logical that a jurisdiction clause in an insurance policy should bind the insured who has accepted it. But it is not so obvious that the jurisdiction clause should bind a claimant bringing a direct action against the insurer as the former has not accepted the clause. After all a direct action if allowed by the law of an EU member is a clear exception to the principle that the liability insurer can only be sued by his insured. So why should that right not include the accessory privilege to bring proceedings against the insurer before the courts where the victim is domiciled. As to the relevance of the “arbitration exception” in the recast Regulation 1215/2015 the position is very far from clear. The new recast Regulation contrary to some expectations has not expressly outlawed the notorious decision of the ECJ in the Front Comor case holding that English anti suit injunctions in arbitration are unenforceable. There is indeed a more expanded section in the introductory provisions of the recast Regulation stating that arbitration is excluded but it falls far short of justifying the conclusion that the EU member courts would have no jurisdiction whatsoever to review the applicability of an arbitration clause as opposed to a jurisdiction clause in the circumstances of the Assens Havn case. Even English legal writers agree that the position in the recast Regulation affecting the arbitration exception is very far from clear.

The French courts may well take encouragement from the recent ruling of the ECJ in the Assens Havn case to accept jurisdiction for direct actions against Clubs. But precisely how the French courts will deal with the potential obstacles to proceeding directly against Clubs remains to be seen.

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