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Assignments and transfers by operation of law: an important distinction clarified in Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd [2024] EWCA Civ 5

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Arbitration , Procedure

Background

In this case the Court of Appeal considered when a non-assignment clause would be effective to stop the transfer of a cause of action to an indemnifying insurer. The case turned on the proper interpretation of the non-assignment clause:

…this Contract shall not be assigned or transferred in whole or in part by any Party to any third party, for any reason whatsoever, without the prior written consent of the other Party…

The underlying facts concerned the sale of aircraft by Dassault Aviation (**Dassault**) to Mitsui Bussan Aerospace (**MBA**) which contained the non-assignment clause. MBA had entered into a contract of insurance with Mitsui Sumitomo Insurance (**MSI**) to insure MBA in respect of any delay in supplying the aircraft on to the Japanese Coastguard. Such delay occurred, and MSI indemnified MBA for the liquidated damages payable to the Coastguard.

The question was whether MSI could bring arbitration proceedings against Dassault to recover the funds. It was found by the arbitrators, and common ground before the Court of Appeal, that the MBA's claims against Dassault were transferred to MSI by operation of Japanese law. By a majority, the arbitrators determined that the non-assignment clause was no bar to the transfer of the claim to MSI. On appeal under s.67 of the Arbitration Act 1996 Cockerill J allowed the appeal and found the arbitrators had no jurisdiction because of the clause.

Court of Appeal

The Court of Appeal (Sir Geoffery Voss MR, Coulson and Phillips LJJ agreeing) allowed the appeal. The Master of the Rolls began by rejecting Cockerill J's reliance on early 20th Century cases concerning the distinction between transfers by operation of law and voluntary acts of transfer. He concluded that those cases turned on their specific context (being different types of insolvency proceedings).

Instead, the matter turned on contractual interpretation. The Master of the Rolls first considered that the contract did provide for insurance in certain circumstances (albeit not the ones which ultimately arose here). He then went on to focus on the term *"by any Party"* in the non-assignment clause, and whether it could properly be said that there was a transfer 'by MBA'.

In concluding that the transfer was not 'by MBA', the Master of the Rolls noted the agreement between the parties that the transfer occurred by operation of law. It was no response to say that the voluntary decision of MBA and MSI to enter into the contract of insurance imbued MBA with responsibility for the transfer; that was a consequence of voluntary agreement and did not mean the consequence itself was voluntary. Properly understood, then, the transfer was by operation of law alone and was not captured by the clause.

In reaching this conclusion, the Master of the Rolls expressly held that the clause did not admit of multiple competing interpretations; as such, he concluded that he need not engage in the iterative process of interpretation set out in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

Comment

While at first glance a case determined on the specific wording of the clause, the speed with which the Master of the Rolls concluded the transfer was lawful is striking. That he found the clause did not even admit of multiple competing interpretations compounds this. While the case did not set out a general principle that such transfers will never be barred by a non-assignment clause, there seems to be significant weight weighing against such an interpretation. It is also notable that the parties agreed the clause would be no bar to a claim brought by way of subrogation (if the relevant law had been English law). Overall, practitioners and insurers can be confident that it will be an unusual case where a non-assignment clause will be effective to defeat a transfer to an indemnifying insurer.