

CLAIMANTS UNBOUND – DIRECT ACTIONS AGAINST INSURERS UNDER THE BRUSSELS I REGULATION

Direct actions against insurers have long been a problematic area for private international law. Insurers and insureds will commonly seek to agree which courts have jurisdiction to hear their disputes by including jurisdiction clauses in policy wordings. However, the European Court of Justice (ECJ) has confirmed in the recent case of *Assens Havn v Navigators Management (UK) Ltd* ([2017] ECLI:EU:C:2017:546) that such clauses are not binding on third parties. In many jurisdictions, liability insurers may have a direct liability to those who have claims against their insureds, including (but not limited to) cases where the insured is insolvent. This case confirms that insurers have little control over which EU jurisdiction hears such claims, and serves as a warning to liability insurers that they cannot be confident that their jurisdiction clauses will be given effect.

BACKGROUND

The Brussels I Regulation (Regulation (EU) No 1215/2012 replacing Regulation (EC) No 44/2001) sets out the rules for determining which EU Member State has jurisdiction to hear a particular claim. In dealing with direct actions against insurers, the Regulation presents a reasonably straightforward picture, albeit one that cannot be pleasing to the eye of liability insurers. Art 13(2) of the Regulation applies the rules of jurisdiction in Arts 10, 11 and 12 to any direct action by an injured party against a liability insurer permitted under the forum's private international law rules (see *Hotel Pineros Canarias SL v Keefe* [2015] EWCA Civ 598, [2016] 1 WLR 905). Those rules of jurisdiction in the Regulation give the injured party a broad palette of litigation options, entitling it to bring a direct action:

1. in the courts of the Member State in which it is domiciled (*FBTO Schadeverzekeringen NV v Odenbreit* [2007] ECR I-11321);
2. in the courts of the Member State in which the insurer or (in co-insurance) the leading insurer is domiciled;
3. in the courts for the place where the branch which issued the policy is located; or

Key facts

- Where an insurer is domiciled in, or underwriting from, a Member State, the courts will in many cases give effect to a jurisdiction clause in any claim made by an insured.
- However, the ECJ has confirmed that the position is different where the claim is brought by a third party- most commonly where an injured party has a direct claim under a liability policy.
- The injured party could bring a claim in the courts of the Member State:
 - in which it is domiciled;
 - in which the insurer or (in co-insurance) the leading insurer is domiciled;
 - where the branch which issued the policy is located; or
 - where the harmful event (i.e. either the event giving rise to damage or the direct damage) occurred.

4. in the courts for the place where the harmful event (i.e. either the event giving rise to damage or the direct damage) occurred.

Art 15 of the Regulation provides that “the provisions of this Section” (including Arts 10, 11 and 12) may be departed from by agreement in certain, limited circumstances. Those include (Art 15(5)) in insurance contracts covering risks of the kinds listed in Art 16, including any loss or damage of ships, offshore installations and aircraft, or goods in transit at sea or in the air, and any liability (other than to passengers for personal injury or loss of baggage) arising out of the use or operation of ships, installations or aircraft or caused by goods in transit (Art 16(1)-(2)).

This latter provision provides liability insurers with a measure of control with respect to proceedings brought by insured parties, but in a decision delivered on 13 July 2017 the European Court of Justice has rejected an argument that such clauses can be relied on to deprive an injured party of the right to bring proceedings in any of the courts designated by Arts 10-12.

ASSENS HAVN CASE

In the *Assens Havn* case, the Swedish charterer of a tug vessel took out liability insurance with the defendant insurer (Navigators). The policy of insurance, and Navigators’ conditions of insurance, contained clauses subjecting the policy to English law and to the exclusive jurisdiction of the English courts. The vessel caused damage to a quay in Denmark and, following the insolvency of the charterer, the quay owner brought an action against Navigators in the Maritime and Commercial Court, Denmark. At first instance, the Danish court dismissed the action on the ground that the exclusive choice of court agreement was binding on the injured party. The Danish Supreme Court referred a question to the European Court as to whether the Convention between Denmark and the European Community giving effect, in relations between them, to the provisions of the Brussels I Regulation mandated that conclusion.

The ECJ gave an emphatic negative answer to this question, without seeking an Opinion of the Advocate General on the point (a step that can be taken only if the case is considered to raise no new point of law). As far as the ECJ was concerned, the matter was settled by the earlier case of *Société financière et industrielle du Peloux v Axa Belgium* [2005] ECR I-3707, a case dealing with third party beneficiaries of an insurance policy and in *Assens Havn* it reiterated and extended that reasoning to injured parties seeking to bring a direct action. *Assens Havn* confirms the ECJ’s view that the provisions for insurance contracts in Section 3 of Chapter II of the Regulation are designed to protect the weaker party in the relationship, and that the possibility of derogating from that protection afforded by Art 15 (Art 13 of Regulation (EC) 44/2001) should be restrictively interpreted in such a way that a choice of court agreement should not be held binding on a claimant that has not agreed to it (*Assens Havn*, at [30]-[31], [36]-[42]). In the Court’s view (at [39]) “*the situation of a third party victim of insured*

Insurers domiciled in the EU, and non-EU insurers underwriting liability insurance from an establishment within the EU, face the prospect of being required to defend a direct action in the courts of Member State of the injured party’s domicile or of the place in a Member State where the event giving rise to damage or the damage occurred, regardless of policy terms.

damage is even farther removed from the contractual relationship than an insured beneficiary who did not expressly consent to that agreement". The Court was reinforced in this view by the fact that the provision in the Regulation addressing the entitlement of injured parties to bring direct actions (the current Art 13(2), see above) does not cross-refer to the provisions (the current Arts 15 and 16, see above) concerning choice of court agreements (see *Assens Havn*, [34]-[35]).

CONSEQUENCES FOR INSURERS

It is clear that insurers domiciled in the EU (and non-EU insurers underwriting liability insurance from an establishment within the EU – see Art 11(2)) face the prospect of being required to defend a direct action in the courts of Member State of the injured party's domicile or of the place in a Member State where the event giving rise to damage or the damage occurred, and that they will not be able to rely on a choice of court provision in the insurance policy to remove proceedings to their favoured forum. Nor may they rely on an English exclusive choice of court provision to seek an anti-suit injunction to prohibit the bringing of those proceedings, as such a remedy would undermine the effectiveness of the Regulation and violate the principle of mutual trust between Member States (*Turner v Grovit* [2004] ECR I-3565).

If a claim is brought by a third party in a jurisdiction not provided for in the Policy, the English courts might be more receptive to an action for compensation for breach of an equitable obligation not to pursue a direct action otherwise than in accordance with the dispute resolution framework in the policy.

ENGLISH COURTS: A REMEDY IN DAMAGES?

In 2016, the UK Supreme Court granted leave to appeal a 2016 decision of the Court of Appeal addressing questions concerning the characterisation of the claim as contractual or non-contractual, and the insurer's right to seek an injunction to enforce a dispute resolution provision in a policy against an injured party bringing a direct action (*Containerships Denizcilik Nazliyat Ve Ticaret AS v Shipowners' Mutual Protection and Indemnity Association, The Yusuf Cepnioglu* [2016] EWCA Civ 15 leave to appeal granted 3 November 2016).

The proceedings in that case had been brought in a court outside the European Union. Nevertheless, the English courts might (at least pending the outcome of the appeal in *The Yusuf Cepnioglu*) be more receptive to an action for compensation for breach of an equitable obligation not to pursue a direct action otherwise than in accordance with the dispute resolution framework in the policy (see *Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG* [2012] EWCA Civ 1714). Yet it seems extremely doubtful whether the European Court would be willing to countenance an award of damages of this kind when proceedings are brought before a Member State court, particularly as Arts 25(4) and 31(4) denude agreements falling outside Art 15 of legal force.

ARBITRATION: A WAY OUT?

A liability insurer would, for now at least, appear to be in a stronger position if the policy contains an arbitration provision. In this case, although claims in the English courts for an anti-suit injunction (and, if submitted, an award of damages) would be ruled offside for the reasons set out above (see *Allianz SpA v West Tankers Inc* [2009] ECR I-663) the insurer may be able to rely on the provisions of an international convention (most obviously, the New York Convention) to seek a stay of proceedings in the forum Member State (Brussels I Regulation, Arts 71 and 73(2)) or may pursue the option of issuing arbitration proceedings against the injured party as a person claiming under the policy and may in that case seek anti-suit relief or compensation from the tribunal (see *Gazprom OAO v Lietuvos Respublika* [2015] ECLI:EU:C:2015:316).

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However, the extent to which such arguments will succeed in practice remains to be seen. For the moment, the case serves as a salutary reminder to all parties that when it comes to determining which court has jurisdiction, it is the courts, and not the jurisdiction clause, which will have the final say.

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