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English Court of Appeal Introduces Uncertainty as to the Scope of Commercial Anti-Assignment Provisions

James Herbert, Mikaël Schinazi (Gaillard Banifatemi Shelbaya Disputes) · Wednesday, March 20th, 2024

Assignment issues are often of decisive importance in international arbitrations given the hard-edged nature of questions of jurisdiction, title, and standing. These issues are often less simple than they would first appear, especially in cases involving the interaction of multiple legal systems, complex financing arrangements, insurance or insolvency.

On 12 January 2024, the English Court of Appeal issued an important decision on the interpretation of contractual prohibitions on assignment in the context of an insurance subrogation dispute between Mitsui Sumitomo Insurance Co Ltd ("**MSI**") and Dassault Aviation SA ("**Dassault**"). The Court decided that a voluntary transfer that takes effect through a statute would not be considered to be a transfer "by a party" and would therefore not be captured by the relevant contractual prohibition. Although framed by the Court as a single issue of contractual interpretation, the case has led to contradictory outcomes at every stage of the proceedings and has potentially significant ramifications for parties negotiating or arbitrating to English law contracts, especially where there is a particular need to control the identity of counterpart(s). The decision will also be of interest to insurers, banks and any other third parties who deal with contractual rights arising under an English law contract containing a prohibition on assignment.

The Dispute

In March 2015, Dassault entered into an English law sale contract with its Japanese distributor, Mitsui Bussan Aerospace Co Ltd ("**MBA**"), which in turn contracted with the Japanese Coast Guard ("**JCG**") as the end customer. The sale contract between Dassault and MBA contained the following broad prohibition on assignments and transfers:

"[…] 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 and any such assignment, transfer or attempt to assign or transfer any interest or right hereunder shall be null and void without the prior written consent of the other Party. […]"

Without obtaining Dassault's consent, MBA entered into a Japanese law insurance policy with MSI in September 2017 to cover the risk of potential liability to the JCG for late delivery. Delivery

was delayed and MBA agreed to pay liquidated damages to the JCG. MSI accepted MBA's claim under the insurance policy and initiated an ICC arbitration in its own name against Dassault on the basis that MBA's rights had been transferred to it by operation of the Japanese insurance statute.

The Arbitration

The arbitration was heard by a panel of eminent English lawyers, including a former Justice of the UK Supreme Court, Lord Collins (as President), alongside Joe Smouha KC and Simon Crookenden KC. Dassault challenged the Tribunal's jurisdiction on the basis that the contractual rights under the sale contract were not capable of transfer without Dassault's consent.

Since MSI's position was that the relevant transfer had taken place "by operation of law," a theoretical question of Japanese law arose in the arbitration as to whether any transfer would have taken place under the insurance contract or the relevant statute (which was agreed not to apply mandatorily). That was because the insurance policy itself contained contractual subrogation provisions that largely mirrored the terms of the Japanese statute. The Tribunal took the view unanimously that the purported transfer occurred by operation of law pursuant to the Japanese statute. The Tribunal's finding on this point was not challenged before the English courts.

Consistent with the decision in *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2005] EWHC 454 (Comm) at [29], it was agreed that English law governed the transferability of MBA's rights under the sale contract and whether MSI was entitled to bring the claim in its own name. By a majority (Lord Collins and Joe Smouha KC), the Tribunal found that it had jurisdiction on the basis that there was a general rule of English law that a contractual prohibition on assignment will not generally be interpreted to apply to an assignment "by operation of law." Simon Crookenden KC dissented and found instead that the purported transfer in the case fell within the clause because the operation of Japanese law was brought about by voluntary acts of the assured. The arbitrators all treated that issue as turning on the proper understanding of the authorities on transfers "by operation of law" and so did not engage with construction.

The High Court

Considering the case *de novo* under s. 67 of the Arbitration Act 1996, Mrs Justice Cockerill in the High Court found that there was no special rule of English law concerning assignments "by operation of law" and that the true question emerging from the cases was "whether the transfer occurs truly outside the voluntary control of the transferring party" (para. 64). As a matter of construction, she engaged in a full iterative analysis of the relevant provision and concluded that to accept MSI's position would have required the Court to "rewrite the parties' agreement" (para. 121). Nevertheless, Mrs Justice Cockerill reached her conclusion "with an unusual degree of hesitation" (para. 121) and granted leave to appeal.

The Court of Appeal

The Court of Appeal viewed the authorities on transfers "by operation of law" as being largely

irrelevant. The Master of the Rolls, Sir Geoffrey Vos, concluded "that the old insolvency cases do not enunciate a general principle applicable to the interpretation of non-assignment clauses in commercial contracts. Instead, they seem […] mostly to turn on the nature of the insolvency under which the transfer in question took place" (para. 20).

The Court of Appeal proceeded to construe the relevant clause as having been designed to "prevent any transfer that is effected by a party to the sale contract, but not a transfer that is effected by operation of law" (para. 11). The Master of the Rolls considered that "the key words for our purposes are 'by a party'" (para. 28), which meant that "[t]he correct question was whether the transfer was made **by** MBA, not whether the transfer was caused as a consequence of certain actions taken by MBA" (para. 29; emphasis in original). He went on to note that "[h]ad [the transfer] been made under […] the insurance contract, the position might well have been different. But the arbitrators decided as a matter of fact that the transfer had occurred, as I have said, by operation of law" (para. 29).

Dassault has sought leave to appeal to the Supreme Court.

Comment

While the Court of Appeal has presented the case as a fact-specific one, it is likely to have broader implications as many commercial contracts contain similar non-assignment provisions and almost all non-assignment clauses in commercial contracts are likely to contain similar references to one or both of the parties. At the level of principle, the judgment raises questions as to the willingness of the courts to enforce broadly worded prohibitions on assignment and the extent to which a party may be permitted to circumvent such restrictions by voluntarily triggering a transfer under a statute or through some other indirect means.

In our view, the Court of Appeal's decision raises several concerns as a pure matter of English law.

First, it remains unclear where the notion of an assignment "by operation of law" originates, what it might encompass and whether it is a useful or relevant concept in this context (especially given that even an express assignment takes effect by operation of statute pursuant to s. 136 of the Law of Property Act). The same cases from which the phrase seems to have been drawn focus on concepts of voluntariness or the Latin expression of assignments that pass *in invitum* (without consent). While the Court of Appeal rejected the notion that any general principle can be drawn from the "old insolvency cases" (para. 20), it proceeded to base its decision on the notion that assignments "by operation of law" are a special category.

Second, the Court's interpretation of the relevant contractual prohibition did not form part of the reasoning of any of the other eminent decision-makers—all of whom are very senior English lawyers—who had previously considered the issue. It is difficult to reconcile that fact with the Court of Appeal's view that the relevant clause was so "clear" (para. 28) as not to require the Court to "undertake the detailed iterative process of interpretation explained in *Rainy Sky* and in *Wood v. Capita"* (para. 31). While it is quite possible for different decision-makers to reach different conclusions as to the meaning of words, the thrust of the Supreme Court's jurisprudence on contractual interpretation is that the process should be systematic rather than impressionistic.

Third, the construction adopted by the Court of Appeal is uncommercial. Rational businesspeople

are unlikely to intend the enforceability of their non-assignment provisions to turn on legal niceties as to the mechanism by which a given transfer is effected: the accepted commercial goal of such clauses is to avoid to the greatest extent possible the unilateral introduction of a new party into the contractual relationship. Except where necessary for reasons of public policy, there is no obvious reason why that commercial intention should be overridden.

Fourth, the practical implication of the decision is that in each case involving a foreign transfer potentially taking place "by operation of law," parties will need to engage foreign lawyers and, potentially, submit expert evidence to assess the basis by which the given transfer is said to have taken effect. That analysis risks drawing parties and decision-makers into highly theoretical questions, such as whether a transfer is deemed by the relevant foreign law to have taken place under a contract or a statute in circumstances where both contain similar provisions. By contrast, an assessment regarding whether a given transfer was voluntary or not will largely turn on questions of fact.

For these reasons, we consider the Court of Appeal's decision to be unconvincing and, most likely, incorrect as a matter of contractual interpretation.

Uncertainty in this area of law is of particular concern not only to transactional lawyers, but also to international arbitration practitioners given the special importance in arbitrations of matters of assignment or transfer. As shown above, the case has produced no fewer than three different answers by senior English lawyers and judges on two threshold points of English law: (i) whether English law contains general presumptions regarding the interpretation of contractual prohibitions on assignment; and, (ii) the proper construction of the clause at issue in this case. Until a more robust answer is provided by the English courts, counsel and arbitrators in cases involving such issues will continue to be placed in a difficult position. For obvious reasons, it will normally be appropriate to decide narrow legal questions of jurisdiction, title, and standing as preliminary issues. However, the availability of de novo review under s. 67 of the Arbitration Act 1996 means that litigation will almost inevitably ensue to the extent that the law remains unsettled.

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Note: The authors currently act on behalf of Dassault Aviation SA in the underlying arbitration.

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