INSURANCE & REINSURANCE | JULY 2021

FAITES VOS JEUX: LONDON TRUMPS LAS VEGAS IN COVID-19 CASINO DISPUTE

With the Monte-Carlo Reinsurance Rendezvous again being cancelled due to Covid-19, a recent Court decision reminds us of casinos. In an expedited Covid-19 related decision (*Markel Bermuda-v- Caesar's Entertainment*), Mr. Justice Bryan recently:

1. permitted the insurer to "rectify" (or "reform" the formal policy which it had issued to its insured, so as to incorporate a "Bermuda Form"-type arbitration clause (providing for arbitration of disputes in London, subject to New York law), which the Judge found had previously been agreed and bound between the parties, but mistakenly omitted from the policy, and so he
2. granted the insurer a permanent anti-suit injunction, to restrain the insured from starting or continuing coverage litigation in Nevada, USA, in breach of this arbitration clause.

Caesar's Entertainment, a U.S. casino and entertainments group, claimed an indemnity in respect of alleged property damage and business interruption ("BI") losses arising out of COVID-19. Caesar's sued Markel (along with other excess insurers) in the State District Court of Clark County, Nevada.

Several days prior to expiry of the preceding cover, the insurer had issued a quotation for excess property/BI policy to the broker, in terms which expressly provided for London arbitration/New York law. Based on evidence consisting mainly of emails between the broker and the insurer, the insurer invited the Judge to find that these terms had been accepted by the insured and that cover had been bound accordingly, with a policy wording to follow. The policy wording was not issued until the evening when the existing cover would expire when, under pressure from the broker, the insurer hurriedly issued a policy which contained a US Court/Nevada law clause, with no reference to the London arbitration/New York law terms.

The insured relied on this policy to commence proceedings in Nevada. The insurer sought to rectify the policy to include the London/New York clause which the quotation had incorporated.

The insured submitted that there were strong commercial reasons to infer that, where there is a policy wording, that is the basis of the contract between the parties, since where a subsequent policy follows a prior agreement, it will usually be the intention of the parties to supersede the earlier one, and an earlier contract (in particular, a slip) will set out the agreement in shorthand and so it is unlikely to be useful to look to the earlier agreement to establish the terms of the policy (see *HIH v New Hampshire*.)

Rien ne va plus: the Judge's short answer to that submission, and the associated authorities relied upon by the insured, was that they were not relevant in the present case.

On the evidence, the Judge decided the policy had been issued in error (described by one witness as a "cock-up") and he accepted the insurer's argument that cover had been bound on terms which incorporated the London arbitration/New York provision, prior to the policy issue.

He ruled that, in any event, there was nothing in the authorities relied upon by the insured that would support the ("*bizarre*") conclusion that despite the parties contractually agreeing London arbitration and New York law, this was superseded, without discussion or negotiation or agreement, between the parties with an entirely different jurisdictional and law regime (Nevada), a regime that the insurer had never quoted on the basis of, and that was inconsistent with London arbitration and New York law that had not only been quoted, but had been contractually agreed.

It was common ground, that the law applicable to the question of whether the parties agreed New York law should govern the policy was to be determined on the ordinary rules of English law relating to the construction of contracts. It was equally common ground that the law applicable to the question of whether the agreement to London arbitration was valid and binding was governed by the putative law applicable to the said agreement to arbitrate.

The insurer's case was that, to the extent that the policy document did not reflect the arbitration agreement, the policy should be reformed by reason of a mutual mistake. The insurer said that this issue was governed by New York law as the putative applicable law of the policy.

Claims for rectification of insurance contracts are regularly contemplated by legal advisers but seldom pleaded: successful rectification claims are relatively rare.

The parties agreed that reformation as a matter of New York Law is analogous to the English law principle of rectification.

A mutual mistake occurs when both parties to a contract shared the same erroneous belief as to a material fact, and their acts did not in fact accomplish their mutual intent. A contract entered into under a mutual mistake of fact is subject to the equitable remedy of reformation or rescission. In the context of mutual mistake, the remedy applies where there is no mistake about the agreement but it is alleged that a mistake occurred in the reduction of that agreement to writing (a so-called "scrivener's error"). Such a mistake of the scrivener, or of either party, no matter how it occurred, may be corrected by reforming the contract: New York law requires “clear, positive and convincing evidence” or a “high level of proof” that the parties were similarly mistaken (which was also common ground). A similar standard of “convincing proof” applies in English law.

According to *FSHC Holdings v GLAS Trust [2020] Ch 365*:

> *"before a written contract may be rectified on the basis of a common mistake it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an outward expression of accord meaning that, as a result of communication between them, the parties understood each other to share that intention."*

The intention of the parties is to be assessed subjectively.

The judge considered whether the matter was to be determined as a matter of New York law (reformation) or English law (rectification). Ultimately, he decided it did not matter, since neither party suggested that there were any material differences in the context of the facts of the present case.

The law applicable to the contract of insurance was, as he had found, New York law and the policy did not reflect the terms of that contract of insurance, and so the documentation stood to be reformed – with the result that the matter was to be addressed by reference to New York law.

There was no mistake about the agreement as to London arbitration and New York law but a mistake occurred as a result of a "scrivener’s error" by way of omission to include a policy clause (usually effected by policy endorsement) to this effect.

Applying the principles of New York law, the Judge was satisfied and found that the requirements for reformation under New York law were met, and that it was therefore appropriate to order reformation of the policy. He was also satisfied that this was a classic case for rectification, the requirements for rectification being met, there being convincing proof that the policy was not in accordance with the parties’ mutual intention by reason of the failure to include the relevant arbitration provision.

Having decided as he did, the Judge had little trouble in giving effect to the London arbitration/New York clause by granting an injunction restraining the policyholder from continuing coverage litigation in Nevada or elsewhere in breach of the clause. Section 37 of the Senior Courts Act 1981 permitted the Court to make a final injunction to enforce the terms of the arbitration agreement in all cases in which it appeared to the court to be just and convenient to do so. It mattered not that the insurer could apply to the Nevada Court to decline jurisdiction and/or remove the proceedings to federal court. The insurer was entitled to an anti-suit injunction unless the insured could show strong reasons to the contrary, which it was unable to do. The croupier raked away the losing chips. We do not know whether there will be an appeal.

For more information, please contact the author(s) of this alert

ANDREW BANDURKA
Partner, London
T +44 (0)20 7264 8404
E andrew.bandurka@hfw.com

hfw.com

Americas | Europe | Middle East | Asia Pacific