HFW

MIDDLE EAST:

COURT OF APPEAL DECIDES COVID BI CLAIM CANNOT BE HEARD IN ENGLAND

In *Al Mana Lifestyle Trading LLC & Ors v United Fidelity Insurance Company PSC & Ors*[1], the Court of Appeal has held, overturning a decision by the Commercial Court, that the English court does not have jurisdiction to hear BI claims brought under various multi-risk insurance policies issued in the Middle East.

In doing so, the Court of Appeal emphasised that initial impressions can be important when interpreting ambiguously worded contractual provisions. However, as this case illustrates, this is not always a helpful approach given that initial impressions may differ.

1 [2023] EWCA Civ 61.

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Background

The Claimants all form part of the Al Mana Group, which operates in the food, beverage and retail sectors, predominantly in the Middle East and Gulf regions. In May 2021, they commenced English court proceedings, bringing claims under a suite of seventeen multi-risk insurance policies underwritten by the Defendants (the **Policies**). The Claimants sought an indemnity totalling around US $40 million for business interruption losses arising from the COVID-19 pandemic.

The Defendants are insurers headquartered in the United Arab Emirates, Qatar and Kuwait and the Policies were issued in those jurisdictions.

The Defendants challenged the English court’s jurisdiction to hear the claims.

Each of the Policies contained the following wording (the **Clause**):

> *“APPLICABLE LAW AND JURISDICTION:*
>
> *In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued. Otherwise England and Wales UK Jurisdiction shall be applied,*
>
> *Under liability jurisdiction will be extended to worldwide excluding USA and Canada.”*

The Defendants’ case was that, in each policy, the Clause provided for the exclusive jurisdiction of the court of the country in which the policy was issued, with a fallback for English jurisdiction in the event that the local court did not have or would not accept jurisdiction.

The Claimants argued that the Clause gave the party wishing to bring a claim a free choice to bring proceedings either in the local court or in the courts of England and Wales. Alternatively, if that was wrong, the Claimants contended that the jurisdiction of the English and Welsh courts would be available so long as the jurisdiction of the local court was not mandatory under the law of that country.

First instance decision

At first instance, Cockerill J found that the Clause was not exclusive, and permitted proceedings to be brought *either* in the country where the policy was issued (in this case the UAE, Qatar or Kuwait), *or* in the courts of England and Wales.

In analysing the wording of the Clause, the Court emphasised the importance of giving consideration to every word, and of viewing each word in its place in the Clause, rather than in *“the slightly overfocussed context”* of the parties’ submissions.

The Court found that there was only one possibility for the applicable law: the relevant local law. The Court also recognised that this was a factor in favour of the Defendants’ contention that the courts of the countries where the policies were issued should have jurisdiction. However, ultimately, the Judge agreed with the Claimants that the words *“in accordance with”* could not be seen as synonymous with *“subject to”*; the former is less mandatory and imperative than the latter. The Judge also considered that the use of the word *“otherwise”* in conjunction with *“in accordance with”* suggested a natural balancing which is more suggestive of a non-exclusive jurisdiction clause.

Court of Appeal decision

The Court of Appeal, by a 2-1 majority (Andrews LJ dissenting), allowed the Defendants’ appeal, finding that the English court did not have jurisdiction to try the Claimants’ claims.

The Court agreed with the first instance Judge that the test to be applied was how the words of the Clause would be understood by a reasonable policyholder. Males LJ (with whom Nugee LJ agreed) noted that, in applying this test, first impressions are important, and his strong impression on first seeing the Clause was that the first sentence contained the primary jurisdiction selected by the parties, with a fallback for English and Welsh jurisdiction in the second sentence.

That impression was confirmed on a more analytical reading of the Clause.

The Clause made clear that local governing law and practices would continue to apply, even if the English court heard the claim, and this was a powerful factor in favour of the Defendants' argument that the choice of local jurisdiction was intended to be mandatory.

Males LJ considered that in the context of the Clause, the words *"in accordance with"* were imperative and mandatory, and *prima facie*, therefore, the choice of the jurisdiction of the local court would also be mandatory. This was subject to the effect of the second sentence and in particular the use of the word *"otherwise"*. Males LJ's view was that in the context of a jurisdiction clause, the word "otherwise" was more appropriate to introduce a fallback. Males LJ concluded that the fallback of England and Wales would be available only if the local court did not or would not accept jurisdiction. Males LJ did not think it was relevant – as the Claimants had argued – that there were no or very limited circumstances in which the local court would not accept jurisdiction: there was no reason why parties could not agree a fallback jurisdiction without first investigating the likelihood of it being necessary. There was also no need for a single neutral venue where it had not been suggested that the local courts could not handle the claims in an independent, efficient, cost-effective and timely manner.

Dissenting, Andrews LJ indicated that her strong first impression of the meaning of the clause was the opposite to that of Males LJ. Andrews LJ agreed that a key consideration was the meaning of the word *"otherwise"* at the start of the second sentence, but considered that the more natural and obvious interpretation of the Clause was that if, for whatever reason, the proceedings were not brought in the courts of the country where the policy was issued, they must be brought in England and Wales. Andrews LJ was therefore of the view that the first instance decision was correct, and that the Clause should be interpreted as a non-exclusive jurisdiction clause.

Comment

Perhaps even more so now that the first instance decision has been overturned, this case highlights the importance of clearly drafted policy provisions. As the case illustrates, an ambiguously worded (or, as Males LJ put it, *"tersely expressed"*) jurisdiction clause can create a great deal of uncertainty, which in turn can lead to costly and time-consuming jurisdictional disputes arising before the substantive issues can be dealt with. Clearly, this is in the interests of neither policyholders nor insurers.

For further information, please contact the authors of this briefing:

ALEX JOHNSON
Associate, London
T +44 (0)20 7264 8219
E alex.johnson@hfw.com

SAM WAKERLEY
Partner, Dubai
T +971 4 423 0530
E sam.wakerley@hfw.com

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