Shipping

February 2015

DIRECT RIGHTS OF ACTION AGAINST P&I CLUBS: A GROWING TREND?

It is well known that there are a number of International Conventions conferring direct rights of action against liability insurers. Notable examples would include the International Convention on civil liability for oil pollution damage and the International Convention on civil liability for bunker oil pollution damage.

It is also well known that there are a number of jurisdictions in which domestic legislation confers upon "victims" direct rights of action against insurers. Such direct rights exist in Scandinavia, most American States and Tunisia and the list is increasing with Spain and Turkey both recently enacting new maritime codes which include direct rights of action against insurers.

The issue for liability insurers in general, and P&I Clubs in particular, with respect to such legislation is not only that a claim can be brought and prosecuted in a forum other than that provided for within the contract of insurance, but also that contractual defences, most notably the pay to be paid rule, can be circumvented or declared unenforceable in the local Courts.

In the recent case of *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS*[1] the High Court granted and maintained an anti-suit injunction preventing the charterers of the M/V *YUSUF CEPNIOGLU* (the vessel) from prosecuting a direct claim in Turkey against the owners' P&I Club.

The case throws a light upon foreign legislation conferring direct rights of action and is of wider application for P&I Clubs facing such claims (outside of Europe). It demonstrates that where appropriate, the English Courts will act to protect a Club's right to face claims in the forum set out within the Club rules. The facts of the case are as follows.

1 [2015] EWHC 258 (Comm)

"The Club therefore sought and obtained on an ex parte basis an anti-suit injunction against the charterers. This was subsequently challenged by the charterers."

PAUL DEAN, PARTNER

On 8 March 2014, the vessel grounded on the Greek island of Mykonos. Salvage services were rendered but the vessel was a total loss. At the time of the grounding the vessel was laden with 207 containers. The cargo was being carried pursuant to 74 bills of lading issued by the charterers. Cargo claims were notified to both the owners and charterers in Turkey and elsewhere. The charterers commenced arbitration proceedings in London against the owners pursuant to the terms of the charterparty, but were unable to obtain security directly from the owners.

The owners are members of the Club. The Club rules provide (inter alia) for London arbitration and cover is subject to the pay to be paid rule.

In May 2014, the charterers commenced "precautionary" proceedings in Turkey against the Club directly and sought to attach all premia due to the Club in the hands of brokers in Turkey up to a value of US$13.5 million as security for an intended direct substantive claim against the Club in Turkey under Article 1478 of the Turkish Commercial Code. This provision provides:

"The victim may claim its loss up to the insured sum directly from the insurer provided that the claim is brought within the prescription period applicable to the insurance contract".

The Club therefore sought and obtained on an ex parte basis an anti-suit injunction against the charterers. This was subsequently challenged by the charterers.

The key issue for the High Court, following a number of authorities including *THE PRESTIGE (No 2)*[2], was to determine whether the claim under Article 1478 of the Turkish Commercial Code should be characterised as a claim to enforce the contract of insurance (in which case the claim should be brought in accordance with the terms of that contract) or to enforce an independent right of recovery. In this regard the Court considered the substance and content of the right and determined that the claim was contractual as the Article 1478 right is subject to the contractual limits, period of cover and prescription period and it is to the contract that one must look to find the perils insured against. It was also common ground that the Turkish Courts would seek to apply the governing law of the contact insofar as that law did not conflict with public policy in Turkey.

The Court then had to determine whether, if the claims were contractual in nature, to grant an anti-suit injunction. The Club had submitted that the proceedings in Turkey were a breach of the arbitration clause within the Club rules so that in accordance with *THE ANGELIC GRACE*[3] an anti-suit injunction should be granted unless there were good grounds for not doing so. The Judge disagreed and determined by reference to *THE HARI BLUM (NO 1)*[4] that the *THE ANGELIC GRACE* principle does not apply *"by parity of reasoning"* to a case involving direct rights of action. Thus an injunction could only properly be granted if the proceedings in Turkey were vexatious and oppressive.

In this regard the Judge held that the Turkish proceedings were vexatious and oppressive. The effect would be to deprive the Club of its right set out in the rules to have claims brought against it in arbitration in London. Further, there was a real risk that those proceedings would also prevent the Club from being able to rely upon the pay to be paid clause in its contract with its member.

2 [2014] 2 Lloyd's Rep 309
3 [1995] 1 Lloyd's Rep 87
4 [2005] 1 Lloyd's Rep 67 (CA)



"the Turkish proceedings were vexatious and oppressive because they would infringe the contractual rights of the Club"

RICHARD STRUB, SENIOR ASSOCIATE

Against that, must be considered the fact the Charterers were merely exercising a right given to them by Turkish statute. However, the Court held that as a matter of English law, the Club has the right to have claims brought against it enforced by arbitration in London and is entitled to the benefit of the pay to be paid clause. In those circumstances the Turkish proceedings were vexatious and oppressive because they would infringe the contractual rights of the Club.

This case is therefore of great importance to P&I Clubs and liability insurers if/when faced with claims brought under foreign legislation giving direct rights of action. Leave to appeal has, however, been granted to the charterers and we will send an update once the outcome of any appeal is known.

Richard Strub and Paul Dean acted for the successful P&I Club in this matter.

For more information, please contact the authors of this Briefing:

Paul Dean
Partner, London
T: +44 (0)20 7264 8363
E: paul.dean@hfw.com

Richard Strub
Senior Associate, London
T: +44 (0)20 7264 8014
E: richard.strub@hfw.com

HFW's London office is part of an international network of 13 offices in 11 countries. For further information about shipping related issues in other jurisdictions, please contact:

Guillaume Brajeux
Partner, Paris
T: +33 1 44 94 40 50
E: guillaume.brajeux@hfw.com

Jeremy Davies
Partner, Geneva
T: +41 (0)22 322 4810
E: jeremy.davies@hfw.com

Dimitri Vassos
Partner, Piraeus
T: +30 210 429 3978
E: dimitri.vassos@hfw.com

Simon Cartwright
Partner, Dubai
T: 971 4 423 0520
E: simon.cartwright@hfw.com

Nick Poynder
Partner, Shanghai
T: +86 21 2080 1001
E: nicholas.poynder@hfw.com

Paul Hatzer
Partner, Hong Kong
T: +852 3983 7666
E: paul.hatzer@hfw.com

Paul Apostolis
Partner, Singapore
T: +65 6411 5343
E: paul.apostolis@hfw.com

Robert Springall
Partner, Melbourne
T: +61 (0)3 8601 4515
E: robert.springall@hfw.com

Nic van der Reyden
Partner, Sydney
T: +61 (0)2 9320 4618
E: nic.vanderreyden@hfw.com

Hazel Brewer
Partner, Perth
T: +61 (0)8 9422 4702
E: hazel.brewer@hfw.com

Jeremy Shebson
Partner, São Paulo
T: +55 (11) 3179 2903
E: jeremy.shebson@hfw.com

Lawyers for international commerce

hfw.com

São Paulo London Paris Brussels Geneva Piraeus Dubai Shanghai Hong Kong Singapore Melbourne Sydney Perth