



In this week's Insurance Bulletin:

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1. COURT CASES AND ARBITRATION

Brazil: Brazilian Superior Court ruling on Petrobras arbitration dispute with Brazilian oil and gas regulatory agency

The Superior Court of Brazil published its decision on the jurisdiction of the arbitration tribunal in a case brought by Petrobras against the Brazilian oil and gas regulatory agency, Agência Nacional do Petróleo, Gás Natural e Biocombustíveis (ANP). The dispute related to an ANP board resolution on the concession agreements in place for the exploration and production of oil and gas fields that would have resulted in an additional charge of BRL2.9 billion (approximately USD880 million) to Petrobras.

The issues

In 2014, ANP passed a board resolution requiring the unification of seven oil and gas fields. Unification led to an increase in the rate of the “special participation” payable by Petrobras to ANP. “Special participation” is a government levy calculated based on the volume of oil and gas produced from a field and takes into account factors such as the net production volume and the location of the fields.

Petrobras commenced arbitration proceedings against ANP under the concession agreement claiming that the ANP board resolution resulting in the increased rate was invalid. ANP sought to block the proceedings by arguing that the tribunal lacked the competence to decide the merits of the case. Under Brazilian law arbitration tribunals can only rule on disputes relating to “disposable rights”. ANP argued that its right to charge special participation was a right ANP had as a regulator and therefore could not be a “disposable right” capable of being arbitrated. Pending arbitration, Petrobras requested interim measures to stop ANP demanding payment of the higher rate of special participation.

Following rulings in the lower courts and from the arbitral tribunal, Petrobras made an application to

the Superior Court. The Superior Court found that the arbitral tribunal was competent to rule on its own jurisdiction and based its judgment on the “competence-competence” principle.

The competence-competence principle is a general principle of international commercial arbitration; a tribunal can make a determination as to its own jurisdiction to deal with substantive claims in dispute. However, an enforcing court that is not at the seat of the arbitration can re-examine the tribunal’s jurisdiction. If a national court determines that the tribunal lacked competent jurisdiction, then it may determine that the arbitration award is invalid and unenforceable.

In the Petrobras case, the Superior Court found that issues arising out of a contract entered into by a public entity relate to “disposable rights” and therefore could be subject to arbitration. The Superior Court left the question of whether the rights at the centre of the dispute were “disposable rights” to the arbitration tribunal to determine.

The ruling is significant as it could be seen to demonstrate the Superior Court’s pro-arbitration stance and the approach of Brazilian law to arbitration disputes where public administration powers are involved. ANP has initiated a public consultation on the latest version of its arbitration clause and it seems the clause will be reviewed to bring additional clarity to this issue.

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2. MARKET DEVELOPMENTS

England and Wales: Cyber insurance: implications following the ruling against Morrisons

In a “landmark” ruling, the English Court has held Morrisons liable for a former employee’s leaking of payroll details of nearly 100,000 staff. In the action, brought by current and former staff, Morrisons

denied liability for alleged breaches of privacy, confidence and data protection laws. The claimants also sought compensation for upset and distress. Morrisons, however, denied both direct and indirect liability and submitted that it had already incurred huge costs as a result of the data leak.

Morrisons has been given leave to appeal. If this ruling is upheld on appeal, a definitive precedent will be set whereby a company may be held vicariously liable for the criminal acts of its staff in instances of data breaches and liable to pay compensation for upset and distress. This could pave the way for many such cases in the future.

According to a study by PwC, only one in ten small businesses in the UK

has cyber insurance, in comparison with 16% globally. However, this ruling, coupled with the implementation of the EU General Data Protection Regulation (coming into force in May 2018) as a result of which customers must be informed in the event that their data is stolen, will increase clients' awareness in respect of cyber exposures. This in turn will mean that companies need to be evermore resilient in the face of the growing potential for cyber actions. PwC has predicted that the global cyber insurance market could increase from \$2.5 billion in 2015 to \$5 billion in 2018, with an estimated \$7.5 billion of premiums in 2020.

LUCINDA RUTTER

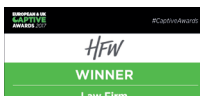
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SEASON'S GREETINGS

We're taking a short break for Christmas and our next bulletin will be published in January.

HFW extends Season's Greetings to all of our readers with our best wishes for 2018.

¹ <http://www.bailii.org/ew/cases/EWHC/QB/2017/3113.html>



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