Ointment for Mosquito Bites – English Court upholds exclusion clause in aircraft purchase agreement; statutory limitations do not apply

Air Transworld Limited v Bombardier Inc [2010] EWHC 243 involved a Gibraltar company, Air Transworld Limited ("ATL"), and the Canadian manufacturer, Bombardier Inc. ("Bombardier"). ATL was controlled by Mr. Antonio Mosquito, an Angolan resident, who wished to purchase a new Challenger 605 private jet for his personal use. The Aircraft Purchase Agreement (the "APA") with Bombardier was originally entered into by an Angolan company, Angoil SA ("Angoil"), which was also controlled by Mr. Mosquito. In April 2007, Angoil assigned the APA to ATL. The aircraft was delivered to ATL in March 2009 and suffered an incident in May 2010.

Exclusion of Implied Conditions under SOGA

While the aircraft was under investigation at Bombardier's premises, ATL rejected it on the basis that it did not correspond with description, was not of satisfactory quality and was unfit for purpose within the implied conditions under Section 13 and 14 of the Sale of Goods Act 1979 (the "SOGA").

Bombardier contended that the APA excluded such liability under statute and ATL's rights and remedies were restricted to the contractual warranty given by Bombardier in the APA (the "Warranty"), which Bombardier argued had not been breached. Article 4 of the APA provided that:

"THE WARRANTY, OBLIGATIONS AND LIABILITIES OF SELLER AND THE RIGHTS AND REMEDIES OF BUYER SET FORTH IN THE AGREEMENT ARE EXCLUSIVE AND ARE IN LIEU OF AND BUYER HEREBY WAIVES AND RELEASES ALL OTHER WARRANTIES, OBLIGATIONS, REPRESENTATIONS OR LIABILITIES, EXPRESS OR IMPLIED, ARISING BY LAW, IN CONTRACT, CIVIL LIABILITY OR IN TORT, OR OTHERWISE, INCLUDING BUT NOT LIMITED TO (A) ANY IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE, AND (B) ANY OTHER OBLIGATION OR LIABILITY ON THE PART OF SELLER TO ANYONE OF ANY NATURE WHATSOEVER BY REASON OF THE DESIGN, MANUFACTURE, SALE, REPAIR, LEASE OR USE OF THE AIRCRAFT OR RELATED PRODUCTS AND SERVICES DELIVERED OR RENDERED HEREUNDER OR OTHERWISE."

ATL claimed that Article 4 did not effectively exclude the implied conditions of the SOGA because it did not include the word "**condition**". As Article 4 is an exclusion clause, it must be construed strictly *contra proferentem*. This principle of construction provides that, where there is ambiguity, the relevant contractual term should be decided against the party who insisted upon it.

The distinction between "warranties" and "conditions" in the SOGA is so well known that exclusion of a warranty could not be taken as excluding a condition and there is a long line of authority which establishes that "such obligations can only be excluded by language which expressly (or perhaps one may add which must necessarily be taken to) refer to conditions" (*Rix LJ, Mercini Lady [2011] 1 Lloyd's Rep 442, paragraph 62*).

The court held that the first part of Article 4 was sufficiently clear to exclude the SOGA implied conditions, as "no person...could be in any doubt that every promise implied by law is excluded, in favour of the contractual promises set out in the APA." The following examples within Article 4 were "only illustrative" of the "all embracing provision found in the first part." While there was no express reference to the word "condition", the language of Article 4 must necessarily be taken to refer to the SOFA implied conditions because they are obligations and liabilities "implied, arising by law." The Warranty given

by Bombardier was in substitution of all other rights.

This decision is helpful for parties seeking to rely on exclusion or exemption clauses and is the latest in a series of recent decisions where the *contra proferentem* principle seems to be coming under jurisprudential scrutiny (*Mercini Lady* considered). Further, as the case revolved around construction of an aircraft purchase agreement and, given that aircraft leases and warranty agreements contain similar exclusion clauses, it is of particular relevance to the aviation industry.

International Supply Contract Exemption under UCTA

The court also had to consider whether the APA was an "international supply contract" under the Unfair Contract Terms Act 1977 ("UCTA"). UCTA imposes limitations on parties seeking contractually to exclude or restrict liability in circumstances covered by the act. In particular, it includes a requirement of reasonableness. If UCTA applied to the APA, then the exclusion of the SOGA implied conditions under Article 4 would have been subject to the UCTA reasonableness test.

However, these statutory limitations, including the reasonableness test, do not apply to international supply contracts. A contract of sale of goods will qualify as an international supply contract if it is made by parties whose place of business or habitual residence are in different States and either (a) the goods are, at the time of conclusion of the contract, in the course of carriage, or will be carried, from one State to another; or (b) the acts constituting offer and acceptance have been done in different States; or (c) the contract provides for the goods to be delivered to a third State from those in (b).

Offer and acceptance in different States

The court interpreted "the acts constituting offer and acceptance" to mean the totality of the acts, including the making and receiving of each (i.e. communication of an offer). UCTA intends to exclude contracts "where there is an international element in the formation of the contract."

The court concluded on the facts that the APA, as assigned, was an international supply contract. This was based on the parties executing in different States, including communication and receipt of the offer and acceptance. An interesting point to note is the court's view that it was the tripartite Assignment Agreement between Angoil (as assignor), ATL (as assignee) and Bombardier (as seller) assigning the APA which was the relevant contract to determine whether UCTA applied, as this was the contract in respect of which ATL brought its claim.

Carriage of goods across national boundaries

In addition, the APA (as assigned) was a contract falling within the relevant sub-section of the act described in (a) above. The court relied upon *Amiri v BAE [2003] 2 Lloyd's Rep 767* and to *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd [2010] QB 86*, both also important cases for the aviation industry.

In *Amiri*, the court held that the sub-section would be satisfied where, at the relevant time, goods were being, or were to be, carried between two different States, regardless of any express obligation to deliver to another state. The Court of Appeal in *Trident Turboprop* extended this analysis, concluding that the sub-section was directed to any case where the parties contemplated, at the time of entering the contract, that the goods would be transported across national boundaries, not necessarily to fulfil any contractual terms, but to achieve the contract's commercial object. The Court of Appeal also made clear that "carriage" does not exclude ships, aircraft and other vehicles capable of moving under their own power.

Consequently, it was binding on the court to decide that application of the relevant sub-section does not require a contractual term providing for transportation across national boundaries. It was sufficient that, at the time of conclusion of the APA and the Assignment Agreement, the parties contemplated that the aircraft would be "carried" from one State to another, as the aircraft was to be exported from Canada, based in Africa and operated in Europe.

Finally, the court was satisfied that, even if the international supply contract exemption did not apply, Article 4 met the statutory reasonableness test.

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