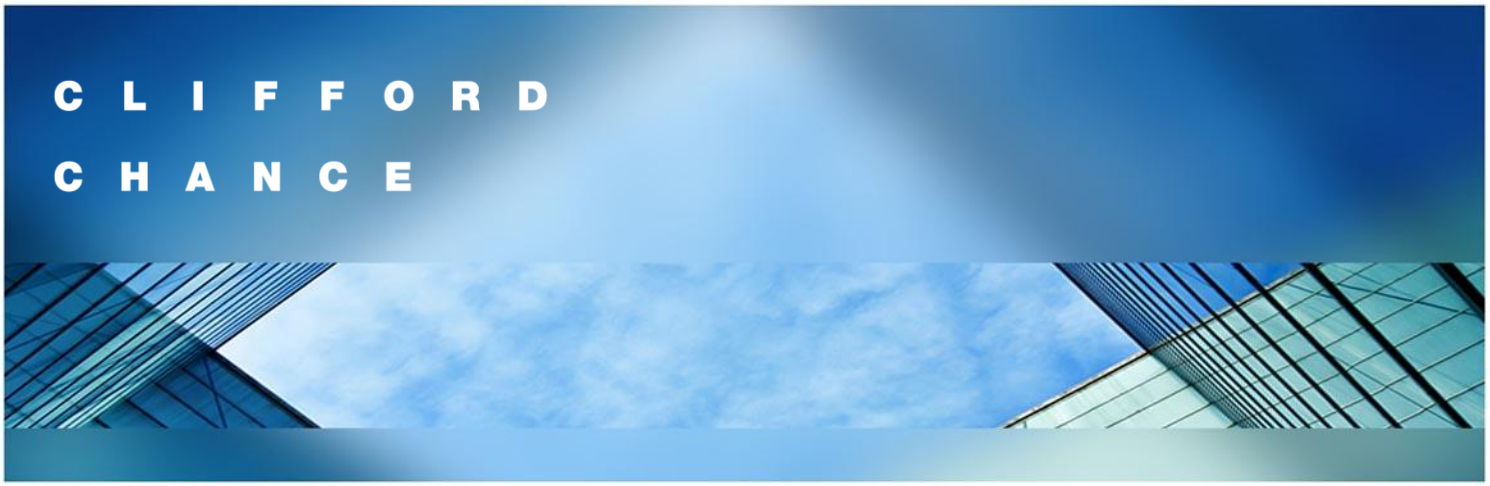

DASSAULT AVIATION SA V MITSUI SUMITOMO INSURANCE CO LTD [2022] EWHC 3287 (COMM).

The central question for the High Court in *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* was whether a "non-assignment" clause was limited to contractual assignments and did not prohibit a transfer of rights to an insurer by operation of law under an insurance policy.

In *Dassault*, the claimant, a leading aircraft manufacturer, made a successful jurisdictional challenge under s. 67 of the Arbitration Act 1996. Specifically, the High Court held that the determination of whether an assignment that arose "by operation of law" was caught by the specific contractual assignment prohibition turned not on whether the transfer mechanic itself was "by operation of law", but on whether the relevant party had voluntary control of the circumstances giving rise to such assignment. The decision is of relevance to all insureds and insurers where the insured has contractual rights in respect of the insured loss. It will be of particular interest to parties who may have insured against (or are the insurers of) certain risks involved in a transaction and wish to ensure that, following a claim, the insurers are effectively subrogated to, or may otherwise "step in the shoes" of, the insured, regardless of any non-assignment clause in the principal transaction documents. More broadly, it is a reminder that the wording of any contractual prohibition on assignment should be carefully drafted or reviewed, to reflect the parties' commercial intention.

Key issues

- **Under English law, there is no general rule that a non-assignment clause does not apply to transfers by operation of law or other involuntary assignments**
- **Whether or not a non-assignment clause extends to such transfers or assignments is a matter of contractual construction, taking into account commercial purpose and context**
- **The focus is not on the mechanism of transfer but on whether the transfer occurs truly outside the voluntary control of the transferring party**
- **A party should consider carefully whether the terms of any contractual restrictions on assignment or transfer of rights and interests exclude assignments or transfers to insurers, by subrogation or otherwise**
- **English law subrogation does not involve a transfer of rights and the Court did not determine whether it would be contrary to a non-assignment clause**

Background

Mitsui Bussan Aerospace Co Ltd ("MBA") and Dassault Aviation SA ("Dassault") had entered into a sale contract governed by English law, under which Dassault was to manufacture and deliver to MBA two aircraft (and

related supplies and services), to be operated by the Japanese Coast Guard. The sale contract contained a non-assignment clause which provided that:

"…this Contract shall not be assigned or transferred in whole or in part by any party to any third party, for any reason whatsoever, without the prior written consent of the other Party and any such assignment, transfer or attempt to assign or transfer any interest or right hereunder shall be null and void without the prior written consent of the other Party."

Without seeking Dassault's consent, MBA later took out an insurance policy with Mitsui Sumitomo Insurance Co Ltd ("MSI") which was governed by Japanese law. The insurance policy covered the risk of MBA being liable to the Japanese Coast Guard for late delivery of the aircraft and spares. When delivery of the aircraft was indeed delayed, the Japanese Coast Guard claimed liquidated damages against MBA, for which MBA made a claim under its insurance policy. MSI paid out the claim to MBA.

The parties did not dispute that the mechanism of subrogation under Japanese law involves the transfer of rights: the insurer automatically acquires the right to sue in its own name, including the right to initiate proceedings, pursuant to domestic legislation.

MSI commenced arbitration proceedings against Dassault, pursuant to the arbitration agreement in the sale contract. Dassault challenged the tribunal's jurisdiction, submitting that the non-assignment clause in the sale contract precluded any transfer of rights without its consent. The challenge failed, with the tribunal holding that (i) the non-assignment clause in the sale contract did not apply to involuntary assignments and assignments by operation of law, and (ii) the transfer of rights from MBA to MSI under Japanese law occurred by operation of law.

Dassault subsequently made an application to the Commercial Court to set aside the arbitral award under Section 67 of the Arbitration Act 1996.

Decision

No general rule

The Court appreciated that there was "a real and obvious tension" between the nature and wording of the clause, supported by the well-established principle that "*an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights*" (Lord Browne Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals* Ltd [1994] 1 AC 85, 108), and the context of the transfer. The Court noted that "instinctively, there is a feeling that a transfer in the context of insurance should not be caught by such a proviso."

While the authorities might give rise to a presumption that a contractual prohibition on assignment will not generally be interpreted to apply to an assignment "by operation of law" or other involuntary assignments, the Court was not persuaded that this is a general rule. The cases mostly related to bankruptcy scenarios, unlike the present context.

Involuntary or voluntary distinction

In determining what constitutes "by operation of law", the Court concentrated on the involuntary and voluntary distinction. Dassault relied on *Cohen v Popular Restaurants* which distinguished assignments that arose from compulsory liquidation from those that arose from voluntary liquidation. The

Court agreed with this assessment, holding that the focus should not be on the mechanism of the transfer, but whether it is voluntary in the sense of being consented to. As such, regardless of the immediate cause of the transfer, the fact of MBA making voluntary decisions which gave rise to the situation leading to the transfer under Japanese law meant that it had been "*tinged with a taint of voluntariness*".

Contractual construction

The wording of the non-assignment clause was the more important, in view of the Court's conclusion that the authorities do not provide for a firm rule of general application and having due regard to the parties' objective intention and agreement.

While the broad construction of the clause implied an intention for general application, context and commercial purpose also had to be considered. The Court determined that, while the clause did not apply to true involuntary assignments, it encompassed assignments which were caused by the assignor's voluntary act.

The Court acknowledged MSI's argument that the non-assignment clause would not have affected a subrogated claim under English law (as English law does not provide for subrogation by way of transfer in the same way as Japanese law). However, it did not determine whether that argument was correct. MSI contended that the mere difference between a subrogated claim and a claim as assignee, being the name of the claimant in the arbitration proceedings, meant that there was "no good reason" to conclude that the clause prevented such transfer. The Court did not consider this argument adequate to supersede the wording of the clause and dismissed it as a factual matrix point which did not go to the commercial purpose of the clause.

Permission to appeal has been granted.

Sector Focus

- **Asset Finance**

  In certain aircraft and other asset financings, the financiers will have the benefit of export credit agency ("ECA") support against non-payment by the borrower under the facility agreement. The support may be provided by way of guarantee or by way of insurance, depending on the ECA. Similarly, the financiers may have the benefit of a credit risk insurance ("CRI") policy against such non-payment risk from specialist providers. Parties should consider whether the transfer and assignment provisions in the facility agreement expressly allow for the ECA or CRI provider, as the case may be, to "step in the shoes" of the financiers following a claim under the relevant ECA support agreement or CRI policy, whether by subrogation or other means.

- **Trade Finance and Sovereign debt lending**

  It is also common for lenders and financiers to take out CRI in the context of trade finance and sovereign lending, both from the private insurance market and from ECAs. Insureds should review their policies and financing documents carefully to determine whether any non-assignment provisions conflict with their duties under their insurance.

- **General**

  The decision in *Dassault* is a stern reminder of the importance of clearly drafted transfer and assignment language.

  Although the case concerned a bespoke policy obtained in relation to a particular contract, its reasoning cannot necessarily be limited to that scenario. It is common in many jurisdictions for insurers to be subrogated to all of an insureds' rights in respect of the loss, which could arise under a range of contracts.

  The Court was not required to consider the treatment of equitable assignments or declarations of trust, where the assignor or grantor has entered into a non-assignment clause.

  The Court also did not determine the question as to whether English law subrogation, which does not involve a transfer of rights, would be prevented by such a clause. However, the Judge indicated she could not preclude that it would be prevented.

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