



Client Alert
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Arbitration Prevails

Many US institutions and authorities have long seen a service of suit clause as a mechanism by which the reinsurer agrees to submit to any court of competent jurisdiction in the US to provide a legal basis for the enforcement of arbitration awards. For the purposes of gaining US jurisdiction against the reinsurer, they are also required to name an agent to accept process service. This ensures that even though the insurer may not be licensed in most states in the US, a US Court will have personal jurisdiction over them. However, parties often come into dispute over the application of such clauses.

This July saw the Commercial Court in *ACE Capital Limited v CMS Energy Corporation* ruling that a service of suit clause in a policy did not preclude the operation of an arbitration clause.

ACE Capital Limited ("**ACE**") was the lead underwriter on a group of policies ("**Policies**") taken out over certain political risks by CMS Energy Corporation ("**CMS**"). The Policies contained a service of suit clause, under which CMS served a claim on ACE under Michigan statute. ACE then applied to the English Court, on behalf of itself and the other underwriters, seeking a permanent injunction restraining CMS from continuing the Michigan Proceedings.

The service of suit clause contained the following wording:

"It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States."

The Policies were stated to be governed by the laws of England and contained an arbitration clause as follows:

"All disputes that may arise under, out of, or in relation to this policy or to the determination of the amount of loss hereunder shall be submitted to arbitration at the London Court of International Arbitration."

CMS unsuccessfully argued that the service of suit clause allowed proceedings to be brought in the US Courts, parallel to arbitration in England, pointing to ambiguity in some US case law. ACE focused on the body of US case law pointing towards arbitration being used to decide the merits of a case where there was inconsistency between the clauses and the arbitration clause was precise and unambiguous.

Decision and reasons

The Commercial Court looked at decisions of US Courts as instructive background to the service of suit clause, and accepted that legal advice on those decisions would have been available to the parties. The Commercial Court held that the arbitration clause compelled the parties to enter into arbitration on the merits of the claim, and that the service of suit clause was effective in relation to the enforcement of the arbitration award. The Court considered that a parallel process of arbitration and US claim would not have been appropriate, and the specific wording of arbitration clause precluded such a finding.

In reaching its conclusions, the Court highlighted the importance of reading the contract as a whole, and taking into account the relationship between each of the contractual clauses. The Court lent some weight to an extra clause (b) which had been inserted between the arbitration and service of suit clause, which stated:

"The parties hereto agree that the speedy resolution of any disputes between them to be had as a consequence of this clause is mutual and material inducement to enter into this policy."

In relation to the service of suit clause itself, the Court recognised that the use of the words "any amount claimed hereunder" did not make sense given the ability to use it only to enforce an amount already awarded.

The Court therefore considered the clause in the light of the previous English case of *Paul Smith v H & S International Holding Inc*, and substituted "claimed" for "awarded" when interpreting the clause in the context of the contract as a whole.

The Court deemed it pertinent to give a judgment which would be consistent with any made in a US Court, in the interests of commercial certainty, as the same issues may be heard in both countries. Much weight was also given to the principle of liberal interpretation in favour of arbitration on both sides of the Atlantic.

Ramifications of decision

This case highlights a need to clearly understand the relationship between an arbitration and service of suit clause when including them in policies and to review the contract as a whole to ensure no other clause affects the intentions of the parties as regards dispute resolution mechanisms, so as to avoid any potential conflict between such clauses. It is clear that, consistent with the approach of the Courts on both sides of the Atlantic, where possible a finding will be made to construe arbitration clauses as prevailing in cases where there is ambiguity as to the correct primary dispute forum.

Where the parties wish to use the service of suit clause as an alternative forum for a decision on the merits of a claim, this should be made clear within the text of the policy, and the insertion of further clauses highlighting the importance of arbitration to the parties should be avoided. In the absence of a specific provision otherwise, the traditional view of a service of suit clause as a method of ensuring personal jurisdiction over non-US insurers for enforcement of arbitral awards will prevail.

The UK Courts have shown that they will not shy away from precluding a decision on the merits through the US Courts by means of an injunction where this is felt necessary. If seeking to enforce a service of suit clause, parties should be mindful that this decision now firmly backs previous US case law on the interpretation of arbitration and service of suit clauses in reinsurance policies, and brings English interpretation in line with the body of US authority.

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