RECENT CASES IN INSURANCE LAW

AUTUMN 2012

"Disputes as to jurisdiction are one of the plagues of modern litigation" (Phillips LJ, New Hampshire v Phillips Electronic (1998)

A series of jurisdictional disputes in insurance cases have been reported in 2012. The following is a summary of the recent decisions in this area.

1. Differences between US and English law as to recoverability of asbestos losses - Faraday v Howden North America (2012, Court of Appeal)

The English courts do not see eye to eye with the American (including the Pennsylvania) courts on insurers' liability for asbestos claims. The English courts do not accept the triple trigger of liability, nor do they accept that insurers are liable if the relevant trigger does not occur within the strict time limits of the policy. Further, in the case of an insurance which does not contain an express choice of law clause, the two legal systems could come to different conclusions as to whether US or English law governed the contract. Therefore, the recoverability of asbestos losses can depend on whether the claim is pursued in the English or US courts.

In this case, Howden was an engineering group, supplying fans, rotary heat-exchangers, compressors and gas cleaning equipment. Faraday was the successor in title to an insurer that subscribed various lines on Howden's excess public and products liability insurance program.

Numerous asbestos claims were pursued against Howden. During the 2000's Howden was engaged in coverage disputes in the US courts with its insurers, albeit not with Faraday. In August 2010, Howden gave notice of occurrences which it said might entitle it to claim under the cover provided by Faraday. In response, in December 2010, Faraday issued English proceedings, taking the example of a policy covering a period in 1998/98, and seeking declarations (amongst other matters) that (a) the policy was governed by English law and subject to the jurisdiction of the English courts and (b) as a matter of English law, effect must be given to the periods under each policy granted to Howden. This judgment related to an application by Howden to set aside service of the English proceedings on Howden in the USA.

Originally, Howden's case was that it was not arguable that the policy was governed by English law. However, the Judge at first instance held that the policy was, in the light of its many connections with London, governed by English law. Howden did not challenge this on appeal.

The point Howden took, and argued again on appeal, was that Faraday had failed to show that the English proceedings were justified and served a useful purpose. Howden argued that Faraday had instituted the English proceedings in order to try to establish "issue preclusion" on governing law and the effect of the policy under English law; however, a judgment by the English court would not achieve that purpose. After being served with the English proceedings, Howden applied to join Faraday as an additional Defendant to the Pennsylvania proceedings.

In the Court of Appeal in the English proceedings, the key issue was whether there was any utility to the English proceedings. The Court of Appeal upheld the decision of the Judge at first instance and found that the English proceedings did serve a useful purpose. The Court's reasoning was firstly that, despite the Pennsylvania court's preliminary assessment that it was unlikely that English law would be held to govern the policy in issue, there was nevertheless a good arguable case that an English court, if the proceedings in England continued, would hold that English law governed the policy. That was a position which the court in each country had to accept.

Secondly, it was inappropriate to resolve issues of preclusion under Pennsylvanian law at an interim stage in English proceedings. The English court was entitled to take a broad view of the suitability of the proceedings for determination by the English court. It had been for Faraday to show that the proceedings did have utility and Faraday had so shown. Faraday could, therefore, continue with its declaratory proceedings in England.

2. ACE, HDI-Gerling, New Hampshire, Portman, QBE and Swiss Re v Howden Group (2012, Commercial Court)

In a sequel to the above litigation, a number of other non-US insurers, who also participated in excess layers of Howden's public and products liability insurance program, issued English proceedings in 2011, (two years after some of them had been joined to proceedings in Pennsylvania) seeking the same declarations as Faraday.

The central issue here also was as to whether the English proceedings were useful, and some solid practical benefit would ensue, such that they should be allowed to continue.

The Commercial Court held for the insurers, concluding that, although the Pennsylvania court had held in the course of dealing with one specific application that it was unlikely that English law would apply, there remained a real prospect that English law would be held to be the governing law, in which case it was reasonable to assume that the Pennsylvania court would find the English court's judgment to be of assistance. The declarations sought would also be useful in resisting enforcement of a judgment that ignored the express or implied choice of law of the parties. The insurers were, therefore, permitted to continue the English declaratory proceedings.

3. Loss of EU consumer protection rights - Sherdley v Nordea Life & Pensions (2012, Court of Appeal)

Mr and Mrs Sherdley entered into a form of equity release scheme with Nordea, a company based in Luxembourg. Capital sums, raised on the security of the Sherdley's properties, were invested by Nordea. Unfortunately, the investments went wrong. The Sherdleys wished to sue Nordea in the courts of England & Wales, an important reason for doing so being that they could then retain solicitors on a conditional fee agreement, which would not be available to them in the other possible jurisdictions.

The contractual documents entered into by the Sherdleys with Nordea were muddled as to the jurisdiction in which disputes were to be resolved. The application form provided for the exclusive jurisdiction of the country of commitment. This was defined as the country of habitual residence of the investor as at the commencement of the contract. At the time, the Sherdleys were resident in Wales and British nationals. However, the application form also stated that the choice of law (and therefore of jurisdiction), was subject to any other provisions to the contrary. The Sherdleys later signed Nordea's "proposal" which contained a Spanish jurisdiction clause.

To complicate matters further, Nordea's General Conditions, which the Sherdleys also signed, contained the provision that, where the country of commitment allowed a free choice of law (as English law does), the law of Luxembourg (and therefore Luxembourg jurisdiction) would apply. What therefore appeared to be a choice of the insured's country for resolving disputes ultimately resolved itself into a choice of the insurers' home jurisdiction.

The final complication was that the Sherdleys accepted that, by the time they commenced proceedings, they had become habitually resident in Spain, although they continued to be British nationals.

The rules of jurisdiction relating to disputes between nationals of different EU Member States are to be found in the Judgments Regulation (EC No 44/2001). The primary rule (Article 2) provides that persons

domiciled in a Member State should, whatever their nationality, be sued in the courts of that Member State. That would have involved the Sherdleys suing Nordea in Luxembourg.

However, there is a special rule to assist insureds in their disputes with their insurers (Article 9), which extends jurisdiction to the courts for the country where the insured is domiciled. Further, insureds are protected against attempts by insurers to remove that advantage from them in the contract documentation (Article 13). This is part of a wider concern of the Regulation to protect insureds and other consumers with more favourable rules of jurisdiction.

The Sherdleys' argument was based on residence in Wales at the time the agreement was entered into and on the point that their initial agreement with Nordea had provided for English jurisdiction, as the country of their habitual residence at the time of contract, which agreement was never displaced.

However, the Court of Appeal held that, even though (a) the purpose of the EU Regulation was to protect the consumer, (b) Nordea's contractual documentation was complex and (c) the Sherdleys had been domiciled in England and Wales at the time of the negotiations, they were not entitled to rely on the Regulation to bring proceedings in England & Wales after they had become domiciled in Spain. By the time of the Court of Appeal hearing, the Sherdleys had returned to Wales but this did not assist them as they had not argued that at the time of commencing proceedings they were only temporarily resident in Spain.

4. Which country's rules for assessing damages will apply? Cox v Ergo Versicherung AG (2012, Court of Appeal)

Katerina Cox, widow and sole dependant of Major Christopher Cox, brought proceedings in the English court for compensation arising out of an accident occurring in Germany at a time when the Coxes were living there and Major Cox was stationed with HM Forces. Major Cox was knocked off his bicycle by a car, causing him injuries from which he died. The driver of the car was a German national, who was a resident and domiciled in Germany, and was insured by Ergo.

It was not in dispute that German law governed the liability of the driver. However, Mrs Cox argued that the quantification of damages recoverable from Ergo was governed by English law and, in particular, the Fatal Accidents Act 1976 ("FAA"). Ergo, on the other hand, argued that the principles for quantifying the damages were those applicable to a claim under S.844 Bürgerliches Gesetzbuch ("BGB"), being part of the German Civil Code. The FAA provisions would produce a much more generous result for Mrs Cox. The BGB required various mitigating factors to be taken into account, for example maintenance from Mrs Cox' new partner, and the possibility or prospect of her remarrying or co-habiting with a new partner.

The Court of Appeal held that Germany was the country in which the events constituting the tort had occurred, since the accident had occurred there. Under the general rule in the Private International Law (Miscellaneous Provisions) Act 1995, German law was the applicable law governing the substantive aspects of Mrs Cox' cause of action. The heads of damages recoverable by Mrs Cox was a matter of substantive law and so governed by German law as the applicable law under the 1995 Act. The actual assessment of those damages was procedural, and so governed by English law as the law of the forum. However, the principles involved were governed by German law. Under German law, the principle was compensation for loss of maintenance on a net basis. That was not the same as compensation for loss of dependency, which was the principle under the FAA. It would be wrong to interpret the head of loss under the BGB so widely as to encompass loss of dependency under the FAA: that would be contrary to comity and principle. The duty to mitigate was a matter of substantive law, governed by the German Code.