Hong Kong—third party barred from seeking a determination of coverage other than in accordance with insurance policy—and its arbitration clause (AIG Insurance Hong Kong Ltd v Lynn and William McCullough)

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Arbitration analysis: Simon Chapman, partner, and Naomi Lisney, senior associate, both at Herbert Smith Freehills, examine the decision of the Hong Kong High Court in AIG Insurance Hong Kong Limited v Lynn McCullough and William McCullough that the McCulloughs, who needed to obtain a determination of coverage in favour of the insured as a precondition to bringing a 'bad faith' claim against the insurer in Florida, were barred from doing so otherwise than in accordance with the provisions in the policy, which included an arbitration clause.

AIG Insurance Hong Kong Limited v Lynn McCullough and William McCullough [2019] HKCFI 1649, [2019] HKCU 2510

What are the practical implications of the judgment?

This case provides further confirmation that the Hong Kong courts' robust pro-arbitration stance extends to the protection of a party's right to have any claims brought against it in respect of its obligations under a contract pursued in accordance with the arbitration agreement in that contract.

In so doing, the Hong Kong courts follow the approach taken by the English courts, as recently applied in *XL Insurance Company v Peter Little* [2019] EWHC 1284 (Comm), when the English High Court granted anti-suit relief to the insurer against Mr Little on the basis of the London arbitration agreement (LCIA) in the directors' and officers' insurance policy that had been issued to his former employer. Popplewell J found that, in the New York litigation commenced against the insurer, Mr Little was clearly claiming rights conferred under the relevant policy, and it was well established under English law that he was not entitled to seek to take the benefit of the rights conferred by such policy without the burden of the obligation to comply with its dispute resolution provisions. Mr Little was accordingly injuncted from pursuing the New York proceedings and required to take steps to discontinue and withdraw those proceedings and to pay the insurer's costs of the English anti-suit proceedings.

These judgments are likely to bolster the popularity of London and Hong Kong as arbitration seats. They also provide a reminder, however, that the courts' power is a discretionary one—a court will not act where there are strong reasons for not granting anti-suit relief. As reflected in both of these recent decisions, it is particularly important to act promptly in seeking anti-suit relief in order to ensure that no material progress is made in the foreign proceedings.

What was the background?

While on a cruise stop in St. Lucia, Mr and Mrs McCullough went on a zip line excursion during which Mrs McCullough fell and was rendered quadriplegic.

The McCulloughs sued the operators of the zip line in Miami, including Mr von der Goltz, who was an insured person under a directors' and officers' insurance policy issued by AIG (the policy). When Mr von der Goltz sought an indemnity under the policy, his claim was rejected by AIG on the grounds (among others) that the policy did not insure him against claims from bodily injury.

After obtaining a Miami court judgment in their favour in the amount of US$65.5m against Mr von der Goltz among others, on 20 August 2018 the McCulloughs issued a tort claim available under Florida law against AIG (the bad faith claim) for 'failing to act in good faith in handling, litigating, and settling [these proceedings], resulting in an excess judgment (ie judgment in excess of policy limits) being entered into against the insured'.

On 29 November 2018, AIG filed a motion with the Miami court to compel arbitration in Hong Kong in accordance with the terms of the policy, and on 18 December 2018 AIG obtained an anti-suit injunction against the McCulloughs in Hong Kong.

Before the Hong Kong court issued its judgment on the application (among others) for the continuation of the ex parte anti-suit injunction, the Miami court decided that the McCulloughs, as non-signatories to the arbitration agreement, could not be compelled to arbitrate, but that their bad faith claim was premature until coverage under the policy had been established. The Miami court accordingly directed the case to be stayed pending resolution of the coverage issue.

As of the date of the Hong Kong court's decision, the McCulloughs had filed a motion to lift the stay and sought a declaration from the Miami court regarding the extent to which there was coverage for their established damages under the policy, while AIG had appealed the Miami court's decision on its motion to compel.

What did the Hong Kong court decide?

The central question for the Hong Kong court was whether the Miami proceedings were in substance proceedings to enforce an obligation created by the policy, or proceedings to enforce a liability which was independent of the policy.

If the former, then AIG (subject to the other contentions against it) was entitled to a continuation of the anti-suit injunction because the McCulloughs' claim would be properly characterised as contractual. Following *Dickson Valora Group (Holdings) Co Ltd v Fan Ji Qian* [2019] HKCFI 482 (not reported by LexisNexis® UK) (in which the Hong Kong court applied the principles expounded by the English courts in *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (not reported by LexisNexis), *Schiffahrtsgesellschaft Detlev von Appen GmbH v Wiener Allianz Versicherungs AG and Voest Alpine Intertrading GmbH (The Jay Bola)* [1997] CLC 993 (not reported by LexisNexis) and *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu)* [2016] EWCA Civ 386, [2016] 3 All ER 697), AIG had the right to prevent a claim against it based on its contractual obligations being pursued otherwise than by the contractually agreed mode, ie arbitration in Hong Kong. The Hong Kong case law was to the effect that an anti-suit injunction would ordinarily be granted to restrain the claimant from pursuing proceedings in a non-contractual forum unless there were strong reasons to the contrary, whether the claimant was a party to the contract or not.

Blair J disagreed with the McCulloughs' contention that their bad faith claim was entirely independent from any contractual claim under the policy. The coverage issue, which was a precondition to the McCulloughs' bad faith claim, was clearly contractual—it determined the liability of the insurer to the insured under the terms of the policy. Thus, while the McCulloughs' claim against AIG was framed in tort, the Miami proceedings were in substance proceedings to enforce the obligation created by the policy.

Having rejected the McCulloughs' other contentions as to why the court should refuse to grant anti-suit relief to AIG, Blair J held that AIG was entitled to have the coverage issue determined in accordance with the provisions in the policy, ie arbitration in Hong Kong, and that AIG was further entitled to its costs of the Hong Kong court proceedings.

Blair J agreed that the court's approach should be informed by judicial comity, and that inconsistent judgments were to be avoided if possible. In his view, however, his decision was not inconsistent with the Miami court's decision to decline to compel the McCulloughs to arbitrate in accordance with the policy but to stay the proceedings pending determination of coverage.

Interviewed by Alex Heshmaty.

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