

Standard Bulletin

July 2015

The Standard
for service and security

The Standard



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Rights of direct action against P&I clubs

In the recent case of *Shipowners' Mutual v Containerships Denizcilik*¹, the English Commercial Court granted an anti-suit injunction against cargo interests which prevented them from pursuing direct rights of action in Turkey against a P&I club with headquarters in London.

The Court safeguarded the club's contractual right to defend claims in the forum specified within the club's rules over a right of direct action conferred by local Turkish law. This is encouraging news for P&I clubs in a world where jurisdictions are progressively allowing third-party victims to sue insurers directly.

The background facts

The *Yusuf Cepnioglu* grounded on the Greek island of Mykonos in March 2014, laden with 207 containers and became a total loss. Cargo claims were notified to both the Turkish charterer (the charterer) and the Turkish owner (the owner) in Turkey and elsewhere. The charterer initiated arbitration proceedings against the owner in London, pursuant to the contractual provisions under the charterparty, but was unable to obtain security directly from the owner. It also commenced proceedings against the club in Turkey and sought security directly for its claims. The charterer relied on a recent Turkish statute, which gives a right to third parties to claim losses directly from a carrier's liability/cargo insurer, in this case, the P&I club.

This was a clear and unequivocal attempt to infringe and declare unenforceable the 'Pay to be Paid' rule contained in all P&I club rules, under which an insured will not receive payment from its insurers until it pays out on any claims against it (i.e. the principle of indemnity).

The club obtained an order from the English Court for an anti-suit injunction restraining the charterer from continuing the proceedings in Turkey. The club contended that the Turkish proceedings would be in breach of the exclusive English law and arbitration clause contained in the insurance contract between the club and the owner.

The Court's reasoning

The main issue for the High Court to decide was whether the right of direct action under the Turkish statute was a claim to enforce the insurance contract between the club and the owner, or a claim to enforce an independent right of recovery against the club.

¹ [2015] EWHC 258 (Comm)

The Court, following the reasoning in *The London Steam Ship Owners Mutual Insurance Association v The Kingdom of Spain and another (Prestige No.2)*², concluded that the 'essential content' of the right of direct action (contained in the Turkish statute) was the right to enforce the insurance contract between the club and the owner. The charterer's right of direct action was inherently linked to the main insurance contract between the club and the owner.

The second issue that the Court had to determine was whether to uphold the owner's application to continue the anti-suit injunction. As a general rule, an injunction should only be granted if the proceedings (in this case, in Turkey) were deemed to be 'vexatious and oppressive' from the claimant's (in this case, the club's) perspective.

In this regard, the Court held that the proceedings in Turkey were indeed vexatious and oppressive. The effect would be to deprive the club of its contractual right under the Rules to have claims brought against it in arbitration in London.

Additionally, there was also a real risk that the Turkish proceedings would prevent the club from being able to rely upon the 'Pay to be Paid' clause in its contract with the owner. In view of the above, the Court concluded that the anti-suit injunction should be continued, preventing the charterer from continuing the proceedings in Turkey.

Comments

This ruling will make it harder for third parties to exercise rights under 'direct action' laws against insurers in the future, and it is a reminder that the English courts will act to protect a club's right to rely on the contractual provisions of its rules – including the 'Pay to be Paid' rule. However, the charterer in this case has been given leave to appeal and the Court of Appeal is expected to provide further guidance on this issue in the near future.

The Standard Club will continue to keep its members fully informed of developments and will issue an update once the outcome of any appeal is known. If a member has any questions in relation to this issue, they should not hesitate to call their usual club contact or the author of this article.

² [2014] 1 Lloyd's Rep. 309

