1. BUSINESS INTERUPPTION POLICY COVERAGE IN RELATION TO COVID-19

The Irish Case of *Brushfield Limited (t/a The Clarence Hotel) -v- Arachas Corporate Brokers Limited and AXA Insurance Designated Company [2021] IEHC 263*:

Brief Facts

Brushfield Limited ("**The Plaintiff**") made a claim for business interruption due to Covid-19 under an insurance policy ("**The Policy**") with AXA Insurance ("**The Defendant**"). The Policy was entered into on 1 April 2019 when covid-19 was not known. In their claim, the Plaintiff relied on the following extensions to the non-damage business interruption clauses:

a) Murder, Suicide, or Disease Clause ("**MDSE Clause**"); and
b) Denial of Access (Non-Damage) Clause ("**Denial Clause**").

Clarence Hotel – Photograph: Dave Meehan

The Relevant Clauses

MDSE Clause

The MDSE Clause contained a list of specified human diseases that are covered under the policy, and the diseases must occur at or within 25 miles of the premises and had interrupted the business. But, Covid-19, SARS or SARS-cov-2 was not included in the list.

The MSDE clause also provides cover for closures due to defects in the drains or other sanitary arrangements.

Denial Clause

The Denial Clause covers losses sustained arising from the actions taken by the police or any other statutory body in response to a danger or disturbance at the premises or within a 1-mile radius of the premises. There was a limit on liability for any one claim of £50,000.

The Court's Findings

i. The cover under the MSDE Clause is only limited to business interruption caused by one of the listed diseases. Hence, as Covid-19 was not listed, it is not covered.

ii. On the closure due to sanitary arrangements, this clause only applies when there is an order by a public authority requiring a closure in response to a defect in the Plaintiff's sanitary arrangements. The Court found that the concept of social distancing was not considered to be a sanitary arrangement when the Policy was made.

iii. The denial of access clause is intended to apply to localised dangers or disturbances which occur within a one-mile radius of the affected premises, and only where such restriction resulted from the actions of a statutory body. The Court also observed that the measures taken by the government could not be regarded as actions by the police, and no arguments put forward had the effect of demonstrating the measures were actions by a statutory body. *[Readers should note that the position in Malaysia will be different as Covid-19 movement restrictions were imposed pursuant to the Prevention and Control of Infectious Diseases Act 1988.]*

iv. The clauses should be interpreted as to how it would be reasonably understood when the Policy was put in place in 1 April 2019, before the outbreak of Covid-19.

2. CARRIAGE OF GOODS BY SEA (AMENDMENT) ACT 2020

The Carriage of Goods by Sea (Amendment) Act 2020 (**the "Amendment Act")** that was gazetted on 4 February 2020, came into force on 15 July 2021. The Amendment Act made changes to a few provisions in the Carriage of Goods by Sea Act 1950 ("COGSA"), *inter alia*, to confer power to the Minister of Transport to amend the Schedule of COGSA without the need for amendment legislations to be tabled in Parliament.

All references to "Bills of Lading" in COGSA are now replaced with "Sea Carriage Document(s)" to extend the type of shipping documents to which COGSA applies, which now includes consignment notes and sea waybills, ship's delivery order which either contains or evidences a contract of carriage of goods by sea.

The First Schedule of COGSA has also been amended to adopt the Hague Visby-Rules ("**HVR**") and the Special Drawing Rights ("**SDR**") Protocol pursuant to the Amendment Act and the Carriage of Goods by Sea (Amendment of First Schedule) Order 2021 ("**Amendment Order**"). This is a long awaited change from the earlier Hague Rules which applied under COGSA in Malaysia.

Perhaps the most important amendment to COGSA is in relation to the limitation of liability of the carrier and ship.

Limit of Liability

Originally, COGSA provided that a claim for cargo loss or damage will be limited to £100 per package or unit, unless the nature and value of such goods had been declared by the shipper before shipment and inserted in the bill of lading. The Amendment Order, substituted the limit of liability of £100 per package or unit to *"666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher".* The key differences of the amendment to Article IV, paragraph 5 is:-

i. The limit of liability of £100 is replaced with 666.67 units of SDR; and
ii. Calculating the limit by *"package or unit"* is supplemented with the alternative of *"gross weight of the goods"* whichever the higher.

Time Bar

In relation to the one-year time bar provided under the Act for loss or damage claims, some of the wordings in Article III, paragraph 6(b) have been substituted to provide that if the one-year time bar has passed, such period may be extended, provided that parties agree to the extension.

The Amendment Order has also introduced paragraph 6bis in Article III of the First Schedule which allows indemnity proceedings to be brought not less than three months of a settlement of the claim or from the service of legal process in respect of which the indemnity is sought.

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