CLYDE&CO

Update

September 11 WTC Attacks: Aggregation

A recent Commercial Court decision has shed some light on the long-standing issue of whether under English law, and at least for the purposes of whole account catastrophe excess of loss reinsurance contracts containing general "event"-based aggregation wording, the 9/11 terrorist attacks on the WTC buildings constitute one event or two.

Although aggregation of WTC losses had been the subject of an earlier New York law decision, that case involved property policy losses under a different aggregation wording. By contrast, *Aioi Nissay Dowa Insurance Company v Heraldglen Limited and Advent Capital (No. 3) Limited*[1] involved claims under liability policies issued to the two airlines involved and the security companies who handled their check-ins.

The claimant retrocessionaire appealed against the decision of a London arbitration Tribunal which had previously held that, for the purposes of aggregation, the dual attacks inflicted on the North and South Towers of the WTC complex constituted two events and not one.

Background to case

The defendant reinsurers sustained losses under 10 inward reinsurance contracts arising out of the WTC attacks, all of which were eventually settled on a "two-event" basis i.e. each attack on each of the Twin Towers was considered a separate event.

The claimant retrocessionaire contended, however, that its liability to the defendants under four outward XL retrocession covers was on a one event basis. The outward retrocessions operated on LSW351 terms, of which Article 4 aggregated on the basis of "each and every loss or accident or occurrence or series thereof arising out of one event".

The Arbitration Award

The Final Report of the National Commission on Terrorist Attacks upon the United States summarised what happened on the morning of September 11 2001; the Tribunal relied on this with the parties' agreement. The Tribunal held that the four hijacked flights:

"…were hijacked within minutes of each other (or at least that was the plan) in what was the execution of a terrorist conspiracy inspired and organised by members of the Al Qaeda".

The judgment of Judge Field quotes parts of the Award (which is of course confidential to the parties) but does not set it out in full. In the context of the caselaw, however, it appears that the Tribunal adopted a relatively narrow view of "event" by ultimately concluding that the losses arising on the 10 inward reinsurances, as presented to the 4 retrocession covers, were caused by two separate occurrences arising out of separate events.

[1] [2013] EWHC 154 (Comm)

In reaching this conclusion the Tribunal applied the well-known test of the Four Unities deriving from Mr Michael Kerr QC's award in the *Dawson's Field* Arbitration, which was later applied and developed by Rix J in Kuwait Airways Corporation v Kuwait Insurance Co[2].

Specifically, in Dawson's Field Mr Kerr commented that:

"Whether or not something which produces a plurality of loss or damage can properly be described as one occurrence … depends on the position and viewpoint of the observer and involves the question of degree of unity in relation to cause, locality, time, and, if initiated by human action, the circumstances and purposes of the persons responsible …".

In *Kuwait Airways Corporation*, Rix J quoted extensively from Dawson's Field and endorsed the Four Unities test, stating:

"… An "occurrence" (which is not materially different from an event or happening, unless perchance the contractual context requires some distinction to be made) is not the same as a loss, for one occurrence may embrace a plurality of losses. Nevertheless, the losses' circumstances must be scrutinised to see whether they involve such a degree of unity as to justify their being described as, or arising out of, one occurrence. The matter must be scrutinised from the point of view of an informed observer placed in the position of the insured."

The test has been subsequently affirmed by the Court of Appeal in *Mann v Lexington Insurance Co*[3] and *Scott v Copenhagen Reinsurance Co (UK) Ltd*[4].

The Tribunal expressed the view that the facts that are regarded as having a bearing on the final conclusion – one event or two – have to be considered in the round, in the context of the particular contractual wording and the overall contractual purpose:

"We accept that the matter is one to be assessed from the viewpoint of an informed observer having regard to the facts as they are now known to have been, rather than as they might have appeared at the time to an observer not fully aware of what was in fact happening".

The Tribunal accordingly proceeded to evaluate the unities of:

(i) intent i.e. the circumstances and purposes of the persons responsible;

(ii) cause;

(iii) timing; and

(iv) location

in the context of the WTC attacks, as follows:

(i) Unity of intent: although the Tribunal accepted that the hijackings were the result of a co-ordinated plot by Al Qaeda, they pointed to caselaw to the effect that a conspiracy or plan cannot of itself constitute an occurrence or an event;

(ii) Unity of cause: the Tribunal concluded that *"there were two separate causes …. because there were two successful hijackings of two separate aircraft, admittedly in execution of a dastardly plot to turn each into a guided missile each directed at one of the two signature Towers of a single property complex."* As stated by Judge Field, the Tribunal were not satisfied that there was *"… any basis, at least in the context of analysing unity of cause, for concluding that there was any factor amounting to an event of sufficient causative relevance to override the conclusion that two separate hijackings caused separate loss and damage"*. This is commented on further below.

(iii) Unity of time: the Tribunal took the view that it was right to look at the whole period from check-in and passenger scrutiny to the collapse of each Tower and not just from the time each flight took off. They held that there were *"… clearly similarities in the timing of the events from the commencement of the flights to contact with the Towers but these were not such as to lead to the conclusion that there was either one occurrence or two occurrences arising out of one event. So far as timings were concerned there were two occurrences and two events: infliction of personal injury and death started in the case of each aircraft shortly after they were hijacked and continued until at least the collapse of each of the Towers …".*

(iv) Unity of location: the fact that *" … the Twin Towers were located in close proximity to one another and were part of a single property complex did not [in the Tribunal's view] give rise to a sufficient degree of unity … to conclude that there was a single occurrence or two occurrences arising out of one event. Each Tower was a separate building, albeit the two were connected by a single mall. They did not stand or fall together. If only one of the hijackings had succeeded, only one Tower would have been destroyed. The fact that both Towers were destroyed was attributable to the fact that there were two successful hijackings directed at separate buildings forming part of the WTC."*

On the above basis, the Tribunal concluded that no unifying factor *"was sufficiently compelling"* to lead them to conclude that there were two occurrences arising out of a single event in the context of WTC, stating:

"… the hijackings, consequent death and personal injury on board before contact with each tower, and then further death, injury and property damage consequent on the towers being separately struck, constitute two separate occurrences which did not arise out of one event. An independent objective observer watching each of the hijackings and then death and personal injury on board would have concluded that there were two separate hijackings. The same observer then hypothetically transported to the proximity of the WTC would have observed two aircraft flying into the Twin Towers and would clearly have in his mind two incidents".

[2] [1996] 1 Lloyd's Rep 664
[3] [2001] 1 Lloyd's Rep 1
[4] [2003] Lloyd's Rep IR 696

Commercial Court decision

S.69 of the Arbitration Act 1996 provides for appeal of an arbitration award to the court on a question of law. The court's role is not to consider the question of law afresh and impose its own conclusion (as would broadly be the case on an appeal from a court, rather than arbitral, decision). Instead the court's function is to determine whether the arbitrators correctly identified the relevant law, identified and interpreted the relevant provisions of the contract, **and identified the facts to be taken into account**. If those aspects survive scrutiny the arbitrators' application of the law will generally be respected. In particular, the court should not interfere where the decision reached by the arbitrators is within a range of permissible decisions open to them in the circumstances.

The claimant retrocessionaire therefore had to focus its appeal submissions on the *approach* that the Tribunal had adopted, rather than directly upon the *conclusion* they had reached. Field J considered and rejected these submissions, and found that the Tribunal had not made any errors of law that would vitiate their Award.

Impact of this decision in the WTC context

In our experience the large majority of reinsurance contracts affected by WTC liability claims were aviation-specific and incorporated war clauses drawn from the family of London Standard Wordings **(LSW)** 337 – 342. Perhaps the most commonly incorporated LSW terms are LSW 339 and LSW 342, which are often expressed to be *"at the option of the reinsured"*. These LSW clauses (originally known as Market War Clauses A and B) were drafted in the aviation reinsurance market to address aggregation issues in a variety of "war" and related contexts, including hijacking and terrorism. They specify in some detail how losses arising from hijacking or terrorism perils are to be aggregated such that the decision in the present case based on a pure "event"-based aggregation wording has no bearing on them.

Where the aggregation clause contained in the relevant aviation contract refers generally to "event" only (without reference to inter alia LSW339 and/or LSW342), the decision in this case confirms that it is open to a Tribunal to conclude that the WTC losses arising out of the attacks on the Twin Towers arose out of two events for the purposes of aggregation of losses under a whole account excess of loss reinsurance.

Analysis

In a number of prior aggregation decisions the courts have commented that "event" and "occurrence" do not have rigid meanings and that the application of a particular aggregation provision is influenced by the wider contractual context; it is also very sensitive to the precise facts of the losses. This is borne out by the wide range of outcomes in those decisions.

In this most recent case, the judge had to decide whether the Tribunal had committed an error of law. If more than one outcome was possible without such an error, the judge had no basis for intervening – even if he would have decided the matter differently if the dispute had originally been heard in court.

Rix LJ commented in *Scott v Copenhagen Re* that:

"… even though the causative link [in the context of an event from which losses can be said to have arisen] is looser than that of proximate cause, the courts will look for a nearer and more relevant cause than for a more distant one. Another way of saying this is that the causative link has to be a significant rather than a weak one".

He also held in *Kuwait Airways Corporation v. Kuwait Insurance Co* that Iraq's successful invasion of Kuwait (the carrying out of a plan) constituted an "occurrence" and quoted with approval from the arbitration award in *Dawson's Field* where Michael Kerr QC expressed the view that, while a plan cannot constitute an "event", the carrying out of a plan can do so - and this can provide the necessary degree of unity between separate acts.

Applying this reasoning to the WTC facts, it seems clear that the two acts of hijacking could have been viewed as having the necessary degree of causal unity on the basis that (as the Tribunal found) the hijackers involved were carrying out a single plan. Similarly, it was open to the Tribunal to conclude that the attacks satisfied the other "unities" insofar as:

(i) the means by which the two flights were hijacked and flown into the Twin Towers were virtually identical (unity of circumstances);

(ii) the Twin Towers struck by the said flights formed a part of a single structure connected by an underground mall (unity of location); and

(iii) the flights struck the Twin Towers less than 19 minutes apart (unity of time).

The Tribunal took account of the two other attacks, which ended with planes crashing into the Pentagon and into a field near Shanksville, Pennsylvania. It was observed that:

"… it has never been suggested on the evidence presently available that these constitute four occurrences arising out of a single event. It would seem to us that it would be a strange result if we were to conclude that the loss resulting from the hijacking of [the Pentagon and Shanksville flights] each constituted separate occurrences but [the two WTC flights] *resulted in two occurrences arising out of one event …"*

In truth, there appears to be a widespread view that the four attacks did not share sufficient unity of location/time for "Unities"-based classification as a single occurrence/event; however, that in itself does not seem to be a compelling reason to decline aggregation of the specific attacks at a specific time and location, namely the WTC complex.

It is further worth noting that the aggregation provision involved here (LSW 351, Article 4) contrasts "occurrence" with "event". Specifically, an indemnity limit is payable for:

*"**each** and every loss or* **accident or occurrence or series thereof arising out of one event"** (emphasis added).

As noted by Rix J in *Kuwait Airways* (as referenced above), it is well established that the two terms - occurrence and event - usually have the same meaning unless the contractual context otherwise requires (for example, where (as here) the terms are used in juxtaposition).

In *Midland Mainline* (which arose out of the 17 October 2000 Hatfield rail disaster) the two terms were used in different policy sections:

(i) there was Denial of Access BI coverage for all Emergency Speed Restriction **(ESR)** "occurrences" up to policy end on 31 October 2000; and

(ii) the deductible clause deemed *"a series of losses arising from a single event"* to be a single claim.

It was common ground that insofar as each ESR imposed post-accident amounted to a separate loss-inducing "occurrence", the concept of "event" for (deductible) aggregation purposes had to be wider: to restrict the aggregating "event" to each of those ESR "occurrences" (which proximately caused the overall series of losses) would have robbed the "event" aggregation wording of any meaning.

This led the English High Court to conclude that "event" had to be something broader than each ESR occurrence, and thus to look well back in the chain of causation to the rail accident itself as the relevant "event" from which the series of ESR loss occurrences arose.

The Tribunal in the present case appears not to have adopted this approach. They considered that the two separate hijackings were two separate causes for Unity of Cause purposes, such that (the other unities not being satisfied) there were accordingly two separate occurrences/events. However, if each hijacking was a separate occurrence, the aggregation clause still permits the aggregation of *"… a series of* [occurrences] *arising out of one event"*. The latter concept of *"event"* would thus appear to be wider than the former concept of (hijacking) "occurrence": yet this does not appear to have swayed the Tribunal in its analysis.

Conclusions

Although this decision may be regarded as influential, it is suggested that this was a case where the arbitrators could legitimately have decided the matter either way: if the Tribunal's decision was such that the losses arising from the two WTC attacks should be aggregated on the basis that they arose out of one event, then that decision too would have survived an appeal to the court. While Judge Field was scrupulous in analysing the claimant retrocessionaire's arguments and concluding that the arbitrators had not made an error of law, he did not articulate what he would have decided in their place.

Further information

If you would like further information on any issue raised in this update please contact:

Nigel Brook
E: nigel.brook@clydeco.com

Garrett Moore
E: garrett.moore@clydeco.com

David Abbott
E: david.abbott@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

Further advice should be taken before relying on the contents of this summary.