RAJAH TANN

Insurance & Reinsurance

# Assessing Onerous Clauses In Insurance Policies

## Introduction

If a contractual clause is particularly onerous or unusual, it is a general rule of law that the party seeking to enforce it must show that it was fairly brought to the other party's attention. However, what constitutes an onerous or unusual clause, and the extent to which it must be highlighted, differs according to the context of the contract. In *William McIlroy Swindon Ltd & Anor v Quinn Insurance Ltd* [2010] EWHC 2448 (TCC), the English High Court considered the application of this rule in the context of an insurance policy agreement.

This case revolved around a clause in a commercially obtained insurance policy, which provided for arbitration as an exclusive remedy for disputes between the insurer and the insured, and required the insured to refer any disputes to an arbitrator within 9 months of the dispute arising. One of the issues which the Court had to determine was whether this clause had in fact been effectively incorporated into the policy.

The Claimants submitted that the arbitration clause was unenforceable as it was onerous and unusual, and had not been brought to the attention of the insured. However, the Court disagreed, holding that the clause, albeit unusual and potentially inconvenient, was not onerous. Further, having provided the insured with a copy of the policy and having advised the insured to read it, the Defendant had given sufficient notice of the clause.

The Court highlighted that an insurer could not be expected to draw the attention of the insured to every limitation and procedural requirement because the nature of an insurance policy is to limit the insurer's risk. Therefore, what may be an onerous clause that must be highlighted in an ordinary commercial contract may not be considered onerous in an insurance agreement.

## Brief Facts

(1) The insured ("Lenihan") had a commercially obtained insurance policy ("the Policy") with Quinn Insurance ("Quinn"), covering public liability and other risks.

(2) Lenihan was found responsible for a building fire, and was held liable to the Claimants. Before the judgments were satisfied, Lenihan entered liquidation, and the Claimants commenced proceedings against Quinn under the Third Parties (Rights Against Insurers) Act 1930.

(3) However, Quinn argued that the Claimants were prevented from recovering against it due to a clause in the Policy ("the Arbitration Clause"), which provided that:

(a) "Any dispute between (Lenihan) and the (Quinn) on (Quinn's) liability in respect of a claim or the amount to be paid shall … be referred within nine calendar months of the dispute arising, to an arbitrator".

(b) "If the dispute has not been referred to arbitration within the aforesaid nine-month period, then the claim shall be deemed to have been abandoned and not recoverable thereafter."

(4) Quinn had earlier repudiated liability under the Policy in a letter to Lenihan. However, Lenihan had not brought the matter to arbitration within a nine-month period.

# Issues

The Court had to consider whether the Arbitration Clause served to bar the claim against Quinn. It thus had to decide:

(i) Whether the Arbitration Clause excludes the right to pursue a claim by litigation; and

(ii) Whether the Arbitration Clause was unusual and onerous, and could not be enforced due to Quinn's alleged failure to sufficiently notify Lenihan of the clause.

# Holding Of The High Court

## Proper Construction

The Court held that the wording of the Arbitration Clause clearly prescribed arbitration as a mandatory mode of dispute resolution. Further, it set out a time limit for the dispute to be referred to arbitration, failing which any claim would no longer be recoverable.

Therefore, the Arbitration Clause was in fact intended to provide an exclusive remedy in the form of arbitration.

## Enforceability

The Claimants submitted that the Arbitration Clause was unenforceable because it was unusual and onerous, and had not been adequately highlighted, alleging that:

(i) The presence of an arbitration clause in an insurance policy was itself unusual;

(ii) The clause as a whole was onerous, particularly because it imposed a nine month time limit, which was considerably less than the statutory six year limitation period;

(iii) The Arbitration Clause was buried in eleven pages of small print; and

(iv) There was no reference to the clause in the cover letter or the introduction to the Policy and the section entitled "Important points to note".

However, the Court disagreed with the Claimants' arguments, holding that the Arbitration Clause was not onerous, and had been adequately brought to Lenihan's attention.

(i) Lenihan had the Policy wording in its possession for almost two years prior to the inception of the policy, and thus had plenty of time to study its terms.

(ii) Quinn had specifically told Lenihan multiple times to read the policy carefully to ensure that it met Lenihan's needs.

(iii) The insurance was arranged through insurance brokers, who could be expected to be familiar with Quinn's standard terms and to have given relevant advice to Lenihan.

(iv) The Court accepted that the Arbitration Clause was indeed unusual and potentially inconvenient, but this did not equate to being onerous. The nine month time limit may have been significantly shorter than the statutory six year limitation period, but was a reasonably generous time within which to explore the merits of any dispute and to appoint an arbitrator.

Therefore, it was held that the Arbitration Clause was incorporated into the Policy.

# Concluding Words

The Court highlighted that the common law rule restricting the application of unusual and onerous clauses must be approached differently in the context of insurance policies. What is onerous in an ordinary contract may not be onerous in an insurance agreement.

The purpose of a policy is to define and limit the insurer's risk. The policy will contain many detailed requirements to be complied with, as well as numerous limitations and exceptions. Therefore, detailed exceptions such as those in the Policy in this case are common in insurance agreements, and any reasonable businessman can be expected to know that his policy will contain such provisions.

The Court also opined that it is impractical to require insurers to draw attention to every term that might be onerous. The many terms and exceptions in any policy might be more significant to one insured than another, and highlighting them all would be no better than sending a copy of the policy

wording and advising the insured to read it. Further, highlighting certain clauses may cause the insured to ignore other clauses, which may lead to the detriment of the insured.

Nonetheless, the Court conceded that certain terms in insurance policies must be brought to the attention of the insured, such as those concerning the notification of claims. Many policies contain terms requiring notification within a short period of time, and this must be sufficiently highlighted at the outset.

## Contacts

**Simon Goh**
Partner
D (65) 6232 0645
F (65) 6428 2124

simon.goh@rajahtann.com

**Elaine Tay**
Partner
D (65) 6232 0673
F (65) 6428 2126

elaine.tay@rajahtann.com

Please feel free to also contact the Knowledge and Risk Management Group at eOASIS@rajahtann.com

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