CL-2022-000210

Neutral Citation Number: [2022] EWHC 3287 (Comm)

Case No: CL-2022-000210

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
Fetter Lane
London, EC4A 1NL

20 December 2022

Before :

MRS JUSTICE COCKERILL

- -

Between :

DASSAULT AVIATION SA	**Claimant**
- and -	
MITSUI SUMITOMO INSURANCE CO LTD	**Defendant**

- -
- -

Paul Stanley KC, Nico Leslie, Daniel Carall-Green (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Chris Smith KC (instructed by **Norton Rose Fulbright LLP**) for the **Defendant**

Hearing dates: 28 November 2022

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APPROVED JUDGMENT

Mrs Justice Cockerill:

1. The Claimant ("Dassault") makes this application under s.67 of the Arbitration Act 1996 ("AA 1996") to set aside a Partial Award dated 29 March 2022 made by an arbitral tribunal consisting of Lord Collins of Mapesbury, Simon Crookenden KC, and Joe Smouha KC (the "Tribunal"). That Partial Award declared by a majority that it had jurisdiction over the claim of the Respondent ("MSI") against Dassault.

2. The issue as to jurisdiction engages part of the question asked by Professor Goode as to the limits of contractual prohibitions against assignment in his article *"Contractual Prohibitions Against Assignment"* [2009] LMCLQ 300 in which he stated:

> "What is the scope of a no-assignment clause? Does it prohibit equitable as well as statutory assignments? Does it extend to declarations of trust and to equitable charges? Does it embrace the sum received by the assignor from the debtor? These are all questions of construction of the contract."

3. The majority of the Tribunal concluded (broadly with Professor Goode) that a no-assignment clause is limited to contractual assignments and does not encompass a transfer to an insurer by operation of Japanese Law. The minority took the view that the transfer in this case fell within the clause because the operation of Japanese law was brought about by voluntary acts of the assured.

BACKGROUND

4. On 6 March 2015, Mitsui Bussan Aerospace Co Ltd ("MBA") and Dassault entered into a contract governed by English law (the "Sale Contract"), whereby Dassault agreed to manufacture and deliver to MBA two aircraft and certain related supplies and services ("Aircraft and Spares") for supply to the Japanese Coast Guard.

5. Article 15 of the Sale Contract, titled "Assignment-Transfer", provided as follows:

> "Except for the Warranties defined in Exhibit 4 that shall be transferable to Customer, this Contract shall not be assigned or transferred in whole or in part by any Party to any third party, for any reason whatsoever, without the prior written consent of the other Party and any such assignment, transfer or attempt to assign or transfer any interest or right hereunder shall be null and void without the prior written consent of the other Party.
>
> Notwithstanding the above and subject to a Seller's prior notice to Buyer, Seller shall have the right to enter into subcontracting arrangements with any third party, for the purpose of the performance of this Contract"

6. The terms of the Sale Contract required the Claimant to deliver:

   i) The first of the Aircraft on or prior to 31st March 2018.

   ii) The second of the Aircraft on or prior to 31st July 2018.

   iii) The Spares in June 2018.

7. Because of the nature of the contract there were fairly stringent confidentiality provisions in the Sale Contract. Article 20 provided:

> "Except with the written consent of the other Parties, each Party shall keep confidential and shall not disclose any part of the Contract or of any of its provisions including its exhibits to any third party, except :
>
> (i) with respect to disclosures undertaken by Seller, to the sole extent such disclosures are required by Government representatives/banking institutions of the countries involved, in particular for the purpose of obtaining the required export licences or to negotiate and perform contractual arrangements with Mission System Manufacturer;…"

8. The Sale Contract contained an arbitration agreement providing for arbitration under the ICC rules and for the seat of arbitration to be London.

9. On 30 September 2017, MBA entered into a contract of insurance (the "Policy") with MSI, governed by Japanese law. It did not seek Dassault's consent. The Policy covered the risk of MBA being held liable to the Japanese Coast Guard for late delivery under the Sale Contract. It appears that it was entered into at this point because of a perceived risk of delay consequent on issues with approvals needed for the completion of the aircraft.

10. In the circumstances, delivery was delayed; the Aircraft were in fact delivered on 22nd April 2019 (the first of the Aircraft) and 10th May 2019 (the second of the Aircraft). The Spares were delivered on 28th February 2020.

11. The Japanese Coast Guard claimed liquidated damages for late delivery. MBA claimed that sum from MSI (less a deductible) under the Policy, and MSI accepted that claim and paid MBA in turn.

12. Article 25 of the Japanese Insurance Law provides:

> "An insurer, when the insurer has made an insurance proceeds payment, shall, by operation of law, be subrogated with regard to any claim acquired by the insured due to the occurrence of any damages arising from an insured event (under a non-life insurance policy which covers claims arising due to default or any other reason, such claims shall be included; hereinafter referred to as the 'insured's claim' in this Article), up to the smaller of the amounts listed below:
>
> (i) the amount of the insurance proceeds payment made by the insurer; or

> (ii) the amount of the insured's claim (if the amount set forth in the preceding item falls short of the amount of damages to be compensated, the amount that remains after deducting the amount of the shortfall from the amount of the insured's claim)."

13. Article 26 of the Japanese Insurance Law provides: "*A contractual provision that is incompatible with the provisions of [...] [Article 25] that is unfavourable to an insured shall be void.*" However it permits of agreement that an insurer would not be subrogated, as not being "*unfavourable to the insured*".

14. Article 35(1) of the Policy essentially reproduces Article 25 of the Japanese Insurance Law. It provides as follows:

> "In the event that the Insured acquires a right to claim for damages or other claim […] as a result of the occurrence of Losses, such claims shall be transferred to [MSI] when [MSI] pays the insurance benefits for said Losses. However, the amount to be transferred shall be limited to the 'Maximum amount' in the following table.

Category	Maximum amount
(i) If [MSI] has paid the full amount of the Losses as insurance benefits	Full amount of claims acquired by the Insured
(ii) In cases other than (i)	The amount of the claim acquired by the Insured minus the amount of Losses for which no insurance benefits have been paid"

15. It is common ground that the mechanism of subrogation under Japanese Law is the transfer of rights: the insurer acquires the right to sue in its own name, including the right to initiate proceedings.

16. On 30 April 2021, MSI submitted a request for arbitration under the arbitration agreement in the Sale Contract against Dassault. A tribunal consisting of Lord Collins, Joe Smouha KC and Simon Crookenden KC was constituted.

17. On 28 July 2021, Dassault submitted its response to the request for arbitration, in which it challenged the tribunal's jurisdiction. Dassault contended that, because any transfer of rights from MBA to MSI was precluded under Article 15 of the Sale Contract (and was therefore ineffective) MSI did not acquire any rights under the Sale Contract and, as a result, was neither a party to (nor permitted to enforce) the arbitration agreement in the Sale Contract, leaving the Tribunal without substantive jurisdiction. In response to this, MSI argued that the prohibition on assignment created by Article 15 did not on its proper construction (in English

law) apply to an assignment by operation of law. Since MSI's right of subrogation arose by operation of a Japanese statutory provision, that was not a transfer caught by the prohibition under Article 15. Much of the debate before the Tribunal centred on whether the transfer was brought about by Article 25 of the Japanese Insurance Law or by Article 35(1) of the Policy.

18. The Tribunal considered the jurisdictional issue as a preliminary issue. It issued its Partial Award on jurisdiction on 29 March 2022. By a majority decision, the Tribunal dismissed Dassault's jurisdictional objection. The Tribunal held that: (i) Article 15 of the Sale Contract did not apply to involuntary assignments and/or assignments by operation of law; (ii) as a matter of Japanese law, the transfer of rights from MBA to MSI occurred by operation to law pursuant to Article 25 of the Japanese Insurance Act.

19. The majority found that, since the transfer occurred by operation of law, Article 15 did not apply to it. Mr Crookenden KC dissented on this point, on the basis that the transfer of rights was to be regarded as voluntary rather than involuntary, opining that "*any transfer of rights under the Policy would be a consequence of the voluntary decisions of MBA and MSI to enter into the Policy. Any such transfer would, therefore, itself be voluntary*". According to Mr Crookenden KC, any transfer of MBA's rights under the Sale Contract by reason of the Policy was precluded by Article 15 and was legally ineffective, resulting in the Tribunal having no substantive jurisdiction over the dispute.

THE PARTIES' POSITIONS

20. Dassault's position in the present application is that the prohibition of assignments and transfers created by Article 15 of the Sale Contract, on its proper construction, covered and rendered ineffective the transfer of rights under the Sale Contract pursuant to Article 25 of the Japanese Insurance Act.

21. Dassault contended that the text of Article 15 supported its interpretation, as Article 15 was broadly worded, explicit as to the consequences of breach, and contained express and specific exceptions. In addition so far as concerns factual matrix, there were good reasons why a party would wish to preclude a party to the Sale Contract from assigning or transferring rights to a third party. This included, for example, the parties' desire to deal only with persons known to and chosen by them, and concerns about confidentiality.

22. In response to MSI's argument that the transfer was not a transfer "by" a party being a transfer by operation of law, Dassault submitted that the transfer had to be assessed as being, in reality, a voluntary act by MBA. The transfer occurred as a result of a succession of voluntary acts, namely:

    i) The purchase of insurance- no-one required it, and MBA did not seek permission;

    ii) MBA sought cover governed by Japanese law which provides for transfer, not subrogation;

iii) MBA chose not to exclude transfer (when it could have done) but rather the Policy expressly repeats the effect of Article 25;

iv) MBA chose to make a claim and to accept payment.

23. In these circumstances, the transfer was to be assessed as a voluntary transfer and a transfer "by" MBA within the meaning of Article 15.

24. As for the authorities on which MSI relied for the proposition that general contractual prohibitions on assignment should presumptively be construed not to encompass involuntary assignments and/or assignments by operation of law, Dassault submitted that *Doe* and *Re Birkbeck* should be limited to their facts. Both cases involved a situation where there were two transfers, the initial transfer was not prohibited, and the initial transferee was under a duty to realise the assets transferred by performing a further transfer to other third parties. Both cases stood only for the proposition that a "no-assignment" clause did not prohibit the initial transferee from performing that further transfer. Dassault submitted that this was how both cases were understood by the Court of Appeal in Re *Farrow's Bank* [1921] 2 Ch 164, at 174 and 175.

25. Dassault further contended that even if *Doe* and *Re Birkbeck* did create the presumption against construing a "no-assignment" clause to include involuntary transfers occurring by operation of law, the notion of an involuntary transfer for this purpose, properly understood, only included genuinely involuntary transfers and not transfers which were "*tinged with the taint of voluntariness*" in substance, as *Cohen v Popular Restaurants Ltd* [1917] 1 KB 480, 484 had established.

26. Dassault drew attention to the confidentiality provisions in Article 20 and the limited reference to insurance in Article 25, submitting that the provisions are inconsistent with the submission that the parties would have anticipated insurance given that the exchange of information involved would require consent.

27. MSI's primary position was as follows:

i) Absent specific language, general contractual prohibitions on assignment should not be construed as applying to involuntary assignments and/or assignments by operation of law.

ii) It is common ground that the assignment from MBA to MSI occurred automatically pursuant to Article 25 of the Japanese Insurance Act. Such an assignment was, therefore, by operation of law, as opposed to being voluntary in character.

iii) It therefore followed that the transfer of rights from MBA to MSI was not caught by the prohibition against assignments and transfers in Article 15 of the Sale Contract.

28. MSI relied on the cases of *Doe v Bevan* (1805) 3 M&S 353; 105 ER 644 and *Re Birkbeck Permanent Benefit Building Society* [1913] 2 Ch 34, and submitted that they confirmed that generally worded "no-assignment" clauses will presumptively not be construed to apply to assignments by operation of law.

29. MSI submitted that *Cohen* and *Re Farrow's Bank* were of no assistance in the present case as they concerned situations in which a liquidator (who was treated in law as acting on behalf of the assignor) voluntarily transferred the relevant contractual rights to third parties, which counted as the assignor making a voluntary transfer. By contrast, in the present case, the relevant transfer (as is common ground) was effected by Article 25 of Japanese Insurance Law.

30. In support of its construction of Article 15, MSI submitted that the wording of Article 15 indicated that it would not apply to an assignment by operation of law. MSI argued that the wording of Article 15 was framed as a prohibition on the assignment or transfer of the Sale Contract "by" any Party, and a transfer occurring by operation of law (such as under Article 25 of the Japanese Insurance Act) would not be a transfer "by" a party but a transfer "from" a party.

31. MSI also submitted that it was inapposite for Article 15 to be applied to transfers of rights under Article 25 of the Japanese Insurance Act because Article 15 sought to impose an obligation on the parties to the Sale Contract, Dassault and MBA, who might be unable to prevent a transfer by operation of law.

32. MSI also submitted as its secondary case that there was no good reason of principle to construe Article 15 to extend to a transfer to an insurer in the present circumstances (or at all). There was no practical difference between MSI bringing the claim and MSI bringing a claim in MBA's name as a subrogated insurer and directing that claim. Since it was not contended that Article 15 prohibited the latter act, there is no reason why the parties would also have intended for it to prohibit the former.

33. It was also submitted on behalf of MSI that Dassault's proposed interpretation of "no-assignment" clauses would have the effect of unjustifiably limiting access to the insurance market. Because commercial parties might often wish to obtain insurance cover in respect of the risks arising under the contract and so must have envisaged the possibility of a claim being brought by a subrogated insurer. Against that background, it should be assumed that the parties did not intend the "no-assignment" clause to encompass a claim by an insurer, in the absence of express language to that effect.

34. MSI did not dispute that the "voluntary" features relied on by Dassault existed, but rather contended that merely listing these acts did not provide an adequate test for ascertaining what was voluntary. It was submitted that this left hanging the question of whether two of these would be enough to render the act voluntary, as well as the question of other factors such as lack of care and skill. Thus the approach advocated by Dassault on how to determine whether a transfer was truly involuntary would lead to uncertainty, and would require a court to inquire into the underlying factual circumstances that led to the transfer. This provided another reason why the notion of a voluntary transfer should depend on the juridical character of the transfer mechanism, not what it was a matter of a broader inquiry into its background.

DISCUSSION

35. This case raises an interesting point. There is a real and obvious tension between the nature and wording of the clause, backed by the well established principle that "*an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights*" (Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 108) and the context of the transfer.

36. As to the latter instinctively there is a feeling that a transfer in the context of insurance should not be caught by such a proviso. It is this instinct which is expressed (albeit tentatively) in the passage from Professor Clarke's work, *The Law of Insurance Contract*s at [6-8]:

> "Secondly, it seems possible that the courts would construe non-assignment clauses strictly when the purported assignee is an insurer. In 2003 Lord Millett stressed that the general rule "is that the benefit of a contract may be assigned to a third party without the consent of the other contracting party" and that "unless he takes the precaution of including in the contract a prohibition of assignment, he has no right to object". Such statements have led to the observation that the initial "inclination of the law to restrict such transactions (for diverse reasons of principle and policy) has had to yield to a permissive approach". Although in Linden Gardens the House of Lords refused to accept that a contract prohibition might be overridden on grounds of public policy, it is arguable that the decision is qualified by the purposive construction which reinforced the decision, in casu that building contractors had good reason for insisting that they dealt only with the original customer. Thus, it is possible that non-assignment clauses will be strictly construed in the light of the purpose of such clauses."

37. However initial indications have to be tested by analysis.

38. There are really two broad points in issue – the first is as to the position on the authorities on transfer "by operation of law" and assignment as a matter of English law. The second is as to the construction of this clause, an exercise into which the wording and the purpose and context have to be factored.

The authorities

39. Is there or is there not a rule or a presumption that transfers "*by operation of law*" are not caught by a clause of this kind, as MSI would contend?

40. On this the two main authorities in focus are *Doe d Goodbehere v Bevan* (1805) 3 M&S 353, 105 ER 644, and *Re Birkbeck Permanent Building Society* [1913] 2 Ch 34.

41. However the authorities reach back still earlier – the first case cited being that of *Doe d Mitchinson v Carter* (1798) 8 Durn & E 57. That case dealt with the question of whether giving a generalised warrant of execution was a breach of a

covenant not to assign in a specific lease (which was then assigned pursuant to the warrant of execution). The court concluded that there was no breach.

42. The key point is to be found in this passage by Keynon LCJ at 1267:

> "Now, what are the words used in this lease; that the lessee shall not let, set, assign, transfer, make over, barter, exchange, or otherwise part with, the indenture or the premisses demised: but these are all acts to be done by the tenant himself; and I adopt the distinction relied upon by the defendant's counsel between those acts, that the party does voluntarily; and those that pass, in invitum : judgments in contemplation of law always pass in invitum: and I see no difference between a judgment that is obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney, since the latter is merely to shorten the process, and to lessen the expence of the proceedings."

43. This passage introduces the distinction between voluntary acts and those which "*pass in invitum*". In modern terms one might express that distinction as one between acts done with consent and without consent (the "invitum" being an unwilling person). That is a distinction to which I shall return below. A similar line was taken by Grose J:

> "The words in this covenant rather point to some act to be done by the tenant himself: but the giving of a warrant of attorney did not specifically operate on this property….
>
> Now if the words in this proviso were only inserted to guard against an assignment by the party himself (and it seems to me that they were) then according to the above case, there has been no assignment in this case, and consequently no breach of the condition."

44. In *Doe d Goodbehere v Bevan* the court (on appeal from the "Surry" assizes) held that a covenant in a lease of a pub, whereby the tenant covenanted that he and inter alios his "assigns" should not during the term assign the lease, was not effective to prevent the assignment of the lease by order of the court following bankruptcy. The case was not whether the bankruptcy was a breach, but whether the assignment following on from that was a breach. That was a question which turned on whether the trustee was an executor, administrator or assign. The court held that the noun "assigns" did not include those who held rights via a transfer that was not voluntary.

45. There are a number of points of interest in the judgment. The first, which introduces the "operation of law" concept, is in the judgment of Lord Ellenborough LCJ at 646:

> "Here the question is upon the meaning of the term assigns, whether by that term the proviso was meant to have effect against assigns in law, as it would have against assigns by act of the party. Now the

> Courts have construed it to mean voluntary assigns as contradistinguished from assigns by operation of law, and further than that, that the immediate vendee from the assignee in law is not within the proviso ; the reason of which is, that the assignee in law cannot be encumbered with the engagement belonging to the property which he takes, such as in this case the carrying on the bankrupt's trade in the public house, which is a strong instance. In such cases, therefore, the law must allow the assignee to divest himself of the property, and convert it into a fund for the benefit of the creditors. That 'assigns' does not relate to assignees in law, I consider as determined in Doe d. *Mitchinson v. Carter*…
>
> …it does not follow from that [*Roe v Harrison*], that 'assigns' must necessarily comprehend such as are involuntary and do not come in by the act of the party, as the assignees under a commission of bankruptcy do not"

46. Le Blanc J put it this way:

> "It is clear that there has been no assignment by the lessee himself; it is also clear that the lessee's becoming bankrupt is not a breach; but the assignees under the commission have assigned. They were bound to assign, because they took only as trustees for the purpose of disposing of the property to the best advantage for the benefit of the creditors; and they were compelled under an order of the Court of Chancery to sell in discharge of the debt of Whitbread and Co. Therefore this was not an assignment within the meaning of the covenant, because in *Doe v. Carter* it was considered that an assignment under compulsion of law by the sheriff to an execution-creditor was not within a general covenant by the lessee, his executors, administrators, and assigns, not to assign. In this case the commission of bankruptcy is a statutable execution, and there is not any material difference between the compulsory course under which the sale was made in both cases. *Roe v. Harrison* is very distinguishable … the assignees of a bankrupt, in like manner as the sheriff, are relieved from the operation of the word assigns, because 'assigns' means only such as are voluntary assigns."

47. Bayley J's approach was as follows:

> "In *Doe v. Carter* it was decided that a proviso, contemplated only a voluntary assignment, and not one which passed in invitum of the lessee, and where the party making the assignment acted in discharge of a duty cast upon him by the law. It has never been considered that the lessee's becoming bankrupt was an avoiding of the lease within this proviso; and if it be not, what act has the lessee done to avoid it? All that has followed upon his bankruptcy is not by his act but by the operation of law, transferring his property to his assignees. Then shall the assignees have capacity to take it, and yet not to dispose of it? Shall they take it only for their own benefit, or be obliged to retain it in their

> hands to the prejudice of the creditors, for whose benefit the law originally cast it upon them? Undoubtedly that can never be."

48. Dampier J dealt with the matter briefly again citing the distinction between voluntary and *in invitum*.

49. Pausing here, MSI submits that this case provides the authority which it needs for the proposition that such a term does not encompass assignments "by operation of law" noting that Le Blanc J specifically held as much. Dassault for its part points towards the involuntary/in invitum distinction carried over from the earlier case.

50. The next case is *Re Birkbeck Permanent Building Society* [1913] 2 Ch 34. That was another case concerning pubs (here mortgaged to the Birkbeck Building Society) and concerned a condition in an insurance policy taken out by the society's trustees which provided that the policy would terminate if *"the whole or any part of the interest of the insured in the [property] shall pass from the insured otherwise than by will or operation of law"*. The building society was ordered to be wound up, and the relevant property vested in the Official Receiver by order. The insurer contended that this prevented the Official Receiver from assigning the policy to a purchaser of the mortgage. It seems to have been accepted that the vesting in the Official Receiver did not amount to a terminating event.

51. The Court had little difficulty in concluding that the assignment of the mortgage by the Official Receiver was not a terminating event either, since the mechanism by which the interest had passed "from the insured" was not a terminating event. In what appears to have been an extempore judgment, Neville J held at p 38:

> "… *Doe v. Bevan* clearly shews that *prima facie* a contractual restriction of assignment does not apply to the assignment by a person on whom the property has devolved by operation of law, and who is under an obligation to assign. Of course, you may have so contracted as to include such a case, but the mere condition against assignment does not prima facie include it."

52. Dassault also relied on *Cohen v Popular Restaurants* [1917] KB 480. In that case a lease of premises near the modern Borough Market was given to the defendant on terms that there should be no assignment without consent (which was not to be unreasonably withheld *"in the case of a respectable and responsible person"* being offered as a tenant). The defendant's shareholders passed a motion to enter into voluntary liquidation. The liquidator (who was entitled to conduct the business of the company in the name of the company) then assigned the lease to *"a married woman of no financial position"* (i.e. not a respectable and responsible person). The defendants prayed in aid the cases to date where acts of liquidators had been held not to be caught by such clauses.

53. But Rowlatt J perceived a distinction, reiterating references to voluntariness:

> "*Prima facie* a covenant not to assign does not extend to prohibit an assignment by a person who takes the lease by operation of law together with a duty to dispose of it …
>
> [Birkbeck] was a case of a compulsory winding up and an assignment by the officer of the Court. An assignment under those conditions was held not to be the voluntary act of the assured. Here the facts are otherwise. The assignment was the act of a liquidator brought into existence by the voluntary act of the company, the passing of a special resolution to wind up the company voluntarily…
>
> … In a voluntary liquidation there is nothing equivalent to an adjudication. A company may use the process of voluntary liquidation when perfectly solvent merely as machinery for reconstructing itself on a sounder basis. The company whose liquidator in such circumstances assigned an onerous lease to a man of straw could not be heard to say that the assignment had taken place by operation of law and not by its own voluntary act. There is no essential difference between such an assignment and that in the present case; if the former assignment is tinged with the taint of voluntariness so is the latter. I think there is all the difference between an adjudication in bankruptcy and a voluntary winding up, ...".

54. Dassault has also drawn my attention to *Re Farrow's Bank* [1921] 2 Ch 164. That case concerned an assignment by a liquidator of a lease of retail premises on Balham High Road without the consent of the lessor. The lease was to a bank, which was subsequently wound up. There was a term providing for forfeiture if the bank was put into liquidation (whether compulsory or voluntary). But relief from forfeiture was obtained and the liquidator then made an assignment which on its face breached the non-assignment clause.

55. The judge held that such a circumstance was distinguishable from the situation in bankruptcy because the property there vested in the trustee by operation of law, and he was not the assignee of the bankrupt, and what was in focus was an onward further transfer to a person under a duty to realise the asset. Most of the analysis focusses on questions of property law. Perhaps the most interesting of the judgments is not that of Lord Sterndale MR but that of Younger LJ. At 177 he said this:

> "So far as the terms of the lease are concerned it would be, I think, a clear breach of the covenant contained in it, if any such assignment were executed without first obtaining the lessor's assent. Nor can I myself see any reason or equity why those interested in the liquidation should at the expense of the lessor he dispensed from compliance with an essential condition of the company's lease—one regarded as so essential that it is not within the power of the Court to relieve against a breach of it. I do not, in saying this, forget that there are passages to be found in the bankruptcy cases referred to by Mr. Greene which give force to his argument that we ought to regard this question on what may

> be called broader grounds, but, speaking for myself, I am not disposed to do so.
>
> These bankruptcy cases are somewhat anomalous. They are based on no very intelligible principle…"

56. I should also note that Dassault suggested by reference to the explanation at 174 and 175 (Lord Sterndale MR) that in the light of this case I should regard the earlier cases as involving a situation where (a) a transfer took place to a person and that transfer was not prohibited by the clause, but (b) the transferee was under an obligation thereafter to realise the property for the benefit of others and that (c) on that basis, the court held that the clause in question should not be construed as preventing the further transfer following a permitted one to a person who was under a duty to realise that asset, and who did not himself fall within the definition of those bound by the clause.

57. I am not entirely persuaded that this is a strong or sustainable distinction, particularly in the light of (i) LeBlanc J's conclusion in *Goodbehere v Bevan* that the initial assignment did not fall within the scope of the prohibition on assignment and (ii) the reference to assigns in law as distinct from voluntary assigns in *Re Farrow's Bank*.

58. The question is whether the cases give rise to a presumption or a general rule that a prohibition on assignment will not generally be interpreted to apply to an assignment "by operation of law"? I am not persuaded that they do – and ultimately MSI's argument was cast both in terms of that and the voluntary/involuntary distinction. We are looking here at a relatively narrow base of authority. Those cases do not purport to state any such broad principle. There are references to such clauses not applying in conjunction with the phrase "operation of law" as a description of what occurred in that case, but that is about as far as it goes.

59. The reality is that each case occurs in rather particular factual circumstances. The bulk of them occur in the context of bankruptcy or liquidation and leases. As *Re Farrow's Bank* indicates and as is apparent from the reasoning in some of the other cases, some of the analysis turns on specific features of those factual situations. In this context I would note that the point made by Dassault as to Lord Sterndale's "explanation" does go to show the relatively slim base on which the supposed principle rests.

60. That can also be seen from some of the other cases which show that result may be highly dependent on the language used. So, for example, that where a lease contained a covenant not to assign which bound "successors in title" rather than "assigns", that did bind a trustee in bankruptcy: *Re Wright* [1949] Ch 729, at 736 (Dankwerts J).

61. Certainly I regard the cases as giving some support to a distinction not dissimilar to that for which MSI contends. But I also agree with Dassault that the slightness of the foundation and the very specific factual context in which they arise requires a close eye to be had to the ambit of any principle to be drawn from them. I am

not persuaded that in any of the cases the court was purporting to lay down a principle of general application to all transfers which might be called "by operation of law". I do on the other hand consider that the authorities indicate that a cautious approach is to be taken to derogations from the applicability of such a clause and that voluntariness is key. Having looked carefully at these cases I do not consider that any principle which can be derived goes beyond the kinds of circumstances seen in the cases, where the transfer is what Mr Stanley KC called "*genuinely involuntary or forced*". The recourse to the Latin tag of "in invitum" in the cases seems to me to place the emphasis on the voluntary/involuntary distinction (or consent/lack of consent) rather than on any particular immediate cause of the transfer.

62. That distinction is in my judgment the most consistent line to be discerned in the cases. It is the one which best explains the results across the board. It is also consistent with the general approach of English law to respecting the parties' bargain – a point nicely demonstrated in Lord Keynon's judgment in the earliest case, of *Mitchinson v Carter*:

> "Though therefore the grant of an estate prima facie carries with it all legal incidents, that grant may be modified according to the wish of the parties; and when we are considering the rights of the grantee, it is necessary to see what restraints have been imposed on him."

63. I would therefore accept that so far as the authorities go, there is a presumption that the court should not be prevented from giving effect to such a clause when the transfer is one which is voluntary (in the sense of consented to). How far this goes is of course the question, but the cases do indicate that voluntariness is not pegged to immediate and free action, but is rather the correlate of (or what does not qualify as) contrary to the assigning party's will. That is what gives rise to the wording of a "taint of voluntariness".

64. Thus the authorities do not by any means justify a conclusion that prohibitions on assignment should not be taken to carve out transfers which occur "by operation of law" in a broad sense. The focus is not on the mechanism. Rather the question is whether the transfer occurs truly outside the voluntary control of the transferring party.

The wording of the clause

65. The second issue is as to the meaning of Article 15. That is the more important because of the conclusion which I have reached that there is no very firm rule of general application to be taken from the authorities.

66. The question of the meaning of Article 15 is a question of construction. There are of course numerous possible inputs into the question of construction. The first is usually (and most logically) the words of the clause. Here there are a number of points to be made.

The words

67. There is no escaping the fact that the words are very broad: *"assigned or transferred… to any third party" "in whole or in part"*, *"for any reason whatsoever"*. With the inclusion also of "attempt" wording, the clause certainly looks like a blanket ban. In terms of impression it conveys a sense of breadth. On the face of it therefore, this wording is apt to cover transfer to an insurer.

68. Moreover, while the wording is broad, it is not the broadness of sketchy drafting. It has clear wording covering consequences (voidness) and it has limited exceptions (warranties in Exhibit 4 and sub-contracting with notice). Further, as Dassault submits, the "assignment/transfer" wording tends to indicate a practical rather than technical approach; it suggests that one is focussing on effect.

69. The only real limitation on these words is imposed by the wording: *"by any Party … to any third party"*. MSI obviously focusses on the word "by" – and it is accepted by Dassault that if there was a transfer without any party's involvement that would not be caught by the wording; "by" has to be given a content.

70. The essential difference between the parties at this stage is whether one is looking at "by" in the sense of:

    i) Per MSI: if the party's action directly and immediately effects the transfer – even if the transfer is not only or solely as a result of the party's acts. The focus is on the direct mechanism by which the assignment occurs; or

    ii) Per Dassault: whether a considerably lesser or less immediate party involvement suffices. The focus is on the cause of the assignment.

71. This difference between the parties was pursued in argument by reference to the concepts of "hands on" and "autopilot". Dassault's argument concedes the transfer took place pursuant to Article 25 and to that extent by operation of law, but contends that it was nonetheless voluntary, in the sense that steps were voluntarily taken which led to the world where Article 25 operated. That is a rather different iteration of the argument to that advanced before the Tribunal where the focus was on the dichotomy: Article 35 (voluntary) versus Article 25 (operation of law).

72. Again so far as this is concerned I find preferable the submission for Dassault that this wording invites attention to why the assignment/transfer happens in the sense of whether a party chose to cause it to happen. Did the party do that or was it done to the party? This is actually not dissimilar to the argument advanced by MSI that transfers properly regarded as "from" a party, rather than actively "by" them are not caught and which emphasised the importance of control.

73. Where the parties part company is simply as regards the point of whether, if a step is taken by a party which leads to a transfer by operation of law, one should regard that transfer as falling on the voluntary as opposed to the involuntary side of the line.

74. There is much in the idea of a check by way of control, as suggested by MSI. As it noted, the provision for consent is strongly suggestive of control. However once the control cross check is applied, it becomes difficult for MSI's line of argument to hold. A party has control over a decision to agree an assignment at a future date on the occurrence of a contingency. That is in many ways similar to the voluntary liquidation situation seen in *Re Cohen* where the directors chose to put the company into voluntary liquidation, carrying with it the contingency that the liquidator might decide to deal with the asset subject to the non-assignment clause. This is not, as MSI would suggest, a "*novel sub-category of voluntary acts*", but a delineation of what is and is not voluntary. This approach is also consistent with the suggestion conveyed by the assignment/transfer wording that it is the result, not the precise mechanism, which is key.

75. Here the application of this test resolves into the issue of: was the transfer voluntary in that it was in the power of MBA to prevent the transfer? Was it (to put it another way) consented to? To this the answer is that it was, for any or all of the reasons identified by Dassault. MBA might have chosen not to insure (it was, after all a late decision). It might have chosen a policy governed by another system of law. It might have excluded the operation of Article 25 – rather than positively reinforcing it with Article 35 of the Policy. It might have chosen not to make a claim. Any of these decisions could have – and would have – stopped the transfer. It was therefore in the power of MBA to comply with the provision. It chose – acted voluntarily or consented - to take a step which on a certain contingency would put it in breach of that provision.

76. As for MSI's submission that this approach creates unacceptable uncertainty by requiring a full factual inquiry, complete with *"disappearing down a rabbit hole"*, there are two answers to this. The first is that this rather overstates the likely practical requirements; whether there was a voluntary act which led to the transfer by operation of law is likely to be fairly straightforward inquiry in most cases (as it is here). The second is that that very inquiry is manifest in the cases (such as *Re Cohen*) and does not seem to have been previously regarded as unacceptable. A further point could also be made that, absent clear justification on the words here, the "proximate cause" approach which MSI advocates (which elides with a broad approach to the meaning of "operation of law") has the capacity to have less desirable impacts in other areas (such as voluntary liquidations and transfers of business).

77. Nor should the concerns as to timing of consent be seen as impeding the analysis. Firstly, for the mechanics of consent (which could have been obtained at a number of different points) to drive construction would be a classic case of the tail wagging the dog. Secondly, again MSI exaggerates the concerns. This would not be a case of a counterparty having a right to veto insurance per se; only insurance which carried with it an assignment.

78. I therefore conclude that as a matter of pure language the wording of Article 15 provides a preliminary indication that Dassault's analysis is to be preferred.

Context and commercial purpose

79. Moving focus then to the iterative process through factual matrix/commercial purpose, there are a number of facets to this part of the argument. I will deal first with those which I have found of least assistance, essentially to clear them out of the way, before moving to what seems to me to be the major point of relevant matrix/context, namely the position as to subrogation.

80. The first point to make is that there is effectively no commercial purpose or factual matrix argument which goes to MSI's wider case based on "operation of law".

81. Beyond this both parties rely on points which were apparently not before the Tribunal and some of which are not properly evidenced.

82. Thus Dassault contends that:

    i) Commercial parties often prefer to have one counterparty, known to them, with whom they can deal to resolve any difference or dispute. Transfers (especially partial transfers) multiply the number of people who are involved and make it more complicated to manage the contract and resolve any disputes.

    ii) In general, commercial parties prefer to deal with known counterparties with whom they feel comfortable, not with third parties with whom they have been placed into chance relationships – and who may prove to be more "hard nosed" than their own choice of contracting partner.

    iii) Commercial parties are often concerned about confidentiality, including confidentiality in relation to disputes and arbitrations. The addition, without their agreement, of new or additional parties who will be concerned in a dispute, risks undermining that confidentiality comprehensively or in an unpredictable way.

    iv) Commercial parties are not likely to be concerned, in general, with the legal mechanism by which a third party is interposed into a particular relationship.

    v) It is not suggested that the parties jointly contemplated that MBA would insure its potential liability to its customer, much less that it would do so on the terms that it did.

    Some of these points, it is fair to say, are logical not evidential (such as the increase in the number of people involved). Some (e.g. choice of contracting party) echo those made in previous cases. Some echo points made in section C of Professor Goode's article.

83. Meanwhile MSI focuses on the specific context relevant to insurance relationships. It contends that the kinds of factors which underpin anti-assignment claues do not bite when the transfer is to an insurer because:

i) It would be unusual for a commercial contract to make express reference to the parties obtaining liability insurance against the consequences of a breach of that contract by one or other of them (or for the parties to have had discussions to that effect prior to entering into the contract).

ii) Notwithstanding the above, most parties to a commercial contract would normally assume that its counterpart will obtain, or at least consider obtaining, liability insurance.

iii) It is highly unlikely that either party would have thought that its counterpart would limit itself to obtaining only such insurance cover as it was obliged to obtain under the Sale Contract.

84. I am minded to be somewhat careful when dealing with these commercial purpose/factual matrix points, given that many of them are no more than assertion and there are effectively conflicting submissions on some of the points (for example as to the expectation or otherwise of insurance in a particular context). It would be wrong for me to take on board a submission as to it "beggaring belief" that the parties would not have contemplated the purchase of liability insurance, based on nothing better than my own instincts or prejudices where there is no evidence and there is a countervailing submission that a liability insurance of this nature (i.e. covering liability to perform a contract rather than towards third parties) would not normally be contemplated.

85. However what did seem to be common ground were the points which go to generalised reasons for a non-assignment clause (chosen counterparty, undesirability of increased numbers of people to deal with). These give a base of commercial purpose which underpins the clause.

86. Also - given the submissions of both parties and the inclusion of two provisions dealing with insurance in the Sale Contract – it appeared to be common ground that the possibility of insurance (or indeed financing) would have been known to these parties. Unless it were the case that insurance was inevitable and would inevitably be assumed to be in place (on which I have no evidence) that is slightly suggestive. The reason is that (i) there are careful and somewhat niche exceptions to the ban on assignment in Article 15 (ii) the Sale Contract is not without references to insurance and (iii) the facts indicate that there were particular sensitivities in this case arising out of the nature of the contract and the use of the subject matter of the contract. Those are reflected in the confidentiality provisions in the Sale Contract.

87. There therefore might be said to be a hint that the omission of insurance based transfers from Article 15 was deliberate. However it seems that it would be illogical to place much weight on the failure to deal with insurance given the fact that (regardless of the position on the assumption as to the existence of insurance) the Sale Contract was an English law contract and *prima facie* at least subrogation under English law is not caught by a prohibition on assignment.

88. What might be of significance in this context in favour of MSI would be if there were no reason to object to a transfer to insurers at all, such that the agreed purpose of the clause would not be infringed and a business efficacy type

argument could be run. MSI contends that is the case, as I have noted, arguing that the points of objection noted by Dassault are inapplicable to insurance.

89. This is a point which bleeds over into the subrogation debate and was considered in some detail. The points as to objections and their applicability to insurance were as follows.

    i) Dealing with one person: Dassault says that applies equally to insurers where subrogation may mean that there are two people to deal with. Here for example there was a transfer only to extent of the paid claim. If there were other disputes (e.g. regarding the quality of aircraft) Dassault might have to deal with two people because all that is transferred is right to claim damages resulting from insured losses.

    ii) Choosing a counterparty with care (or a "soft nose"): As Mr Stanley noted, one could not with any degree of credibility suggest that insurers are of so soft-nosed a nature that no objection could be taken to them.

    iii) Confidentiality: Dassault submitted that it is at least possible that confidentiality issues could apply as regards insurers. This is a point to which I will return further below.

90. MSI's response on the first issue was that this sort of dealing is not the issue. It is not day to day dealing, or operation of the contract. I am not persuaded by this; dealing with more than one person (or a non-chosen person) can be undesirable at any stage. As regards the second and third issues, the MSI response lay in the position on subrogation. Essentially MSI says that it is illogical to see this as a problem in this context when Dassault would simply have had to "live with it" in the context of a subrogated claim. As to this, I am also not persuaded of the force of this point. Just because there is a problem to be lived with does not mean that there is no problem. It cannot therefore be said that there is no clash between insurance and the non-assignment clause's purpose.

91. To some extent therefore MSI's "*no objection to transfer to insurers*" argument is an argument which depends on seeing subrogation as a trump card; hence the centrality of the debate on subrogation. MSI contends that Article 15 would not have prevented MSI from bringing a subrogated claim in MBA's name (if the effect of Japanese law had been the same as English law) and that the only difference between that scenario and the present one would be the name of the claimant on the arbitration documents. Bearing this in mind, it says that it is hard to think of any reason why the parties would have intended for Article 15 to prohibit MSI from bringing the self-same claim in its own name.

92. This is the most compelling argument in favour of the case of MSI. As Mr Smith for MSI pointed out, there is an instinctive difficulty with saying that subrogation under English law is acceptable, whereas the subrogation equivalent of another legal system is not. There appears to be a logic in saying that, given the obvious possibility of a subrogated claim, and the lack of any practical difference between it and a claim under the Japanese form of subrogation, it is inherently unlikely that the parties would have intended Article 15 to encompass a claim by an insurer (or perhaps more correctly an insurer taking by assignment courtesy of statute).

There are also potential implications for comity, for example, in saying that because English law views subrogation proceeding without a transfer or assignment, but Japanese law views subrogation as involving a transfer, a Japanese law subrogation should be caught by a clause such as Article 15 when an English law subrogation would not.

93. Acknowledging the force of this, Mr Stanley KC for Dassault suggested that I should not assume that English law subrogation would indeed fall outside the ambit of the Article 15 ban. He submitted first that there was a short answer (which did not involve this point) which is that an English law subrogation does not involve a transfer and there simply is a relevant difference for the purposes of a clause such as this. He then went on to posit a second possible answer which is that the assumption that there is no problem with English law subrogation might not be a safe one.

94. This requires a consideration of the nature of subrogation in English law. The submission which was made (with which no real issue was taken) was that it comprises three parts:

    i) The rule that payment by an insurer is not presumed to operate as an indemnity of anyone except insured; so third party debts remain intact;

    ii) The rule that as between insurer and insured, the insured is obliged to account from recoveries from third parties;

    iii) The rule that an insurer can pursue a claim in the name of the insured, but not pursuant to a transfer of rights but rather via what is essentially an agency. This reflects the law cited by the Tribunal in its Award, where this point was not in issue. They noted that: "*In English procedural law, if there is an effective right of subrogation, the proceedings are brought in the name of the insured: Mason v Sainsbury (1782) 23 Doug KB 61;27 Colinvaux's Law of Insurance (12th ed Merkin 2019), para 12□001.28*"

95. The first two rules could have no relevance to a clause like Article 15 and could therefore give rise to no objection. However it was suggested that one cannot be confident that the third rule of English law subrogation would not be affected by Article 15 or a clause like it.

96. That there might be a problem in relation to subrogation might be said to be very tacitly suggested by Professor Goode in his article in which he stated:

> "What is the scope of a no-assignment clause? Does it prohibit equitable as well as statutory assignments? Does it extend to declarations of trust and to equitable charges? Does it embrace the sum received by the assignor from the debtor? These are all questions of construction of the contract. …
>
> Prima facie a no-assignment clause is limited to contractual assignments and does not encompass assignments governed by statute (which, as we have seen, may in any event override the effect of the clause) or rights of subrogation, such as those of a surety who

> discharges the obligations of the debtor and takes over the creditor's rights."

97. Dassault therefore suggests that there may be cases where some aspects of a subrogation – such as such as a transfer of right to bring litigation/arbitration would be a breach (especially in cases where there are issues as to confidentiality). Dassault for example does not accept MSI should have access to confidential information in the light of the confidentiality provisions in the Sale Contract (a topic which has led to a dispute in the arbitration).

98. It might be that such issues are not of acute practical moment here, given the stage at which the dispute arose, but one can readily imagine situations where it might be. For example, if a dispute concerns highly innovative and potentially market leading design and the assured is insured by an insurer linked to or owned by a competitor. Or, moving the current dispute up a couple of notches – if the dispute concerned military technology and the insurer was the state insurer within a country whose interests were not aligned with the nation where the tech had been developed. Here one might see echoes of the current US approach to the importation of certain Chinese technology devices.

99. One can also see by reference to *Banque Financière de la Cite SA v Parc (Battersea) Ltd* [1999] 1 AC 221, 231F-G that subrogation and assignment are not necessarily distinct. There Lord Hoffmann noted that on payment of an insurance claim *"it is customary for the assured, on payment of the loss, to provide the insurer with a letter of subrogation, being no more nor less than an express assignment of his rights of recovery against any third party"*. There may therefore come a point where an equitable subrogation incorporates a contractual subrogation and thus elides into an assignment properly so called.

100. Indeed Lord Hoffman notes in that case that subrogation is not an easy topic – he says it is:

> "bedevilled by problems of terminology and classification which are calculated to cause confusion. For example, it is often said that subrogation may arise either from the express or implied agreement of the parties or by operation of law in a number of different situations… The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with radically different institutions."

101. This argument, as already noted, feeds back into the debate which took place as to whether the commercial purpose issues raised by Dassault were applicable to insurance. If subrogation could fall foul of the clause, then the fact that subrogation would lead to the same consequences as this particular assignment loses some of such force as it has.

102. Mr Stanley suggested that I could decide there was a potential problem without deciding the point. Mr Smith (rightly in my judgment) says that it would be wrong

to take into account in Dassault's favour an asserted potential problem without deciding - at least provisionally - that subrogation would in some cases fall foul of a clause such as Article 15.

103. Having reflected on the arguments I can see how an argument as to the permissibility of subrogation could arise. The argument has certainly illuminated possibilities for debate outside the bounds of this judgment. There is enough in the controversy about how even equitable subrogation arises to provide a basis for this. However I am not prepared to decide that it would probably gain traction based on a fairly slight and somewhat abstract argument. I note that both Professor Goode and Professor Clarke, while acknowledging the origin dilemma (i.e. is subrogation equitable or quasi-contractual?), tend to the view that rights in subrogation are not caught by an anti-assignment clause. Nor am I prepared to give weight to the possibility of the argument within the analysis of this case without deciding the point.

104. Dassault's case must therefore (for present purposes) stand or fall on the basis that English law subrogation would not fall foul of Article 15. I therefore conclude that the position on subrogation is a relevant factual matrix point which supports the argument of MSI. However, having said that, the point is simply a factual matrix point. It does not go to the commercial purpose of the clause or the Sale Contract. It resonates on the level of commercial common sense. But at the same time it is a point which, if it drives the conclusion which MSI seeks, also logically applies to insurance claims across the board, regardless of mechanism.

105. I would also add that for the purposes of this judgment the subrogation argument also highlights the possibility that the conventional position on subrogation may itself not depend entirely on analysis of the parties' intentions to be gleaned from the clause, but may in part be driven by public policy. That opens the door to a consideration of the extent to which public policy is a factor in the analysis which I have to perform.

Public Policy

106. Mr Smith indeed, having in writing merely adjured the Court to be slow to construe the clause so as to restrict access to the insurance market, orally invoked what he described as a policy in favour of insurance: "*a question of public policy arises… because the general view of English contractual law is that it's sensible for parties to obtain insurance and they should not be penalised for doing so*".

107. This really seems to be what underpins MSI's fallback position, which was to say that the clause should not be construed as applying to insurance at all – even if there were a purely voluntary assignment. The way it was put was that if none of the "*purposes or aims [are] undermined by a transfer to an insurer and if applying a no assignment clause to a transfer to an insurers is going to have the effect of limiting a party's right or access to the insurance market, then we say those are good reasons for construing the clause as not applying to such a transfer*." This is not an argument of construction by reference to this case – it is an argument which plainly has a broader application and where the result could only be achieved by placing a public policy ahead of clear words.

108. This argument must indeed in the end be one which depends upon public policy, because it is not possible to get to the result which MSI seeks via the express words, and it is fairly plain that one could not imply into the clause a blanket exception for insurance – both because it would be contrary to the express words of the contract and because it would fail the business efficacy test (insurance is not necessary, the relevant party can, via the terms of the contract, seek consent, and it is possible to contract out of transfer under Japanese law).

109. This feeds into the passage in *Lenesta Sludge* noted by Professor Clarke. Although the House of Lords there refused to find a prohibition on assignment to be contrary to public policy, the argument as to public policy in this context was made and only rendered unnecessary by a strong purposive construction. I can see that there must be scope for it to resurface in a narrower format where a purposive approach to construction cannot achieve a result in line with perceived public policy.

110. However where this goes is to suggest that an orthodox construction does not assist MSI and that any decision in favour of the case advanced by MSI is dependent on public policy.

Conclusions

111. The correct approach to construction was not in issue and the authorities do not require repetition here. Due weight must be given via an iterative process to the words, the commercial purpose, the factual matrix and commercial common sense as well as to any indications or principles provided by the authorities; but at the end of the day the exercise is about identifying what the parties have agreed and objectively intended.

112. As I have concluded above, the authorities establish no clearly applicable principle, but they delineate a distinction between willing/voluntary and unwilling/involuntary transfers, subject to any refinements required by wording or commercial purpose or context. There is room to argue about exactly where they place that line, but there are certainly indications that (leaving aside the process of construction of a particular clause) any degree or "taint" of voluntariness will be caught.

113. Taken alone, the wording of Article 15 in my judgment harmonises entirely with that approach. The broad wording points to a general application, subject only to what is saved by the wording: "by any party". The same degree of voluntariness indicated in the authorities can perfectly well be accommodated by the "by any party" wording; and in my judgment that line also accords best with the other wording of the clause – both as to assignment/transfer and the route round the clause via consent.

114. The question then becomes the extent to which the requirements of commercial purpose and commercial common sense require a reading which does not accord with the wording and therefore move the dial from the authorities and the textual analysis. While this could be done by a purposive reading it is worth bearing in mind that (as I have noted above) it could not be done by implication of a term.

115. As I have noted above there is nothing in the materials which assist on MSI's primary argument on "operation of law".

116. There is no obvious argument in favour of MSI's second approach as to insurance via commercial purpose itself; insurance does infringe against the natural commercial purpose of the clause. While pause for thought is given by the position on subrogation it is not a strong commercial purpose argument. At the same time there is a valid conceptual distinction between subrogation and assignment. The reality of the situation is that a pure subrogation is different from transfer. It develops for different reasons. It cannot therefore be said that maintaining this line would produce a result which must be contrary to the parties' intentions.

117. Further the argument that this approach would permit of a bright line rendering the entire question easy is delusive. There is no easy answer in the context of anti-assignment clauses – as Professor Goode notes there are other difficult distinctions to draw: "*Does it prohibit equitable as well as statutory assignments? Does it extend to declarations of trust and to equitable charges? Does it embrace the sum received by the assignor from the debtor?*" These questions may equally not have easy answers where, as he notes "*the distinction drawn in the cases between an equitable assignment and a declaration of trust or mere charge is a highly technical one. It may be true that the former involves a transfer of rights while the latter entails a creation of rights, but the effect is the same.*" So also there is an uneasy line in the cases where a purported assignment has been held to take effect as a declaration of trust of the benefit of the contract by the assignor in favour of the assignee – noted by Professor Clarke at paragraph 6-8, including references to the academic articles criticising this approach.

118. Nor does the course urged by MSI avoid difficult questions even in the context of this case. As noted in argument, it is odd that on the Tribunal's/MSI's primary interpretation all turns on whether the transfer takes place pursuant to general law not contract in circumstances where, whichever it is, it is because the parties entered into a contract in those terms.

119. In the end I conclude that the context/commercial purpose indications in favour of what is certainly not a text led construction are not sufficiently clear or weighty to displace the position indicated by a consideration of the words. Any more purposive reading would be driven by public policy considerations and not by other relevant clauses or the overall purpose of the clause and the contract. While a case can be made by reference to factual matrix and commercial common sense, the basis for this is insufficient, particularly given the breadth of the reading and the implications in other cases (such as purely voluntary assignments). I do therefore come to the conclusion that the instinctive reaction that this transfer must be permissible simply because it arises in the context of insurance is wrong.

120. The authorities and the clause say in harmony that the line is one between transfers which are truly unwilling/involuntary and those which are willing/voluntary in some degree. Even if there might be debate about whether the line should be drawn at any "taint of voluntariness" or require something more (such as some inferred intention to transfer), on the facts of this case, with the multiple routes open to MBA to avoid the transfer, there can be only one answer.

The triggering of Article 25 of the Japanese Insurance Law was on multiple levels a consequence of voluntary acts by MBA.

121. As is probably apparent, I have reached this conclusion with an unusual degree of hesitation. Ultimately I conclude that it is the more robust analysis intellectually. The contrary view has natural attractions; however in my judgment it involves moving beyond the pure exercise of construction and into policy considerations; it also involves writing something of a blank cheque which may have unexpected or undesirable consequences. I conclude that the right course is to give effect to the contractual wording and not strain to reach a result which is essentially one of public policy – and which does in truth rewrite the parties' agreement.

122. Accordingly, Dassault's challenge succeeds. The Tribunal has no jurisdiction to decide any dispute between Dassault and MSI that is the subject of the reference by in the ICC arbitration (save potentially as regards consequential orders) and its Award falls to be varied accordingly.