England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2016] EWCA Civ 386
Case No: A3/2015/0679

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE TEARE

Royal Courts of Justice
Strand, London, WC2A 2LL
20/04/2016

B e f o r e :

THE RIGHT HONOURABLE LORD JUSTICE MOORE-BICK (THE VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION)
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE MCFARLANE

Between:

SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) **Respondent**

- and -

CONTAINERSHIPS DENIZCILIK NAKLIYAT VE TICARET A.S. ("YUSUF CEPNIOGLU") **Appellant**

Mr David Lewis QC & Mr Oliver Caplin (instructed by Clyde & Co LLP) for the Appellant
Mr Chirag Karia QC (instructed by Holman Fenwick Willan LLP) for the Respondent
Hearing dates: 24th & 25th February 2016

HTML VERSION OF JUDGMENT

Lord Justice Longmore:

Introduction

1. This appeal is another case in which this court has to ascertain the juridical nature of a foreign statute which gives a victim the right to sue a defendant's insurer directly without first suing the insured. Our own provisions are contained in the Third Parties (Rights Against Insurers) Act 1930 ("the 1930 Act"), since the similarly named Act of 2010 has not yet been brought into force. But our courts have also had to consider foreign statutes in cases in which it is necessary to decide what law governs the direct claim. This may be relevant for deciding whether the right of direct suit is a contractual right governed by English law for the purposes of obtaining permission to serve proceedings out of the jurisdiction or of establishing the applicability to such suit of an arbitration or exclusive jurisdiction clause and, if so, whether it is appropriate to protect any such right by invocation of the court's jurisdiction to grant an anti-suit injunction. In such cases the question which has to be determined is whether the intention and effect of the foreign statute is to enable the victim to enforce against the insurer essentially the same obligations as those that could have been enforced by the insured or whether the statute has created a new and independent right which is not intended to mirror the insurer's liability under the contract of insurance. If the former, it may be right to hold that the victim is bound by any jurisdiction or arbitration clause in the insurance contract (with the consequences that service out of the jurisdiction and even an anti-suit injunction might be appropriate); if the latter, any jurisdiction or arbitration clause would be unlikely to bind the victim and, in that event, service out of the jurisdiction and anti-suit injunctions would, on the face of things, be inappropriate.

2. As far as English law is concerned, it is clear that the victim is enforcing the rights of the insured against the insurer. That is because the rights of the insured against the

insurer are, by virtue of section 1(2) of both the 1930 Act and the 2010 Act "transferred to and vest in" the third party to whom the insured is liable. It follows that the victim will be bound by any arbitration clause in the insurance contract, see The Padre Island [1984] 2 Lloyd's Rep 408, a case which would not be decided differently even if the 2010 Act were in force now.

3. Foreign legislation may not be so clear. In Through Transport Mutual Insurance Association (Eurasia) Ltd v New Indian Assurance Co Ltd, The Hari Bhum (No. 1) [2004] 1 Lloyd's Rep 206; [2005] 1 Lloyd's Rep 67 and [2005] 1 All ER (Comm) 715 the court had to consider the Finnish Insurance Contract Act 1994 which provided that a person who had sustained loss under general liability insurance was entitled to claim compensation

> "in accordance with the insurance contract direct from the insurer"

if the insured had been declared bankrupt or was otherwise insolvent. Moore-Bick J had little difficulty in saying that the third party was seeking to enforce a contractual obligation derived from the contract of insurance rather than some independent contract of recovery; it was therefore for the proper law of the contract (English law) to determine whether the third party was bound by the arbitration clause. He held that the third party was so bound. He went on to grant an anti-suit injunction to protect the arbitration clause, a decision which was, in due course, reversed by the Court of Appeal in circumstances to which I shall later have to refer. But it was not suggested by this court that his decision that the essential nature of the right was a right to enforce the insurance contract (and thus the arbitration clause) was wrong.

4. The relevant Spanish law was considered by Hamblen J and this court in The London Steam Ship Owners Mutual Insurance Association Ltd v The Kingdom of Spain (The Prestige (No. 2)) [2014] 1 Lloyd's Rep 309; [2015] 2 Lloyd's Rep 33 in which the shipowners' liability for oil pollution was compulsorily insured up to a certain amount by the claimant. Article 117 of the Spanish Penal Code enabled an injured party to bring a direct claim against the shipowners' insurer in accordance with Article 76 of the Insurance Contract Act 1980. That Article provided that the injured party was entitled to a direct action against the insurer

> "to demand of him the fulfilment of the obligation to compensate."

The Article also provided

> "Direct action shall be exempt from the defences that the insurer may have had in respect of the insured."

The Provincial Court of Madrid had held in an earlier case that the right of the third party was "exclusively covered by the insurer against the obligation to indemnify for acts established by policy", a conclusion which was deduced (inter alia) from

> "the need for it to be related to the first sentence of Article 76 which grants the wronged third party … the action to demand from the insurer compliance with its obligation to indemnify."

In the light of this judgment and other evidence from a Spanish lawyer, Hamblen J held that although the third party's right against the insurer was independent in origin it was not independent in content.

> "It derives from the law rather than the contract, but it does not exist separately from the contract and its content reflects the contract, save for the Article 76 exceptions."

It was therefore not an independent right, a conclusion with which this court agreed. Awards obtained by the claimant pursuant to the arbitration clause in the insurance contract were therefore made with jurisdiction and were enforceable awards.

Facts of this case

5. In this case it is Turkish law which has to be considered. Part 2, chapter 1(B) of the Turkish Insurance Contract Law deals with liability insurance and provides as follows in translation:-

> "**I General Provisions**
>
> **1. Subject and Scope of the Contract**
>
> Article 1473
>
> 1) Under a liability insurance contract, the insurer shall pay to the victim compensation up to the amount stipulated in the insurance contract, for the liability of the insured due to an event that occurred, unless otherwise agreed, during the contract period, even if the loss materialised after that period.
>
> 2) If the insurance is taken out for the liability related to the enterprise of the insured this insurance shall cover, unless otherwise agreed, the liability of the representatives, administrators, auditors and also the employees of the insured. In that case, the insurance shall be deemed taken out in favour of those persons.
>
> …
>
> **6. Right of Direct Action**
>
> Article 1478
>
> The victim may claim its loss up to the insured sum directly from the insurer provided that the claim is brought within the prescription period to

the insurance contract.

7. Right of the Insurer to obtain Information from the Victim

Article 1479

The insurer may request information from the victim for determining the cause and the extent of the loss. The victim must provide all of the documents that can reasonably be provided…

II Compulsory Liability Insurance

1. Obligation of Contracting

Article 1483

Subject to the provisions of other legislation, insurers shall not refrain from granting cover for compulsory insurances in the insurance classes in which they are active.

2. Obligation of Performance as against the Victim

Article 1484

1) In case the insurer is totally or partially discharged of its obligation of performance towards the insured, its obligation of performance as against the victim shall remain effective up to the sum insured under the compulsory insurance.

2) The termination of the insurance relationship shall become effective after one month following the notification by the insurer to the competent authorities that the contract has expired or is to expire.

…"

6. Teare J observed of these provisions that it was apparent from both articles 1473 and 1478 that Turkish law confers upon "the victim" a right to sue the liability insurer. Such a right was not given by the liability insurance contract because only the insured can sue under the contract. However, there was obviously a close connection between the victim's right and the insured's right under the contract because the limit of the insurer's liability to the victim is the limit under the contract and any claim must be brought within the time period allowed by the contract.

7. On 8th March 2014 the vessel YUSUF CEPNIOGLU, which was operating on a liner service between Turkey and North Africa, grounded on the Greek island of Mykonos. Salvage services were rendered but the vessel was a total loss. At the time of the grounding the vessel was laden with 207 containers. The cargo was being carried pursuant to 74 bills of lading issued by the time charterers. The proper law

and jurisdiction of the bills is that of Turkey. Cargo claims have been notified to both the owner and charterers of the vessel. They are both Turkish companies. The charterers have commenced arbitration proceedings in London against the owner pursuant to the terms of the time charter.

8. The owner of the vessel was a member of the claimant Association (which I shall call "the Club"). The owner therefore had insurance against third party claims pursuant to the terms of its Club cover. Those terms provide for English law and London arbitration, for the Club only to be liable if the owner has paid the claims against it ("the pay to be paid" clause) and, further, that an arbitration award is a condition precedent to the Club's liability.

9. In May 2014 the defendant charterers commenced proceedings in Turkey (the "precautionary" proceedings) in which they sought to attach the Club's assets in Turkey up to a value of US$13.5m as security for a claim pursuant to the Turkish statute which gives the charterers a right of direct action against the Club. It is these proceedings, and the intended "substantive" proceedings in support of the right of direct action, which are the subject of an anti-suit injunction, sought in these proceedings by the Club.

10. The debate before the judge concerned two matters; first, whether the court has jurisdiction to serve proceedings out of the jurisdiction on the charterers in Turkey and, second, if so, whether there are sufficient grounds to justify the grant of an anti-suit injunction. The judge held that there was jurisdiction to serve proceedings out of the jurisdiction and that an anti-suit injunction should be granted to prevent the charterers from suing the Club directly in Turkey. He gave permission to appeal.

The Submissions

11. Mr David Lewis QC for the charterers of the vessel accepted that if the judge was right to conclude that an anti-suit injunction to restrain the continuance of proceedings in Turkey should be granted, there was jurisdiction to serve the claim for that injunction outside the jurisdiction and he accordingly directed his fire to the grant of the injunction.

12. In broad outline he submitted:-

    i) the judge was wrong to characterise the proposed substantive proceedings in Turkey as proceedings to enforce a contractual right. The right claimed by the charterers was an independent right, granted by the Turkish statute and proceeded by way of direct action against the insurers with whom the charterers had no contract; and

    ii) while the judge was right to inquire, before an injunction could be granted against a foreign litigant, whether the bringing of the proposed proceedings was "vexatious and oppressive", he was wrong to say that it

was vexatious and oppressive since the charterers were merely taking advantage of a course of action granted to them by Turkish law.

13. Mr Chirag Karia QC for the Club submitted:-

> i) the judge was right to classify the proposed proceedings as proceedings which were essentially contractual rather than an independent right of action because the charterers could only claim what was available to the insured under the contract of insurance;
>
> ii) the charterers were thus obliged to submit their claim to arbitration in London under the Club rules;
>
> iii) the obligation to arbitrate being part of the bundle of rights and obligations passing to the charterers was a right which the court should protect unless there were strong reasons for not doing so, as per The Angelic Grace [1995] 1 Lloyd's Rep 87; and
>
> iv) it was in any event vexatious and oppressive for the charterers to proceed in a Turkish court when they ought to be arbitrating the dispute in London.

Characterisation of the claim

14. If an issue arises in English proceedings with a foreign party it is necessary to decide by what law that issue is to be determined. The issue in the present case is whether it is appropriate for the English court to grant an anti-suit injunction; the first question is whether that issue should be determined in accordance with English law or some other law. That in turn must depend on ascertaining either the nature of the right sought to be asserted namely the right not to be troubled (or, as English lawyers would say, vexed) by foreign proceedings or, more broadly, the nature of the right asserted in the foreign proceedings which is sought to be restrained.

15. The importance of correctly characterising the relevant issue for the purpose of determining by which law that issue is to be decided was stressed in Macmillan Ltd v Bishopsgate Investment Trust Plc (No. 3) [1996] 1 WLR 387 in which Auld LJ said (407 B-C):-

> "Classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the competing system of law which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other systems."

16. In the light of this dictum, it would be too narrow to characterise the issue in the case as whether the Club has the right not to be vexed by foreign proceedings or even

whether the Club has the right to rely on the London arbitration clause in its rules, a question which is liable to be "constrained by … notions … of the lex fori" (English law) but rather as held in the Hari Bhum (No. 1) and the Prestige (No. 2) whether the charterers' right to sue the Club direct is essentially a contractual right (in which case it will be governed by English law as the proper law of the contract) or an independent right (in which case it will be governed by Turkish law).

Contractual or independent right?

17. The judge made findings (of fact) in relation to Turkish law from which it would not be right for us to depart. These included:-

    i) the victim's right is confined to a right to sue in respect of the insured perils, not perils typically insured by P & I Clubs generally and still less in respect of different perils as identified in the Turkish statute (paras 17, 18 and 20);

    ii) the loss sued for has to be within the terms of the policy (para 19);

    iii) any claim is subject to the contractual limit contained in the Club's cover (para 21);

    iv) the liability must be due to an event occurring during the period of the contractual cover (para 21);

    v) any claim must be brought within the period required by the Club's contractual cover (para 21);

    vi) any claim would be subject to the choice of English law and London arbitration in the Club cover with the possible qualification (as to which the judge made no finding) that those provisions would not be enforceable "where to do so would be contrary to public order" because English law or arbitration would override any provision of Articles 1473-1484 (paras 24-25);

    vii) P & I (Protection and Indemnity) cover is compulsory under Turkish law (presumably, though the judge did not say so in terms, for every Turkish shipowner or every owner of a Turkish flag vessel) (para 30);

    viii) By reason of Article 1484 the Club, although its liability to the member has been partially or totally discharged, "may" remain liable to the victim. To "some" extent therefore, Turkish law divorced the right of direct actions from the claim under the Club cover (para 26); and

    ix) Turkish law would not allow the "pay to be paid" clause to be enforced against the victim because reliance on the clause as against a victim would render the right of direct action conferred by Article 1478 ineffective since

the shipowner has not paid the charterers' claim "and is unlikely to do so" (para 31).

18. This last finding (apparently somewhat controversial in Turkish law because there is no statutory provision or decision expressly in point) is, of course, the reason for the present dispute. If the liability of the Club to the charterers is to be determined by English law, it will be a defence that the shipowner has not paid the charterers the amount which they claim in respect of their liability to the bill of lading holders; if it is to be determined by Turkish law, the judge has found that the Club would have no such defence.

19. Not surprisingly Mr Lewis for the charterers focused on the findings that P & I cover was compulsory and that the pay to be paid clause was not enforceable in Turkish law to submit that the charterers' right of suit against the Club was essentially an independent right rather than a contractual right. He also sought to rely on the cautious finding at (viii) above that the Club "may" remain liable to the victim, even if its liability to the member has been discharged. The judge held, however:-

> "the essential content of the right would appear to be reflected in the contract between the Club and its member. The extent of the exceptions is not such as to change the essential nature of the right created."

20. I agree with the judge. Findings (i) – (vi) above show the nature of the victim's right in Turkish law is to a large extent circumscribed by the contractual provisions between the Club and its member. Although findings (vii)-(ix) to some extent point the other way, it is only to a limited extent. The extent to which Turkish law will not allow defences open to the Club to operate against the victim is obscure and controversial. The fact that the "pay to be paid" clause would not be enforced in Turkey can hardly be permitted to be decisive of the question of characterisation. As the judge pointed out, the non-enforceability of defences was much clearer in The Hari Bhum (No. 1) and The Prestige (No. 2). The direct claim in those cases was nevertheless classified as essentially a contractual rather than an independent right. It follows that it should be classified as essentially contractual in this case also.

21. Once it is decided that the charterers are exercising an essentially contractual right, it must follow that the charterers are bound to accept that their claim is governed by English law and must be arbitrated in London. The charterers' proposed substantive Turkish proceedings would be a contravention of that obligation. The question therefore arises whether, as a matter of English law, the Club is entitled to an injunction to restrain the charterers from instituting or continuing with such proceedings.

Anti-suit injunction: the principles

22. If the charterers were actually a party to a contract with the Club with its London arbitration clause but proposed to institute proceedings in a foreign court, there would be no doubt that they would be restrained from doing so by the grant of an

injunction unless there was good reason not to do so, see The Angelic Grace. Mr Lewis submits that this case is different because the charterers have not agreed to arbitrate in London (or anywhere else) and therefore the normal test for the grant of an anti-suit injunction applies namely that no such injunction will be granted unless the foreign proceedings are "vexatious and oppressive", see S.N.I. Aerospatiale v Lee Kui Jak [1987] 1 A.C. 871. In this case the Turkish charterers are only pursuing a right given to them by Turkish law and there is nothing vexatious or oppressive about that.

23. This question was considered in DVA v Voest Alpine (The Jay Bola) [1997] 2 Lloyd's Rep 279 in relation to subrogated insurers of voyage charterers (Voest) who had brought proceedings in Brazil against DVA, disponent owners (who had themselves time chartered the Jay Bola from her actual owner) for breach of a contract of carriage from Brazil to Thailand contained in the voyage charterparty which contained a London arbitration clause. The insurers were not a party to the contract of carriage but, by virtue of their rights of subrogation, became the assignees and transferees of the voyage charterers' rights and were entitled under the law of the insurance contract to sue the time charterers in their own name. After citing The Angelic Grace, Hobhouse LJ, at page 285, pointed out that the insurers had no contract with the time charterers but were the assignees or transferees of the rights of the voyage charterers; they could not, however, he said, enforce those rights without being obliged to refer the dispute to arbitration. He referred to various authorities including The Padre Island (referred to in paragraph 2 above) and continued (page 286):-

> "These authorities confirm that the rights which the insurance company has acquired are rights which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligation of the time charterers to pay that award. Likewise, the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognising the obligation to arbitrate.
>
> Miss Bucknall [for W.A.V. the insurers] submits that, even so, there is no right which can be asserted by the time charterers against the insurance company which gives a cause of action by the former against the latter. She submitted that to recognise any such cause of action would amount to treating the burden of the contract as having been transferred, something which would only occur if there had been a novation. In the present case all that had been transferred was a right of the voyage charterers against the time charterers. The burden of the contract was not transferred. The insurance company came under no actionable liability to the time charterers. In my judgment this argument fails to understand the nature of the equitable remedy which is being sought in this action. The simplest

way in which to illustrate this is to take a simple analogy. If the assignee of a legal right in action seeks to enforce that right against the debtor without taking into account an equitable set-off which the debtor was entitled to raise against the assignor, the debtor's remedy, prior to the Common Law Procedure Acts and the Judicature Acts of the last century, would have been to apply in the Court of Chancery for an injunction to restrain the assignee from asserting the common law right in the Common Law Courts unless and until he recognised the equitable right of the debtor. The injunction was granted to provide the debtor with the appropriate protection from the unconscionable conduct of the assignee; it does not depend upon any liability of the assignee for the sums to be set-off. The right to apply for an injunction is not a "cause of action" of the same character as the right to sue for damages for breach of contract or tort or to collect a legal debt. It is an application for an equitable remedy to protect the plaintiff against the consequences of unconscionable conduct. Since the fusion of the jurisdiction of the Chancery and Common Law Courts, the need of the aggrieved party to apply for an injunction no longer arises and the common injunction has been abolished by statute. He can raise the equity in response to and in the same proceedings as the common law action. However, where the action is brought by the assignee in another jurisdiction which does not recognise the equitable right of the debtor, the debtor's only remedy is (just as it was in the first half of the last century) to apply for an injunction to restrain the assignee from refusing to recognise the equity of the debtor. The present case is such a case. The insurance company is failing to recognise the equitable rights of the time charterers. The equitable remedy for such an infringement is the grant of an injunction.

This conclusion accords with the authorities about the scope of the jurisdiction to grant injunctions. The breadth of this jurisdiction has been reaffirmed in the judgment of the Judicial Committee of the Privy Council delivered by Lord Goff in Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] 1 A.C. 871 at p 893. The present case falls clearly within the scope of that jurisdiction because the application of the time charterers for an injunction has been made to protect a contractual right of the time charterers that the dispute be referred to arbitration, a contractual right which equity requires the insurance company to recognise. The jurisdiction in this case does not depend upon such concepts as forum non conveniens or oppressive and vexatious conduct. It depends upon the contractual rights of the time charterers although it can fairly be said that those rights show that Brazil is an inappropriate forum for the determination of the dispute and that the conduct of the insurance company has in fact been oppressive."

Sir Richard Scott V-C agreed saying:-

> "WAV is bound by the arbitration agreement not because there is any privity of contract between WAV and DVA but because Voest's contractual rights under the sub-charter-party, to the benefit of which WAV has become entitled by subrogation, are subject to the arbitration agreement which, too, is part of the sub-charter-party. WAV cannot enforce those contractual rights without accepting the contractual burden, in the form of the arbitration agreement to which those rights are subject (cf. Halsall v Brizel [1957] Ch. 169 and Tito v Waddle (No. 2) [1977] Ch. 106 at p. 309). WAV is, through subrogation, an assignee from Voest of Voest's contractual rights against DVA. DVA is contractually entitled, whether as against Voest or any assignee from Voest, to require the enforcement of those rights to be pursued by arbitration. WAV's attempt to enforce those rights otherwise than by arbitration is a breach of DVA's contractual entitlement. I agree with Lord Justice Hobhouse that DVA's remedy is, prima facie, the grant of an injunction to restrain the attempt."

24. I regret the length of these citations but they are extremely apposite since they deal with the very question raised by Mr Lewis in this case namely the relevance of the defendant not being a party to the contract containing the arbitration clause and hold that, if he is obliged to arbitrate, the fact that he is not a party to the contract containing the arbitration clause is irrelevant. They also make clear that the only way in which the claimant can be protected is by way of an injunction. The reference to Halsall v Brizel is instructive because in that case Upjohn J upheld the right of the beneficiary of a positive covenant given by the original house owners on a building estate to pay for the upkeep of the roads on the estate (a covenant which was prima facie unenforceable as not running with the land) because the defendants could only claim to have a right to use the roads on the estate if they were prepared to pay the costs which their predecessors in title had agreed to pay. The effect of the Jay Bola decision in 1997 is that the Commercial Court became free to follow the path pioneered by the Chancery Division 40 years earlier.

25. The Jay Bola was followed by HH Judge Anthony Diamond QC sitting as a judge of the Commercial Court, in The Charterers' Mutual Assurance Association v British and Foreign [1997] I.L.P. 838 in which the defendant availed itself of provisions of French law entitling a victim to proceed against an insurer by means of an action directe. HH Judge Diamond held first (para 28) that the right to bring an action directe was governed by the limits and defences available to the insurer under the terms of the relevant liability policy and secondly (para 44) that the rights sought to be enforced against the insurers were limited and qualified both by the arbitration clause and the equivalent of the pay to be paid clause in the policy. He added:-

> "The respondents urged that the proceedings in France infringe no legal or equitable right of the arbitration. I reject this submission since in my judgment it is clear that any rights which the respondents may have acquired or may in the future acquire are rights which are subject to the arbitration clause and which can only be explored by arbitration in

London. The position is not distinguishable from that considered by the Court of Appeal in The Jay Bola."

26. Addressing the argument that the respondents had committed no breach of contract by instituting proceedings in France he said (para 53):-

> "…nevertheless under English law, which is the proper law of the relevant contracts, the right of any member or of any third party to claim an indemnity from the Association is limited or qualified by the arbitration and jurisdiction clause set out in the Association's rules. If it be assumed, as may be the case, that a French court would not recognise that clause, then unless the court intervenes by way of injunctive relief the clause will be wholly ineffective and there will be no means of enforcing the Association's right under English law. There will be no possibility of the Association claiming damages for breach of contract. The situation will be allowed to continue which under English law is to be regarded as unconscionable and so unjust.
>
> [54] This is not, therefore, a case where the court is confronted simply with the position that the foreign court may or may not have jurisdiction, nor is it a case where the *forum conveniens* may be one jurisdiction rather than another. It is a case where the applicant for injunctive relief has a right to require disputes to be determined either by an English court or by arbitration in London and where that right would be ineffective unless an injunction be granted. In this context either considerations of comity play little or no part or, alternatively, they are greatly outweighed by the factors I have mentioned."

27. Mr Lewis submitted that the Charterers' Mutual case was indeed distinguishable from The Jay Bola because in The Jay Bola the claimants were transferees or assignees of the rights under the policy and, for that reason, bound by the terms of the policy, while in the Charterers' Mutual case they were beneficiaries of a statutory right of action which said nothing about being bound by the terms of the policy. It seems to me that, while that was a factual difference between the two cases, it is not a distinction of principle because the insurers had a right to require arbitration in both cases which was an empty right unless enforceable by injunction.

28. The same approach was taken by Aikens J in Youell v Kara Mara Shipping [2000] 2 Lloyd's Rep 102 which concerned an exclusive jurisdiction clause and a direct right of action contained in a Louisiana statute but it is fair to state that, since the application was only for an interim injunction, he only had to decide the case on the basis of arguability.

29. The Hari Bhum (No. 1) in the Court of Appeal [2005] 1 Lloyd's Rep 67 and 1 All E.R (Comm) 715 came to a different conclusion which, in Mr Lewis's submission was preferable to the result in The Jay Bola and the Charterers' Mutual cases. As already mentioned, the direct action in that case was given by a Finnish statute but

the claimant (New India) was nevertheless subject to the arbitration clause because the action was essentially contractual rather than an independent action. In spite of this the court concluded that, on the facts of the case, the proceedings could not be said to be oppressive or vexatious and it would not therefore be just and convenient to grant an injunction restraining the defendant from pursuing a claim under the Finnish statute in Finland. Neither The Jay Bola nor the Charterers' Mutual case seems to have been cited.

30. Clarke LJ delivered the judgment of the court consisting of Lord Woolf CJ, himself and Rix LJ. He pointed out in paragraph 52 that New India were not a party to the arbitration agreement, because they were neither an original party nor did they become a party by a novation or transfer to them of the rights and obligations of the insured (the starting point, it may be noted, of Ms Bucknall's rejected argument for the third party in The Jay Bola). He then added that this fact was important on the question whether an injunction should be granted. At paragraph 63 he referred to the two declarations made at first instance by Moore-Bick J. The declaration that New India was bound to refer their claims to arbitration was upheld but the second declaration that the proceedings begun in Finland by New India were in breach of the arbitration clause was thought to be unsatisfactory if it meant that New India were in breach of contract, because they were not in breach of contract. This second declaration was accordingly set aside. Moore-Bick J had granted an injunction to restrain proceedings in Finland. On behalf of New India Mr Christopher Smith submitted:-

> i) an anti-suit injunction should not be granted in cases to which Council Regulation (EC) 44/2001 applied since Finland was a member of the European Union and on the authority of Turner v Grovit [2005] 1 AC 101 and Erich Gasser v Misat [2005] QB 1 injunctions should not be granted by the courts of one member of the European Union to restrain proceedings in another member state of the European Union; and
>
> ii) the Hari Bhum case was different from previous cases and there was no good reason to restrain New India from using a Finnish statute in Finland enacted to provide third parties with rights against liability insurers free of what he called the artificial shackles of the pay to be paid clause.

31. The court rejected the first of these submissions to the extent that, if New India had been a party to the arbitration clause so that the foreign proceedings meant that New India were in breach of the arbitration clause, an injunction would have been appropriate (a conclusion now rendered ineffective by the decision of the CJEU in the Front Comor [2009] AC 1138). But it did accept Mr Smith's second submission saying:-

> "[95] The question is whether in all the circumstances the English court should grant an injunction restraining New India from bringing its claim under the Finnish Act in Finland. It is always a strong step to take to prevent a person from commencing proceedings in the courts of a

contracting state which has jurisdiction to entertain them. The ECJ has either held or in effect held that no such injunction should be granted in the case of an exclusive jurisdiction clause (Erich Gasser GmbH v MISAT Sri) or on the ground that the proceedings are vexatious and oppressive (Turner v Grovit). New India is not in breach of contract in bringing these proceedings in Finland, so that the principles in cases like The Angelic Grace do not apply directly. In this regard we accept Mr Smith's submission that, while such cases may provide some assistance by analogy, they do not apply by parity of reasoning, as the judge thought. None of the cases to which we were referred, including Akai Pty Ltd v People's Insurance Ltd [1998] 1 Lloyd's Rep 90, was considering a case quite like this.

[96] Further, this is not a case in which it can fairly be said that the proceedings in Finland are vexatious or oppressive. New India is simply proceedings in Finland under a Finnish statute which gives it the right to do so. The question is whether the English court should restrain it from doing so.

[97] Given our view that the principles in the decided cases cannot be applied by parity of reasoning and given the further fact that the judge did not have the assistance of either Erich Gasser GmbH v MISAT Sri or Turner v Grovit, both of which have made an important contribution to the jurisprudence in this area, this court is in our opinion free to form its own conclusion on the question whether to grant an anti-suit injunction on the facts of this case. We have reached the conclusion that, having regard to all the circumstances of the case, including those set out above and the reasoning underlying the approach of the ECJ in Turner v Grovit, this was not a case in which, in the language of s 37(1) of the Supreme Court Act 1981, it was or would be just and convenient to grant an injunction restraining New India from pursuing a claim under the Finnish Act in Finland."

32. The difficulty with these paragraphs, with the very greatest respect, is that the decided cases (although apparently uncited) included The Jay Bola and the Charterers' Mutual, cases which concluded that the principles in The Angelic Grace did apply by parity of reasoning when the third party was obliged to comply with the arbitration clause even though he was not a party to the arbitration agreement. In these circumstances there is, in my view, a conflict between The Jay Bola and The Hari Bhum (No. 1) and, on well-recognised principles, it is necessary to choose between them.

33. For myself I have little hesitation in preferring The Jay Bola to The Hari Bhum (No. 1) for the simple reason given by Hobhouse LJ in the earlier case (at page 286) namely that the Club's application for an injunction is made:-

> "to protect a contractual right … that the dispute be referred to arbitration, a contractual right which equity requires the [third party/victim] to recognise."

It is only by way of an injunction to restrain Turkish proceedings that the charterers in the present case can be required to recognise the Club's right to have the dispute referred to arbitration. In this regard I would respectfully adopt the criticisms of The Hari Bhum (No. 1) to be found in Dicey, Morris and Collins, The Conflict of Laws 14th edition (2006) 16-092 footnote 37 (despite the fact that these criticisms do not seem to be repeated in the 15th edition (2012)) and Mr Thomas Raphael's valuable book The Anti-suit Injunction (2008) para 10.17. - 10.20.

34. Mr Lewis submitted that comity required the English court to permit the Turkish charterers to proceed in Turkey pursuant to the Turkish statute but as HH Judge Diamond QC observed in the Charterers' Mutual case:-

> "either considerations of comity play little or no part or, alternatively they are greatly out weighed by the factors I have mentioned"

namely the nature of the right to have disputes referred to arbitration. Moreover, invocation of comity in cases of this kind is not particularly apposite because it is never clear which country should give way to which. If a Turkish court applying comity defers to the right contained in the English contract and the English court defers to the right contained in the Turkish statute, the dispute will never be decided anywhere. If, moreover, considerations of comity do not apply when statutes expressly disallowing reliance on exclusive jurisdiction clauses are invoked, they can hardly apply when direct action statutes are invoked, see Akai Pty Ltd v Peoples Insurance Co [1998] 1 Lloyd's Rep 90 and OT Africa Line v Magic Sports Wear Corp [2005] 2 Lloyd's Rep170.

35. As a matter of principle, therefore, the right approach is to apply The Angelic Grace and ask whether there are good reasons why an injunction should not be granted. There is no need for the Club to show vexatious or oppressive conduct. In the present case there is no good reason why an injunction should not be granted. There is no question of delay or any inequitable conduct on the part of the Club, nor can the matters set out below affect the result.

Anti-suit injunction: the exercise of discretion

36. The judge decided (in my view unnecessarily) that it was for the Club to show that the proceedings in Turkey were vexatious and oppressive and that it succeeded in surmounting that hurdle. Nothing in Mr Lewis's submissions persuaded me that the judge had taken irrelevant considerations into account or failed to take relevant considerations into account or had otherwise exercised his discretion on a perverse basis. The matters relied on by Mr Lewis as matters which the judge should have taken into account were:-

i) that the charterers were not in breach of contract and merely exercising rights given to them by a Turkish statute;

ii) that if they were prevented from exercising those rights they would have to go to arbitration where they would be met (and, in all probability, defeated) by the "pay to be paid" clause;

iii) considerations of comity;

iv) the Club encouraged Turkish shipowners to place their liability insurance with the Club;

v) many countries in addition to Turkey do not enforce the pay to be paid clause; and

vi) victim protection, as recognised by the Turkish statute and by the fact that liability insurance in respect of marine rights is compulsory in Turkey, is reflected in both European law and English law by virtue of the UK Merchant Shipping (Compulsory Insurance of Shipowners for Maritime Claims) Regulations 2012 which transpose into English law the provisions of Directive 2009/20/EC.

But the judge took account of all these matters in paragraphs 74-81 of his judgment. He concluded nevertheless that the proceedings in Turkey would be oppressive and vexatious because they will infringe the Club's contractual rights. That is not an exercise of discretion which can be faulted; still less do these factors constitute a good reason why an injunction should not be granted as per the principles of The Angelic Grace.

Conclusion

37. It follows that in my judgment the anti-suit injunction granted by the judge should be maintained and that this appeal should be dismissed.

Lord Justice McFarlane:

38. I agree with both judgments.

Lord Justice Moore-Bick:

39. I agree that the appeal should be dismissed for the reasons given by Longmore LJ, but in view of the importance of the questions to which it gives rise I propose to add a few observations of my own.

Characterisation of the owners' right against the Club

40. Provisions of domestic law allowing an injured person to recover compensation direct from the wrongdoer's liability insurer are far from uncommon. Rights of direct

action arising under Finnish and Spanish legislation respectively were considered by this court in Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The 'Hari Bhum') (No. 1) [2004] EWHC 455 (Comm), [2004] 1 Lloyd's Rep 206; [2005] EWCA Civ 1598, [2005] 1 Lloyd's Rep 67 and [2005] 1 All ER (Comm) 715 and The London Steam Ship Owners Mutual Insurance Association Ltd v The Kingdom of Spain (The 'Prestige') (No. 2) [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep 309 and [2015] EWCA Civ 333, [2015] 2 Lloyd's Rep 33. It is also not uncommon for legislation which gives the injured person the right to recover damages from the wrongdoer's insurer to prevent the insurer from relying on certain defences which it could raise in response to a claim by the insured. The *'*Hari Bhum' (No. 1*)* and the 'Prestige' (No. 2) both concerned a typical "pay to be paid" clause forming part of P & I Club cover which local law rendered unenforceable as against the injured party. The legislation may also render unenforceable other defences, sometimes described as defences personal to the insured, such as non-disclosure or a failure to pay premiums or calls.

41. Most, if not all, shipowners obtain liability insurance by becoming members of a P & I Club, the rules of which embody the terms of cover. They usually contain an arbitration clause and often a "pay to be paid" clause, under which the Club's liability to indemnify the member is conditional upon the member's having paid the claim against it. Such clauses are enforceable under English law in accordance with their terms: see Firma C-Trade v Newcastle Protection and Indemnity Association (The 'Fanti' and The 'Padre Island') [1991] 2 A.C. 1. In such cases, as the 'Hari Bhum' (No. 1) and the 'Prestige' (No. 2) demonstrate, therefore, unless the injured person can pursue his claim against the Club free of the arbitration clause and the "pay to be paid" clause, his claim will fail altogether.

42. Whether in the view of English law the claimant can do so depends on the system of law which governs the right he seeks to enforce, as that is characterised by English conflicts of laws rules. If that right is governed by a system of law other than that which provides a direct right of action, the latter will not be regarded under English law as capable of modifying it. Thus, if in the present case the right to obtain compensation from the insurer is viewed as a right to enforce an obligation governed by English law, the English courts will not regard Turkish legislation as capable of affecting it. Characterisation of the right to sue the insurer is thus an essential first step in deciding whether the claimant can enforce it free of the incidents which would otherwise attach to it, such as an arbitration clause or a "pay to be paid" clause.

43. Seizing on the passage from Auld LJ's judgment in Macmillan Ltd v Bishopsgate Investment Trust Plc (No. 3) [1996] 1 WLR 387 to which Longmore LJ has referred, Mr. Lewis QC submitted that, since the purpose of characterisation is to promote comity between competing legal systems, the court should have regard to the effect of characterising the injured person's right to recover against the insurer as contractual in nature. He argued that not to do so would have the effect, at least as far as the English courts are concerned, of undermining the Turkish legislation and thereby the public policy of Turkey as expressed in it. The claim, he said, has very

strong links with Turkey, since both parties are Turkish, the vessel was crewed by Turkish nationals and the owners became members of the Club in order to meet their compulsory obligation under Turkish law to obtain liability insurance. Such considerations, he submitted, argued strongly in favour of characterising the right as one created by Turkish legislation and enforceable only in accordance with that legislation. English courts should therefore recognise that the appellant was entitled to proceed against the Club in Turkey. Mr Karia QC, on the other hand, submitted that the effect of the Turkish legislation was to enable the appellant in proceedings in Turkey to enforce against the Club the obligation arising out of the contract of insurance and that, since that contract is governed by English law, Turkish law could not modify it by excluding the arbitration clause or the "pay to be paid" clause. He relied on the decisions of this court in the 'Hari Bhum' (No. 1) and the 'Prestige' (No. 2).

44. In my view Mr. Lewis sought to place too much weight on the principle of comity in this context. In the passage from his judgment in Macmillan Ltd v Bishopsgate Investment Trust Plc [1996] 1 WLR 387 to which Longmore L.J. has referred Auld LJ was pointing out that characterisation involves an attempt in this context to achieve comity between competing systems of law based on the application of established principles. In other words, it involves an attempt to ensure that issues are determined by reference to the system of law which is most appropriate having regard to their juridical nature. What action the courts should take based on the outcome of that process may raise other questions, including, in an appropriate case, the question whether there is an overriding need to respect the public policy of a friendly foreign state. Characterisation, however, is simply the process by which the court identifies the system of law which governs a particular issue. It forms part of our conflicts of laws and must therefore be undertaken in accordance with established principles of English law. The decisions in the 'Hari Bhum' (No. 1) and the 'Prestige' (No. 2) are binding authority for the proposition that the question in the present case is whether the right which the claimant seeks to enforce against the Club is in substance contractual in nature or an independent right created by Turkish legislation.

45. Longmore LJ has set out the relevant provisions of Turkish Insurance Contract Law in paragraph 5 of his judgment as well as the facts that have given rise to the appeal and there is no need for me to repeat them here. Similarly, it is unnecessary for me to repeat the judge's findings of fact relating to the claimant's right to recover damages from the Club, which he has summarised in paragraph 17. Like him, I am satisfied that the claimant's right to recover damages against the Club is essentially contractual in nature, despite the fact that it arises under or by virtue of Turkish legislation. The question in this case, as in the 'Hari Bhum' (No.1) and the Prestige (No. 2), is not how the claimant obtained a right to recover against the Club, but what right it obtained. The judge's findings show that the claimant's right to recover against the Club was essentially circumscribed by, and reflected, the cover provided under its rules. It is true that the legislation purported to invalidate certain defences that the Club might have raised in answer to a claim by the insured, but those are of largely peripheral relevance. In essence the claimant became entitled under the

legislation to enforce for its own benefit the contract between the insured and the Club. This conclusion is in my view fully supported by the decisions in the 'Hari Bhum' (No.1) and the 'Prestige' (No. 2).

46. It is now well-established that a person who becomes entitled to enforce a contractual obligation can do so only in accordance with its terms. The Club rules expressly provided that the contract with its members was to be governed by English law. Accordingly, the obligation which the claimant seeks to enforce is governed by English law and cannot be affected by Turkish legislation. The Club's rules also provide for arbitration in London and it is now well established that a person who becomes entitled to enforce an obligation which is subject to an arbitration clause must do so by arbitration in accordance with the clause: see Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The 'Jay Bola') [1997] 2 Lloyd's Rep 279, per Hobhouse LJ at page 286 and Sir Richard Scott V-C at page 291.

47. Mr. Lewis sought to distinguish the position of a person who becomes entitled to enforce an obligation by virtue of an assignment or other transfer (as was the case in the 'Jay Bola') from that of a claimant who obtains a statutory right to recover damages direct from an insurer. In my view, however, there is no real distinction. As was made clear in the 'Jay Bola', the arbitration agreement becomes binding on the claimant because it forms an integral part of the contract giving rise to the obligation, a circumstance which is not affected by the manner in which the claimant obtained the right to enforce it. Accordingly, if it becomes necessary to enforce the obligation by proceedings, that must be done by arbitration. Although the 'Jay Bola' was not cited in either the 'Hari Bhum' (No.1) or the 'Prestige' (No. 2), the principle that a claimant seeking to enforce a claim direct against an insurer must comply with an arbitration clause in the contract of insurance was recognised and applied in both cases.

Are there sufficient grounds for granting an anti-suit injunction?

48. In the light of the decision of this court in Aggeliki Charis Compania Maritima S.A. v Pagnan S.p.A. (The 'Angelic Grace') [1995] 1 Lloyd's Rep. 87 Mr Lewis accepted that in the ordinary way it is right for the court to grant an injunction to restrain a claimant from seeking to enforce by proceedings abroad an obligation subject to an English arbitration agreement. He submitted, however, that a distinction is to be drawn between a party to a contract containing an arbitration agreement who seeks to enforce that agreement by proceedings abroad and a party in the position of the claimant, which has not entered into an agreement to arbitrate and whose conduct in commencing proceedings in its own jurisdiction pursuant to its own domestic legislation could not properly be regarded as vexatious or oppressive so as to support the grant of an injunction.

49. In my view the distinction which Mr Lewis sought to draw between the position of an original party to an arbitration agreement and that of what might be called a "remote" party (i.e., a claimant who has become entitled to enforce an obligation but

is not a party to a contract of any kind with the defendant), is not well founded, because the basis for the court's intervention is the same in each case. In the 'Jay Bola' Hobhouse LJ and Sir Richard Scott V-C explained, in the passages to which Longmore LJ has referred, why the court will intervene by granting an anti-suit injunction to restrain the claimant from enforcing the obligation by proceedings abroad instead of by arbitration. It will do so, not because the claimant is party to a contract containing an arbitration agreement (which it is not), but because enforcement by arbitration alone is an incident of the obligation which the claimant seeks to enforce and because the defendant is therefore entitled to have any claim against him pursued in arbitration. It is the right not to be vexed by proceedings otherwise than in arbitration that equity will intervene by injunction to protect.

50. The principle can be seen at work most clearly in cases involving the original parties to an agreement containing an arbitration clause and it is not surprising, therefore, that in the 'Angelic Grace' Millett LJ should have expressed the view that in those circumstances an injunction should be granted to restrain a breach of the arbitration agreement unless there was good reason not to do so. However, although he drew a distinction between such a case and a case where an injunction is sought on the general ground that the foreign proceedings are vexatious or oppressive, but where no breach of contract is involved, with all due respect to what was later said by this court in the 'Hari Bhum' (No. 1), I do not think that he can have had in mind a case such as the present. True it is that this is not a case in which a breach of contract is involved, but nor is it a case in which the Club is seeking to restrain the proceedings in Turkey on the general ground of vexation or oppression. It has very much more the character of the former than the latter, since the right which equity is asked to protect by injunction is the same in the case of a remote party as in the case of an original party. In each case sufficient grounds for intervention are to be found in the commencement of proceedings contrary to the terms of the arbitration agreement.

51. As Longmore LJ has noted, the principles set out in the 'Jay Bola' were applied by His Honour Judge Anthony Diamond QC in The Charterers' Mutual Assurance Association v British and Foreign Marine Insurance Co. Ltd [1997] ILP 838, a case involving an attempt to enforce a claim in France by way of *action directe*, a process available under French law by which an injured party may recover damages direct against the liability insurer of the wrongdoer. Judge Diamond granted an injunction to restrain the claimant from proceeding with its claim on the grounds that it was necessary to do so in order to protect the defendant's right to have it determined in arbitration. I agree with my Lord that there is no distinction of principle between that case and the 'Jay Bola' or between that case and the present appeal.

52. It follows that in my view, subject only to the decision of this court in the 'Hari Bhum' (No. 1), there are sufficient grounds to justify the court's intervention.

53. The facts of the 'Hari Bhum' (No. 1) have been described by Longmore LJ and I need not repeat them. When the matter came before me in the Commercial Court I granted an injunction to restrain the defendant, New India Assurance, from proceeding against the claimant, the Through Transport Club, in Finland because I

was satisfied that the obligation it sought to enforce was subject to the arbitration clause in the Club rules. I granted a declaration that New India was bound to refer any claim against the Club to arbitration. I also granted a declaration that, in bringing proceedings in Finland the defendant, was "in breach of the arbitration clause". The Court of Appeal affirmed the first declaration, but set aside the second and also the anti-suit injunction on the grounds that, since New India had not become party to a contract with the Club, the commencement of proceedings in Finland by New India did not involve a breach of contract and was not vexatious or oppressive. However, the court was also influenced by the fact that an anti-suit injunction would have prevented New India from pursuing a claim in the courts of another Member State of the European Union which had jurisdiction to entertain it. At that stage the European Court of Justice had held that the courts of one Member State could not grant an anti-suit injunction against a party to proceedings in another Member State in support of an exclusive jurisdiction clause (Erich Gasser GmbH v MISAT Srl Case C-116/02, [2005] Q.B.1) or to prevent vexatious and oppressive conduct in the ordinary sense (Turner v Grovit Case C-159/02, [2005] 1 AC 1), and although the position in relation to arbitration clauses had still to be finally determined, those decisions clearly weighed heavily with it.

54. The Court of Appeal's decision proceeded on the footing that since there was no contract between New India and the Club, New India was not acting in breach of contract by commencing proceedings in Finland so that an anti-suit injunction could not be justified by parity of reasoning with the 'Angelic Grace'. Moreover, New India's conduct could not be regarded as vexatious or oppressive, since it had not agreed to arbitrate its dispute with the Club and was pursuing a course open to it in Finland. It is unfortunate, in my view, however, that the court's attention was not drawn to the decision in the 'Jay Bola'. In that case Hobhouse LJ and Sir Richard Scott V-C both recognised that the claimant had not become a party to the contract which had given rise to the obligation it was seeking to enforce or to the arbitration clause contained in it. Nonetheless, they explained why, if the claimant wished to pursue a claim against the defendant, it was bound to do so in arbitration and why equity would intervene by way of injunction to protect the defendant's right to have any claim against it determined in that way. In that respect the position in the 'Hari Bhum' (No. 1) was the same as that in the 'Jay Bola'.

55. Mr Lewis submitted, however, that the 'Hari Bhum' (No. 1) was consistent with the *'Jay Bola'*, since the former was concerned with the position of an assignee or transferee and the later with a claimant seeking to pursue a statutory right of direct action, but I find that submission difficult to accept. Whereas the 'Hari Bhum' (No. 1) proceeds on the footing that the court will not intervene in the absence of a contract between the parties, the 'Jay Bola' proceeds on the basis that the right to have the claim against it determined by arbitration is an incident of the obligation which the claimant is seeking to enforce and does not depend on the existence of a contract between the claimant and the defendant. If that is right, there is no distinction of principle between the position of a claimant who is an original party to a contract containing an arbitration clause and one who is a remote party in the sense described earlier. The grounds upon which equity will intervene, as explained in the

'Jay Bola', are the same in each case, namely, to protect the defendant's right to have the claim determined in arbitration. The commencement of proceedings contrary to the arbitration clause is, I would suggest, sufficiently vexatious and oppressive, or at any rate sufficiently unconscionable and unjust, to provide sufficient grounds for the court's intervention by way of the equitable remedy of an injunction. The position is no doubt at its clearest when the proceedings are between original parties to the arbitration agreement, but the rationale of the decision in the 'Angelic Grace' applies equally to both cases.

56. For these reasons I am satisfied that, insofar as the decision in the 'Hari Bhum' (No. 1) proceeds on the basis that the relationship between the parties provided an inadequate basis for exercising the court's jurisdiction to grant an injunction because of the absence of a contract between them, it is inconsistent with the decision in the 'Jay Bola' and we are entitled to choose which of the two decisions we should follow. In agreement with Longmore LJ I prefer the reasoning in the 'Jay Bola', which, with respect, I find entirely convincing. For the purposes of deciding whether conditions exist in which equity can intervene by way of injunction there is no distinction of principle between what in the 'Hari Bhum' (No. 1) were referred to as "privies" and those who seek to enforce an obligation under legislation conferring a right of direct action. I am therefore satisfied that the existence of an arbitration clause in the Club rules provided sufficient grounds for the court to grant an anti-suit injunction in this case.

Should an anti-suit injunction be granted in this case?

57. The grant of an injunction is a matter of discretion, however, and there remains the question whether it would be just and convenient to grant one in this particular case. Mr. Lewis submitted that it would not, because, for the reasons given in the 'Hari Bhum' (No. 1), the appellant's conduct could not be described as vexatious or oppressive and because considerations of comity should lead the court to avoid undermining the public policy of Turkey as expressed in the Turkish Insurance Contract Law. This latter point is a factor which is likely to be present in every case in which an injunction is sought to restrain a direct action against an insurer in contravention of an arbitration clause in the contract of insurance. Although in the 'Hari Bhum' (No. 1) the court was clearly influenced by the fact that the proceedings in question were pending in the courts of another Member State, the particular factor on which Mr. Lewis relied does not seem to have played a part in its decision. Nor did it influence the court in the Prestige (No. 2). In the Charterers' Mutual case Judge Diamond did not consider it to be of great significance.

58. In my view questions of comity in the established sense do not arise in a case such as this. Parties to a contract of this kind are free, if they so wish, to agree that any disputes arising under the contract are to be referred to arbitration. That necessarily involves giving up the right to pursue a claim by proceedings in the courts of any country. If legislation confers on an injured party the right to recover directly against the wrongdoer's liability insurer by giving him in substance the right to enforce the contract, he must accept what the legislation gives him, including the obligation to

pursue any claim in arbitration. To hold him to that agreement is to give effect to the legislation while preserving the substance of the obligation which he seeks to enforce. I agree that this is a case in which the judge was right to grant an injunction to restrain the appellant from pursuing its proceedings against the respondent in Turkey and that the appeal should be dismissed.

Appeal Court Ref. No. A3/2015/0679

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM:

THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

THE HONOURABLE MR JUSTICE TEARE

[2015] EWHC 258 (Comm) (2014 Folio 871)

SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG)

Claimant/Respondent

-and-

CONTAINERSHIPS DENIZCILIK NAKLIYAT VE TICARET A.S.

Defendant/Appellant

Draft ORDER

---

1. The Appellant's appeal is dismissed.

2. The Appellant shall pay the Respondent's costs of the appeal on the standard basis, to be assessed if not agreed.

3. On or before 4th May 2016, the appellant shall pay the sum of £50,000 on account of such costs.

4. Permission to appeal to the Supreme Court refused.

Dated: 20th April 2016