

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th December 2003

Before :

THE HONOURABLE MR. JUSTICE MOORE-BICK

Between :

**THROUGH TRANSPORT MUTUAL
INSURANCE ASSOCIATION (EURASIA) LTD**

Claimant

- and -

NEW INDIA ASSURANCE CO. LTD

Defendant

Mr. Ricky Diwan (instructed by **Richards Butler**) for the **claimant**
Mr. Christopher Smith (instructed by **Holmes Hardingham Walser Johnston Winter**) for
the **defendant**

Judgment

Mr. Justice Moore-Bick :

1. In October 1999 an Indian merchant, Saluja Fabrics, shipped on board the vessel *Hari Bhum* at Calcutta a container said to contain various types of garments for carriage to Moscow. The container was shipped under a through transport bill of lading issued by Borneo Maritime Ltd which provided for the goods to be carried by sea to Kotka, Finland and thence by road to Moscow. The goods were insured against loss or damage in transit by the defendant, New India Assurance Company Limited ("New India").
2. The container arrived at Kotka on 30th November 1999. On 16th December Borneo Maritime Oy, an associated company of the carrier incorporated in Finland, issued a CMR waybill for the carriage of the container by road from Kotka to Moscow. Unfortunately, the container did not reach Moscow, having been lost in circumstances which are still in dispute somewhere in the course of its journey through Russia.
3. The claimant, Through Transport Mutual Insurance Association (Eurasia) Ltd ("the Club"), is a mutual insurance association which provides insurance to its members in respect of various kinds of losses and liabilities incurred in connection with the carriage of goods. Borneo Maritime Ltd was a member of the Club for the year

beginning 1st September 1999; Borneo Maritime Oy was insured as an associated company of Borneo Maritime Ltd.

4. Following the loss of the container Saluja Fabrics made a claim against New India. In due course it was compromised and the benefit of any claim against the carrier was thereupon assigned to New India. During 2002 Borneo Maritime Oy filed for bankruptcy and on 26th November 2002 it was struck off the register. It is not clear whether any claim had been intimated to the company before that occurred, but it is common ground that no payment had been made by Borneo Maritime Oy or Borneo Maritime Ltd in respect of the loss of the container.
5. The Club rules for the year beginning 1st September 1999 contained the following provisions:

“Clause A. Cargo Liabilities

1 RISKS INSURED

1.1 Loss of or Damage to Cargo

You are insured for your liability for physical loss of or damage to Cargo and for consequential loss resulting from such loss of damage.

General Provisions

Clause A. Exclusions & Qualifications

1. STANDARD EXCLUSIONS AND QUALIFICATIONS

.....

1.3 Indemnity insurance

Insurance with the Association is on the basis of indemnity which means that the Association shall pay you only

- (a) after you have suffered a physical loss of your insured property, for example, your Equipment, or
- (b) after you have expended money, for example, by paying a claim of your Customer or a Third Party for which you are liable or by paying for repairs to your insured property.

Clause D. Law & Disputes

1. LAW

Every insurance provided by the Association and the rights and obligations of you (or any other person) and the Association arising out of or in connection with such insurance, is subject to and shall be construed in accordance with English law.

2. DISPUTES

If any difference or dispute shall arise between you (or any other person) and the Association out of or in connection with any insurance provided by the Association or any application for or an offer of insurance, it shall be referred to arbitration in London.”

6. On 16th December 2002 New India began proceedings in its own name against the Club in Finland by applying to the District Court of Kotka for the issue of a writ in respect of its claim for the loss of the container. The claim was made under section 67 of the Finnish Insurance Contracts Act 1994 which, broadly speaking, gives a claimant the right to proceed directly against the defendant's insurer when the insured defendant himself is insolvent. On 3rd January 2003 a writ was issued which was served on the Club in this country on 31st March. On 30th April the Club took steps to contest the jurisdiction of the District Court of Kotka and on 8th May it issued an arbitration claim form in this court seeking a declaration that New India was bound to pursue any claim in arbitration and an injunction to restrain it from pursuing its claim in Kotka. On 16th May Gross J. gave the Club permission to serve the claim form on New India out of the jurisdiction and on 2nd July, following service of the proceedings in Mumbai, New India applied for the order for service out of the jurisdiction to be set aside or, in the alternative, for the proceedings here to be stayed in the exercise of the court's discretion.
7. On 22nd October 2003 the District Court of Kotka rejected the Club's challenge to its jurisdiction. In reaching its conclusion the court held that it had jurisdiction to determine the claim because it arose out of an international contract for the carriage of goods by road and because under article 10 of the E.C. Judgments Regulation (Council Regulation (EC) No 44/2001) claims against insurers may be brought in the courts of the country where the harmful event occurred. It held that neither Saluja Fabrics nor New India were parties to the contract of insurance and that New India's claim against the Club was not derived from Borneo Maritime Oy. For these reasons it was not bound by the arbitration agreement. I understand that an appeal against that decision is pending.
8. The matter now comes before me on the hearing of New India's application to set aside service or to stay the action and the Club's application for an injunction restraining New India from pursuing the proceedings in Finland. Logically the first question to consider is that of service out of the jurisdiction, but at the heart of both these applications lies the question whether, in the eyes of English law, New India's claim against the Club is subject to the arbitration clause in the Club rules.

The arbitration clause

9. The arbitration clause is framed in wide terms. It applies to any difference or dispute arising out of or in connection with the insurance and it purports to extend to disputes involving third parties as well as members. On the face of it, therefore, it is apt to cover claims under the insurance made against the Club by assignees or others whose claims are derived in one way or another from a member. Mr. Diwan submitted that the claim now being pursued by New India in Kotka is in substance one to enforce directly against the Club the rights of indemnity available to Borneo Maritime Oy under the contract. In effect it is seeking to obtain the benefits of a statutory assignment and is therefore bound by the arbitration clause in the rule: see *Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd (The 'Padre Island')* [1984] 2 Lloyd's Rep. 408.
10. Mr. Smith did not dispute that the arbitration clause in the Club's rules is wide enough to apply to someone who seeks to pursue a claim against the Club under the terms of the insurance, whether as an assignee or on some other derivative basis. He submitted, however, that New India is not seeking in its action in Finland to enforce a derivative

claim of that kind, but is pursuing an independent statutory remedy provided by the Insurance Contracts Act and that therefore the arbitration clause has no application. This raises a question of characterisation.

11. Although New India is pursuing a claim in Finland under a Finnish statute, I think Mr. Diwan was right in submitting that in proceedings before an English court a dispute about the nature of New India's claim can only be resolved by applying the principles of English law relating to characterisation. The learned editors of *Dicey and Morris on The Conflict of Laws* (13th ed.) suggest in paragraph 2-034 that characterisation is in essence a process of refining conflicts of laws rules by expressing them with greater precision and if that is correct, as I think it is, it follows that the court must apply the principles of its own law relating to characterisation rather than those of the relevant foreign law.
12. Three modern cases to which I was referred support that conclusion. The first is *National Bank of Greece and Athens v Metliss* [1958] A.C. 509. The case concerned sterling bonds issued by the National Mortgage Bank of Greece to the respondent in 1927. In 1949 the payment of interest on bonds payable abroad (which included the bonds issued to Metliss) was suspended by emergency legislation and the moratorium was subsequently continued until and after the commencement of the action. As a result of certain bank amalgamations the National Bank of Greece and Athens became the universal successor to the National Mortgage Bank of Greece. Metliss brought an action on the bonds in this country. The House of Lords characterised the claim as one to enforce a contractual obligation and held that, since the proper law of the contract was English law, Greek legislation was ineffective to alter the obligations contained in the bonds.
13. The next case is *Adams v National Bank of Greece* [1961] A.C. 255. Following the decision at first instance in *National Bank of Greece and Athens v Metliss* the legislation providing for the amalgamation of banks which had given rise to the universal succession recognised in that case was amended with retrospective effect to exclude from the succession obligations arising under bonds payable in gold or foreign currency. The issue before the court was whether the bank was liable on the bonds. The characterisation of the issue was of great significance because if it were characterised as one of status, the later legislation would have to be accepted as having varied the status of the bank so as to prevent its being the universal successor of the bank that issued the bonds. However, if the issue were one of obligation, the later legislation could not abrogate an English law obligation to which the bank had succeeded by virtue of the earlier universal succession. A majority of their Lordships considered that the issue was one of obligation because in substance the legislation was intended to relieve the bank of its liability under the bonds. Lord Reid said at page 282-283

“As I have already said, it is well settled that English law cannot give effect to a foreign law which discharges an English liability to pay money in England and the appellants' contracts were English contracts under which they were to be paid in England. So, unless the form of a foreign law is more important than its substance and effect, law No. 3504 must be treated as a law which seeks to discharge English liabilities and it cannot, therefore, be effective in England. In my judgment, we must look at the substance and effect of a foreign law and that is a

question of fact. I have found nothing in the evidence to show that its effect was anything other than I have stated.”

Lord Denning identified three distinct ways in which the legislation could be viewed. He held that even if it were viewed as a law relating to status the bank could not succeed. The importance of the case for present purposes, however, lies in the fact that their Lordships considered it appropriate for the English courts to characterise the issue for themselves.

14. The most recent case in which the problem of characterisation has been considered is *Macmillan Ltd v Bishopsgate Investment Trust Plc (No. 3)* [1996] 1 W.L.R. 387. In his judgment in that case Auld L.J. said at page 407B-C

“Subject to what I shall say in a moment, characterisation or classification is governed by the *lex fori*. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law. However, 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 system: see *Cheshire & North’s Private International Law*, 12th ed., pp. 45-46, and *Dicey & Morris*, vol. 1, pp. 38-43, 45-48.”

15. Thus the exercise of characterisation must be directed not to the cause of action or the claim, but to the individual issues which underlie it. Aldous L.J. said at page 418A-B:

“I agree with the judge when he said [1995] 1 W.L.R. 978, 988: “In order to ascertain the applicable law under English conflict of laws, it is not sufficient to characterise the nature of the *claim*: it is necessary to identify *the question at issue*.” Any claim, whether it be a claim that can be characterised as restitutionary or otherwise, may involve a number of issues which may have to be decided according to different systems of law. Thus it is necessary for the court to look at each issue and to decide the appropriate law to apply to the resolution of that dispute.”

16. The issue in the present case is whether New India is bound by the arbitration clause which in turn depends on whether it is seeking to enforce a contractual obligation derived from the contract of insurance or an independent right of recovery arising under the Insurance Contracts Act. If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterised as one of statutory entitlement to which there may be no direct

equivalent in English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterised as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law: see *Adams v National Bank of Greece*.

17. Section 67 of the Finnish Insurance Contract Act 1994 provides as follows:

“Section 67

Injured person’s entitlement to compensation under general liability insurance

A person who has sustained bodily injury, property damage or financial loss under general liability insurance is entitled to claim compensation in accordance with the insurance contract direct from the insurer if

(1)

(2) the insured has been declared bankrupt or is otherwise insolvent;”

18. Both parties relied on evidence of Finnish lawyers on the meaning and effect of section 67 and the nature of the rights to which it gives rise. Although the experts disagree about the enforceability of the arbitration clause and the “pay to be paid” provisions of the contract, they agree that in principle the claimant’s right of recovery is regulated by the terms of the contract of insurance itself. In other words, subject to the terms of section 3 of the Act which renders void provisions in the contract that would derogate from the protection provided by the Act, the terms of the contract govern the insurer’s liability. However, the experts disagree about the legal nature of the right given to the claimant by section 67. The District Court in the course of giving judgment on the issue of jurisdiction held that the Act gives the injured party the right to claim compensation “according to the insurance policy” if the insured is insolvent and that the application of the statutory provisions was mandatory under Finnish law. The court did not really express a view on the question with which I am concerned, but in any event it is for this court to characterise the issue for itself by reference to the substance of the matter.
19. Applying that test I consider that the issue in this case is to be characterised as one of obligation. The effect of section 67 is in substance to enable an injured party who has a claim against an insolvent insured to bring proceedings directly against the insurer to obtain the benefit that the insured would himself have been entitled to obtain under the contract. No doubt it would have been possible for the legislature to have created a right of compensation in such cases that was wholly independent of and did not fully reflect the terms of the contract of insurance, but in my view that is not what section 67 is designed to achieve. Although it gives claimants a right of action directly against the insurer without the need for the formalities of an assignment, what he obtains by the operation of the Act is essentially a right to enforce the contract in accordance with its terms. The statute renders void those terms of the contract which have the effect of restricting the right to recovery in a way that is inconsistent with its terms and those provisions must, of course, be applied in any action before the Finnish

courts. However, that does not in my view detract from the conclusion that the essential nature of the right created by section 67 is to enforce the terms of the contract.

20. The obligations of the Club under the contract of insurance are governed by English law and accordingly, Finnish legislation will not be recognised in this country as effective to modify them. It follows that if New India wishes to pursue a claim against the Club, it must do so in accordance with the terms of the contract under which it arises. That includes the arbitration clause. It follows that in my view the court had jurisdiction in this case to give permission to serve the claim form out of the jurisdiction under rule 6.20(5)(c) and rule 62.5(1)(c) and that it has jurisdiction to grant an injunction to prevent the continuation of proceedings contrary to the terms of the arbitration clause.
21. Mr. Smith put forward a number of reasons why the court should not exercise its discretion in favour of permitting service out of the jurisdiction. Most of the issues which go to the exercise of the court's discretion arise in relation to the application for an injunction, but two of them can conveniently be considered at this point.
22. The first of these is his submission that Kotka is clearly the appropriate forum for any claim against Borneo Maritime Oy and the fact that the same issues will necessarily arise in New India's action against the T.T. Club makes Kotka the more appropriate forum for the trial of that claim as well. I do not regard this as a factor of much importance in this case. No doubt Kotka would have been an appropriate forum for a claim against Borneo Maritime Oy because it was a Finnish company which carried on business there. It was also the place where the goods were accepted for carriage and where the documentation relating to the road haulage leg of their journey was issued. However, the question in this case is not whether the claim should be litigated in Finland or England but whether it should continue to be litigated through the courts or determined in arbitration. There is nothing as far as I can see to suggest that the issues surrounding the issue of the documents or the loss of the goods cannot be effectively and fairly determined in arbitration and, to be fair to him, Mr. Smith did not suggest otherwise.
23. The second is his submission that the very fact that the District Court was first seised of the dispute is itself a factor that points in favour of Kotka. However, that is of no relevance once the court is satisfied if the parties have agreed that the claim should be pursued in arbitration. The fact that proceedings were begun first in Kotka is simply a consequence of the failure on the part of New India to accept that the obligation it seeks to enforce must be pursued in that way.

Stay of the action

24. Mr. Smith submitted that the District Court of Kotka was first seised of the proceedings relating to the applicability of the arbitration clause and that therefore this action should be stayed pursuant to article 27 of the E.C. Judgments Regulation. However, the Judgments Regulation does not apply to arbitration by virtue of article 2(d). In *Navigation Maritime Bulgare v Rustal Trading Ltd (The 'Ivan Zagubanski')* [2002] 1 Lloyd's Rep. 107 Aikens J. held that a claim for a declaration that the defendants were bound by arbitration clauses in certain bills of lading and for an injunction restraining them from pursuing proceedings in Marseille fell within article 1(4) of the Brussels Convention and were therefore excluded from the operation of

article 21. Mr. Smith recognised that unless he could persuade me that the decision of Aikens J. was wrong, he was obliged to accept that the present claims are to be regarded as falling within article 2(d) of the Regulation. He did not seek to do so, although he indicated that he might wish to challenge that decision if the matter went further. In those circumstances I am happy to follow the decision in *The Ivan Zagubanski* and to hold that article 27 has no application in this case.

The anti-suit injunction

25. Mr. Diwan submitted that if, as I have held in the case, New India is bound to pursue any claim against the Club in arbitration, it would be appropriate for the court to grant an injunction to restrain it from continuing the proceedings in Finland in defiance of the terms of the arbitration agreement. In support of that submission he relied on *Aggeliki Charis Compania Maritima S.A. v Pagnan S.p.A. (The 'Angelic Grace')* [1995] 1 Lloyd's Rep. 87, *Bankers Trust Co v P.T. Jakarta International Hotels & Development* [1999] 1 Lloyd's Rep. 910 and *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep. 500.
26. Mr. Smith accepted that in the ordinary case the court will grant an injunction to restrain the breach of an arbitration clause unless there are strong reasons for not doing so. He also accepted that as the authorities now stand the court can make such an order to prevent the continuation of proceedings in the courts of a country to which the Judgments Regulation applies, but he drew my attention to the opinion of Advocate General Ruiz-Jarabo Colomer in *Turner* (Case 159-02) delivered on 20th November 2003 on the reference by the House of Lords to the European Court in *Turner v Grovit* [2001] UKHL 65; [2002] 1 W.L.R. 107. The Advocate General expressed the view that it was inconsistent with the Brussels Convention for the judicial authorities of one contracting state to restrain litigants from commencing or continuing proceedings before the judicial authorities of another contracting state, but until the European Court itself delivers a ruling I consider that I have no alternative but to regard myself as bound by the existing law and practice in this country. Mr. Smith will be free to argue on another occasion that the court ought not to entertain an application for an anti-suit injunction in cases where proceedings are pending either before the courts of a Judgments Regulation state or before the courts of a state which is party to the New York Convention. That argument is not open to him before me, but he could and did submit that the practice of restraining a breach of an agreement to arbitrate is not invariable and that there are strong grounds in the present case for exercising my discretion in favour of allowing the action in Finland to proceed to a conclusion.
27. In *Donohoe v Armco Inc.* [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425 the House of Lords considered this question in relation to an exclusive jurisdiction clause. Lord Bingham said at page 433 (paragraph 24)

“If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as

is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word “ordinarily” to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party’s prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. ”

28. Lord Hobhouse said at page 439 (paragraph 45)

“The position of a party who has an exclusive English jurisdiction clause is very different from one who does not. The former has a contractual right to have the contract enforced. The latter has no such right. The former’s right specifically to enforce his contract can only be displaced by strong reasons being shown by the opposite party why an injunction should *not* be granted. The latter has to show that justice requires that he should be granted an injunction.”

29. These principles apply equally in the case of an arbitration clause, as is clear from *Welex A.G. v Rosa Maritime Ltd (The ‘Epsilon Rosa’)* [2003] EWCA Civ 938; [2003] 2 Lloyd’s rep. 509. Tuckey L.J., having referred to the passage in the speech of Lord Bingham cited above, said at page 518 (paragraph 48)

“ the starting point is, as the judge said, that the party suing in the non-contractual forum must show strong reasons for doing so or he faces the prospect of an injunction being granted against him. I accept that the court should take into account how serious the breach is. In other words a defendant who cynically flouts a jurisdiction clause which he has freely negotiated is more likely to be enjoined than one who has had the clause imposed upon him and has acted in good faith. But I do not think this leads to a sliding scale of enforcement. The parties to a contract, however it is made, should abide by its terms. If they have agreed to resolve their disputes in a particular way they should be kept to their bargain unless there are strong reasons for not doing so.”

30. Mr. Smith submitted that there are strong reasons in this case for not granting an injunction to restrain New India from continuing the proceedings in Finland. First, he submitted that New India could not be accused of cynically flouting the arbitration clause or of improper forum shopping because Finland was the appropriate jurisdiction in which to bring proceedings which are founded on a claim against the Finnish carrier. As to that, I accept that the proceedings followed naturally from

earlier attempts on the part of New India to pursue a claim against Borneo Maritime Oy and that those who were responsible for that may not have had uppermost in their minds the thought that by bringing a claim in Finland New India could avoid the effect of the “pay to be paid” provisions. However, I do not think that takes the matter very far once it is established that the claim is subject to the arbitration clause and the Club has made it clear that it wishes to have the matter decided in arbitration.

31. Although Mr. Smith accepted that the court has power to grant relief by way of injunction, he submitted that the fact that Finland is a fellow member state of the European Union subject to the Judgments Regulation and a party to the New York Convention before whose courts an application for a stay of the proceedings is pending should nonetheless weigh strongly against exercising that power. That is closely bound up with his submission that the Club has failed to act promptly in seeking relief and that, in effect, it should not be allowed to make a further challenge to the jurisdiction of the District Court by this route. However, there is now a strong line of authority which supports intervention by the court under these circumstances and the mere fact that an application for a stay of the proceedings for the purposes of arbitration can be made to the court in which they are pending is not a ground for refusing to grant relief.
32. Mr. Smith criticised the Club for failing to apply promptly for interim relief and instead pursuing a claim for final relief with the result that the District Court had already delivered its judgment by the time this application was heard. At first sight there is some force in what he says. It is true that in general a party who wishes to obtain relief by way of anti-suit injunction must apply to the court promptly, but this case is not altogether straightforward and if New India was minded to challenge the jurisdiction of this court and the grant of an injunction (as it clearly was), it is unlikely that the Club’s application could have been heard very much sooner than it was. It would have been preferable in my view for this application to have been heard before the District Court gave judgment, but the Club has not submitted to the jurisdiction in Finland and I do not think that the proceedings there have reached such an advanced stage that New India should be allowed to continue them despite the existence of the arbitration agreement. In all the circumstances although the fact that the Club has made an unsuccessful challenge to the jurisdiction in Kotka before making this application is a factor to take into account, it is not one which in my view carries great weight.
33. Mr. Smith submitted that for this court to grant relief by way of injunction at this stage would be a direct attack on the judgment of the District Court which has held that New India is entitled to pursue its claim free from the arbitration clause. It would also, he said, represent an attack on the public policy of Finland to extend protection to those who have claims against insolvent insureds.
34. I need hardly say that this court attaches the greatest importance to judicial comity and is very conscious of the respect due to the courts of other countries. It is for that reason that it cannot be emphasised too strongly that orders made in support of agreements to refer disputes to arbitration are directed at the defendant and not in any sense at the court in which he has chosen to commence proceedings. The question for the court in the present case is whether it should make an order preventing New India from disregarding the arbitration clause or whether it should allow it to do so and leave the Club to resist enforcement and pursue any remedy it may have for its breach.

35. In considering this question I think it is helpful to bear in mind the real nature of the issue between the parties. New India is able to bring a claim against the T.T. Club in Finland only by virtue of the Insurance Contracts Act to which the Finnish courts are bound to give effect. For present purposes I will make the assumption (although there is conflicting evidence on this) that the “pay to be paid” provisions are to be regarded under Finnish law as inconsistent with the claimant’s right to make a claim direct against the Club and would therefore be unenforceable against New India. Moreover, the District Court has held that New India is not bound by the arbitration clause in the Club’s rules so the action can continue in Finland where, subject to proving the loss, New India can hope to succeed in its claim. If the matter were to proceed by way of arbitration in this country, however, the position would be very different. New India would still be entitled to pursue a claim against the Club under the Third Parties (Rights against Insurers) Act 1930, but the “pay to be paid” provisions would be construed as a condition precedent to the right to recover against the Club: see *Firma C-Trade S.A. v Newcastle Protection and Indemnity Association (The ‘Fanti’)* and *Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd (The ‘Padre Island’)* (No.2) [1990] 2 Lloyd’s Rep. 191. The claim would therefore fail.
36. It can be seen from this that the viability of New India’s claim is very much bound up with the jurisdiction in which it can be pursued. However, I do not think that this provides sufficient reason for refusing to grant relief by way of anti-suit injunction. If anything, it provides greater justification for doing so, since it is only by ignoring the arbitration clause that New India can circumvent the “pay to be paid” provisions which form an integral part of the cover afforded by the Club’s rules. In the end one comes back to the nature of the obligation that New India is seeking to enforce. Once the court is satisfied that the claim being made by New India in Finland is in substance one to enforce an obligation governed by English law, it would be wrong in my view to allow it to be pursued in disregard of the arbitration clause which is one of its incidents.
37. Support for this conclusion is to be found in the decision of Thomas J. in *Akai Pty Ltd v People’s Insurance Co Ltd* [1998] 1 Lloyd’s Rep. 90. In that case the claimant, a subsidiary of a well-known Japanese company, entered into a contract for credit insurance with the defendant (“PIC”), a company incorporated in Singapore. The contract contained a choice of English law and jurisdiction. It also contained a provision barring any action arising out of the policy unless commenced within 12 months of the events giving rise to the loss. Following the insolvency of one of its main debtors Akai made a claim under the policy which PIC declined. Akai commenced proceedings in both England and New South Wales. PIC applied to the court in New South Wales for a stay of the action which was granted. Akai’s appeal was dismissed but an appeal to the High Court of Australia was allowed on the grounds that section 8 of the Australian Insurance Contracts Act 1984 rendered the choice of English law and jurisdiction void. In the English action PIC counterclaimed seeking a declaration that the claim was time-barred and Akai applied for an order striking out or staying the counterclaim. Thomas J. held that the court should give effect to the parties’ contract unless it would be contrary to public policy to do so. He considered that the close connection of the policy with Australia was not a decisive factor to the contrary and that the counterclaim should therefore not be stayed.
38. The decision is of interest in the present case because one of the questions the court had to consider was whether it should, as a matter of comity, stay the action in this

country in order to give effect to Australian law and public policy. If the action were tried here in accordance with the principles of English law, Akai would fail because its claim was time-barred. If it were tried in Australia, the time bar would not be effective because it would be rendered void by the statutory provisions. As in this case, therefore, there were competing policy considerations in the different jurisdictions. (It was also a case in which the decision on jurisdiction had been pursued to the final court of appeal.) Thomas J. concluded that the considerations of comity did not require the courts of this country to give effect to decisions of a foreign court that would override the parties' choice of law and jurisdiction.

39. In reaching that conclusion the judge relied heavily on the fact that the terms of the policy had been freely agreed between the parties. Mr. Smith submitted that the present case is different because New India was not an original party to the contract and had no opportunity to influence its terms. I accept that the two cases differ in this respect, but this ground of distinction does not undermine the conclusion that New India should be held to the clause. There is a strong presumption that in commercial contracts of this kind parties should be free to make their own bargains and having done so should be held to them. By parity of reasoning those who by agreement or operation of law become entitled to enforce the bargain should equally be bound by all the terms of the contract.
40. Finally, there is the question whether relief, if granted, will be effective. Mr. Smith submitted that the evidence suggests that the Finnish courts will not recognise or be prepared to give effect to an order restraining New India from pursuing its action and that that of itself is a factor that tells against granting an injunction.
41. In the present case the proceedings were served on New India in Mumbai and as far as I am aware it has neither a presence nor assets within the jurisdiction. In *Phillip Alexander Securities and Futures Ltd v Bamberger* [1997] I.L.P. 73 Leggatt L.J. recognised that in these circumstances an anti-suit injunction may not be readily capable of enforcement without the co-operation of the foreign court. The evidence before me is that the Finnish courts would not regard themselves as bound by an anti-suit injunction which would not in any event be directed at them. However, an order could, and if necessary no doubt would, be served on New India in Bombay and therefore the assistance of the Finnish courts is not required to render it effective as far as this jurisdiction is concerned.
42. One of the points that arose for decision in *Phillip Alexander Securities and Futures Ltd v Bamberger* was whether a judgment obtained in the courts of a member state by a litigant who had previously received notice of an injunction restraining him from prosecuting the proceedings would have to be recognised and enforced in this country under the Judgments Regulation. Both Waller J. at first instance and the Court of Appeal held that it would not have to be recognised on the basis that it would be contrary to public policy to do so. This seems to me to be an important aspect of the matter because in a case such as this where the party against whom the claim is being made carries on business in this country with assets located here it provides a powerful, albeit indirect, means of enforcement while at the same time providing real protection for the rights of the party who wishes to have any proceedings against him pursued in arbitration in accordance with the contract.
43. In these circumstances I am satisfied that the right course is to grant the relief which the Club seeks restraining New India from pursuing the claim in Finland.

Crown Copyright. Source: BAILII. This information is licensed under the terms of the Open Government Licence: <http://www.nationalarchives.gov.uk/doc/open-government-licence>. (<http://www.bailii.org/ew/cases/EWHC/Comm/2003/3158.html>, accessed 13 September 2012.)