Case No: A3/2004/0153

Neutral Citation Number: [2004] EWCA Civ 1598
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
MR JUSTICE MOORE-BICK
[2003] EWHC 3158 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 2 December 2004

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE CLARKE
and
LORD JUSTICE RIX

- -

Between :

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Mark Howard QC and **Mr Ricky Diwan** (instructed by **Birketts**) for the Claimant/Respondent
Mr Christopher Smith (instructed by **Holmes Hardingham Walser Johnston Winter**) for the Defendant/Appellant

- -

Judgment

Lord Justice Clarke:

Introduction

1. This is the judgment of the court on an appeal from an order of Moore-Bick J dated 18 December 2003. By that order he dismissed the defendant's challenge to the jurisdiction of the English High Court, declared that the defendant was bound to refer certain claims to arbitration in England and that proceedings issued by the defendant in Finland were brought in breach of the agreement to arbitrate and granted an injunction restraining the defendant from continuing with the proceedings in Finland and/or from commencing proceedings otherwise than by way of arbitration in London. The judge also ordered the defendant to pay the claimant's costs and gave the defendant permission to appeal.

The facts

2. The facts are not in dispute and can be taken from the judge's judgment. 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 two through transport bills of lading issued by Borneo Maritime Ltd ("BML"), which provided for the goods to be carried by sea to Kotka in 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").

3. The container arrived at Kotka on 30 November 1999. On 16 December Borneo Maritime Oy ("BMO"), 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.

4. 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. BML was a member of the Club for the year beginning 1 September 1999. BMO was also insured under the same cover as an associated company of BML.

5. Following the loss of the container, Saluja Fabrics made a claim against New India which was in due course compromised. As a result of the compromise New India became entitled to exercise Saluja Fabrics' rights against the carrier, either as assignee of those rights or by way of subrogation; we are not sure which. During 2002 BMO filed for bankruptcy and on 26 November 2002 it was struck off the register in Finland. As the judge observed, 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 either BMO or BML in respect of the loss of the container.

6. The Club rules for the year beginning 1 September 1999 included 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.

2.2 The submission to arbitration and all proceedings in connection with it shall be subject to English law.

2.3 No action or other legal proceedings against the Association upon any such dispute may be maintained unless and until it has been referred to arbitration and the award has been published and become final.

2.4 The sole obligation of the Association to you in respect of such dispute is to pay such sum, if any, as such final award may direct."

7. Clause A1.3(b) is colloquially known as a pay to be paid clause and clauses D2, 2.3 and 2.4 together contain both an arbitration clause and a *Scott v Avery* clause and are very similar to the clauses considered by Leggatt J in *Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd (The Padre Island (No 1))* [1984] 2 Lloyd's Rep. 408.

8. On 19 October 1999 the Club issued a certificate of membership ("the certificate") with the terms of the cover attached. The parties to the contract at that time were of course only BML and BMO on the one hand and the Club on the other. Neither Saluja Fabrics nor New India was a party. However, having paid Saluja Fabrics, New India naturally wanted to recover the amount it had paid from those responsible for the loss. It could not recover from BMO because it was insolvent (or indeed from BML presumably for the same reason) and it naturally considered how it could recover directly from the Club as the liability insurer of both BMO and BML. The claim is, by today's standards, comparatively modest. We were told that it is of the order of US$250,000 plus interest.

9. New India did not proceed in England under the Third Party (Rights Against Insurers) Act 1930, no doubt because of the pay to be paid clause and the decision of the House of Lords in *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. Instead, on 16 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 ("the Finnish Act").

10. Section 67 provides as follows:

> "*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) the insurance policy has been taken out pursuant to laws or regulations issued by the authorities;
>
> 2) the insured has been declared bankrupt or is otherwise insolvent; or
>
> 3) the general liability insurance has been mentioned in marketing efforts launched to promote the insured's business.

> If such claim is made to the insurer, the insurer shall inform the insured of the claim without undue delay and reserve the insured an opportunity to give further information on the occurrence of the insured event. The insured shall also be notified of the subsequent processing of the claim.
>
> If the insurer accepts a claim made by a person who has sustained bodily injury, property damage, or financial loss, such acceptance is not binding on the insured."

Section 67 thus gives a third party the right in some circumstances to proceed directly against a liability insurer such as the Club when the insured who would otherwise be liable to the third party is insolvent.

11. The only other section of the Finnish Act which is (so far as we are aware) relevant or potentially relevant is section 3, which provides as follows:

> "*Peremptory nature of the provisions*
>
> (1) Any terms or conditions of an insurance contract that deviate from the provisions of this Act to the detriment of an injured person or a person entitled to compensation or benefits other than the policyholder shall be null and void.
>
> (2) Any terms or conditions of an insurance contract that deviate from the provisions of this Act to the detriment of the policyholder shall be null and void if the policyholder is a consumer or a business which in terms of the nature and scope of its operations or other circumstances can be compared to a consumer as a party to the contract signed with the insurer. What is provided in this Subsection is not applied to group insurance contracts.
>
> (3) The provisions contained in Subsections 1 and 2 are not applied to credit insurance, marine or transport insurance taken out by businesses, or insurance taken out by businesses to insure aircraft."

As can be seen, section 3 is an anti-avoidance provision not dissimilar from that contained in the Third Party (Rights Against Insurers) Act 1930.

12. On 3 January 2003 a writ was issued in Finland which was served on the Club in England on 31 March. On 30 April the Club took steps to contest the jurisdiction of the District Court of Kotka. As we understand it, it did so without submitting to the jurisdiction for any other purpose. On 8 May it issued an arbitration claim form in the High Court seeking a declaration that New India is bound to pursue any claim in arbitration and an injunction to restrain it from pursuing its claim in Kotka. On 16 May Gross J gave the Club permission to serve the claim form on New India out of the jurisdiction and on 2 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.

13. On 22 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 EC Judgments Regulation (Council Regulation (EC) No 44/2001) ("the Regulation"), claims against insurers may be brought in the courts of the country where the harmful event occurred. It appears to have held that, although the loss occurred in Russia, the harmful event occurred in Finland on the basis that the loss was caused there, although the court does not spell out the basis of that finding in its judgment.

14. As to the arbitration clause the court said:

> "As grounds for the District Court's lack of jurisdiction, TT-Club has also invoked the fact that the insurance contract made between TT-Club and Borneo Maritime Oy's parent company Borneo Maritime Ltd contains an arbitration clause. According to it, all disputes rising from the insurance and the insurance contract must be settled according to the arbitration procedure in London under English law. The District Court observes that Saluja Fabrics and The New India are not contractual parties to that insurance contract. The arbitration clause thus does not concern The New India. Because The New India does not derive its right to insurance compensation from Borneo Maritime Oy, the arbitration clause does not concern The New India on this basis either. Nor have such other grounds been presented in the case as would lead to a situation in which the arbitration clause would be binding upon The New India."

15. The court thus held that neither Saluja Fabrics nor New India was a party to the contract of insurance and that New India's claim against the Club was not derived from BMO. For these reasons it was not bound by the arbitration agreement. We understand that an appeal against that decision is pending, although no date for it has yet been fixed. The order which is the subject of this appeal expressly permits New India to defend the appeal in Finland, notwithstanding the injunction.

The issues

16. The parties' positions before the judge can be summarised in this way. The Club relied upon the arbitration clause in its rules. It said that, if New India is to recover under section 67 of the Finnish Act, it can only do so "in accordance with the insurance contract" between the BMO and the Club and that it follows that it is, at least for that purpose, bound by all the Club rules including the arbitration clause. It thus follows that New India must bring the claim by way of arbitration in England. It makes that submission in these proceedings. In due course it will submit in the arbitration that it is entitled to a declaration that New India's claim is

doomed to failure because it is bound by (and cannot satisfy) the pay to be paid clause. The Club said that in these circumstances it is entitled to an injunction to restrain New India from proceeding in Finland or elsewhere in breach of the arbitration clause.

17. New India's case was that it is suing in Finland in reliance upon an independent statutory cause of action created by a Finnish statute and that the English court has no jurisdiction because the Finnish court was first seised of the dispute under Article 27 of the Regulation. Moreover it said that it is not suing on the contract of insurance in the Club rules or indeed bringing a claim in contract at all and that it is not bound by the arbitration clause in the rules. In any event it said that the issue whether it was bound by the arbitration clause was one in respect of which the Finnish court was first seised and that under Finnish law both the arbitration clause and the pay to be paid clause are void. Alternatively New India said that the English proceedings should be stayed on the ground of *forum non conveniens* and in any event that no injunction should be granted.

18. Since the case was before the judge there have been two important decisions of the European Court of Justice ("ECJ") upon which New India places considerable reliance in support of its submissions, and especially in support of its case that no injunction should be granted by the English Court restraining proceedings in Finland. They are *Erich Gasser GmbH v Misat Srl*, ECR C-116/02, in which the judgment was given on 9 December 2003, and *Turner v Grovit*, ECR C-159/02 [2004] All ER (EC) 485, in which judgment was given on 27 April 2004. The judgment of the judge was given on 18 December 2003 at a time when he was unaware of the decision in *Gasser*.

The decision of the judge

19. The judge's conclusions may be shortly summarised in this way.

    i) New India was bound to submit the claim under section 67 of the Finnish Act to arbitration in London. In proceedings before an English court a dispute about New India's claim can only be resolved by applying the principles of English private international law relating to characterisation. On the authorities, notably *National Bank of Greece and Athens v Metliss* [1958] AC 509, *Adams v National Bank of Greece* [1961] AC 255 and *Macmillan Ltd v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387, the question depends on whether New India is seeking to enforce a contractual obligation derived from the contract of insurance or an independent right of recovery arising under the Finnish 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 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

ii) 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. The essential nature of the right created by section 67 is to enforce the terms of the contract.

iii) 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.

iv) It further follows that the court had jurisdiction in this case to give permission to serve the claim form out of the jurisdiction under CPR 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.

v) The court was not bound to stay the proceedings under Article 27.1 of the Regulation because by Article 1.2(d) it does not apply to arbitration and because, following the decision of Aikens J in *Navigation Maritime Bulgare v Rustal Trading Ltd (The 'Ivan Zagubanski')* [2002] 1 Lloyd's Rep. 107, these proceedings are within the arbitration exception and thus outside the Regulation.

vi) There was no basis for staying the proceedings or setting aside the service outside the jurisdiction as a matter of discretion, given the judge's conclusion that the Club was entitled to have the matter arbitrated in England and not pursued in litigation in Finland or elsewhere.

vii) Applying the principles in the authorities as to anti-suit injunctions, the club was entitled to an injunction restraining New India from proceeding further in Finland.

The appeal

20. The argument in the appeal ranged somewhat more widely than before the judge because it was submitted by Mr Smith on behalf of New India that, as the court first seised, the Finnish court and not the English court must decide whether these proceedings are within the arbitration exception or not. He also submitted that, if it was open to the English court to determine that question, we should hold that *The Ivan Zagubanski* was wrongly decided and that the proceedings are outside the arbitration exception, with the consequence that the proceedings are within the Regulation and that this court must decline jurisdiction or stay the proceedings under Article 27. Mr Smith further relied upon the decisions of the ECJ in *Gasser* and *Turner v Grovit* in support of his submission that in any event no anti-suit injunction should have been granted.

21. The principal questions which arise in the appeal seem to us to be these:

i) Should the court decline jurisdiction or stay the proceedings under the Regulation?

ii) Was the judge right to hold that New India is bound to pursue its claim under the Finnish Act by arbitration in England?

iii) Should the permission to serve the claim form out of the jurisdiction be set aside or the proceedings be stayed as a matter of discretion?

iv) Should the judge have granted the declarations he did?

v) Should he have granted an anti-suit injunction?

We will consider those questions under these headings: the Regulation, the arbitration clause, setting aside service and stay, the declarations and the anti-suit injunction.

The Regulation

22. The Regulation provides, as far as relevant, as follows:

> "CHAPTER 1 – SCOPE
>
> Article 1
>
> 2. The Regulation shall not apply to:
>
> ……
>
> (d) arbitration.
>
> CHAPTER II – JURISDICTION
>
> SECTION 9 – LIS PENDENS – RELATED ACTIONS
>
> Article 27
>
> 1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.
>
> Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

CHAPTER III – RECOGNITION AND ENFORCEMENT

Article 32

For the purposes of this Regulation 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1 – Recognition

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedure provided for in Section 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Article 36

Under no circumstances may a foreign judgment be reviewed as to its substance."

23. It is common ground that the Finnish court is the court first seised. Mr Smith submitted that the English court should decline jurisdiction or stay the proceedings under Article 27 or stay them under Article 28. Mr Howard submitted on behalf of the Club that the Regulation has no application because these proceedings relate to arbitration and are within the arbitration exception in Article 1.2(d). However, Mr Smith took a prior point, namely that, as the court first seised, it is for the Finnish court and not the English court to decide whether these proceedings are within the Regulation or not and that the English court should stay these proceedings in the meantime under Article 27 of the Regulation, pending a decision of the Finnish court on that question. We will therefore consider that question first.

24. There is undoubted force in Mr Smith's submission if it is considered in principle and without regard to the decided cases. It seems to us to be at least arguable that the court first seised should indeed decide whether any relevant set of proceedings in a member state is within the Regulation or outside it because the arbitration exception applies, in order to have a clear rule on that question and in order to avoid conflicting judgments on that very question. However, that is not the approach which has so far been adopted.

25. Mr Howard relied upon the decision of the ECJ in *Marc Rich & Co AG v Societa Italiana PA (The Atlantic Emperor)* [1992] 1 Lloyd's Rep 342. He submitted that that decision is inconsistent with the proposition advanced by Mr Smith. In that case plaintiff buyers ('Marc Rich') claimed damages for breach of contract from defendant sellers of crude oil ('Impianti') alleging that the oil was contaminated. On February 18 1988 Impianti issued a writ in Italy claiming a declaration that it was not liable to Marc Rich. The writ was served on February 29 and on the same day Marc Rich commenced an arbitration in London. Impianti failed to appoint an arbitrator. On May 20 Marc Rich issued an originating summons asking the English court to appoint an arbitrator and obtained leave to serve the summons out of the jurisdiction. On July 8 Impianti applied to set aside the order giving leave to serve out of the jurisdiction on the ground that the dispute between the parties was whether or not the contract contained an arbitration clause and fell within the arbitration exception in Article 1(4) of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 ("the Brussels Convention"), which was of course the forerunner to the Regulation. Marc Rich argued that the Brussels Convention did not apply on the ground that the arbitration exception in Article 1(4), which was in the same terms as Article 1.2(d) of the Regulation, applied.

26. The Court of Appeal referred these questions to the ECJ for a preliminary ruling:

> "1. Does the exception in Article 1(4) of the Convention extend:
>
> (a) to any litigation or judgments and, if so,
>
> (b) to litigation or judgments where the initial existence of an arbitration agreement is in issue?
>
> 2. If the present dispute falls within the Convention and not within the exception to the Convention, whether the buyers can nevertheless establish jurisdiction in England pursuant to:
>
> (a) Article 5(1) of the Convention, and/or
>
> (b) Article 17 of the Convention.
>
> 3. If the buyers are otherwise able to establish jurisdiction in England than under paragraph 2 above, whether:

(a) the Court must decline jurisdiction or should stay its proceedings under Article 21 of the Convention or, alternatively,

(b) whether the Court should stay its proceedings under Article 22 of the Convention, on the grounds that the Italian Court was first seised."

27. Impianti relied upon a report prepared for them by Mr Jenard, who had of course previously made a report on the Brussels Convention and the 1971 Protocol to which, like that of Professor Schlosser on the 1978 Accession Convention, the court may consider and which must be given such weight as is appropriate in the circumstances, by reason of the express terms of section 3(3) of the Civil Jurisdiction and Judgments Act 1982. In paragraph 22 of his report prepared for Impianti Mr Jenard said this:

> "Both the Italian and the English Courts are presently seised of this matter. The Italian Court (which was the court where proceedings were first brought) is asked to deal with the merits of the claim brought by Marc Rich under the sale contract and, incidentally to that claim, to confirm its own jurisdiction and determine the validity of the disputed jurisdiction clause in the contract. The English Court, on the other hand is asked to decide whether the arbitration clause is valid and if so to appoint an arbitrator. It is therefore certain that both the English and Italian Courts will directly or indirectly rule on the validity of the arbitration clause and it is further possible that they could come to different conclusions, in the event that the Italian courts, in reaching a conclusion on the merits, consider the Arbitration Clause to be invalid or non-existent and the English Court find that there is a valid Arbitration Agreement. In this respect it is important to remember the aims of the Brussels Convention."

28. Mr Jenard then referred to *Effer v Kantner* [1982] ECR 825 and in paragraph 24 stressed the desirability of avoiding simultaneous proceedings on the same subject matter before the courts of two or more contracting parties "since this would lead to conflicting judgments and difficulties in the enforcement thereof". His view was that, since the Italian court was the court first seised, it should determine the question whether the arbitration clause was valid and that, if it held that it was, the parties should be sent to arbitrate in England, whereas if it held that it was not, the litigation should remain in Italy. In the meantime the English court should stay its proceedings under Article 21 of the Brussels Convention, which was the equivalent of Article 27 of the Regulation.

29. There was in our view some force in that approach but Advocate General Darmon did not agree. His view was that the principal subject matter of the proceedings pending before the English court was arbitration, that the arbitration exception therefore applied and that the Convention did not apply because it did not apply to that principal subject matter and that was so whether or not the English court had before it the preliminary issue of whether or not the arbitration existed: see eg paragraph 30 and following. The Advocate General was of the view that it was of decisive importance to determine whether the principal issue before the court fell within the scope of the Convention (paragraph 47), which in his view the principal issue in the English proceedings did not.

30. In considering question 1, the ECJ reformulated it by posing this question:

> "Whether a preliminary issue concerning the existence or validity of an arbitration agreement affects the application of the Convention to the dispute in question."

It answered the question in this way:

> "22 Impianti contends that the exclusion in Article 1(4) of the Convention does not extend to disputes or judicial decisions concerning the existence or validity of an arbitration agreement. In its view, that exclusion likewise does not apply where arbitration is not the principal issue in the proceedings but is merely a subsidiary or incidental issue.
>
> 23 Impianti argues that, if that were not so, a party could avoid the application of the Convention merely by alleging the existence of an arbitration agreement.
>
> 24 Impianti contends that, in any event, the exception in art 1(4) of the Convention does not apply where the existence or validity of an arbitration agreement is being disputed before different Courts to which the Convention applies, regardless of whether that issue has been raised as a main issue or as a preliminary issue.
>
> 25 The Commission shares Impianti's opinion in so far as the question of the existence or validity of an arbitration agreement is raised as a preliminary issue.
>
> 26 Those interpretations cannot be accepted. In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the Court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.

> 27 It would also be contrary to the principle of legal certainty, which is one of the objectives pursued by the Convention (see judgment in Case 38/81, *Effer v Kantner*, [1982] ECR 825, paragraph 6) for the applicability of the exclusion laid down in Article 1(4) of the Convention to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties.
>
> 28 It follows that, in the case before the Court, the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator.
>
> 29 Consequently, the reply must be that Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national Court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation."

31. The court then said that, in view of the answer given to the first question, the second and third questions did not call for a reply. Mr Howard submitted that it follows from the reasoning of the ECJ that it rejected the suggestion that only the Italian court, as the court first seised, was entitled to determine the question whether the English proceedings fell within the Convention. He submitted that, if it had reached that conclusion, it would simply have so held and the problems with which it was faced would have been solved.

32. There is force in that submission. It seems clear that the Advocate General did not think that it was a matter for the Italian court, as the court first seised, to determine whether the English proceedings were within the arbitration exception. Moreover there is nothing in the ECJ decision or reasoning to suggest that that was not a matter for the court in which the proceedings said to be subject to the arbitration exception are brought, which was of course the English court in that case, to determine. Although the ECJ did not specifically address that question, it is we think reasonably clear that that was its view and we do not accept Mr Smith's submission that, because the Finnish court was the court first seised, the judge should have stayed the proceedings under Article 27 of the Regulation pending a decision by the Finnish court on the question whether the English proceedings were within the arbitration exception under Article 1.2(d) of the Regulation.

33. Mr Smith submitted that that conclusion is inconsistent with the decision of the ECJ in *Gasser*, where the facts were shortly these. On 19 April 2000 MISAT, who were Italian buyers of children's clothing from an Austrian company called Gasser, started proceedings in Rome seeking a ruling that the contract between the parties had been terminated. On 4 December Gasser brought an action in Feldkirch in Austria for payment of outstanding invoices. Gasser asserted not

only that Austria was the place of performance under the contract but also that the Austrian court was designated by a choice of jurisdiction clause which had contractual effect between the parties so that it had jurisdiction under Article 17 of the Convention, which is now Article 23 of the Regulation. MISAT challenged the existence of the agreement as to jurisdiction and asserted that the question whether there was such an agreement was a matter for the court first seised, which was the court in Rome. On 21 December 2001 the Austrian court declined jurisdiction of its own motion pending the decision on jurisdiction by the court in Rome.

34. On appeal the Oberlandesgericht in Innsbruck stayed the proceedings and referred a number of questions to the ECJ, including what was the second question, which the ECJ formulated in this way in paragraph 28:

> "whether Article 21 of the Brussels Convention must be interpreted as meaning that, where a court is second seised and has exclusive jurisdiction under an agreement, it may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction."

The ECJ held in paragraphs 51 and 54 of its judgment that the answer to the second question must be that Article 21 must be interpreted as meaning that a court second seised must await the decision of the court first seised as to whether it (ie the court second seised) has jurisdiction to determine the dispute under a jurisdiction clause.

35. Mr Smith relied upon paragraphs 41, 42, 47, 48 and 51 of the judgment, where the court made it clear that the issues to be determined solely by the court first seised included issues "as to the very existence of a genuine agreement between the parties, expressed in accordance with the strict formal conditions laid down by Article 17" because, as the court put it, "it is conducive to the legal certainty sought by the Convention that, in cases of *lis pendens*, it should be determined which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention." It held that it was clear from the wording of Article 21 that it was for the court first seised alone to determine that question.

36. Mr Smith submitted that the same reasoning leads to the conclusion that the court first seised should decide whether the claim in the court second seised is within the Regulation or outside it because of the arbitration exception. As we indicated earlier, there is force in that submission but we do not accept it for the reason given by Mr Howard. The reason is that there is a crucial distinction between this case and *Gasser*, namely that in *Gasser* it was common ground that the claims in both courts were within the Convention and governed by Articles 21 and 22, whereas here that is not common ground. The question here is whether the claim in England is within the Regulation or not.

37. In these circumstances we do not accept Mr Smith's submission that the English court is no more entitled to consider the applicability of the arbitration exception than the Austrian court was entitled to consider Article 17 of the Convention in *Gasser*. As already indicated, it appears to us that the reasoning of the Advocate

General and of the ECJ in *The Atlantic Emperor* supports the conclusion that it is open to the court in which the issue whether the arbitration exception applies to consider that question, even if it is the court second seised. If it concludes that the arbitration exception applies so that the claim and proceedings are outside the Convention it is entitled to proceed in the ordinary way. If, on the other hand, it concludes that the exception does not apply and that the proceedings are within the Convention, the provisions of the Convention apply in their full rigour, in which event, if a question arose as to whether the court second seised had jurisdiction under an exclusive jurisdiction clause to which Article 23 applied, it would be for the court first seised to determine that question by reason of Article 27 in accordance with the decision of the ECJ in *Gasser*. It follows that we do not accept the submission that the judge should have stayed the proceedings under Article 27 of the Regulation pending a decision by the Finnish court on the question whether the English proceedings were within the arbitration exception under Article 1.2(d) of the Regulation.

38. The next question is whether the judge was right to hold that the claim in these proceedings comes within the arbitration exception and is thus outside the Regulation altogether by reason of Article 1.2(d). Mr Smith submitted that the decision of Aikens J in *The Ivan Zagubanski* was wrong and that it follows that the decision of the judge, which followed it, was also wrong. This is a topic upon which there has been some divergence of opinion at first instance. This can be seen from the judgment of Aikens J, who (at pp 118-9) disagreed with the analysis of Judge Diamond QC in *Pertenreederei M/S 'Heidberg' v Grosvenor Grain and Feed Co Ltd (The Heidberg)* [1994] 1 Lloyd's Rep 287.

39. We note in passing that at one stage during the argument we considered referring a number of questions to the ECJ because this appeal seems to us to raise some issues which are at least arguably not *actes clairs*. However, since the conclusion of the argument our attention has been drawn to Article 68 of the revised EC Treaty which adapted Article 234 (formerly 177) so that it provides in this context:

> "Where a question on the interpretation of [the Regulation] is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the [ECJ] to give a ruling thereon."

It is common ground between the parties that under the revised EC Treaty this court no longer has power to refer questions on the interpretation of the Regulation to the ECJ. The only court which can do so is the House of Lords, which, as a court against whose decisions there is no judicial remedy in the United Kingdom, is bound to refer such a question in the circumstances identified in the adapted Article 234 quoted above.

40. In *The Ivan Zagubanski* Aikens J considered a number of first instance decisions in addition to *The Heidberg*, including *Qingdao Ocean Shipping Co v Grace Shipping Establishment (The Xing Su Hai)* [1995] 2 Lloyd's Rep 15, *Toepfer*

41. In *The Ivan Zagubanski* explosions and fire had caused damage to cargo, which had been shipped under bills of lading containing English arbitration clauses. Cargo interests brought proceedings in Marseille and elsewhere against the shipowners. The claimant shipowners claimed a declaration that there was a valid arbitration agreement between the parties and sought an anti-suit injunction restraining the cargo interests from pursuing court proceedings in Marseille or elsewhere. Aikens J held that the claims were within the arbitration exception and thus outside the Brussels Convention and granted both the declaration and the injunction sought. In reaching his conclusion on the first point he analysed the opinion of Advocate General Darmon in *The Atlantic Emperor* and relied both upon it and upon the decision and reasoning of the ECJ, part of which we have already set out.

42. Aikens J set out what in our view is an entirely accurate account of the Advocate General's opinion in paragraph 70 of his judgment as follows:

> "Mr Advocate General Darmon's opinion is elaborate and gives a detailed analysis of the structure and scope of the Convention and its relationship with arbitration. The following points in his opinion seem particularly relevant to the present case:
>
> (1) Before the Brussels Convention there were already important international conventions governing the enforcement of arbitration agreements and awards, particularly the New York Convention of 1958.
>
> (2) Although the application before the English Courts in Marc Rich was for the appointment of an arbitrator, there was a threshold or "preliminary" question that had to be considered: whether an arbitration agreement existed at all.
>
> (3) The "principal issue" before the English Court was the appointment of an arbitrator. That is not within the Convention.
>
> (4) If the "principal issue" is outside the scope of the Convention, then even if a "preliminary matter" is within the Convention, that cannot bring the whole proceedings within the scope of the Convention. In this case the "preliminary matter" is whether an arbitration agreement exists.
>
> (5) In any event a dispute as to the existence of an arbitration agreement falls outside the scope of the

Convention. This opinion is reinforced by the view at par 64 of Professor Schlosser's report on the Accession Convention.

(6) Whether or not the existence of an arbitration agreement is a preliminary or principal issue, "it seems that the principal subject-matter of the dispute before the national Court relates to arbitration."

(7) The views of Mr Schlosser (expressed in an opinion prepared specifically for that case when before the ECJ) that the Convention applied to *all proceedings* before Courts must be rejected. They are contrary to the views expressed in the reports by Mr Jenard and Mr Schlosser on the original Convention and the Accession Convention. They stated:

> (a) The Brussels Convention … does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration … and does not apply to the recognition of judgments given in such proceedings.
>
> (b) … the 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the dismissal of arbitrators, the fixing of the judgment determining whether an arbitration agreement is valid or not … is not covered by the 1968 Convention.

(8) The report of Messrs Evrigenis and Kerameus (on the accession of the Hellenic Republic to the Brussels Convention in 1986) also stated that:

> Proceedings which are directly concerned with arbitration as the principal issue … are not covered by the Convention.

(9) It is not legitimate to suggest that arbitration awards that are made into judgments must be capable of recognition and enforcement under the Convention. They are enforceable under the New York Conventions as awards or as judgments "under bilateral conventions or by domestic law". Furthermore, there is no reason for it to be "desirable" to apply the Brussels Convention and *annul* arbitration awards.

(10) The Brussels Convention should also not apply to the issue of the recognition and enforcement of judgments concerning the existence and validity of arbitration agreements. That is because there is the danger that such a

judgment may be given in a state other than the place of the arbitration.

(11) Finally on this aspect of the case he said that the application of the Brussels Convention to determine jurisdiction would undermine international arbitration. That is because arbitration needs the assistance of the Courts of the state where the arbitration is to take place in order to aid the arbitration process itself. Yet that Court might not have jurisdiction under the Convention unless a special jurisdiction could be invoked by art 5(1) or 17. But attempts to use those articles to found a Court's jurisdiction in relation to arbitration were open to strong objection or criticism."

43. In paragraph 70(5) Aikens J referred to paragraph 64 of Professor Schlosser's report on the Accession Convention. Paragraph 64(b) is in these terms:

> "The 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example, the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time-limit for making awards or the obtaining of a preliminary ruling on the question of substance as provided under English law in the procedure known as "statement of special case" (Section 21 of the Arbitration Act 1950). In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention."

The case contemplated in the last sentence is very close to this case on the facts.

44. Aikens J expressed his conclusions derived from the Advocate General's opinion in paragraphs 71 and 72 in this way:

> "71. In my respectful view the opinion of Mr Advocate General Darmon is comprehensive and its analysis compelling. The theme and overall conclusion of it is that the Brussels Convention does not apply to any Court proceedings or judgments in which the principal focus of the matter is "arbitration". That includes proceedings concerning the validity or existence of an arbitration agreement; the appointment of arbitrators; ancillary assistance to arbitration proceedings and the recognition and enforcement of awards.
>
> 72. Based on his opinion and the views of Messrs Jenard and Schlosser on which he relies, I would have no hesitation in saying that proceedings in the English Court

> for (i) a declaration that arbitration clauses bound the defendants; and (ii) an injunction to restrain proceedings in Courts in breach (or threatened breach) of binding arbitration agreements fall within the exception in art 1(4) of the Convention. That is simply because the principal focus of those proceedings is "arbitration". "

We entirely agree with that analysis and cannot improve upon it.

45. In paragraph 73 Aikens J summarised the conclusions of the ECJ, the substance of which we have set out in paragraph 30 above. We should also refer to paragraph 18 of the ECJ judgment upon which Aikens J placed some reliance. It is in these terms:

> "The international agreements, and in particular the abovementioned New York Convention on the recognition and enforcement of foreign arbitral awards …, lay down rules which must be respected not by arbitrators themselves but by the courts of the Contracting States. Those rules relate, for example, to agreements whereby parties refer a dispute to arbitration and the recognition and enforcement of arbitral awards. It follows that, by excluding arbitration from the scope of the Convention on the ground that it is already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings before national courts."

46. Aikens J correctly observed in paragraph 73 that the ECJ generally followed the view of the Advocate General and in paragraph 74 he said this:

> "[Counsel] submitted that the decision of the ECJ was narrow and confined to the single issue of whether litigation for the appointment of an arbitrator was excluded from the Convention under art 1(4). He is correct about the decision. But that cannot detract from the fact that the Court took a very broad view of the scope of the "arbitration exception" in art 1(4), as particularly expressed in pars 18 and 21 of its judgment. Nor is there one word of disapproval of the approach of Mr Advocate General Darmon or his views."

47. In the result Aikens J, in our opinion correctly, held that the question in each case is whether the (or a) principal focus of the proceedings is arbitration. That test seems to us to be consistent, not only with *The Atlantic Emperor*, but also with the first instance decisions to which he referred and we agree with him that the reasoning in those decisions is to be preferred to that in *The Heidberg*. Another way of putting the same point is to ask the question posed by Rix J in *The Xing Su Hai*, namely whether the essential subject matter of the claim concerns arbitration. We do not think that that is any different from the test which seemed to Clarke J to be correct in *The Lake Avery* [1997] 1 Lloyd's Rep 540, namely whether the

relief sought in the action can be said to be ancillary to, or perhaps an integral part of the arbitration process.

48. In our opinion the decisions in *The Ivan Zagubanski* that both the claim for a declaration that there was a binding arbitration agreement between the parties and the claim for an anti-suit injunction were within the arbitration exception were correct for the reasons given by Aikens J. We see no distinction in this regard between the facts of that case and this. It follows that the judge was correct to hold on the facts of the instant case both that the claims for declarations that New India was bound to refer its claim to arbitration and that the Finnish proceedings were brought in breach of an agreement to arbitrate and that the claim for an anti-suit injunction were within the arbitration exception in Artice 1.2(d) of the Regulation.

49. It follows that the answer to the first question identified in paragraph 21 above, namely whether the court should decline jurisdiction or stay the proceedings under the Regulation is no, since the Regulation has no application to the claims brought in the English proceedings.

50. A number of other questions which might arise under the Regulation were touched on in argument. In particular, there was some debate on the question whether the judgment of the District court of Kotka is entitled to recognition under Article 33. However, we do not think that this question arises for decision at present. As we understand it, the judgment obtained to date is simply to the effect that that court has jurisdiction to entertain a claim by New India under the Finnish Act. That was essentially a matter for that court in proceedings which seem to us to be within the Regulation. Whether that judgment is entitled to recognition or not does not seem to us to be relevant to the question whether the judge was correct to grant the declarations or injunction which he did.

51. The fact that arbitration is excluded from the Convention means that from time to time there are likely to be conflicting judgments in different member states and it is therefore possible that questions of recognition and enforcement of conflicting judgments may arise in the future in a case like this. In our opinion such questions are best left for decision when and if they arise.

The arbitration clause

52. Some of the argument in this appeal proceeded on the footing that the question is whether New India became a party to the agreement to arbitrate contained in clause D2 of the General Provisions in the Club Rules. However, we do not think that that is quite the right question and, as we read his judgment, the judge did not go so far. We accept Mr Smith's submission that New India did not become a party to an arbitration agreement. We agree that self-evidently New India was not an original party and there is no basis upon which it could be held that there was any novation or transfer to New India of the rights and obligations of the insured under the Club Rules. This is in our view important on the question whether it was appropriate to grant an anti-suit injunction discussed below.

53. As we read his judgment, the judge accepted the submission made to him on behalf of the Club that, if New India wished to make a claim against it under

section 67 of the Finnish Act, the claim was properly characterised under English principles of conflict of laws as a claim under the contract to enforce the obligations of the Club and that, just as New India could rely upon the terms of the rules to establish liability, so the Club could rely upon the terms of the rules to defeat or limit the claim. One of those rules was the arbitration clause in clause D2 of the General Provisions and another was the *Scott v Avery* clause in clause D2.3, which expressly provided that no action can be brought on a dispute "unless and until it has been referred to arbitration and the award has been published and become final".

54. In our judgment, if the judge was right to hold that the claim under section 67 of the Finnish Act was properly characterised under English principles of conflict of laws as a claim under the contract to enforce the obligations of the Club, he was plainly correct to hold that the Club could, as a matter of English law, rely upon the terms of the rules, whether they be provisions relating, say, to the extent of the cover or the arbitration clause. The key question under this head is therefore whether he correctly classified New India's claim under section 67 of the Finnish Act.

55. Mr Smith submitted that he did not. He pointed to the judge's own conclusion that if in substance the claim is independent of the contract of insurance and arises simply as a right of action under the Finnish Act against an insolvent insured, the issue must be determined under Finnish law. Mr Smith submitted that that is precisely what the Finnish Act is. There is undoubtedly some force in that submission but, like the judge, we do not accept it. The authorities, which are referred to in paragraph 19(i) above and were relied upon by the judge, show that the nature of New India's claim can only be resolved by applying the principles of English law relating to characterisation.

56. We agree with the judge that those principles involve a consideration of the substance of the claim being advanced. The judge cited two passages from the judgments of this court in *Macmillan Ltd v Bishopsgate Investment Trust Plc (No. 3)* [1996] 1 W.L.R. 387 which bear this out. The first is in the judgment of Auld LJ at page 407B-C, where he said this:

> "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."

The second is in the judgment of Aldous LJ at page 418A-B, where he said this:

> "I agree with the judge when he said [1995] 1 WLR 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."

57. We agree with the judge that those are helpful statements because they recognise that the court is concerned to identify the true issues or, as Aldous LJ put it, the question at issue. Applying that approach the judge expressed his conclusion in paragraph 16 as follows:

> "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*."

We entirely agree with that approach, which seems to us to be consistent with the authorities.

58. The question is therefore what is the substance of New India's claim under section 67 of the Finnish Act. The judge held that the claim is in substance to enforce against the Club as insurer the contract made by the insured. He was in our opinion right so to hold for the reasons he gave. In short, the title to section 67 is the "*insured person's entitlement to compensation under general liability*

insurance" and the right is defined as a right "to claim compensation in accordance with the insurance contract direct from the insurer" in certain defined circumstances. The claim under the Act is not therefore in any sense independent of the contract of insurance but under or in accordance with it. In these circumstances it seems to us that the judge was correct to hold that the issue under the Act is one of obligation under the contract. The judge noted in passing in paragraph 18 of his judgment that the Finnish court itself described the Act as giving the injured party the right to claim compensation "according to the insurance policy".

59. In all the circumstance, we agree with the judge that, although the Act gives the claimant a right of action directly against the insurer without the need for the formalities of an assignment, what he obtains is essentially a right to enforce the contract in accordance with its terms. As to the anti-avoidance provisions in section 3 (quoted above), the judge said this in paragraph 19:

> "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."

We agree.

60. For these reasons, which are essentially those of the judge, our answer to the question posed in paragraph 21(ii) is that the judge was right to hold that, if New India wishes to pursue a claim under the Finnish Act, it is bound to do so by arbitration in England because the Club is entitled to rely upon the arbitration clause, just as it is entitled to rely upon any other clause in the contract to defend the claim.

Setting aside service and stay

61. Mr Smith submitted that the judge should in any event have set aside service out of the jurisdiction or granted a stay on the basis of *forum non conveniens*. The judge rejected two specific submissions in this regard in paragraphs 22 and 23 of his judgment:

> "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 TT 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."

62. In our judgment, the judge was plainly correct in this regard. Once it is held by the English court that New India is bound to submit its claim under the Finnish Act to arbitration it does not seem to us that it would be just to stop the Club seeking a declaration to that effect in proceedings in England. In any event we see no proper basis upon which this court could interfere with the exercise of the judge's discretion under this head.

The declarations

63. The declarations granted were set out in paragraphs 2(a) and (b) of the order as follows:

> "(a) It is declared that the Defendant is bound to refer any claims against the Claimant, in respect of the consignment carried from Calcutta (India) to Kotka (Finland) and onwards to Moscow (Russia) pursuant to 2 bills of lading … and CMR International Way Bill ("the consignment"), to arbitration in accordance with the arbitration clause contained in Section D, Clause2.1 of [the certificate] ("the arbitration clause").
>
> (b) It is declared that the proceedings commenced by the Defendant against the Claimant in Kotka, Finland, by summons dated 16 December 2002

("the Kotka proceedings"), are in breach of the arbitration clause."

64. It seems to us to follow from the conclusions which we have reached so far that the Club is entitled to the first of those declarations. For the reasons given above under the heading 'the arbitration clause', an application of English conflict of laws principles leads to the conclusion that, if New India wishes to pursue a claim under the section 67 of the Finnish Act, it must do so in arbitration in London because the Club is entitled to rely upon the arbitration clause in the Club Rules, which are the very rules which New India relies upon in order to make a claim under the Act: see, in the context of the Third Parties (Rights Against Insurers) Act 1930, *The Padre Island (No 1)*.

65. It is less clear that the Club is entitled to the second declaration. In our view the Club is not entitled to such a declaration if it means, on its true construction, that New India was in breach of contract in commencing the Kotka proceedings. As indicated in paragraph 52 above, we do not think that New India was in breach of contract. So, for example, the Club could not in our view sue New India for damages for commencing the proceedings in Finland. It seems to us that the declaration could be so construed and for that reason we think it right to set aside that declaration. As we see it, the Club is sufficiently protected by the first declaration and either does not need the second or, if it is construed as just suggested, is not entitled to it.

The anti-suit injunction

66. The judge granted an anti-suit injunction restraining New India from commencing or continuing any claims arising out of the consignment otherwise than by arbitration in London. As a result New India is at present enjoined from proceeding with the Kotka proceedings, save so far as necessary to defend the Club's appeal on jurisdiction. The judge considered this topic in detail between paragraphs 25 and 43 of his judgment.

67. The judge referred to what is now a considerable body of authority to the effect that the court will readily grant an injunction to restrain proceedings elsewhere in breach of an exclusive jurisdiction clause or an agreement to arbitrate. The cases include: *Aggeliki Charis Compania Maritima SA v Pagnan SpA. (The 'Angelic Grace')* [1995] 1 Lloyd's Rep 87, *Bankers Trust Co v PT Jakarta International Hotels & Development* [1999] 1 Lloyd's Rep 910, *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500, *Donohoe v Armco Inc* [2001] UKHL 64, [2002] 1 Lloyd's Rep 425 and *Welex AG v Rosa Maritime Ltd (The 'Epsilon Rosa')* [2003] EWCA Civ 938; [2003] 2 Lloyd's Rep 509.

68. The rationale of the cases on exclusive jurisdiction clauses can be seen from these passages in the speeches of Lord Bingham and Lord Hobhouse in *Donohoe v Armco Inc*, which were quoted by the judge in paragraphs 27 and 28 of his judgment. 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."

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."

69. Almost identical principles have been applied in the case of arbitration clauses. As the judge observed in paragraph 29, in *The Epsilon Rosa* Tuckey LJ, 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."

70. The judge essentially applied those principles to the facts of the instant case. He rejected Mr Smith's submissions that this case is to be distinguished from the ordinary case. He accepted that New India was not cynically flouting the clause but said that that did not take the matter very far once it was established that the claim is subject to the arbitration clause and the Club had made it clear that it wanted the matter decided in arbitration.

71. The judge rejected the submission that the Club should be left to apply for a stay in Finland, on the basis that there is now a strong line of authority that the mere fact that an application for a stay of the foreign 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 injunctive relief. The judge took account of the delay in making the application and the fact that the Club had made an unsuccessful challenge to the jurisdiction of the District Court in Kotka before making the application but (in the latter case) expressed the view that it was not a factor which carried great weight.

72. As to Mr Smith's submission based on comity, the judge said in paragraph 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."

We return to this point below in the context of the decision of the ECJ in *Turner v Grovit*, which was not of course decided until after the judgment in this case.

73. A key aspect of the judge's reasoning was this. He recognised (in paragraph 35) that if the proceedings continue in Finland, subject to any possible defences on the merits, it is likely that the claim will succeed because the pay to be paid clause in the Club Rules will not be effective because of section 3 of the Finnish Act, whereas if the claim proceeds by way of arbitration in London the claim will fail because the pay to be paid clause will be held to be effective in accordance with the decision of the House of Lords in *The Fanti* and *The Padre Island (No 2)*.

74. In support of his conclusion the judge relied upon the decision of Thomas J in *Akai Pty Ltd v People's Insurance Ltd* [1998] 1 Lloyd's Rep 90, where Akai brought an action in England under a credit insurance policy which contained both

a choice of English law and jurisdiction clause and a clause barring any action arising out of the policy unless commenced within 12 months of the relevant events. The action was brought after the expiry of the 12 months and the insurer counterclaimed for a declaration that the action was time barred. Akai also commenced proceedings in Australia, where the High Court of Australia held that, by reason of section 8 of the Australian Insurance Contracts Act 1984, the clause providing for English law and jurisdiction was void.

75. As a result, the position was that, if the action was tried in England the claim would be time barred, whereas if it was tried in Australia the time bar would be ineffective as a matter of Australian law and policy. Thomas J held that the court should give effect to the parties' choice of law and jurisdiction clause unless it would be contrary to public policy to do so. He held that considerations of comity did not require the courts of this country to give effect to the decisions of a foreign court that would override the parties' choice of law and jurisdiction. He therefore allowed the counterclaim to proceed.

76. All the cases to which the judge referred (and to which we have been referred) are cases in which the parties to the litigation or their privies had agreed the jurisdiction or arbitration clause. That includes the *Akai* case. Mr Smith submitted to the judge that this case is different but the judge said this in paragraph 39:

> "In reaching that conclusion the judge [ie Thomas J] 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."

The judge thus rejected the distinction between this case and the decided cases identified above on the footing that "by parity of reasoning" the same considerations apply to both.

77. Finally the judge rejected a submission based on the evidence that the Finnish courts would not recognise or give effect to an injunction. He did so on the basis that the injunction would not be addressed to the Finnish court but to New India.

78. Mr Smith submitted to us that the judge was wrong not to distinguish the ordinary case where a party to a contract brings proceedings in breach of contract and this case in two key respects. First, he submitted that, even in a case where such proceedings are a breach of contract, an anti-suit injunction should not be granted to restrain proceedings in the courts of a country to which the Regulation applies.

It is in this regard that he relied upon the decision of the ECJ in *Turner v Grovit*. Second, he submitted that this case is markedly different from any of the previous cases and submitted that, whatever the state of English law, there was no good reason to restrain New India from using a Finnish statute in Finland for the purposes for which it was intended, namely to provide third parties with rights against liability insurers free of artificial shackles such as pay to be paid clauses. We will consider each of those submissions in turn.

79. As to the first submission, the judge in effect left the point open. He noted in paragraph 26 that in *Turner v Grovit* (which had been referred to the ECJ by the House of Lords [2001] UKHL 65, [2002] 1 WLR 107) Advocate General Ruiz-Jarabo Colomer 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. However, the judge said that until the ECJ itself delivered a ruling he considered that he had no alternative but to regard himself as bound by the existing law and practice in this country.

80. In *Turner v Grovit* the Court of Appeal granted an injunction restraining the defendant from continuing proceedings in Spain or commencing proceedings there or elsewhere against Mr Turner on the ground that such proceedings were or would be vexatious and oppressive and brought in bad faith in order to vex Mr Turner in the pursuit of his application in England before an Employment Tribunal. The question referred by the House of Lords was answered in this way by the ECJ at paragraph 31:

> "Consequently, the answer to be given to the national court must be that the Brussels Convention is to be interpreted as precluding the grant of an injunction whereby a court of a contracting state prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another contracting state, even where that party is acting in bad faith with a view to frustrating the existing proceedings."

81. Before answering the question in that way the ECJ emphasised in paragraphs 24 and 25 the mutual trust which contracting states accord to one another's legal systems and judicial institutions and said that it was implicit in that principle that the rules on jurisdiction, which are common to all, may be interpreted and applied with the same authority by each of them. The court also stressed in paragraph 26 that, save in a few cases, the Convention does not permit the jurisdiction of a court to be reviewed by a court in another contracting state. The court then said this:

> "27. However, a prohibition imposed by the court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which,

as such, is incompatible with the system of the Brussels Convention.

28. Notwithstanding the explanations given by the referring court and contrary to the view put forward by Mr Turner and the United Kingdom government, such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum state. In so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another member state, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another member state. Such an assessment runs counter to the principle of mutual trust which, as pointed out in paras 24 to 26 of this judgment, underpins the Brussels Convention and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another member state.

29. Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Brussels Convention (see *Kongress Agentur Hagen GmbH v Zeehaghe BV* Case C-365/88 [1990] ECR I-1845 (para 20). However, that result would follow from the grant of an injunction of the kind at issue which, as has been established in para 27 of this judgment, has the effect of limiting the application of the rules on jurisdiction laid down by the Brussels Convention.

30. The argument that the grant of injunctions may contribute to attainment of the objective of the convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings, cannot be accepted. First, recourse to such measures renders ineffective the specific mechanisms provided for by the convention for cases of lis alibi pendens and of related actions. Second, it is liable to give rise to situations involving conflicts for which the convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one contracting state, a decision might nevertheless be given by a court of another contracting state. Similarly, the possibility cannot be excluded that the

> courts of two contracting states that allowed such measures might issue contradictory injunctions."

82. Mr Smith submitted that this case is stronger than that because in *Turner v Grovit* the defendant was guilty of abusing the process of the court and acting in bad faith, whereas no such suggestion is or can be made against New India. That is so but, as we see it, this case is different from *Turner v Grovit* and indeed *Gasser* in a very important respect. In both *Turner v Grovit* and *Gasser* both sets of proceedings were what may be called Convention proceedings. Thus in *Gasser* the proceedings in both Italy and Austria were within the Convention, just as they were in England and Spain in *Turner v Grovit*. Each court had or potentially had jurisdiction under the Convention.

83. In the exclusive jurisdiction clause type of case like *Gasser*, there is as we see it no room for an anti-suit injunction because the court first seised must decide issues of jurisdiction including the jurisdiction of the court second seised. Although it was not said that Article 27 or 28 applied, *Turner v Grovit* was also a case in which both sets of proceedings were within the Convention. The position is different in a case where one set of proceedings is outside the Convention, as here. In a case where two parties to a contract which includes an arbitration clause bring proceedings in different contracting states and there is an issue as to whether one of those sets of proceedings is within the arbitration exception and thus outside the Convention, we have already expressed our view that the court in which that dispute arises has jurisdiction to determine that dispute and that Articles 27 and 28 do not apply to them. If that were wrong, the same principles would apply as in *Gasser* and no injunction could be granted.

84. However, if that view is correct, the underlying rationale of *Gasser* does not apply directly to such a case. Moreover, the considerations in paragraphs 26 to 30 of the judgment in *Turner v Grovit* quoted above do not seem to us to apply directly. Thus, as we see it, there is nothing in the Convention to prevent the courts of a contracting state from granting an injunction to restrain a claimant from beginning proceedings in a contracting state which would be in breach of an arbitration clause. As the ECJ put it in paragraph 18 of its judgment in *The Atlantic Emperor* (quoted in paragraph 45 above), the contracting parties "intended to exclude arbitration in its entirety", so that arbitration must be treated as entirely outside the Convention.

85. Once it is held (as it was for example in *The Ivan Zagubanski*) that proceedings in the court of a contracting state for (i) a declaration that arbitration clauses bound the defendants and (ii) an injunction to restrain proceedings in the court of another contracting state in breach (or threatened breach) of binding arbitration agreements fall within the exception in Article 1.2(d) of the Regulation and are thus outside the Convention so that Articles 27 and 28 do not apply to them, the question arises whether, in the light of the underlying reasoning in *Turner v Grovit*, an injunction should not be granted restraining the person in breach from bringing such proceedings.

86. The competing considerations seem to us to be these. It might be said in the light of the reasoning in *Turner v Grovit* that an injunction should never be granted to

restrain a claimant from proceeding in the courts of a contracting state in breach of an English arbitration clause because to do so interferes with the exercise by that court of the jurisdiction conferred on it by the Regulation. There is certainly some support for that view in *Turner v Grovit*, with its emphasis on mutual trust and the opinion expressed in paragraphs 27 and 28 (quoted above) that such an injunction interferes with the jurisdiction of the foreign court and that such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum state.

87. The question is whether that view should be preferred in this context to what has come to be the settled approach in England to proceedings brought in breach of an arbitration clause in a contract between the parties which was set out by the judge and is referred to above. In this regard the approach to actions in breach of contracts containing arbitration clauses is most clearly stated in the judgments of Rix J at first instance and in the judgments of Leggatt, Millett and Neill LJJ in this court in *The Angelic Grace* [1994] 1 Lloyd's Rep 168 and [1995] 1 Lloyd's Rep 87. It may be recalled that, although *The Angelic Grace* was itself concerned with an arbitration clause, by the time the case reached this court, the court had recently considered the correct approach to the grant of anti-suit injunctions in cases where proceedings were brought in breach of an exclusive jurisdiction clause in *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR.588. It was in those circumstances that in *The Angelic* Grace the court discussed both arbitration clauses and exclusive jurisdiction clauses.

88. The essential reasoning of the all judgments, expressed in robust form, can be seen in these paragraphs in the judgment of Millett LJ at page 96:

> "In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution. There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of forum non conveniens or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the question whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.
>
> The Courts in countries like Italy, which is a party to the Brussels and Lugano Conventions as well as the New York Convention, are accustomed to the concept that they may be under a duty to decline jurisdiction in a particular case

> because of the existence of an exclusive jurisdiction or arbitration clause. I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.
>
> ….
>
> In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank N.A. v. Aeakos Compania Naviera S.A.*, [1994] 1 W.L.R. 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction, is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."

89. In considering the propositions advanced by Millett LJ in those paragraphs, it is important to note that, as we have seen from the decision of the ECJ in *Gasser*, so far as proceedings within the Regulation are concerned, the approach to contracts containing exclusive jurisdiction clauses is not now the same as that advocated by the English courts. That is because the court first seised must decide whether any relevant court, including the court second seised, has jurisdiction under an exclusive jurisdiction clause within Article 23, so that there is no room for an anti-suit injunction. However, we see no reason why the principles in *The Angelic Grace* should not continue to apply to the circumstances in which claimants may be restrained from bringing proceedings in courts of non-contracting states in breach of agreements to arbitrate.

90. As to proceedings brought in the courts of a contracting state, in the first of the paragraphs quoted above Millett LJ in our view drew an important distinction between proceedings brought in breach of an arbitration clause and proceedings said to be vexatious or oppressive but where no breach of contract is involved. He said that the question whether proceedings are vexatious or oppressive was primarily for the court before which it was pending, whereas in the case of proceedings brought in breach of contract there was no good reason for diffidence in granting an injunction on the clear and simple ground that the claimant had promised not to bring them.

91. It appears to us that that distinction is consistent with the reasoning in *Turner v Grovit*, which was of course a case in which the ground on which the injunction had been granted was that the proceedings in Spain were vexatious and oppressive. There is nothing in *Turner v Grovit* which in our opinion contradicts the reasoning in the second or third of the paragraphs quoted from the judgment of Millett LJ, in so far as it relates to arbitration clauses. As to the second paragraph, there is no reason why any court should be offended by an injunction granted to restrain a party from invoking a jurisdiction in breach of a contractual promise that the dispute would be referred to arbitration in England. The English court would not be offended if a claimant were enjoined from commencing or continuing proceedings in England in breach of an agreement to arbitrate in another contracting state. As to the third paragraph, it remains the position that damages would be an inadequate remedy.

92. For these reasons we agree with the conclusions expressed by the judge in paragraph 34 of his judgment (quoted in paragraph 72 above) which seem to us to remain applicable in a case of this kind. We do not accept Mr Smith's submission that the court should not grant an anti-suit injunction in a case where a party to an arbitration agreement begins proceedings in the courts of a contracting state in breach of an arbitration clause in a contract.

93. That is not, however, this case. We therefore turn finally to Mr Smith's submission that the judge should not have granted an injunction in this case, where the highest that it can be put against New India is that the only reason that it can be said in England that New India should not be permitted to proceed in Finland is that, because of English principles of conflict of laws, the claim is classified as a claim under the contract so that New India is bound to bring any claim against the Club in arbitration in London. Mr Smith submitted that in these circumstances there is no parity of reasoning between this case and the principles relied upon by the judge and set out above.

94. We accept that submission. This claim is brought in Finland under a Finnish statute conferring rights on third parties against liability insurers in circumstances in which the insured is insolvent. The statute was no doubt passed because, as a matter of public policy in Finland, it was thought that liability insurers should be directly liable to third parties who had suffered loss in respect of which the insured was liable. The public policy behind the Finnish Act was the same as or very similar to the public policy behind the Third Parties (Rights Against Insurers) Act 1930. It appears that the only difference of importance between them is that in England the anti-avoidance provision does not defeat the pay to be paid clause, whereas it may be that section 3 of the Finnish Act will do so, although it is right to say that that is a matter yet to be determined by the Finnish courts. It may also be observed that by section 3(3) section 3(1) and (2) do not apply to "marine or transport insurance taken out by businesses". There is, as we understand it, an issue between the parties as to whether the liability insurance provided by the Club is within the exception. The court in Kotka appears to have been of the view that it was not, but was liability insurance outside the exception. However, it is not entirely clear to us whether the court has made a final decision to that effect in its decision on jurisdiction.

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 (*Gasser*) 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*, 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 proceeding 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 *Gasser* 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 section 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.

CONCLUSIONS

98. For the reasons set out above, we answer the questions posed in paragraph 21 above as follows:

i) No, the court should not decline jurisdiction or stay the proceedings under the Regulation (see paragraphs 22 to 51). In particular, the question whether the claim in England was within the arbitration exception was not a matter for the Finnish court as the court first seised (paragraphs 22 to 37) and the judge was right to hold that the claim in England was within the arbitration exception and thus outside the Regulation (paragraphs 38 to 51).

ii) Yes, the judge was right to hold that, under English principles of conflicts of laws, New India was bound to pursue its claim under the Finnish Act by arbitration in England (paragraphs 52 to 60).

iii) No, the permission to serve the claim form should not be set aside and the proceedings should not be stayed as a matter of discretion (paragraphs 61 and 62).

iv) The judge was right to grant the first declaration, namely that New India was bound to refer any claims against the Club in respect of the consignment to arbitration in England. However, the second declaration, namely that the Kotka proceedings, were and are in breach of the arbitration clause should be set aside because New India was not in breach of contract in bringing them (paragraphs 63 to 65).

v) No, the judge should not have granted the anti-suit injunction, which should be set aside (paragraphs 66 to 97).

It follows that the appeal is allowed in part. If there should be questions as to the recognition or enforcement of judgments under Articles 32 to 36 of the Regulation, they must be determined when and if they arise.

99. Finally we would like to thank counsel for all their assistance in this interesting case.

ORDER: Appeal allowed in part; agreed order; respondent to have 50% of costs in court below; appellant to have 25% of costs in appeal

(Order does not form part of approved judgment)

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