England and Wales High Court (Commercial Court) Decisions

Neutral Citation Number: [2005] EWHC 454 (Comm)

Case No: 2004 FOLIO 574

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

Royal Courts of Justice
Strand, London, WC2A 2LL

21/03/2005

B e f o r e :

COLMAN J.

Between:

WEST TANKERS INC **Claimant**

- and -

(1) RAS RIUNIONE ADRIATICA DI SICURTA SpA
(2) GENERALI ASSICURAZIONI GENERALI SpA
"THE FRONT COMOR" **Defendants**

Mr Timothy Brenton QC and Mr David Bailey (instructed by Ince & Co) for the Claimant
Mr Stephen Males QC and Ms Sara Masters (instructed by Moore Fisher Brown) for the Defendant
Hearing dates: 1 and 2 March 2005

HTML VERSION OF JUDGMENT

Mr Justice Colman: :

Introduction

1. This is an application to set aside an interim anti-suit injunction granted by Gross J. on 20 September 2004. By that order the defendant Insurers were restrained from proceeding with their claim against the claimant Owners of the Front Comor before the Tribunale di Syracuse in Sicily. The Insurers were not present at the hearing before Gross J.

2. The Insurers had insured Erg Petroli SpA ("Erg") who were owners of an oil refinery in Syracuse. Erg were also charterers of the vessel Front Comor under an Asbatankvoy charterparty dated 24 July 2000. The claimants were the Owners of the vessel. In August 2000 the vessel collided with an oil jetty at the Erg refinery and caused a great deal of damage. The jetty was put out of operation. Erg suffered losses not only in respect of repair costs, but also by reason of disruption of refinery operations and liabilities to pay demurrage to third parties. The Insurers have paid to Erg a total of Euros 15,587,292.66 under the policies.

3. The charterparty contained an agreement to arbitrate in clause 24 which provided as follows:

> "Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration in the City of New York or in the City of London whichever place is specified in Part 1 of this charter pursuant to the laws relating to arbitrations there in force before a board of three persons, consisting of one arbitrator to be appointed by the owners, one the charterer and one by the two so chosen."

4. The place specified in Part I was London. It also expressly provided by line 105 of the ISAB/ERG PETROLI CLAUSES that English Law was to apply.

5. In August 2000 Erg commenced arbitration proceedings against the Owners in London, confining their claims to uninsured losses. In respect of the insured losses the Insurers have in their own name commenced court proceedings against the Owners in the Tribunale di Syracuse in Sicily. In so doing they rely on their rights of subrogation under Article 1916 of the Italian Civil Code and claim the amount which they paid to Erg. These proceedings were started on 6 October 2003. They were served on the Owners' registered office in Liberia but do not appear to have come to the Owners' attention until May 2004. The Insurers then arrested the vessel at Fujairah and security was provided by the Owners' hull insurers extending to the Insurers' claim security which it had already put up to secure Erg's claim in the arbitration.

6. It is clear that the issues of liability which arise between the Insurers and the Owners in the Syracuse court proceedings are substantially the same as those which arise in the arbitration. The main issue is in both cases whether the Owners are protected by the errors of navigation exclusion in clause 19 of the charterparty or by Article IV rule 2(a) of the Hague Rules. Although Erg's claim is confined to its uninsured losses, there is a complete overlap between the arbitration and the Syracuse proceedings in as much as the Owners counterclaim a declaration in the arbitration that they are under no liability for damage caused by the collision.

7. In the arbitration the pleadings are closed and disclosure is substantially complete.

8. In the Syracuse court proceedings the first hearing was fixed for 16 February 2004 but was adjourned by the court because the lawyers were on strike. On 5 October 2004 the Owners entered their appearance and rejoinder by which they disputed jurisdiction and applied for a stay on the grounds of the arbitration agreement. At a hearing on 8 October 2004 the court was informed of the injunction granted by Gross J. and the Owners asked the court to suspend its proceedings. The Insurers did not take part in that hearing so as not to be in breach of the injunction. The Court on that occasion set 1 April 2005 as the date for the next hearing but the judge is not recorded as having made any reference to the injunction. He clearly declined to suspend the proceedings in the sense of granting a stay.

9. The Insurers put forward the following grounds for their application for discharge of the injunction:

> "(1) Because the proceedings before the Tribunale di Syracuse ("the Italian proceedings") are civil or commercial matters falling within the scope of the Jurisdiction Regulation, the anti-suit injunction is incompatible with the Jurisdiction Regulation in the light of Turner v. Grovit [2004] 2 Lloyd's Rep 169.
>
> (2) Because the proceedings before this Court are civil or commercial matters falling within the scope of the Jurisdiction Regulation, the anti-suit injunction is incompatible with the Jurisdiction Regulation in the light of Turner v. Grovit, supra.
>
> (3) As a matter of discretion (in the light of the reasoning in Turner v. Grovit, supra, Article II of the New York Convention and the fact that issues of Italian Law are said to arise), the court should not grant an anti-suit injunction.
>
> (4) Because the subrogated Insurers are not bound by the arbitration clause contained in the Charterparty."

10. In advancing these grounds the Insurers recognise that this court is bound by the decision of the Court of Appeal in Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Association Co Ltd [2005] 1 Lloyd's Rep 67. However, they reserve their

right to argue that the Through Transport Case was wrongly decided. In particular, they wish to argue that:

i) the Syracuse Court proceedings, being civil or commercial proceedings, fall within the scope of EU Regulation 44/2001;

ii) the arbitration exception in Article I.2(d) of the Regulation does not apply to those proceedings nor does it exclude the application of the Regulation from the present proceedings in the English courts;

iii) the Regulation (Article 71) covers the situation in this case by preserving the operation of the New York Convention 1958;

iv) the application of Turner v. Grovit to the present case has the result that it could be contrary to principle for the English Court to assume jurisdiction to determine whether the Insurers should continue to pursue the Syracuse proceedings it being for the Owners to raise objections to jurisdiction in those proceedings and for the Syracuse Court to determine that issue.

11. The Insurers alternatively submit that, quite apart from the correctness or otherwise of the Through Transport decision, this court should discharge the injunction because:

i) upon this application the issue whether the Insurers are bound by the arbitration agreement is governed by Italian law – the law of the insurance contracts;

ii) under Italian law, on the evidence of the Insurers' expert, a subrogated insurer would not be bound by an arbitration agreement between the assured and a third party debtor.

12. If the issue whether the Insurers are bound is not governed by Italian Law or Italian Law provides that they are so bound, then it is submitted that as a matter of discretion the injunction should be discharged because:

i) it would be the duty of the Syracuse Court to stay the proceedings before it if it concluded that the Insurers were bound to arbitrate, having regard to Article II.3 of the New York Convention;

ii) that being the jurisdictional duty primarily cast by the Convention on the Syracuse Court, the English court should not pre-empt that jurisdiction for to do so would be inconsistent with the philosophy underlying Turner v. Grovit.

13. Finally, it is submitted that, if English law applies, the Insurers are not in actionable breach of the arbitration agreement and consequently in accordance with the decision in the Through Transport Case, supra, the approach to anti-suit injunctions identified by the Court of Appeal in The Angelic Grace [1995] 1 Lloyd's Rep 87 does not apply and this court must approach the issue of discretion to grant an injunction, not on the basis that strong cause must be shown

for its discharge but that, as a matter of general discretion, such an injunction is neither just nor necessary. In particular, the tort is governed by Italian Law and it is Italian Law which governs the issue of subrogation. In this discretionary exercise it is also necessary to bring Turner v. Grovit or comity principles into the discretionary balance.

14. I therefore consider the following issues which arise on this application:

i) What is the law which governs the question whether the subrogated insurers are bound by the arbitration agreement?

ii) How that law is to be applied on the facts of this case.

iii) Findings as to Italian Law on the effect of subrogation.

iv) Should the Anti-Suit Injunction be discharged? The Insurers' submissions.

v) The Attitude of the Italian Courts to anti-suit injunctions and its relevance.

vi) Article 11.3 of the New York Convention.

vii) The Insurers' Submission that there was no actionable breach of the Agreement to arbitrate.

The Law Governing the Issue of Transfer by Subrogation of the Duty to Arbitrate.

15. It is submitted on behalf of the Insurers that the body of law which determines the question whether subrogated insurers are bound by the arbitration agreement in the charterparty is Italian law, which, as is common ground, is the proper law of the contract of insurance. It is submitted by the Owners that the question is to be determined by English law which, as is common ground, is the proper law of the arbitration agreement.

16. Mr Stephen Males QC, on behalf of the Insurers, draws attention to the fact that the subrogated claim is in tort and that under section 11(1) and (2) of the Private International Law (Miscellaneous Provisions) Act 1995 the applicable law in relation to a claim in tort is therefore that of the country (Italy) in which the events constituting the tort occurred. He draws attention also to Article 13 of that Convention (made applicable to the contract of insurance in this case by Schedule 3A of the Insurance Companies Act 1982). This provides as follows:

> "Where a person ("the creditor") has a contractual claim upon another ("the debtor"), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent."

17. This Article has no application to a claim in tort. However, it is to be observed that it demonstrates that, at least in relation to ascertainment of the entitlement to be subrogated to a contractual claim against the debtor, it is the law of the contract between the subrogated party and the creditor which is determinative and not the proper law of the contract between the creditor and the debtor.

18. The same principle should therefore apply where the issue is whether the insurer is subrogated to a claim in tort. In Dicey & Morris, The Conflict of Laws, 13th Edn, paragraph 30-037 it is stated:

> "On the other hand, the subrogation of an insurer to the rights of the insured is not normally an assignment and is governed by the law applicable to the contract of insurance."

19. Accordingly, in the present case it is submitted that it is by reference to Italian law as the law governing the policy of insurance that it must be determined whether the arbitration agreement is binding on the insurers.

20. Mr Timothy Brenton QC, on behalf of the Owners, while accepting that the law of the insurance contract governs the issue what rights have been transferred and further that under Italian law the Insurers have acquired the assured's right to sue the Owners in tort, submits that the question whether agreement to arbitrate is binding on the Insurers falls outside the scope of those matters to which the law of the insurance contract applies. He submits that it is by reference to the law of the arbitration agreement itself that this question falls to be determined.

21. In support of that proposition Mr Brenton relies on the decision of the Court of Appeal in Schifforhortsgesellschaft Detler v. Appen v. Voest Alpine Intertrading, The Jay Bola [1997] 2 Lloyd's Rep 279. In that case the relevant issue was similar to that which arises here, namely whether the time charterers claiming to enforce an English arbitration clause against subrogated insurers of the sub-charterers should have an injunction to prevent those insurers from pursuing their subrogated claim in the Brazilian courts. The Court of Appeal had to consider an argument by the insurers that, because they were not parties to the agreement to arbitrate contained in the time charter arbitration clause, they, as subrogated party, were not affected by any duty arising under that agreement (see page 285R). That argument was rejected. Hobhouse LJ. approached the issue by asking what contractual rights were said to have been transferred to the insurers. At page 285 he observed that:

> "The proper law which governs the voyage charter-party and the contractual rights which the insurance company is seeking to enforce in Brazil is English law."

22. He then went on to consider the analogous transfers of rights under section 136 of the Law of Property Act 1936 and the Third Parties (Rights against Insurers) Act 1930, citing the following passage from the judgment of Lord Goff in The Padre Island (No.2) [1990] 2 Lloyd's Rep 191 at 200:

> "The agreement to arbitrate is one which regulates the means by which the transferred right is to be enforced against the Club. As such, it is inevitable that such an agreement must be treated as transferred to the statutory transferee as part of, or as inseparably connected with, the member's right against the Club under the rules in respect of the relevant liability."

23. Hobhouse LJ. then referred to the following passage from his own judgment in The Jordan Nicolev [1990] 2 Lloyd's Rep 11 where there had been an assignment of the cause of action after the commencement of the arbitration:

> "Where the assignment is the assignment of the cause of action, it will, in the absence of some agreement to the contrary include as stated in s.136 all the remedies in respect of that cause of action. The relevant remedy is the right to arbitrate and obtain an arbitration award in respect of the cause of action. The assignee is bound by the arbitration clause in the sense that it cannot assert the assigned right without also accepting the obligation to arbitrate. Accordingly, it is clear both from the statute and from a

> consideration of the position of the assignee that the assignee has the benefit of the arbitration clause as well as of other provisions of the contract."

24. Hobhouse LJ. then continued:

> "The authorities confirm that the rights which the insurance company has acquired are rights which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligation of the time charterers to pay that award. Likewise, the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without recognising the obligation to arbitrate."

25. Sir Richard Scott VC expressed the identical reasoning at p291. The contractual rights to which the insurers were subrogated were "subject to the arbitration agreement" in the same contract. Therefore the insurers could not enforce those contractual rights "without accepting the contractual burden in the form of the arbitration agreement, to which those rights were subject."

26. It is to be observed that in order to determine the issue before it, the Court of Appeal, was concerned to analyse the nature of the chose in action available to be transferred by way of subrogation. It concluded that the chose in action consisted both of the cause of action for breach of the time charter and the requirement that disputes about it should be referred to arbitration. Whether those two components should be treated as inseparable was to be determined by reference to the law governing the contract under which both arose. The analytical process was thus that of defining the ambit of the subject-matter of the transfer by way of subrogation by reference to the proper law of that subject-matter.

27. It is right to add that it was never argued in that case that the issue whether the insurers were bound by the agreement to arbitrate was to be determined by reference to the law which governed the contract of insurance (Austrian law).

28. In The Ivan Zagubanski [2002] 1 Lloyd's Rep 106 where a similar issue arose, Aikens J. accepted as correct the claimant's argument that English law must govern the question whether the shipper and insurers were bound by the arbitration agreement: see page 115. Again, it does not appear to have been argued that the issue was governed by any other law than English law and certainly not by the proper law of the insurance contracts. In that case the agreement to arbitrate was governed by English Law.

29. Against this background, the application of English law conflicts rules require that the issue whether the insurers are entitled to be subrogated to their assured's rights of action is to be determined by reference to the proper law of the contract of insurance. However, once it has been decided that the insurer is in principle entitled to such a transfer, the next step is to identify the ambit of the rights available to be transferred. The transferability of those rights is for this purpose to be defined by reference to that body of law by which their source is governed.

30. In the present case the underlying cause of action relied on by the Insurers is in tort. They make no claim to be subrogated to any claim for breach of the charterparty. The tort took place in Italy. The body of law by reference to which the substantive rights of the charterers in respect of the jetty damage fall to be determined is Italian law by section 11(1) of the Private International Law (Miscellaneous Provisions) 1995. Is that, therefore, to be determinative of the subject-matter of the transfer?

31. The answer to that question is that in this court the applicable body of law is to be determined by English conflicts rules. Those rules prescribe, consistently with The Jay Bola, supra, that in

identifying the ambit of the subject matter of the transfer, it is necessary to investigate what right the assured had which has available to be transferred by subrogation to the insurer. The answer to that question is provided by asking what the assured's position was vis-à-vis the Owners. To that the answer is that circumstances are said to have arisen which, if proved, would arguably give rise under Italian law to a cause of action for damages in delict. However, the enforceability of that cause of action depends upon whether it falls within the scope of the arbitration agreement in the charterparty. That agreement is governed by English law and the issue whether its scope covers the claim in tort, as defined by Italian law, must therefore be determined by reference to the proper construction of the arbitration agreement in accordance with English law. The question whether the enforcement of that substantive right is to be by arbitration alone is then to be determined by the proper law of the arbitration agreement. If it is, then the question whether the subrogated insurer becomes the transferee of the bare underlying right of action in delict or such right of action becomes enforceable only in accordance with the arbitration agreement is to be determined by English Law as the law of the arbitration agreement and not by the law governing the tort or the law governing the contract of insurance.

Application of the Conflict Rules

32. If it is thereby concluded that the scope of the arbitration agreement is wide enough to cover the claim in delict, then, in accordance with English conflict rules, the subject-matter of the transfer by subrogation will have been conclusively defined as a claim in delict in accordance with Italian law enforceable by means of an arbitration agreement binding on the assured in accordance with English law. The application of both bodies of law therefore defines the subject-matter of the right available for transfer by subrogation in this case. Consequently, since the only method of enforcement of the underlying delictual right by the assured is by means of arbitration under an English Law arbitration agreement English conflicts rules apply English Law to determine whether the duty to arbitrate is to be treated as an inseparable component of the subject-matter transferred by subrogation to the Insurer.

33. Accordingly, by reference to The Jay Bola, supra, it is to be concluded that the defendant insurers have, under Italian Law, by subrogation become entitled to enforce, the insured charterer's right of action in delict against the Owners, but that, by reference to English Law, their duty to refer their claim to arbitration is an inseparable component of the subject matter transferred to the insurers.

34. This conclusion is, therefore, arrived at without reference to the expert evidence of Italian law on the issue whether by that body of law insurers under a contract of insurance governed by Italian law are bound by an agreement to arbitrate between the assured and the party against whom the subrogated claim lies. If, contrary, to my view, it is relevant to consider Italian law to determine this point, I make the following findings.

Italian Law Findings

35. The Insurers relied on the evidence of Professor Sergio La China, Professor of Civil Procedure Law in the University of Genoa. The Owners relied on the evidence of Professor Enrico Righetti, Professor of Arbitration Law and Lecturer in Civil Procedure Law at the University of Genoa.

36. It is common ground that under Italian law:

i) upon payment of a claim an insurer acquires rights of subrogation under Article 1916 of the Italian Civil Code;

ii) the insurer is entitled to exercise such rights by bringing proceedings in its own name;

iii) in consequence of the process of subrogation the insurer acquires the assured's rights against a third party liable to the assured in respect of the loss suffered by the assured and up to the amount paid to the assured by the insurer;

iv) there is no express provision or rule in Italian law as to whether a subrogated insurer is bound by an arbitration agreement which would bind the assured to refer its claim against the third party to arbitration;

v) in order to ascertain what Italian law provides on this matter it is necessary to refer to the opinions of writers and court judgments;

vi) decisions of the Supreme Court of Cassation are not binding, but considerable weight is attached to them;

vii) transfer by subrogation is a cessione del diritto whereby only a specific part of the contractual rights is transferred, as distinct from the whole contract;

viii) although where there is an assignment of the entire contract (cessione del contratto) the assignee is bound by the arbitration clause, it does not necessarily follow that the same applies to the case of transfer by cessione del diritto and opinions of Italian writers are divided whether this is the effect where there is an automatic legal transfer by way of subrogation.

37. Professor La China, while accepting that opinions are divided, considers the better view to be that the subrogated insured is not bound by the arbitration clause to the effect that an assignee de diritto cannot start arbitration proceedings. He must rely on court proceedings. Whereas the decisions of the Court of Cassation in two cases suggest that the right of the third party defendant to have the claim referred to arbitration is preserved thereby providing that third party with a procedural defence, the reasoning is defective in principle and does not represent Italian law.

38. Professor Righetti's evidence is that although there are no decisions of the Court of Cassation directly on the position of a subrogated party, the decisions of that court as to the consequences of a cessione del diritto support the conclusion that the effect of such an assignment is to entitle the debtor to treat the assignee as occupying the same procedural position as the assignor vis-à-vis the debtor, particularly the decisions in No.12616 (17 December 1998) and No.13893 (19 September 2003). The effect of this would be that, whereas the subrogated assignee could not invoke the arbitration agreement, the debtor would be entitled to insist that any claim against it was advanced by arbitration. Professor Righetti describes the explanation for this approach to the problems as identified by the Court of Cassation as being that it would be unfair for an agreement between the assignor and the assignee to which the debtor was not a party to deprive the debtor of the procedural benefit of an arbitration agreement binding on the assignor. Further an original party to a contract might otherwise assign his rights under it to an assignee for the purpose of avoiding arbitrating the disputes.

39. Whereas I entirely understand Professor La China's view that there are anomalous features in this solution in the sense that it appears to create a unilateral transfer of the arbitration agreement which leaves the assignee without the benefit of being able to start a claim by that means, yet potentially confronts him with a so-called procedural defence if he advances his claim in court, I am satisfied that the weight of more recent decisions of the Court of Cassation on the cessione de diritto is as described by Professor Righetti. Moreover, I find intrinsically unpersuasive Professor La China's argument that an automatic transfer of a private right of arbitration by subrogation is to be distinguished from a voluntary contractual assignment of such a right of a jurisdiction agreement or choice of court clause. For the reasons given by the Court of Cassation in the two judgments referred to above, it would be a remarkably defective juridical concept if the voluntary or automatic assignment of a right of action could have the effect of preventing the debtor from relying on an accrued procedural benefit.

40. For these reasons I conclude that in Italian law the effect of subrogation is to transfer rights of action to insurers who have paid a claim and that such transfer has the effect of binding the insurers to any binding arbitration agreement between the assured and the third party liable for the claim to the extent that if the insurer avails itself of its subrogated rights, whereas it cannot start an arbitration without the debtor's consent, the debtor can insist on the claim being brought referred to arbitration and a refusal to accede to such a request would be a breach of the insurer's duty as the party subrogated to the assured's right of action.

41. Accordingly, had I concluded that under English conflicts rules the subject-matter of the transfer of rights by subrogation was to be determined exclusively by reference to Italian law, I should have held it was an integral part of the subject-matter transferred that the Insurers must pursue their claim by arbitration if, having first claimed by court proceedings, the Owners had required a reference of the claim to arbitration and that to decline to take that course would be a breach of their contractual duty to the Owners.

Should the Anti-Suit Injunction be discharged? Insurers' Submissions

42. It is submitted on behalf of the defendant Insurers as follows:

i) The granting of an injunction is incompatible with EU Regulation 44/2001, in as much as the Italian proceedings are civil or commercial proceedings in the courts of a members state and the decision of the EU Court of Justice in Turner v. Grovit [2004] 3 WLR 1193 precludes such an order as an unjustifiable interference in the courts of a member state.

ii) Alternatively, if this court has any discretion in the matter, it should be exercised against granting an injunction on the grounds of (a) the general approach of the European Court to such orders in Turner v. Grovit, supra, and (b) the effect of Article II.3 of the New York Convention on the Recognition and Enforcement of Foreign Arbital Awards under which primary responsibility for enforcement of the arbitration agreement rests with the Italian courts and/or (c) the fact that the Italian Court is best placed to decide whether the Insurers under a policy governed by Italian Law are bound by the arbitration clause.

iii) Alternatively, if the question whether the Insurers are bound by the arbitration agreement is to be determined by the English Court, the Insurers are not so bound and there is no basis for granting an injunction.

iv) In any event, whether the consequence of the transfer by subrogation is governed by English or Italian law, the granting of an anti-suit injunction by the English courts would be regarded by the Italian courts as an unacceptable interference by the English courts in their procedures and should therefore be refused by analogy with Turner v. Grovit principles. In particular, Article II.3 of the New York Convention left it to the courts where the court proceedings had been commenced to determine whether those proceedings should be stayed and where that court was a member state of the EU it would be inappropriate to anticipate the determination of that issue by an anti-suit injunction. In this connection Mr Males QC accepted that the recent decision of the Court of Appeal in Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Association Co Ltd [2005] 1 Lloyd's Rep 67 meant that his submission as to the applicability of Turner v. Grovit as such was not open to him in this court, but while reserving his right to challenge that decision, he submitted nonetheless that:

> a) If the question whether subrogated insurers were bound by the arbitration agreement between their assured and the third party were governed by Italian law, and that law provided that the third party had an option to enforce the arbitration agreement by insisting on the insurers pursuing their subrogated claims by arbitration albeit the insurers were not entitled to begin arbitration proceedings, as stated by Professor Righetti, the insurers could not be in breach of the arbitration by not beginning an arbitration and accordingly an essential pre-requisite for the grant of an anti-suit injunction would be missing;
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> b) In the Through Transport Case, supra, an injunction was refused on the grounds that the subrogated insurers were not in breach of the arbitration agreement and that the commencement of the foreign court proceedings was not vexatious or oppressive on the facts of that case and that in the present case the facts were not materially different and the grant of an injunction under section 37(1) would not be just and convenient.

Attitude of the Italian Courts to an Anti-Suit Injunction and its Relevance

43. The Insurers rely on the evidence of Professor La China which can be summarised as follows:

i) The Italian courts would be likely to regard the grant of an anti-suit injunction in this case in much the same light as the German Court of Appeal of Dusseldorf judgment dated 10 January 1996 in Re the Enforcement of an English Anti-Suit Injunction. The following passage from that judgment reflects the substance of a view widely held amongst European commercial judges:

"[14] However, such injunctions constitute an infringement of the jurisdiction of Germany because the German courts alone decide, in accordance with the procedural laws governing them and in accordance with existing international agreements, whether they are competent to adjudicate on a matter or whether they must respect the jurisdiction of another domestic or a foreign court (including arbitration courts). Furthermore, foreign courts cannot issue instructions as to whether and, if so, to what extent (in relation to time-limits and issues) a German court can and may take action in a particular case.

[15] The fact that the contested anti-suit injunctions are not directly addressed to the German State or German courts, but to Mr G as the plaintiff in the actions already instituted by him and in potential further actions in Germany, cannot affect this decision, for the following reasons.

[16] Firstly, under German procedural law, where proceedings have already been instituted the courts must rely on the co-operation of the parties. In particular, if the parties fail to co-operate, this may, for reasons which need not be considered in detail here, bring the action to a standstill, thus achieving the aim of the anti-suit injunctions described above, so that the injunction addressed to the party is quite likely to influence directly the work of the German courts and is, in effect, equivalent under certain circumstances to an order addressed directly to the court (which would no doubt also be inadmissible according to the Anglo-Saxon concept of justice).

[17] Quite apart from this, the Sovereignty of Germany would also be generally infringed if, as in the present case, a foreign court issued instructions to the parties to an action before a German court as to how they are to act or to enter appearance and what applications they are to make. Judicial proceedings are guaranteed to be duly conducted in accordance with the rule of law only if the parties and their representatives are able, without any restriction, to place before the court all the facts they consider necessary for assessment by the court and to make the applications required by the procedural situation, and no further demonstration of this is necessary. These rights are safeguarded by the German procedural codes and, in many respects, by the Basic Law. The courts must give effect to these rights. Instructions from foreign courts to the parties concerning the manner in which the proceedings are to be conducted and their subject-matter are likely to impede the German courts in fulfilling this task. Therefore the authorities who are responsible for handling requests for assistance, and who have to respect jurisdiction, cannot be permitted to forward or serve such instructions to or on parties and in this way to allow foreign courts to influence the arrangements for and the course of pending judicial proceedings or to expose the parties concerned to the risk of punishment for contempt of court merely because they wish to exercise their rights which are safeguarded by German procedural law.

> [18] Like instructions concerning actions which are already pending, instructions from foreign courts purporting to prohibit certain proceedings before the German courts constitute interference with the sovereignty of Germany. The principle of free access to the German courts, which as such is an expression of state sovereignty and must be safeguarded by all state authorities, includes the right of every individual to refer to a court a matter of concern to him. The decision whether the proposed action is admissible is a matter for the German courts alone and cannot therefore be anticipated by instructions from foreign courts.
>
> [19] Finally, taking all the circumstances into consideration, it must be observed that the sole purpose of anti-suit injunctions (whatever form they take and to whomsoever they are addressed) is to safeguard the alleged jurisdiction of the foreign court (in the present case, the London Court of International Arbitration) and therefore their very object is to interfere with the jurisdiction of the German courts, which themselves claim the right and have the obligation exclusively to determine whether they have jurisdiction in any particular case."

ii) To give effect to such an anti-suit injunction would be inconsistent with the rights which Italian corporations are given by the Italian constitution to take legal proceedings to enforce claims in the Italian courts.

iii) The ethos of the Judgments Regulation, as expressed in Turner v. Grovit, was the mutual respect for the level of dignity and trustworthiness of the courts of all the member states to the effect that it is for the courts first seised to determine jurisdictional issues, such as that raised by reliance on an arbitration agreement.

iv) Under Article II.3 of the New York Convention the duty to enforce the agreement to arbitration falls on the court where court proceedings are started and there should be no interference in such jurisdiction by the granting of an anti-suit injunction by the courts of another state which is party to that Convention.

44. Professor Righetti shares this view, at least in part. He accepts that the Italian courts would take a similar attitude to that of the Dusseldorf Court cited above, but then goes on to state that such an injunction would not be seen "as offensive or an affront to the proper ambit of their own jurisdiction". The effect would be that such courts might regard an injunction as unenforceable and probably as "either as neutral or as irrelevant to their jurisdiction". When the issue of a stay was raised in the Italian courts it was clear enough that the court would abstain from proceeding with the court proceedings and would therefore dismiss the Italian proceedings consistently with the New York Convention.

45. The effect of this evidence is, in my judgment, that the Italian courts would simply ignore an anti-suit injunction and would go on to decide the issue whether to stay the proceedings on the grounds of the arbitration clause. In other words, they would not treat it as having any effect on their own jurisdiction to determine the point. It is thus implicit that an anti-suit injunction would be regarded as an ineffective attempt to anticipate the issue in the Italian proceedings which could be ignored.

46. However, it is necessary to observe that it is established by authority binding on this court that such attitude of a foreign court can be treated as irrelevant, at least where the anti-suit injunction is in support of an arbitration agreement.

47. In the Angelic Grace [1995] 1 Lloyd's Rep 87, which long preceded Turner v. Grovit, supra, Millett LJ., with whose judgment and reasoning Neill LJ. agreed, made the following observations at page 9.

> "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. We should, it was submitted, be careful not to usurp the function of the Italian Court except as a last resort, by which was meant, presumably, except in the event that the Italian Court mistakenly accepted jurisdiction, and possibly not even then. That submission involves the proposition that the defendant should be allowed, not only to break its contract by bringing proceedings in Italy, but to break it still further by opposing the plaintiff's application to the Italian Court to stay those proceedings, and all on the ground that it can safely be left to the Italian Court to grant the plaintiff's application. I find that proposition unattractive. It is also somewhat lacking in logic, for if an injunction is granted, it is not granted for fear that the foreign Court may wrongly assume jurisdiction despite the plaintiffs, but on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to that Court at all. Moreover, if there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign Court, far less offence is likely to be caused if an injunction is granted before that Court has assumed jurisdiction than afterwards, while to refrain from granting it at any stage would deprive the plaintiff of its contractual rights altogether. 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."

48. At least as regards those anti-suit injunctions granted in respect of breach of jurisdiction clauses, and therefore within the ambit of Regulation 44/2001, this approach is no longer permissible following the decision in Turner v. Grovit, supra. However, the reasoning in that decision is inapplicable to anti-suit injunctions in respect of cases involving breach of arbitration agreements which fall outside the scope of that Regulation: see the Through Transport Case, supra. In that case Clarke LJ., giving the judgment of the court, said as follows at p88R:

> "89. In considering the propositions advanced by Lord Justice Millett 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 art. 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 Lord Justice Millett 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 Lord Justice Millett, 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."

49. It is to be observed that in The Angelic Grace, supra, there appears to have been no evidence of the way in which the Italian courts would react to an anti-suit injunction and that Millett LJ. was able to infer that those courts would not in fact be "offended" were there to be an injunction in the case of breach of an arbitration agreement.

50. The purpose of such an order being to prevent the claimant in the foreign proceedings from acting in breach of contract by putting the other party to the cost and inconvenience of a

wrongly initiated set of proceedings, that would be less likely to cause offence to the foreign court. In the Through Transport Case, as appears from paragraph 77 of the judgment, there was evidence that the Finnish Courts would not recognise or give effect to such an injunction. This evidence was rejected as irrelevant by Moore-Bick J. at first instance on the grounds that the injunction would not be addressed to the Finnish Court but to the insurer. The Court did not again refer to that approach or suggest that it was wrong, but must have regarded it as correct because it subsequently went on to adopt the reasoning of Millett LJ., Turner v. Grovit notwithstanding. It is therefore an inescapable conclusion from that decision that in the case of an anti-suit injunction in support of an arbitration agreement evidence that a foreign court will not recognise or enforce the order is not capable of sustaining a submission that the foreign court would be so offended or affronted that an order should not be made.

51. Accordingly, it is to be concluded from the authorities binding on this court, that whatever terminology is adopted – "offended", "affronted" or "contrary to comity" – evidence that the foreign court would treat the order as an impermissible exercise of jurisdiction by the English courts is, as a matter of English conflicts rules, not in itself any reason to withhold such an order to procure compliance with an agreement to arbitrate.

52. Accordingly, the Court of Appeal's strong endorsement in the Through Transport Case of the continued application of the approach of the Angelic Grace to submissions that the foreign court would be affronted or offended by the making of an anti-suit injunction in the case of an arbitration agreement makes it unnecessary for this court to consider what weight should be attached to the reaction of the Italian courts in this case.

Article II.3 of the New York Convention

53. The Insurers' argument that it is for the court seised of the allegedly impermissible court proceedings to determine whether those proceedings should be stayed in order to give effect to a binding and applicable arbitration agreement and not for the English courts is inconsistent with the decision of the Court of Appeal in Toepfer v. Societe Cargill [1998] 1 Lloyd's Rep 379 in which the court reluctantly held that the decision in the Angelic Grace, supra, precluded such a submission. At p386L Phillips LJ. in holding that the judge did not err in principle in granting an anti-suit injunction in protection of an agreement to arbitrate observed:

> "The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. II.3 requires the Court of a Contracting State to refer the parties to arbitration when an action is commenced in disregard of a binding arbitration clause. It might be thought that there would be much to be said, both as a matter of comity and in the interests of procedural simplicity, if a defendant who was improperly sued in disregard of an arbitration agreement in the Court of a country subject to the New York Convention were left to seek a stay of the proceedings in the Court in question. It seems, however, that litigants in cases governed by English arbitration clauses are not prepared to trust foreign Courts to stay proceedings in accordance with the New York Convention, for it has become the habit to seek anti-suit injunctions such as that sought in the present case. In The Angelic Grace, [1995] 1 Lloyd's Rep. 87 the Court of Appeal gave its approval to this practice."

54. He then cited the first paragraph of that passage from the judgment of Millett LJ. at p96 set out at paragraph (47) above and observed:

> "While we would not wish it to be thought that we have independently endorsed these sentiments, in view of this decision we feel obliged to hold that Mr. Justice Colman did not err in principle in the exercise of his discretion when granting an injunction in this case. The point will be open to argument in a higher tribunal."

55. The decision in Turner v. Grovit does not disturb this decision. The exclusion by the Court of Appeal in the Through Transport Case, supra, of the application of Turner v. Grovit principles to anti-suit injunctions relating to arbitration agreements makes it clear that the approach in the Angelic Grace, supra, still prevails. It is therefore unnecessary and inappropriate to consider whether the court first seised of the proceedings in breach of the arbitration agreement would be offended or affronted by the English court granting such an order rather than leaving it to the foreign court to consider whether to grant a stay.

56. It should be added that Article II.3 of the New York Convention provides:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

57. Whereas this provision identifies the duty which rests on the court seised of court proceedings to stay those proceedings and to refer the parties to arbitration, it contains nothing which vests in that court exclusive jurisdiction to enforce that arbitration agreement. In this respect the Convention crucially has no provision equivalent to Article 27 of Regulation 44/2001 which vests exclusive jurisdiction in the court first seised of the issue. There is therefore no conventional provision of a similar nature to that which influenced the decision in Turner v. Grovit, supra.

58. Accordingly, I conclude that under English conflicts rules, Article II.3 does not provide a ground for refusal of an anti-suit injunction.

The Insurers' Submission that there was no actionable breach of the Agreement to arbitrate

59. This submission is directed to establishing that an essential pre-requisite of an anti-suit injunction is absent in this case and is founded on the analyses in both the Angelic Grace and the Through Transport Case. Thus in the judgment of Millett LJ. at p962 the distinction is strongly drawn between the case where a party has commenced foreign proceedings in breach of a jurisdiction clause or of an arbitration clause and a case where there is no breach but it is said that an injunction is justified on grounds of forum non conveniens or because the court proceedings are vexatious. In the case of a breach there was "no good reason for diffidence in granting an injunction", whereas in the other case of forum non conveniens great care should be taken to avoid casting doubt on the fairness or adequacy of the procedures of the foreign court and in the case of vexatiousness or oppression, that would be a matter primarily for the foreign court.

60. In the Through Transport Case the decision of the Court of Appeal reversing the decision of Moore-Bick J. and concluding that, although the subrogated insurers were bound to pursue their subrogated claim against the Finnish carrier's Club by arbitration due to the effect of the Finnish equivalent of the Third Parties (Rights against Insurers) Act 1930, turned on the court's view that in failing to refer their subrogated claim to arbitration the insurers had not acted in breach of any contract between it and the Club: see paragraphs 52, 59, 65 and 95 of the judgment of Clarke LJ. Nevertheless, the court agreed with Moore-Bick J. that the effect of the Finnish legislation was such that there had been transferred to the assured and by subrogation to the insurer a right to enforce the claim against the Club but only in accordance with its Rules, including the arbitration clause. However, the Court of Appeal's view was that because the insurers' omission to comply with this requirement did not amount to a breach of any contract between it and the Club or between its "privy" and the Club (see paragraph 76 of the judgment), the case fell outside the settled principles in the Angelic Grace, supra.

61. The judgment concentrated on the effect of the Finnish legislation in providing the insurers with a direct right of action (subject to the agreement to arbitrate) against the Club and on the fact that there had therefore been no direct contractual relationship between the insurer and the Club. Accordingly, there could be no breach by the insurers of any contract between the insurers or their privy and the Club. The substance of the court's reasoning arising out of that conclusion is set out at paragraphs 95 to 97 of the judgment of Clarke LJ:

> "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 s. 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 s. 3(3) s. 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.
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> 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 s. 37(1) of the Supreme Court Act, 1981 , it was or would be just and convenient to

> grant an injunction restraining New India from pursuing a claim under the Finnish Act in Finland."

62. It was thus the reliance by the insurers on the statutory transfer of rights of action against the Club under a contract to which the insurers were not a party that took the case out of the approach in the Angelic Grace and enabled the Court of Appeal to conclude that there was neither a breach of any contract with the Club, the only contract in respect of which the claim was brought being between the club member and the assured, nor any conduct by the insurers which could be regarded as vexatious or oppressive. There was thus no relevant parity of reasoning which justified the English court's intervention on the Angelic Grace lines by an order to restrain the insurer's conduct in acting inconsistently with the Club's Rules.

63. It is to be observed that in that case the burden of the arbitration agreement was not directly binding on the assured and was not therefore transferred to the insurer as part of the subject-matter which passed to the insurer by subrogation. It was one stage removed from the relationship between the debtor and the assured. Further, the judgment does not suggest in terms that, where the arbitration agreement is binding between the assured and the debtor, the transference of the assured's rights of action by way of subrogation to the insurer would involve that the insurer was not bound to comply with an applicable and binding arbitration agreement or could not be subjected to an anti-suit injunction. Nor, for reasons which I shall now explain, could it correctly have done so.

64. In the The Jay Bola, supra, one of the main issues was whether the subrogated insurers of DVA, disponent Owners of the vessel, should be granted an anti-suit injunction against Voest, who were the sub-charterers, and against their insurers restraining them from proceeding with a claim for cargo loss and damage in the Brazilian courts. It was argued on behalf of the insurers that they were not parties to the arbitration agreement in the sub-charter. There having been no novation which transferred the burden of the contract to the insurers they came under no actionable liability to the disponent owners for breach of the sub-charter. There was therefore no basis for the grant of an injunction against them. In other words, there had been no breach. Further, Brazil was not a party to the New York Convention. Having observed, by reference to the Angelic Grace, supra, that where one party to a contract containing an arbitration agreement insisted on pursuing a claim by proceedings in the courts of a jurisdiction which did not recognise the New York Convention the primary remedy would be an injunction to restrain the contract breaker, Hobhouse LJ. said this at p285 L-R:

> "Therefore if the Brazilian action had been brought by the voyage charterers, it cannot be disputed that the voyage charterers would thereby have been in breach of contract. The time charterers would, prima facie, be entitled to an injunction against the voyage charterers to restrain them from continuing the Brazilian action. The action claiming an injunction would be an action to enforce or obtain other relief in respect of the breach of a contract being a contract which is by its terms or by implication governed by English law so that the writ or other originating procedure would be one which the Court has jurisdiction to allow to be served out of the jurisdiction under O. 11. No problem of jurisdiction to give leave to serve out or to grant an injunction would arise. But the plaintiff in the Brazilian proceedings and the relevant defendant in the present action is the insurance company. The insurance company has made no contract with the time charterers. The insurance company is the assignee or the transferee of the rights of the voyage charterers against the time charterers. It is submitted on behalf of the insurance company that as a result the insurance company is entitled to enforce the voyage charterers' contractual rights without any obligation to refer the dispute to arbitration. This submission is unsound and contrary to decided authority.
> The proper law which governs the voyage charter-party and the contractual rights which the insurance company is seeking to enforce in Brazil is English law. Under s. 136 of the Law of Property Act, 1925 rights of action are assignable subject to equities, for example, rights of equitable set-off.

(Lawrence v. Hayes, [1927] 2 K.B. 111). Similarly under s. 4 of the Arbitration Act, 1950 and s. 1 of the Arbitration Act, 1975 the stay of an action may be ordered on the application not only of the contracting party but also "any person claiming through or under him". (The position is the same under the 1996 Act: see s. 82(2).) An example of such a stay being granted against an assignee is The Leage, [1984] 2 Lloyd's Rep. 259. The assignee takes the assigned right with both the benefit and the burden of the arbitration clause. (Aspel v. Seymour, [1929] W.N. 152; Shayler v. Woolf, [1946] 1 Ch. 320 not following the dicta in Cottage Club Estates v. Woodside Estates Co. Ltd., [1928] 2 K.B. 463.) In The Padre Island (No. 1), [1984] 2 Lloyd's Rep. 408, Mr. Justice Leggatt held that the transferee under the Third Parties (Rights against Insurers) Act, 1930 of an insolvent assured's rights against his insurer, a P. & I. Club, was bound by the arbitration clause: . . .The 1930 Act transfers to the plaintiffs not the claim but the contractual rights of the insured. Those contractual rights are subject to the arbitration clause. . .(p. 414) In The Padre Island (No. 2), [1990] 2 Lloyd's Rep. 191 at p. 200 Lord Goff said:

> "The agreement to arbitrate is one which regulates the means by which the transferred right is to be enforced against the Club. As such, it is inevitable that such an agreement must be treated as transferred to the statutory transferee as part of, or as inseparably connected with, the member's right against the Club under the rules in respect of the relevant liability."

65. At page 286 L-R Hobhouse LJ. developed this further:

> "Miss Bucknall submits that, even so, there is no right which can be asserted by the time charterers against the insurance company which gives a cause of action by the former against the latter. She submitted that to recognize any such cause of action would amount to treating the burden of the contract as having been transferred, something which would only occur if there had been a novation. In the present case all that had been transferred was a right of the voyage charterers against the time charterers. The burden of the contract was not transferred. The insurance company came under no actionable liability to the time charterers. In my judgment this argument fails to understand the nature of the equitable remedy which is being sought in this action. The simplest way in which to illustrate this is to take a simple analogy. If the assignee of a legal right in action seeks to enforce that right against the debtor without taking into account an equitable set-off which the debtor was entitled to raise against the assignor, the debtor's remedy, prior to the Common Law Procedure Acts and the Judicature Acts of the last century, would have been to apply in the Court of Chancery for an injunction to restrain the assignee from asserting the common law right in the Common Law Courts unless and until he recognized the equitable right of the debtor. The injunction was granted to provide the debtor with the appropriate protection from the unconscionable conduct of the assignee; it does not depend upon any liability of the assignee for the sums to be set-off. The right to apply for an injunction is not a "cause of action" of the same character as the right to sue for damages for breach of contract or tort or to collect a legal debt. It is an application for an equitable remedy to protect the plaintiff against the consequences of unconscionable conduct. Since the fusion of the jurisdiction of the Chancery and Common Law Courts, the need of the aggrieved party to apply for an injunction no longer arises and the common injunction has been abolished by statute. He can raise the equity in response to and in the same proceedings as the common law action. However, where the action is brought by the assignee in another jurisdiction which does not recognize the equitable right of the debtor, the debtor's only remedy is (just as it was in the first half of the last century) to

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

66. Morritt LJ. agreed and Sir Richard Scott VC delivered a judgment which specifically concurred with this analysis.

67. This decision, which was not cited to the Court of Appeal in the Through Transport Case, supra, indicates that it will normally be appropriate to grant an anti-suit injunction against a subrogated insurer who pursues a claim by court proceedings inconsistently with an arbitration agreement binding on its assured and notwithstanding that the insurer has not become liable for damages for breach of the agreement to arbitrate. Were it otherwise a debtor would be deprived by operation of subrogation of an accrued contractual entitlement to have a claim against him referred to arbitration, a result no less unjust than being deprived of that benefit by the opposite party to the agreement to arbitrate.

68. Accordingly, I have come to the conclusion that, where a subrogated insurer commences proceedings in a foreign court inconsistently with an agreement to arbitrate such a claim which is binding as between the assured and the debtor, the reasoning and approach to the grant of the anti-suit injunction in the Angelic Grace supra, is as applicable to that insurer as it would have been to the assured had the foreign court proceedings been commenced by that assured. The fact that the subrogated insurer would not commit an actionable breach of contract vis-à-vis the debtor by commencing the court proceeding would in such circumstances be in principle irrelevant.

69. As I have said, the Through Transport Case, supra, does not deal with the position of a subrogated insurer where by operation of law or legislation it is the assignee of the assured's right of action subject to an agreement to arbitrate. However, the reasoning which led to the refusal of an anti-suit injunction rested heavily on the absence of an actionable breach of contract by the subrogated insurers or indeed their assured against the Club. However, The Jay Bola shows that the availability of a claim for damages for breach of the agreement to arbitrate is not a pre-requisite to the applicability of the Angelic Grace approach at least in the case of a claim by a subrogated insurer. That was also the approach of Aikens J. in The Ivan Zagubanski [2001] 1 Lloyd's Rep 106. It is unnecessary for the purposes of this case to decide whether any different principle should apply where, as in the Through Transport Case, there is superadded a statutory transfer of liability, also subject to an arbitration agreement, by reason of the insolvency of the debtor. It is right to say, however, that the express reliance of Hobhouse LJ. at p285 on Lord Goff's analysis of the effect of the Third Parties (Rights against Insurers) Act 1930 in The Padre Island (No.2) [1990] 2 Lloyd's Rep 191 at 200 strongly suggests that the Court of Appeal would have drawn no distinction between the availability of an anti-suit injunction to a statutory transferee under that Act and its availability against an assignee or transferee of an assured's rights by way of subrogation.

70. Accordingly, I conclude that, if, as I have held, the ambit of the subject-matter of the transfer by subrogation is to be determined by English Law, the Insurers were bound to pursue subrogated claims against the Owners by arbitration. Their insistence on proceeding in the Italian courts would be inconsistent with the equitable rights of the Owners under the arbitration agreement to have a claim against them in tort referred to arbitration. In principle, therefore, the anti-suit injunction would be an appropriate remedy unless strong cause were shown to the contrary.

71. If the ambit of the subject-matter transferred by subrogation is determined by Italian law to be the right to sue in court proceedings subject to the Owner's option to insist on the claim being referred to arbitration, the result would be the same. The Owners have asserted that they require arbitration and the Insurers have refused to accede to that requirement. They have thereby acted and they continue to act inconsistently with the Owners' equitable rights and, although that conduct may not amount to an actionable breach of the agreement to arbitrate, it gives rise to a right of protection by way of injunctive relief under English Law which governs the agreement to arbitrate.

72. The right to be protected against a breach of an agreement to arbitrate is to be enforced unless strong reasons are shown to the contrary: see Donohue v. Armco Inc [2002] 1 Lloyd's Rep 425, para 23 per Lord Bingham. The authorities, such as The Angelic Grace and The Jay Bola leave it in no doubt that strong cause is not normally to be provided by forum non conveniens considerations alone. In principle, the fact that evidence relevant to the cause of action in tort may be exclusively or substantially located in Italy or that the tort or the contract of insurance are governed by Italian Law are thus considerations which yield to the need to protect the Owners' contractual rights. So also must any sensitivity to the risk of affront to the Italian courts by an approach analogous to that in Turner v. Grovit.

Conclusion

73. For the reasons which I have given this is a clear case for an anti-suit injunction. In continuing the Syracuse court proceedings the Insurers have demonstrated that they intend to ignore the Owners' rights to insist that the determination of claims in tort arising out of the charterparty should be by London arbitration. There can be no real doubt as to their position nor that it is inconsistent with the terms of the arbitration agreement to the effect that the Owners are entitled to injunctive relief in equity.

74. In these circumstances this application will be dismissed.

75. The Owners invite me to make the injunction permanent. The Insurers say that before that happens they should be entitled to have a mini trial of the issues of Italian Law as to the effect of the Italian Law of subrogation. However, in view of the fact that I have held that as a matter of law the relevant ambit of the subject-matter of the rights transferred by subrogation that is to say whether the duty to arbitrate is an inseparable component of that subject-matter is to be determined by English law and not by Italian Law, the determination of any such issues of Italian Law would be irrelevant. The issues as to the proper law have been fully argued on this application and there is no sensible purpose in re-opening them before this court.

76. Accordingly, the correct order, in my judgment, is that a permanent injunction should now be substituted for the temporary injunction which was granted by Gross J.