COURT OF APPEAL FILE NO. CA44448

COURT OF APPEAL

ON APPEAL FROM the order of Madame Justice Fitzpatrick of the British Columbia Supreme Court pronounced on the 1st of May, 2017

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND:

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND:

IN THE MATTER A PLAN OF COMPROMISE AND ARRANGEMENT OF NEW WALTER ENERGY CANADA HOLDINGS, INC., NEW WALTER CANADIAN COAL CORP., NEW BRULE COAL CORP., NEW WILLOW CREE COAL CORP., NEW WOLVERINE COAL CORP., AND CAMBRIAN ENERGYBUILD HOLDINGS ULC

PETITIONERS
(RESPONDENTS)

AND:

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN AND TRUST

APPELLANT

BOOK OF AUTHORITIES OF THE RESPONDENT, WALTER CANADA GROUP
VOLUME 3 of 3

United Mine Workers of America 1974 Pension Plan and Trust

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INDEX

* Tab references to the Appellant 1974 Plan's Book of Authorities are included as [P#] where applicable

VOLUME 1

Tab*	Authority
	Cases
1	*BG Preeco (Pacific Coast) Ltd v Bon Street Holdings Ltd,* [1989] 1989 CanLII 230, 37 BCLR (2d) 258, (BC CA)
2	*Chevron Corp. v Yaiguaje*, 2015 SCC 42
3	*Concept Oil Services Ltd v En-Gin Group LLP,* [2013] EWHC 1897 (QBD); All ER (D) 90 (Jul)
4 [P4]	*International Association of Science and Technology for Development v. Hamza*, 1995 ABCA 9 [*Hamza*]
5 [P5]	*JTI-Macdonald Corp v British Columbia (Attorney-General)*, 2000 BCSC 312 [*JTI*]
6	*Macmillan Inc v Bishopsgate Investment Trust plc and others (No 3),* [1996] 1 All ER 585; 1 WLR 387 (UK CA)
7	*Menillo v Intramodal Inc*, 2016 SCC 51

VOLUME 2

8 (a–b) [P6]	*Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2006 BCSC 1102 [*Minera*] aff'd 2007 BCCA 319
9	*National Bank of Greece and Athens SA v Metliss*, [1957] 3 All ER 608 [*National Bank of Greece*]
10	*National Trust Co v Ebro Irrigation & Power Co*, [1954] 1954 CarswellOnt 61 (ONSC) [*Ebro*]
11	*Re Maple Leaf Mills Ltd*, [1962] 35 DLR (2d) 684 (BC SC)
12 (a–c)	*Re Northland Properties Limited,* [1988] 1988 CanLII 2924, 29 BCLR (2d) 257 (BC SC) [*Northland I*]; *Re Northland Properties Limited*, [1988] 1988 CanLII 3250 (BC SC) [*Northland II*]; aff'd. *Northland Properties Limited v. Excelsior Life Insurance Company of Canada*, [1989] 1989 CanLII 2672 (BC CA)
13	*Re Redstone Investment Corp.*, 2016 ONSC 4453

14	*Risdon Iron and Locomotive Works v Furness*, [1905] 1 KB 49
15	*Salomon v Salomon & Co*, [1897] AC 22 (HL)

VOLUME 3

16 [P9]	*The London Steam-Ship Owners' Mutual Insurance Association Ltd v. The Kingdom of Spain,* [2013] EWHC 3188
17 [P10]	*Through Transport Mutual Assurance Association (Eurasia) Ltd v. New India Assurance Association Co Limited*, [2004] EWCA Civ 1598
18	*Tolofson v Jensen*, [1994] 3 SCR 1022
19 [P11]	*Youell v. Kara Mara Shipping Company Ltd,* [2000] EWHC 220
Statutes	
20	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s. 142
21	*Business Corporations Act*, SBC 2002, c 57 ss. 30, 31, 51.3(1)
22	*Partnership Act*, RSBC 1996, c 348 ss. 2, 7, 9, 12, 26
23	*Tobacco Damages and Health Care Costs Recovery Act*, SBC 1997, c 41
Texts	
24	Dicey, Morris and Collins, *The Conflict of Laws*, 15e (London: Sweet & Maxwell, 2012) pp. 2-033 to 2-034, 2-036
25	H. Hansmann, R. Kraakman and R. Squire, "The New Business Entities in Evolutionary Perspective", [2005] U. Ill. L. Rev. 5; pp. 11-12
26	Kevin Patrick McGuinness, *Canadian Business Corporations Law*, 3e (Toronto: LexisNexis Canada Inc, 2017) ss. 6.18, 6.79
27	James Gary McLeod, *The Conflict of Laws*, (Calgary: Carswell, 1983) p. 45
28	Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2e (Toronto: Irwin Law Inc., 2016) pp. 221, 227
29	Janet Walker, *Castel & Walker: Canadian Conflict of Laws*, 6e (Toronto: LexisNexis, 2005) (loose-leaf updated 2017, release 62) pp. 1-65, 3-4, 3-10, 30-1–30-2, 30-5

TAB 16

Judgments

London Steam Ship Owners Mutual Insurance Association Ltd v Kingdom of Spain and another

Arbitration - Award - Enforcement of award - Reliance on English law and arbitration clause - Discretion of court - Claimant seeking to enforce arbitration award in its favour - Defendants opposing application on grounds of jurisdiction, state immunity, and as matter of discretion - Whether arbitration tribunal having jurisdiction - Whether defendants having state immunity - Arbitration Act 1996, s 66, 67, 72 - State Immunity Act 1978, s 9

Constitutional law - Foreign sovereign state - Immunity from suit - Conflict of laws - Jurisdiction - Claimant seeking to enforce arbitration award in its favour - Defendants opposing application on grounds of jurisdiction, state immunity, and as matter of discretion - Whether defendant state entitled to rely on immunity - Whether arbitration tribunal having jurisdiction - Arbitration Act 1996, s 66, 67, 72 - State Immunity Act 1978, s 9

[2013] EWHC 3188 (Comm), 2013-368, 2013-920, (Transcript)

QBD, COMMERCIAL COURT

HAMBLEN J

3, 4, 7, 8, 9, 10, 14, 22 OCTOBER 2013

22 OCTOBER 2013

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

C Hancock QC, C Tan and T Corby for the Claimants

J Smouha QC and A Dilnot for the Defendants

Ince & Co LLP; K&L Gates LLP

HAMBLEN J:

INTRODUCTION

[1] In November 2002 M/T "PRESTIGE" ("the vessel") was on a voyage from St Petersburg to the Far East carrying 70,000 tonnes of fuel oil.

[2] On 13 November 2002 the vessel suffered damage from a storm surge 28 miles from Cape Finisterre and began to list significantly. A distress call was sent to the Spanish authorities but salvage attempts over

the following days were unsuccessful. On 19 November 2002 the vessel broke in two and sank.

[3] The resulting oil spillage was an ecological disaster severely polluting the Atlantic coasts of Cantabria and Galicia. Its effects spread as far as France where thirteen administrative departments from the western coastal area were affected. Cleaning up after the spill required extensive resources and took years.

[4] In late 2002 criminal proceedings were instituted in Spain against the Master, Chief Officer and Chief Engineer and Mr Lopez-Sors, the Spanish official who had ordered the vessel to sail away from the coast ("the Spanish proceedings").

[5] In or about June 2010, at the conclusion of the investigatory stage of the criminal proceedings, civil claims were brought against the owners of the vessel, Mare Shipping Inc ("the Owners"), on the grounds of its vicarious liability, and also against the Owners' protection and indemnity ("P&I") insurers, the London Steamship Owners Mutual Insurance Association Limited ("the Club"). These claims were brought under art 117 of the Spanish Penal Code 1995 ("the Penal Code") (which provides an injured party with a direct right of action against an insurer in certain circumstances) and the Convention on Civil Liability ("CLC") in respect of the damage caused by the loss of the vessel. Claims were brought by several separate legal entities, including the State Administration of Spain ("Spain"), the Spanish Public Prosecutor and two autonomous Spanish territorial entities, Galicia and (although there was a dispute about this) Arteixo. The claims brought in June 2010 by the Spanish entities were for just under Eur1 billion. However, that amount has now increased to approximately Eur4.3 billion. At about the same time, the Republic of France ("France") and a number of local French government entities and organisations joined the Spanish criminal proceedings claiming that the Club was civilly liable under the CLC and art 117 of the Penal Code. France's claim is for approximately Eur67.5 million.

[6] The Club acknowledges its CLC liability. The CLC broadly imposes strict liability (subject to certain limited exceptions) on the owners of ships to compensate persons who suffer oil pollution damage, as defined. To ensure that a ship owner is in a position to meet his obligations under the CLC he is obliged to arrange insurance up to his CLC limit (in this case SDR 18,884,400). In this case, the Club was the Owners' CLC insurer. The CLC provides for direct action against the CLC insurer, but only up to the amount of the CLC Fund: Article VII.8 of the CLC. The amount of the CLC Fund for this incident, which was constituted in Spain on 28 May 2003 (at the then exchange rate), is Eur22,777,986.

[7] In relation to the non-CLC claims the Club's position is that the civil Claimants are bound by the terms of the contract of insurance contained in the Club Rules to bring those claims in arbitration and by the English law clause in those Rules. Further, they are bound by any contractual defences available to the Club, including the "pay to be paid" clause (r 3.1) and that upon the proper application of the "pay to be paid" clause, the Club has no liability.

[8] The Club has accordingly played no part in the Spanish proceedings. It did, however, commence London arbitration proceedings seeking negative declaratory relief in respect of any non-CLC liability to Spain and France. The references against each Respondent proceeded separately but the same tribunal (constituted of Mr Alistair Schaff QC) was appointed in each case. Neither Spain nor France participated in the arbitrations.

[9] In awards dated 13 February 2013 (Spain) and 3 July 2013 (France), the tribunal upheld most of the Club's claims for negative declaratory relief in respect of any non-CLC liability. Declarations were granted that Spain/France were bound by the arbitration clause in the Club's Rules to refer the civil claims being brought in Spain to arbitration; that actual payment of the insured liability by the insured member is a condition precedent to the Club's liability pursuant to the "pay to be paid" clause in the Club Rules; that in the absence of such prior payment the Club is not liable to France/Spain in respect of the claims, and that the

Club's liability shall, in any event, not exceed the amount of US$1,000,000,000 (US Dollars One Billion).

[10] The Club now seeks permission pursuant to s 66 of the Arbitration Act 1996 ("the Act") to enforce the two arbitration awards as judgments and/or to have judgments entered in their terms.

[11] France and Spain (together "the Defendants") resist the s 66 application as a matter of jurisdiction, on the grounds that they have state immunity, and as a matter of discretion.

[12] They have also brought their own applications challenging the substantive jurisdiction of the tribunal pursuant to s 67 and/or s 72 of the Act on the grounds that they are not bound by the arbitration agreement as their direct action rights are in essence independent rights under Spanish law rather than contractual rights, non-arbitrability and (in relation to France only) waiver.

[13] The trial of the Spanish proceedings took place between 16 October 2012 and 10 July 2013. Judgment is expected in November 2013 and the present applications have been brought on before the court on an expedited basis, at the Club's behest.

[14] The hearing of the applications took seven days. I heard oral evidence from Spanish law experts, Professor Andrés Betancor for the Defendants and Dr Ruiz Soroa and Mr Fajardo for the Club; French law experts, Mr Grelon for France and Mr Gautier for the Club; and factual witnesses Mr Irurzun Montoro for the Defendants and Dr Ruiz Soroa for the Club.

[15] Both parties made extensive written submissions and I have drawn on those submissions, with adaptations and amendments, in preparing this judgment, particularly in relation to matters of common ground and in setting out the parties' arguments.

THE FACTUAL BACKGROUND

The insurance contract

[16] In the year commencing 20 February 2002, the vessel was entered with the Club in respect of P&I and FD&D cover. The P&I contract of insurance ("the contract") was evidenced by a Certificate of Entry by which the Club agreed to provide P&I cover for the Owners and Managers (Universe Maritime Ltd) of the vessel in respect of, inter alia pollution liabilities up to a maximum aggregate amount of US$1 billion.

[17] The contract was subject to the Club's Rules of Class 5 - Protecting and Indemnity ("the Rules"). The Rules included the usual P&I "pay to be paid" clause and incorporated the Marine Insurance Act 1906.

[18] The most material provisions of the Rules are as follows:

> "RULE 1 INTRODUCTORY
>
> 1.2 All insurance afforded by the Association within this Class is by way of indemnity and all contracts relating thereto shall be deemed to incorporate the provisions of these Rules, save insofar as those provisions are varied by any special terms which have been agreed pursuant to these Rules . . .; all such contracts and these Rules shall be governed by English law and shall be subject to the provisions of the Marine Insurance Act 1906 and any statutory

modifications thereof.

1.3 . . . whatever insurance is afforded by the Association within this Class shall always be subject to the provisos, warranties, conditions, exceptions, limitations and other terms set out in the remainder of these Rules.

RULE 3 RIGHT TO RECOVER

3.1 If any Member shall incur liabilities, costs or expenses for which he is insured, he shall be entitled to recovery from the Association out of the funds of this Class,

PROVIDED that:

3.1.1 actual payment (out of monies belonging to him absolutely and not by way of loan or otherwise) by the Member of the full amount of such liabilities, costs and expenses shall be a condition precedent to his right of recovery; [hereinafter 'the pay to be paid clause']

RULE 9 RISKS COVERED

9.1 Subject to any special terms which may be agreed in writing, a Member is insured in respect of each ship entered by him in this Class against the risks set out in rule 9.2 - 9.28,

PROVIDED that such risks arise:

9.1.1 in respect of the Member's interest in such ship; and

9.1.2 in connection with the operation of such ship by or on behalf of the Member; and

9.1.3 out of events occurring during the period of entry of such ship.

9.15 Pollution:

9.15.1 Liabilities, costs and expenses set out in rule 9.15.1.1 - 9.15.1.4 to the extent that they are the result of the discharge or escape from an entered ship of oil or any other polluting substance, or the threat of such discharge or escape, namely:

9.15.1.1 Liability for loss, damage or contamination . . .

9.15.1.3 The costs of measures reasonably taken (or taken in compliance with any order or direction given by any government or authority) for the purposes of avoiding the threat of or minimising pollution, and liability incurred as a result of such measures

RULE 11 LIMITATIONS OF COVER

11.3 Recovery shall be limited to a maximum of US$1,000,000,000 (US Dollars One Billion) any one occurrence in respect of any one entered ship in respect of oil pollution liability including fines, costs and expenses and clean-up and damages payable to any other person as may arise in respect of oil pollution liability whether under rule 9.15 (Pollution) . . . or any other sections of rule 9 or any other Rule or combination thereof.

RULE 43 JURISDICTION AND LAW

43.2 Save for matters referred to in rule 43.1 [relating to security] and subject to rule 33.4 [relating to Overspill Claims], if any difference or dispute shall arise between a Member and the Association out of or in connection with these Rules, or out of any contract between the Member and the Association, or as to the rights or obligations of the Association or the Member there under, or in connection therewith, or as to any other matter whatsoever, such difference or dispute shall be referred to Arbitration in London before a sole legal Arbitrator and the submission to Arbitration and all the proceedings there under shall be subject to the provisions of the Arbitration Acts 1950, 1979 and 1996 and any Statutory modification or re-enactment thereof, and to English law. In any such Arbitration, any matter decided or stated in any Judgment or Arbitration Award (or in any Reasons given by an Arbitrator or Umpire for making the Award) relating to proceedings between the Member and any third party shall be admissible in evidence. No Member may bring or maintain any action, suit or other legal proceedings against the Association in connection with any such difference or dispute unless he has first obtained an Arbitration Award in accordance with this Rule." ["The arbitration clause"]

THE CASUALTY

[19] In May 2002, the vessel was chartered from Owners to Crown Resources AG for a period time charter of 160/240 days. On 31 October 2002, she sailed from St Petersburg with a cargo of fuel oil bound for the Far East via Gibraltar.

[20] On or around 13 November 2002, the Vessel began to experience serious difficulties, suffered some damage and began to list significantly. A distress call was sent to the Spanish authorities, seeking assistance.

[21] Salvage attempts were unsuccessful. On 19 November 2002 at about 08:00hrs local time, the Vessel broke into two. Later that day, she sank and was declared and accepted as a total loss with effect from 20 November 2002.

[22] As a result of the casualty extensive oil pollution was caused, requiring substantial clean up operations and resulting in widespread and significant damage to both Spanish and French coastlines.

THE CRIMINAL PROCEEDINGS

[23] In late 2002 criminal proceedings were instigated in Spain against, amongst others, the Master, Chief Officer and Chief Engineer of the vessel.

[24] On 28 May 2003 the Club constituted a compensation fund of Eur22,777,986 pursuant to its obligations as liability insurer of the Owners and Managers under the CLC Convention.

[25] In November 2005, France initiated proceedings in the Bordeaux District Court against the Owners, the IOPC Fund and the Club seeking damages of Eur67,499,153.92 as a result of the pollution damage caused to France.

[26] In November 2006, France initiated proceedings before an investigating magistrate in the Brest Criminal Court. Those proceedings were against persons unknown ie against anybody likely to have committed any relevant offence.

[27] On 5 May 2010, the Criminal Court of Corcubión formally declared the investigative stage of the proceedings closed and ordered any Claimants to serve accusation pleadings. Following that order, Spain,

the Public Prosecutor, and each other Claimant in the case filed separate accusation pleadings.

[28] On 30 July 2010, the Magistrates' Court No 1 of Corcubión ordered the commencement of the oral proceedings stage, with trial to take place in the Provincial Court of La Coruña. By order dated 28 November 2011, the proceedings were formally transferred to the Coruña Court.

[29] The oral trial took place between 16 October 2012 and 10 July 2013. Judgment on criminal and civil liability is expected in November 2013.

[30] In broad terms, it is alleged in the Spanish proceedings that the loss was suffered because the vessel was unseaworthy; the Master, Chief Officer and Chief Engineer were deliberately obstructive and uncooperative with the Spanish authorities; the vessel was overloaded, and the Master was negligent in counter-flooding the wing tanks of the vessel in an attempt to correct the list. The Master and Owners deny these allegations. They further say that all but a fraction of the loss was caused by the decision of the Spanish authorities to start the vessel's engines and send her out to sea, rather than sending her to a port of refuge. If the vessel had not been sent out to sea, they say, the pollution damage would have been minimal (if there had been any at all).

THE CIVIL CLAIMS MADE IN THE CRIMINAL PROCEEDINGS

[31] Various civil claims have been brought in the Spanish proceedings. In Spain, a party who is criminally liable will also be civilly liable for harm done by the criminal act, in accordance with the general (civil) principle that a party who does harm to another by a wrongful act is liable to compensate that other.

[32] Claims are brought by the Spanish State Lawyer and by the Public Prosecutor on behalf of Spain. By the end of the trial the quantum of claims brought on behalf of Spain was Eur4,328,130,000.

[33] Claims are also brought by France. Those claims are for Eur67,500,905.92. The civil claims brought in Bordeaux have been stayed pending determination of these claims in the Spanish proceedings.

[34] Other parties have also claimed that they suffered loss by reason of the casualty. These can be divided into four main categories:

> i) Those persons who entered into subrogation agreements with Spain whereby the State paid out the alleged claim and pursued the claim in its own name. By the end of 2009, Spain was subrogated to all the damages suffered by any Spanish public entity (with one or possibly two exceptions).
>
> ii) Those persons who have maintained civil claims separately to Spain and France. Included in this category is the Xunta de Galicia (claiming Eur1,275,458 in respect of a future disbursement). Spain says that the Ayuntamiento de Arteixo ("Arteixo") falls into this category but the Club disputes this.
>
> iii) Those persons who have made allegations of criminal liability, but no allegations or claims of civil liability against the Club in their favour. It is common ground that the Ayuntamiento de O Grove falls into this category. The Club maintains that Arteixo also falls into this category but Spain disputes this.

iv) Those persons, who initially made civil liability claims against the Club but, by reason of their non-representation at the trial, are taken to have waived their claims. These Claimants include the Comunidad Autonoma del Pais Vasco, the Diputacion Foral de Gipuzkoa, the Diputacion Foral de Bizcaya, the Ayuntamiento de Donostia/San Sebastian, the Diputacion Provincial de A Coruña (though, in any event, these parties have been compensated by the State and the State has been subrogated to their claims).

THE ARBITRATION PROCEEDINGS

[35] The Club commenced arbitration against the "Kingdom of Spain" by Notice of Arbitration dated 16 January 2012 and against France by Notice of Arbitration dated 16 January 2012. Although Spain does not accept that the "Kingdom of Spain" was the correct Respondent it accepts, for the purpose of these proceedings only, that it will not assert that by failing to name Spain as a party to the arbitration the Club has failed to obtain an award against it.

[36] Neither Spain nor France agreed to the appointment of an arbitrator. Accordingly, the Club applied for and obtained orders from the court pursuant to s 18 of the Act, constituting the respective tribunals.

[37] The references proceeded (separately but with the same tribunal appointed in each case).

[38] In each reference, the Club contended that the Respondent was bound by the terms of the Club Rules, including the arbitration clause and the contractual defences available to the Club and sought declarations accordingly.

[39] These included a declaration that the Club was not liable to the Respondent by reason of the "pay to be paid" clause in the P&I Rules. As a matter of English law it is well established that this clause operates as a complete defence to a claim if the liability in question has not been discharged by the insured member, since such discharge is a condition precedent to the insured member being indemnified by the Club - see *The "Fanti" and "Padre Island"* [1991] 2 AC 1, [1990] 2 All ER 705, [1990] 2 Lloyd's Rep 191.

[40] The tribunal invited Spain and France to participate in the proceedings. However, neither Respondent took part and the matter proceeded unopposed (though all documents were served upon the Respondents at every stage).

[41] Separate hearings took place in January 2013 (the Spain reference) and June 2013 (the France reference). In each case, the Respondents were given a final opportunity to participate following the close of the hearing but they declined.

[42] The tribunal upheld the majority of the Club's claims in both references. The award in respect of the claim against the Spain is dated 13 February 2013. The award in respect of the claim against the French State is dated 3 July 2013.

[43] The relief granted in each case was substantially identical. The following relief was granted:

"A) . . . as regards all claims arising out of the loss of the M/T PRESTIGE and the resulting loss and damage which are currently brought in Spain by the Respondent against the Claimant by way of alleged direct public liability under the Spanish Penal Code:

1) the Respondent is bound by the arbitration clause contained in rule 43.2 of the Club's Rules and such claims must be referred to arbitration in London;

2)(i) Actual payment to the Respondent of the full amount of any insured liability by the Owners and/or Managers (out of monies belonging to them absolutely and not by way of loan or otherwise) is a condition precedent to any direct liability of the Claimant to the Respondent in consequence of the 'pay to be paid clause' contained in rule 3.1; and accordingly

(ii) Pursuant to the 'pay to be paid clause' and in the absence of any such prior payment, the Claimant is not liable to the Respondent in respect of such claims."

[44] In addition, in the award against Spain the following further declaration was made in the light of the quantum of the asserted claims:

"3) the Claimant's liability to the Respondent shall, in any event, not exceed the amount of US$1,000,000,000 (US Dollars One Billion).

B) . . . the Respondent shall bear and pay the Claimant's costs of this reference and the tribunal's costs of this reference and this Award, and shall reimburse the Claimant for the tribunal's costs if they have been borne in the first instance by the Claimant."

THE ISSUES

[45] The main issues which arise for determination are as follows:

"In relation to the Defendants' applications under ss 67 and 72 of the Act:

i) What is the proper characterisation of the claims?

ii) Are the claims arbitrable?

iii) Has there been a waiver of the right to arbitrate France's claims?

In relation to the applications under s 66 of the Act:

iv) Does the court have no jurisdiction on the grounds of state immunity?

v) If it has jurisdiction, should the court grant the applications as a matter of discretion?"

[46] The Defendants contended that the issue of state immunity should logically be determined first since if the court has no jurisdiction then that is the end of the matter. However, the state immunity issue is closely bound up with the question of characterisation and it is convenient to consider that first. I accordingly propose to address the issues in the order set out above.

(1) What Is The Proper Characterisation Of The Claims?

English Law

[47] The leading modern authority is the decision of the Court of Appeal, upholding (in the relevant part) the decision of Moore-Bick J, in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Insurance Co (The Hari Bhum) (No 1)* [1991] 2 AC 1, [1990] 2 All ER 705, [1990] 2 Lloyd's Rep 191 (Moore-Bick J) and [2005] 1 Lloyd's Rep 67 (CA).

[48] In that case the court considered the characterisation, according to English conflicts of laws principles, of a claim brought by New India Assurance, as an injured third party, against an insolvent insured's insurer pursuant to the Finnish Insurance Contracts Act 1994 ("the Finnish Act") which gave such a third party the right to proceed directly against the insurer.

[49] According to the Court of Appeal (and Moore-Bick J at first instance), there were two possible characterisations available:

i) The third party was seeking to enforce a contractual obligation derived from the contract of insurance; or

ii) The third party was advancing an independent right of recovery under the relevant statute.

[50] The proper approach was set out by Moore-Bick J in his judgment at 16 in a passage with which the Court of Appeal expressed their entire agreement at 57:

> "16 The issue in the present case is whether New India is bound by the arbitration clause which in turn depends on whether it is seeking to enforce a contractual obligation derived from the contract of insurance or an independent right of recovery arising under the Insurance Contracts Act. If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterised as one of statutory entitlement to which there may be no direct equivalent in English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterised as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law: see *Adams v National Bank of Greece*."

[51] As explained in para 58 of the Court of Appeal judgment, the question is what is the substance of the claim. Is it in substance a claim to enforce the contract, or is it in substance a claim to enforce an independent right of recovery?

[52] This involves a consideration of the nature of the right as a matter of the relevant foreign law, but the question of characterisation is a question for the English court applying English conflicts of laws principles - see Moore-Bick J's judgment in *Through Transport* at 11; *Briggs*, *The Conflict of Laws* (2nd ed; 2008) at p 9; *Cheshire and North* (14th ed; 2008) at p 43.

[53] In the *Through Transport* case both Moore-Bick J and the Court of Appeal held that the direct right of action conferred under the Finnish Act was in substance a right to enforce the contract.

SPANISH LAW

The Experts

[54] The expert for Spain/France was Professor Betancor, a public law professor at Pompeu Fabra University in Barcelona with a particular expertise in environmental law.

[55] The expert for the Club was Dr ruiz Soroa, a practising lawyer with particular expertise in maritime law and marine insurance.

[56] Dr Ruiz Soroa acts for the Master and the Owners in the Spanish proceedings, whose defence is funded by the Club under their FD&D cover. The Club can therefore be regarded as his ultimate client and to that extent he was not an independent witness.

[57] I accept that this means that his evidence has to be approached with caution and I also accept that some criticism can be made of the selective nature of parts of his reports, or at least of his failure to make clear the selectivity involved. However, having carefully considered his evidence, on which he was extensively cross examined, I am satisfied it reflects his genuinely held opinions and was not influenced by his role in the Spanish proceedings and his relationship with the Club. He was throughout able to explain why he held the opinions that he did. There was in fact much common ground between the experts, but to the extent that there was disagreement I consider that those differences must be resolved by reference to the quality and cogency of the evidence they gave rather than their relative independence.

The Sources Of Spanish Law

[58] The experts agreed that only multiple consistent decisions of the Supreme Court constitute binding case law. However, although multiple judgments by lower courts do not have binding value, they do have informative and instructive value with regard to the contents of Spanish law.

The Relevant Statutory Provisions

[59] The statutory regime relevant to marine insurance contracts may be summarised as follows:

> i) The 1885 Commercial Code governs, amongst other contracts, contracts of marine insurance.
>
> ii) The 1980 Insurance Contract Act ("the 1980 Act") governs various types of contract, being those not covered by other specific legislation. Such contracts are governed mandatorily by the 1980 Act by reason of s 2 of that Act.
>
> iii) Marine insurance contracts, as a category of contract covered by a specific statute (ie the Commercial Code), are not governed mandatorily by the 1980 Act, save for rules of public order. The fact that the 1980 Act applies in a "subsidiary" manner to marine insurance is reinforced by s 44 of the 1980 Act, which provides that large risks, including marine insurance contracts, are not subject to art 2.

[60] As the experts agreed, Spanish law recognises the application of the principle of contractual freedom to marine insurance, and P&I insurance is a form of marine insurance.

[61] The key provisions addressing the liability of insurers to compensate injured third parties under the

1980 Act are arts 73 and, in particular, art 76 which provide that:

"Article 73 [Object of civil liability insurance. Limits]

By means of civil liability insurance the insurer undertakes within the limits determined by the Law and the contract to cover the risk of emergence for the insured of an obligation to compensate a third party for damages and losses caused by an event covered by the contract when the insured has civil liability for the consequences of the same, according to law . . . .

Article 76 [Direct action against civil liability insurer and the insurer's right to action for recovery]

The injured or aggrieved party or their heirs shall be entitled to a direct action against the insurer to demand of him the fulfilment of the obligation to compensate, without prejudice to the insurer's right to recover from the insured in the event that the damage or injury to the third-party was caused by the wilful misconduct of the insured. Direct action shall be exempt from the defences that the insurer may have had in respect of the insured. The insurer may, however, allege that the injured party is exclusively liable and may also raise the personal defences he may have in respect of the injured party. For the purposes of bringing direct action, the insured shall be obliged to inform the injured third party or their heirs of the existence of an insurance contract and the content of the same."

[62] Civil claims can also be brought in criminal proceedings and there is a specific section of the Penal Code (Ch II) headed "On persons liable under Civil Law". The most relevant provisions are as follows:

"Article 109

1. Perpetration of an act defined as a felony or misdemeanour by Law shall entail, pursuant to the provisions contained in the laws, repairing the damages and losses caused thereby.

2. In all cases, the party damaged may opt to sue for civil liability before the Civil Jurisdiction.

. . .

Article 116

1. All persons held criminally accountable for a felony or misdemeanour shall also be held liable under Civil Law if the fact gives rise to damages or losses. If two or more persons are responsible for a felony or misdemeanour, the Judges or Courts of Law shall set the proportion for which each one must be held accountable . . . .

Article 117

Insurers that have underwritten the risk of monetary liabilities arising from use or exploitation of any asset, company, industry or activity when as a consequence of a fact foreseen in this code, an event takes place covered by the risk insured, shall have direct civil liability up to the limit of the legally established or contractually agreed compensation, without prejudice to the right to bring an action for recovery against who such may be appropriate.

. . .

Article 120

The following persons shall be held civilly liable, failing those held criminally accountable:

4. Natural or legal persons dedicated to any kind of industry or commerce, for felonies or misdemeanours their employees or assistants, representatives or managers may have committed in the carrying out of their obligations or

services . . . ."

[63] It was common ground between the experts that the direct action contemplated in art 117 of the Penal Code has the same nature and regime as that contemplated in art 76 of the 1980 Act. As explained by Dr Ruiz Soroa in evidence, the nature of the art 117 right is treated as a manifestation in the criminal sphere of the right given by art 76. They are both civil liability rules, as Professor Betancor confirmed in evidence.

The Legal Nature Of The Direct Action In Spanish Law

[64] The experts were agreed that the Judgment of the Provincial Court of Madrid dated 16 October 2012 ("the Madrid Judgment") is a correct exposition of Spanish law on this point, and I so find.

[65] The Madrid Judgment included the following:

> "I. Civil liability insurance which is regulated by Insurance Contract Law (LA LEY 1957/1980) within the area of insurance against damage in Articles 73 to 76 can be defined as the insurance by which the insurer is obligated to cover the risk of having an encumbrance placed on the assets of the insured party due to the creation of an obligation to indemnify derived from its civil liability. This civil liability could arise from the non-malicious, malicious, or negligent (civil or criminal behaviour of the insured party (or the people for whom it is civilly liable).
>
> . . . the direct action of a wronged third party against the insurer, for it to indemnify the damage caused, within the coverage of an insurance policy, was consistently recognized by case law . . . . The exercise of this action even became allowed to be admitted by the wronged party against the insurer in criminal procedures in which an act is being tried that has the nature of a criminal infraction which the insured party causes and from which civil liability is derived that is covered by the insurance policy . . . . At a legislative level the cited direct action of the wronged third party against the insurer was . . . generally established in article 76 of Law 50/1980 dated 8 October (LA LEY 482 regarding insurance policies (BOE number 250 dated 17 October 1980; 'The wronged third party or its inheritors will be able to take direct action against the insurer to demand that they comply with the obligation to indemnify'). It should be emphasised that this direct action of the wronged third party against the insurer can be exercised both within civil and criminal jurisdictions (if the accident covered by the insurance has a criminal nature and the insured party is criminally liable).
>
> II. In principle, for the direct action of the wronged third party against the insurer to be successful, it is essential that if it was exercised by the insured party against the insurer, that it was also successful. However this general rule has two clear exceptions in Article 76 of the Insurance Contract Law (LA LEY 1957/1980), in which, despite the fact that the insurer is not obligated to indemnify the insured party for the accident that occurred, nevertheless, it is obligated to indemnify a wronged third party when the direct action is exercised by them. Of course, in these two cases, the insurer is granted the right to a recovery action against the insured party in order to recover the amount of money with which the wronged third party was indemnified.
>
> The first of these two exceptions is when the damage caused to the wronged third party is due to the malicious behaviour of the insured party . . . .
>
> The second of these two exceptions is when the insurer is obligated to pay the indemnity to the wronged third party because it is prevented from bringing up to challenge them, in their exercise of this direct action, any exception that it would have otherwise been able to bring up to challenge the insured party . . . .
>
> So, when faced with a wronged third party who exercises such direct action, the insurer can oppose all the 'defences' that it deems convenient, and specifically, those referring to the lack of facts constituting the third party's right (which should be operative even when they have not been alleged by the insurer, if the Judge believes that these facts constituting the right of the Claimant have not been proven, then the action that is being exercised would not have been brought about, and would be inexistent). These 'defences' or exceptions in a broad sense are the following:
>
> a) Inexistence of a civil liability insurance policy between the insurer and the insured party or the extinguishing of this contractual legal relationship.

b) The absence of the right of the wronged third party to compensation, due to the absence of one or more of the requirements necessary for the civil liability of the insured party to be relevant with respect to the wronged third party.

c) The right of the third party is outside the coverage of the insurance policy: the objective limits to the insurance policy's coverage will determine the substantial contents of the insurer's obligation, such that the right of the wronged third party will have been produced with respect to the insured party, but this is exclusively covered by the insurer against the creation of the obligation to indemnify for acts established in the policy the results of which are civilly liable; This is deduced from the formation of Article 76 of Law 50/1980, dated 8 October, regarding Insurance Contracts (LA LEY 1957/1980) which follows precisely from the precept that said that the wronged party will have the ability to take 'direct action against the insurer in order to demand from it compliance with the obligation to indemnify, within the limits established by applicable regulations, in the case of obligatory insurance, or due to the contract, in the case of voluntary insurance' (Article 108 of the Draft Bill of 1969), a paragraph that was eliminated in the subsequent Draft Bill (Article 76 of the Draft Bill of 1970) because its contents were considered obvious, and therefore its declaration unnecessary. It is also deduced from the need for it to be related to the first sentence of Article 76, which grants the wronged third party or its inheritors the action to demand from the insurer compliance with its obligation to indemnify, with Article 1, which reduces the obligation to indemnify on the part of the insurer up to the 'limits agreed upon', and which Article 73, which also adheres to this obligation, on the part of the insurer, to indemnify up to the 'limits established in the Law and in the policy'.

The insurance coverage comes to be contractually defined by the clauses delimiting the insured risk and by the limiting clauses of the right of the insured party to charge the indemnity produced by the accident, where both the former (those that delimit risk) and the latter (those limiting the rights of the insured party) can be challenged by the insurer, when faced by a wronged third party who exercised direct action.

Lastly, there are the exceptions in a strict sense that are unchallengeable by the insurer when a wronged third party exercises direct action, and which are none other than those that refer to acts, or more specifically omissions, of the insured party that are legally tied to the release of the obligation of the insurer to indemnify the insured party when an accident occurs or a reduction of the amount of indemnification. They are exceptions based on the behaviour of the insured party, since the subjective valuation of the behaviour of the insured party is irrelevant for the purposes of the direct action of the wronged third party against the insurer. Only these exceptions are unchallengeable by the insurer with respect to the wronged third party. And, even without making an exhaustive list of them, the following can be identified:

a) Failure to comply with the duty of the declaration of risk by the party who took out the insurance policy, both before the conclusion of the policy (Article 10 of Law 50/1980 dated 8 October, for Insurance Contracts (LA LEY 1957/1980) and while the legal relationship is in force (Articles 11 LA LEY1957/1980) and 12 of Law 50/1980, dated 8 October, regarding Insurance Contracts (LA LEY 1957/1980))

b) Suspension of coverage of the insurance due to failure to pay the premiums (Article 15 of Law 50/1980, dated 8 October, regarding Insurance Contracts (LA LEY 1957/1980))

c) Failure to comply with the duty of informing the insurer of the accident (Article 16 of Law 50/1980), dated 8 October, regarding Insurance Contracts (LA LEY 1957/1980))

d) Failure to comply with salvaging duties (Article 17 of Law 50/1980, dated 8 October regarding Insurance Contracts (LA LEY 1957/1980))

e) Failure to notify regarding the existence of different insurance policies (Article 32 of Law 50/1980, dated 8 October, regarding Insurance Contracts (LA LEY 12957/1980))."

[66] The Madrid Judgment makes clear that the general rule and starting point is that the third party can only claim against the insurer if and to the extent that the assured would also have been able to claim against the insurer, subject to the specific exceptions laid down in art 76 itself.

[67] As the Madrid Judgment states, "the objective limits of the insurance policy's coverage will determine the substantial contents of the insurer's obligation". The Madrid Judgment explains that this is to be inferred

from the legislative history of art 76 which had originally provided that the direct action would be subject to the limits established by the contract, in case of voluntary insurance, but that those words had been deleted as being unnecessary as this was already obvious. As is explained, this limitation is made manifest by art 73 which provides that the insurer's obligation to compensate is subject to the limits imposed by law (in the case of compulsory insurance) and to the limits imposed by contract (in the case of voluntary insurance).

[68] In relation to the exceptions laid down in art 76 the Madrid Judgment explains that the "defences" referred to are limited to those which are "personal" to the insured party in that they are based on his conduct, the principal examples of which are then listed. All other contractual defences or exceptions may be relied upon by the insurer (save for, as recent cases have shown, a wilful misconduct exclusion).

[69] The wilful misconduct exception is also explained and contrasted with art 19 of the 1980 Act. Recent decisions of the 2nd Division (Criminal) Supreme Court have held that clauses excluding liability for losses which are otherwise within the insurance where such losses are caused by wilful misconduct cannot be relied on as against the injured third party by the insurer, bearing in mind the character of this insurance as intended to protect third parties.

[70] In summary, the direct action rights which may be enforced against the insurer are the insured's contractual rights, save that the insurer may not rely as against the third party on "personal" defences or a defence or exclusion based on wilful misconduct.

[71] The experts agreed that the source of the third party's direct action right is the law and that it is a right which arises from the law rather than the contract. There was disagreement between them as to whether this meant that the right would be regarded as "independent" as a matter of Spanish law.

[72] Dr Ruiz Soroa's view was that although the direct action right is "genetically" independent from the contract, it was not "functionally" independent. Although it does not "flow from" the contract, is does not exist outside the contract and its content is inextricably linked to and determined by the contract, save for the exceptions provided for in art 76. As he explained:

> ". . . in order for the injured party to be able to take action against the civil liability insurer, it is necessary that: a) there is a valid insurance contract between the insured and the insurer, and b) the damage caused to the injured party must be within the limits established in the contract with regards to cause, time, place and nature of the insured risk. Therefore, the direct action of the injured party is functionally dependent on the existence and content of the insurance contract; if the contract does not cover the specific, particular damage caused to the injured third party, then no direct action exists. The direct action is not, in this sense, independent and autonomous from the contract, but rather its existence and content is shaped by the insurance contract."

[73] Dr Ruiz Soroa stressed, as I have found, that the general rule is that the third party can only claim against the insurer if and to the extent that the assured would have been able to do so. His evidence was that in considering the nature of the direct action one should look to the general rule, not its exceptions. As he explained in oral evidence:

> "The law states a general rule. The contents of the direct action of the third party are moulded by the contract. You must go to the contract and examine if the contract cover or not this kind of claim - damage. But the law makes an exception. You are trying to deduct the nature of the third party victim from the exception, not for the general principle . . . . You cannot deduct - you didn't find the nature of the direct action pointing only to the exception . . . . The principal rule is that the third party is in the same position than the assured. This is the general rule. You must consider that in order to deduct which is the exact nature of the direct action. The third party is put, by Article 76 and Article 117, in the same position of the assured. If the assured, according to the contract, have not right against the insurer, the third party has not . . . ."

[74] Dr Ruiz Soroa accepted that, as a matter of logic, functional dependency should mean that the insurer would be entitled to rely on a wilful misconduct exclusion, contrary to the recent jurisprudence of the Supreme Court, Criminal Division. However, I accept his evidence that the essential basis of those decisions is the art 76 wilful misconduct exception, and that its reasoning does not apply to contractual exclusions generally, and, therefore, does not undermine the general point he makes about functional dependency.

[75] Dr Ruiz Soroa was also able to point to a number of Supreme Court decisions that supported his view of functional dependency. For example:

> ". . . despite the fact that the civil liability insurance contract is a contract of special nature, in favour of a third party, which creates a situation of joint and several liability between the insured and the insurer, to the victim who is then able to bring direct action against the insurance company, it is evident that the entire relation brought about by this situation and this capacity, is both based and limited on and by the same contract, and while the content of which, on the one hand, serves as the basis of the rights of the insured and the third party with respect to the insurer, this also allows this latter to enforce between the two former the restrictions which, in the present case clearly apply . . .: Judgment 26 October 1984 Supreme Court 1st Division account must be taken - with regard to the latter [sc voluntary insurance] and even with full knowledge of the applicability of the method of the injured party's direct action against the insurer - of the fact that this direct action is based on and limited by the very contract from which this action arises because the content thereof, although it is the source of the right of the insured and of the victim against the insurer, on the other hand allows the latter to assert this restrictive content against both of them and so, since the contract is the law between the contracting parties, . . . it is clear that the correct interpretation is that the victim cannot be placed in a better position than the contracting party - the insured - to whose legal position he is subrogated, so that he would obtain greater benefits than him . . .: Judgment 4 May 1989 Supreme Court 1st Division
>
> it is also true that the doctrine of this Division has established that the direct action derived from Article 76 of the Law of 8 October 1980 is based on and limited by the very contract from which this action arises because the content thereof, although it is the source of the right of the insured and of the victim against the insurer, on the other hand, allows the latter to assert this restrictive content against both of them . . . . Judgment 26 May 1989, Supreme Court 1st Division
>
> the extent of the victim's rights and those of his successors cannot exceed those of the contracting insured or insurance taker because it is not plausible or logical for the contractual terms agreed between the insurer and the insured to be expanded and extended when it is the beneficiary or beneficiaries of the contract who bring the direct action against the insurer . . . . The scope of an insurance contract is not different for the insured and for the third-party victim or victims . . . and cannot constitute a dead letter when it was agreed freely and subject to the provisions of the law and the agreement made extends to these victims, who cannot claim to have wider rights than those resulting from the provisions agreed between the insurer and the contracting insured party: Judgment 4 April 1990 Supreme Court 1st Division
>
> Given that the insurance company accepted the obligation, under the aforesaid voluntary civil liability, to cover the risk and the consequent obligation of compensating the third party, only within the limits established under the act and in the contract, as established in Article 73 which the Appellant deems was inappropriately not applied, then clearly the entire issue and the decision that this court must take with regard to the grounds for cassation appeals, has to be based on reviewing the contract clauses entered into under the insurance contract: Judgment 8 February 1991 Supreme Court 2nd Division
>
> with regards to this type of insurance [ie voluntary insurance], the general rule is that the insurers' obligation to the aggrieved third-party is determined by the cover of the insured . . .: Judgment 29 March 1995 Supreme Court 1st Division."

[76] Professor Betancor suggested that these decisions were old and that to an extent they had been overtaken by the recent decisions of the Supreme Court, Criminal Division. But, as already found, those recent decisions relate specifically to the issue of wilful misconduct and do not detract from the general point being made in the above cases, which was summarised as the "general rule" in the Madrid Judgment, with which Professor Betancor agreed. Professor Betancor also stated that it was wrong to say that the third party's right was "based on" the contract given that its source was the law rather than the contract. However, although the law is the source of the right there is no right without a valid insurance contract. In any event, I consider that the Supreme Court is essentially referring to the basis of the content of the right, rather than its basis of origin - the content of (the contract) . . . serves as the basis of the rights of the insured - Judgment

26 October 1984.

[77] In support of his view as to the independence of the third party's right Professor Betancor relied on the fact that the applicable limitation period to the direct action claim has been held to be the civil liability limitation period rather than the insurance contract limitation period and the judgment of the Supreme Court dated 27 September 2007 to this effect. Dr Ruiz Soroa's opinion was that this was the understandable result of the fact the direct action claim arises from the law rather than the contract.

[78] Professor Betancor also placed particular reliance on the fact that it is the law which not only creates the right of direct action but which also delimits it. I shall address this issue further below.

[79] A point of difference between the experts was whether the "obligation to compensate" referred to in art 76 refers to the insurer's obligation to indemnify under the insurance policy or the obligation to compensate the third party. I find that it is referring to the insured's obligation to compensate the third party as set out in art 73. Under art 76 the third party has the right to demand that the insurer fulfils that obligation, subject to the limits determined by the insurance contract, as art 73 and the Madrid Judgment make clear.

[80] There was also an issue between the experts as to whether Spanish law involves the third party stepping into the shoes of the insured *vis a vis* the insurer, or the insurer stepping into the shoes of the insured *vis a vis* the third party. Both experts could point to passages in Supreme Court judgments which supported their position. In so far as it matters, I find that art 76 does entitle the third party to require the insurer to fulfil the insured party's obligation to compensate the third party, but subject to the limits and terms of the insurance contract. In other words there is only an obligation to compensate in so far as the contract imposes an obligation to indemnify. Subject to the art 76 exceptions, the third party is in the same contractual position as the insured *vis a vis* the insurer, whether or not he is in his shoes.

[81] Another point of difference between the experts was the extent to which one could contract out of art 76 and whether or not it is a rule of public order. I do not consider it necessary to seek to resolve this issue as it is of marginal relevance to the issue between the parties as to the nature of the direct action right.

[82] In so far as it is necessary to make any findings as to whether the direct action right is an independent right as a matter of Spanish law, I find that it is independent in origin but not in content. It derives from the law rather than the contract, but it does not exist separately from the contract and its content reflects the contract, save for the art 76 exceptions. If it is necessary to choose whether or not that means that it is an independent right I find that it is not, for the reasons given by Dr Ruiz Soroa, as outlined above.

CONCLUSION ON CHARACTERISATION

[83] In the light of my findings as to the nature of the direct action under Spanish law I turn to consider the proper characterisation of the right as a matter of English law.

[84] The Defendants' case was that the crux of the answer to this question lies in the admitted fact that the right arises from the law and not the contract. The juridical basis of this right of action is non-contractual and therefore independent.

[85] Further, the law not only creates the right of action, it also defines its contents and limits. Even though the contents of the right may be referable to the contract it is the law which permits that. It is also the law which sets out the limits to those contractual rights through the art 76 exceptions. These have the effect of

creating a different and greater right for the third party than that possessed by the insured.

[86] The Defendants also stressed that the legal mechanism by which the third party acquires his direct action rights is not assignment of or subrogation to the insured's rights, but the imposition of an obligation to compensate the third party subject to prescribed limits.

[87] In all these cases both the law creating the right of direct action and the existence and validity of the contract made subject to the direct action will be essential pre-requisites of the third party's right. Both are necessary to the existence of that right. In my judgment, in deciding whether or not the direct action right is "in substance" a claim to enforce the contract or a claim to enforce an independent right of recovery, what is likely to matter most is the content of the right rather than the derivation of that content. It is the content of the right which will be the most telling guide to what "in substance" that right is.

[88] The essential content of the right is provided by the contract. Save for the art 76 exceptions, the third party's right is as set out in and defined by the contract. It is the contract that must be looked to in order to determine whether there is any right to recover from the insurer and, if so, on what basis and with what limitations. In many cases the contract is all that will need to be considered. In the present case, for example, there is no suggestion of wilful misconduct by the assured or of "personal" defences arising. In those circumstances the third party's rights will be determined solely by reference to and by the contract.

[89] Whilst it is correct that the source of the right is the law rather than the contract that will always be the case where there is a right of direct action. By definition the third party is not a party to the contract so that his right will have to arise elsewhere, almost invariably under a direct action statute. Because the right is one which is created by law/statute it will also be the law/statute which defines the content of the right even if, as here, it does so by reference to the contract. The law/statute will usually also set out anti-avoidance provisions or other limitations on the insurer's contractual rights. The key features which are relied upon by the Defendants are therefore features that are likely to be present in most direct action cases. In *Through Transport*, for example, the direct action right was created by the Finnish Act; it was the Finnish Act which determined that the right was to be one to claim compensation in accordance with the contract, and it was the Finnish Act which rendered void any contractual provisions which derogated from the protection provided under it. It was nevertheless held to be in substance a right to enforce the contract.

[90] Where the present case does differ from *Through Transport* is in the extent of the exceptions provided by art 76. These clearly go beyond the anti-avoidance provisions of the Finnish Act and indeed create a liability for an event which would not normally be insurable (damage caused by wilful misconduct). I agree with the Club (and the arbitrator) that the question is whether the extent of the exceptions is such as to change the essential nature of the right created so that it can no longer be regarded as being in substance a contractual right. Like the arbitrator, I do not consider that the exceptions go this far. Indeed, as already pointed out, in many cases they will be of no relevance and it is the contract alone which will matter. As the arbitrator observed, "the kernel of contractual obligation, as defined by the terms of the contract, remains at the heart of the claim". Indeed, if anything, it is far more than just the kernel.

[91] The Defendants submitted that this reasoning is fallacious and amounts to no more than saying that there is an insurance contract and, therefore, the claim must be contractual. However, what matters is not merely the existence of the contract but the contents of the contract and the fact that the direct action right has essentially the same content. The third party's rights depend, primarily and substantially, on the terms of the contract, as reflected in the "general rule".

[92] It is fair to observe that most direct action statutes are likely to confer rights which to an extent follow the contract and therefore are liable to be found to be in substance contractual. However, one can have

rights created which depend on little more than the fact of the existence of liability insurance, of which the CLC could be said to be an example. The third party's rights against the insurer under the CLC arise from the mere fact of being an insurer, and the terms of the insurance contract are of no relevance.

[93] Nor do I consider that the legal mechanism by which the rights are created is a critical factor. A direct action statute which creates a statutory assignment or subrogation of the insured's rights provides a clear contractual link, but it could then contain provisions that deprived the rights conferred thereby of any real contractual substance. Conversely, one could have a statute which stated in terms that it was creating an independent right of action, but if it then stated that the rights thereby created were the same as those of the insured under his contract it would in substance be a contractual right. What matters is the substance rather than the form of the right, and substance is closely linked to content.

[94] This is supported by Aikens J's decision in *Youell and others v Kara Mara* [2003] EWHC 3158 (Comm), [2004] 1 Lloyd's Rep 206, [2003] ArbLR 44 in which he held that a Louisiana direct action statute created a right which was contractual in nature. The statute in that case conferred "a statutory right to make a claim on a contract to which [the third party] was not originally party". Aikens J expressly held that the third party had not become a party to the policies by a mechanism of statutory novation or assignment (as would be the case under the English Third Party (Rights Against Insurers) Act 1930) but that the rights granted under the direct action statute were nevertheless contractual in nature.

[95] For all these reasons I conclude that the direct action right conferred by Spanish law against liability insurers is in substance a right to enforce the contract rather than an independent right of recovery. This ground of challenge to the jurisdiction of the tribunal accordingly fails.

(2) Are The Claims Arbitrable?

[96] The Defendants contended that the claims are not arbitrable because they are brought under a criminal statute and are bound up with issues of criminal liability and/or because they involve Spain, France and the Public Prosecutor fulfilling a constitutional, public policy function, namely the protection of the environment.

[97] Section 81 of the Act preserves the common law position as to the arbitrability or otherwise of certain types of dispute. It provides that "(1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to - (a) matters which are not capable of settlement by arbitration . . . ."

[98] In *Mustill & Boyd, Commercial Arbitration* (2nd ed) (1989), the common law position is summarised as follows at pp 149-150:

> "English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. The general principle is, we submit, that any dispute or claim concerning legal rights which can be the subject of an enforceable award, is capable of being settled by arbitration. This principle must be understood, however, subject to certain reservations. First, certain types of dispute are resolved by methods which are not properly called arbitration. These are discussed in Chapter 2, ante. Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding up order or a decision that an agreement is exempt from the competition rules of the EEC under Article 85(3) of the Treaty of Rome . It would be wrong, however, to draw from this any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration: indeed, examples of each of these types of dispute being referred to arbitration are to be found in the reported cases."

[99] The issue of arbitrability was considered in the Court of Appeal decision in *Fulham Football Club (1987) Ltd v Richards and another* [2011] EWCA Civ 855, [2012] Ch 333, [2012] 1 All ER 414. In that case Patten LJ stated at 40 that:

> "it is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an attempt to delegate to arbitrators a matter of public interest which could not be determined within the limitations of a private contractual process."

Longmore LJ at 94 identified the key consideration as being whether reference of such matters to arbitration is prohibited as a matter of statute or English public policy.

[100] In the present case the Defendants relied on various statements made to the effect that criminal matters are not arbitrable. For example:

> "Certain disputes may involve such sensitive public policy issues that it is felt that they should only be dealt with by the judicial authority of state courts. An obvious example is criminal law which is generally the domain of the national courts - *Lew, Mistelis and Kröll, Comparative International Commercial Arbitration* (Kluwer Law International, 2003), Chapter 9 at 9.2.
>
> More generally, criminal matters . . . are usually considered as not arbitrable - *Redfern and Hunter on International Arbitration* (5th edn, 2009) at page 125."

[101] As pointed out by *Mustill & Boyd*, however, a distinction needs to be drawn between determinations of criminal liability and the imposition of criminal sanctions, and determinations of issues which may involve criminal liability. The latter are commonly the subject matter of arbitration, as, for example, in cases involving allegations of fraud.

[102] The Defendants also relied on statements as to the significance of matters which uniquely involve government authority or the enforcement of obligations through the state's own mechanisms. For example:

> "The types of disputes which are non-arbitrable . . . almost always arise from a common set of considerations. The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely government authority, that agreements to resolve such disputes by 'private' arbitration should not be given effect. - *Born, International Commercial Arbitration*, at p 768:
>
> There is no body of authority which suggests how and where the line should be drawn. We can offer only the following tentative suggestions... Another possible category would include disputes exclusively concerned with obligations which the state, acting in the public interest, enforces through its own mechanisms. We express the matter in this way to distinguish the cases, already mentioned, where matters touching public law and policy arise incidentally in the course of the enforcement of private contractual rights." - *Mustill and Boyd, Commercial Arbitration: 2001 Companion Volume to the Second edition* (2001) at p 75.

[103] The Defendants were unable, however, to point to any English statute or English rule of public policy which is engaged in this case.

[104] The Defendants submitted that in relation to the Spanish proceedings, the following matters are of particular relevance and are subject to adjudication in that jurisdiction:

> i) Criminal responsibility of the Master and Chief Engineer of the vessel pursuant to arts 325 and 326 of the Penal Code (sought by the Public Prosecutor).

ii) Whether damage has been caused by the commission of any criminal offence and whether there is an obligation on the part of those criminally responsible to pay compensation in that respect arising from art 109 and following of the Penal Code (pursued by the Public Prosecutor). Thus civil liability is predicated directly upon criminal liability. Similarly, whether there is civil liability on their part under art 1902 of the Spanish Civil Code.

iii) Whether the Owners are vicariously liable for the wrongs committed by the Master and Chief Engineer.

iv) The entitlement of Spain, the Public Prosecutor and France to claim damages from the Master, Chief Engineer, and/or the Owners (ie those who are principally or vicariously liable) in respect of damage caused to the environment as a result of the criminal activity. In so doing, Spain and the Public Prosecutor are acting in the public interest and pursuant to art 45 of the Spanish Constitution. Further, Spain is proceeding in its capacity as a guardian of Spain's natural environment and resources. That role is not confined to seeking redress for property damage. It extends to affording protection based on the intrinsic value of the natural environment, including wildlife. Further, there is international (particularly European) consensus on the need to protect the environment, particularly with regard to the discharge of oil into the sea, which has resulted in an increased level of criminalisation and the creation of remedies which reflect the particular public disapproval of the consequences of disasters such as the loss of the vessel.

v) Whether, by reason of the procedural pathway provided by art 117 of the Penal Code, the Club is liable to any of Spain, the Public Prosecutor and France in respect of the liability referred to above - ie and to use the words of art 117, whether the Club has direct civil liability in respect of the relevant conduct.

[105] The Defendants accordingly submitted that the subject matter of the Spanish and French Awards is inextricably linked with the alleged underlying criminal conduct and the role being fulfilled by Spain, the Public Prosecutor and France in pursuing redress for the damage caused to the natural environment of France and Spain and, as such, is not arbitrable.

[106] I am unable to accept these submissions for the reasons given by the Club and in particular:

i) The Defendants' arguments fall to be considered in the context that it has already been decided that the claims are in substance claims to enforce a contract.

ii) The Defendants' claims are all monetary claims, for damages (whether allegedly suffered by the State itself or other third parties that the State has paid and to whose rights it is subrogated).

iii) The Club's alleged liability is fundamentally civil in nature (a liability to pay in accordance with the terms of the insurance) and arises at several steps removed from the criminality, namely as civil liability insurers of Owners who are, themselves, only vicariously liable (for the acts of its employees) and against whom no criminal allegations are made.

iv) Although the direct claims are brought under the part of a criminal statute which deals with civil liability (including arts 109 and 117), the relevant provisions are civil in nature and are construed according to civil principles of law. The alleged liability is a civil liability and the forum in which it is asserted cannot alter that fact.

v) The fact that the civil liabilities arise out of damage to the environment does not alter the fact that the claims are still, in substance, to recover monetary loss.

vi) Even if the Defendants are fulfilling constitutional or domestic public functions of protecting the environment (or recovering civil damages flowing from criminal offences), the claims pursued are, fundamentally, civil claims which are no different from the claims brought by private parties in respect of the same acts (indeed some of Spain's claims are in respect of losses suffered by private parties, which claims the State has been subrogated to). Further, although the Public Prosecutor has the right to bring claims (or request payment) on behalf of third parties, the claim remains that of the third party, so that any judgment would be rendered in favour of the third party.

vii) Arbitrating such claims is not contrary to any identified English statute or English rule of public policy.

[107] The main point stressed by the Defendants in oral argument was the fact that liability under art 117 is predicated on a finding of criminal liability which is not a proper matter for arbitration. However, whether the claim is brought under art 76 or art 117, the right to recover from the insurer depends on proof of an insured liability under the insurance contract and does not require a finding of criminal liability. Even if it did, it would not be a finding involving criminal responsibility or criminal penal consequences. It would simply be a step towards establishment of a civil law monetary claim. Further, it would be remarkable if civil claims advanced in criminal proceedings were inarbitrable, whereas if the same claims had been advanced in civil proceedings they would not have been, so that arbitrability would effectively be at the option of the Claimant.

[108] For all these reasons I am not satisfied that it has been shown that the dispute referred represents an attempt to delegate to arbitrators a matter of public interest which could not be determined within the limitations of a private contractual process or that such a reference engages, still less is prohibited by, English statute or English public policy or is otherwise inarbitrable. This ground of challenge to the jurisdiction of the tribunal accordingly fails.

(3) Has There Been A Waiver Of The Right To Arbitrate France's Claims?

[109] France's case was that in the civil proceedings in France before the Civil Court in Bordeaux which France commenced against the Club, the Owners, Managers and the IOPC Fund in November 2005 the Club has submitted to the jurisdiction of the French courts and it is no longer open to it to rely on any arbitration agreement contained in the Rules.

[110] This involves a consideration of whether there has been a waiver of the right to arbitrate as a matter of French law and, if so, whether that amounts to a waiver as a matter of English law, being the proper law of the arbitration agreement and/or the lex fori, which precludes the Club from relying on the right to arbitrate France's claim subsequently brought in Spain under Spanish legislation permitting direct action.

[111] On 8 November 2005 France served its writ against the Owners, the IOPC Fund and the Club

claiming compensation for pollution damage in the amount of Eur67,499,153.92 in the Civil Court of Bordeaux. The writ was served at the address of the Club's counsel in France (Mr Gautier of Ince & Co, Paris) which, in line with the circular letter it had provided, the Club had chosen as its service address for any CLC proceedings.

[112] In relation to the claim against Owners, two possible bases of liability are mentioned in the writ:

> i) First, the body of the writ and the *dispositif* (the final, concluding section of the writ in which the relief is set out) refer to the CLC. Mention is made that the ship owner is entitled to limit its liability up to the amount of a limitation fund, if he has set up one, unless the event was caused as a result of the ship owners' personal act or omission, committed with the intention of causing such damage or committed recklessly and knowing that such damage would probably result. Mention is also made of the fact that the Club has set up a limitation fund on account of the Owners, and that damage suffered by France exceeds the amount of the limitation fund. The body of the writ contains no reference to any particular fault on the part of the Owners.
>
> ii) Secondly, in the *dispositif* only, France refers to art 1382 of French Civil Code. Article 1382 of the French Civil Code states that where one person causes damage to another through fault, that first person is obliged to compensate the other.

[113] In relation to the claim against the Club reference is made in the body of the writ to it being the Owners' insurer and to it having established the CLC fund and to France acting by way of a direct action. In the *dispositif* the court is asked to order the Owners and the Club to jointly pay the sum of Eur67,499,153.92, a sum in excess of the CLC fund.

[114] The first issue between the French law experts is whether France has brought a claim against the Club under the CLC only, or whether it has also brought a direct action claim on the basis of Owners' liability under art 1382.

[115] France's position, as reflected in the evidence of Mr Grelon, is that the reference in the *dispositif* to a claim against the Owners and the Club to be made jointly liable for an amount in excess of the CLC limit and to art 1382 is sufficient to make a claim against the Owners under art 1382 and against the Club as the Owners' liability insurer. Further, in the body of the writ reference is made to the provisions of the CLC disapplying the limit of liability in the event of fault of the ship owner.

[116] The Club's position, as reflected in the evidence of Mr Gautier, is that it is not sufficient to refer to a claim in the *dispositif*. The factual basis for making a claim has to be set out in the body of the writ for a claim to be made. In this case there is no factual basis set out for a claim against the Owners under art 1382. If so, there is no basis for a non-CLC claim against the Club. In any event neither the factual nor legal basis for a non-CLC right of direct action against the Club is set out.

[117] I prefer the evidence of Mr Gautier on this issue. He was very firm in his evidence that it is essential to lay factual grounds in the body of the writ for any relief claimed in the *dispositif*. No facts relating to or alleging fault are set out. The descriptive reference to the CLC provision dealing with the loss of the right to limit does not involve any averment of fault. Nor is any legal or factual basis for the non-CLC direct action liability of the Club identified. I accordingly find that the only claim made against the Club in the French proceedings is a CLC claim and that therefore the issue of waiver of the right to arbitrate non-CLC claims does not arise.

[118] Even if that be wrong and as a matter of French law such claims are to be considered to have been made, I consider that it is far from clear that that is so and that as a matter of English law there was no clear choice to be made for the purpose of the doctrine of waiver by election. It was not objectively clear that the Club was being presented with two alternative and inconsistent options at the time of the alleged election. If so, there can be no waiver as a matter of English law.

[119] In these circumstances it is not necessary to decide the further French law issue which arises as to whether the Club did in fact raise a procedural exception in January 2007 by requesting a stay of proceedings, as opposed to simply joining in the request made by others for such a stay.

[120] This ground of challenge to the jurisdiction of the tribunal accordingly also fails.

(4) Does The Court Have No Jurisdiction On The Grounds Of State Immunity?

[121] By s 1(1) of the State Immunity Act 1978 ("the SIA"), a State is immune from the jurisdiction of the courts of the United Kingdom except as provided for in the subsequent provisions of the SIA.

[122] By s 14(1) of the SIA, the immunities and privileges conferred by the SIA apply to any foreign or commonwealth State other than the UK, and references to a State include references to the sovereign or other head of that State in his public capacity (s 14(1)(a)), the Government of that State (s 14(1)(b)) and any department of that Government (s 14(1)(c)).

[123] Thus Spain and France are prima facie immune from the jurisdiction of the English Court. That immunity will only be lost to the extent that they fall within one of the exceptions set out in the SIA.

[124] The Club contended that the immunity has been lost on the following grounds:

> i) Pursuant to s 9(1) of the SIA the Defendants have agreed in writing to submit the relevant dispute to arbitration; and
>
> ii) These are proceedings relating to an obligation of the Defendants which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the UK (see s 3(1)(b) of the SIA). The Club says that the relevant contractual obligation to which these proceedings relate is the obligation to arbitrate and to do so in London; and
>
> iii) The Defendants have submitted to the jurisdiction of the English courts for the purposes of s 66 application. By virtue of s 2 of the SIA, the Defendants are therefore not immune in respect of the s 66 proceedings.

[125] The Club further contended that any plea of immunity is unsustainable in respect of the Defendants' own ss 67/72 applications. In respect of those applications, the Defendants have "instituted the proceedings" and are therefore taken to have submitted to the jurisdiction of the courts of England pursuant to s 2(3)(a) SIA.

Section 9 of the SIA

[126] Section 9(1) of the SIA provides that "Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

[127] The Defendants submitted that even if they were bound by the arbitration clause by reason of the *Through Transport* analysis they were not party to any agreement to arbitrate, as the Court of Appeal decision makes clear. Even if they were, that was not sufficient for the purposes of s 9(1) which requires some written manifestation of express consent on the part of the State. Tacit consent does not suffice.

[128] The Court of Appeal in *Through Transport* held that New India was bound by the arbitration clause (and granted a declaration to that effect). However, it also held that in commencing proceedings in Finland New India was not in breach of contract and could not have been sued in damages for so doing, and it set aside both the declaration that there had been a breach of contract and the anti-suit injunction which had been granted. The relevant passages from Clarke LJ's judgment are as follows:

> "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.
>
> . . .
>
> 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 para 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 . . . ."

[129] The Defendants also relied on Waller LJ's summary of the *Through Transport* decision in *The "Wadi Sudr"* [2010] 1 Lloyd's Rep 193 at 50:

> "50 What the Finnish court had decided was that the Finnish statute provided the basis for the claim in Finland and thus the arbitration clause had no application. So far as the English court was concerned, the issue was whether that was a correct characterisation of New India's claim. The Court of Appeal (in agreement with Moore-Bick J (as he then was)) confirmed that, under English conflict of laws, issues of characterisation are to be resolved by applying principles of English law (see paragraph 55) and that Moore-Bick J had been correct in his characterisation and in holding New India bound by the arbitration clause but only in the sense of the club being entitled to raise the same as a defence. The court found that New India was not a party to the contract containing the arbitration clause and was thus not in breach of contract in commencing proceedings in Finland (see paragraph 65). It thus held that since New India were pursuing a claim which, under Finnish statute, it was entitled to do, it was not a case where an injunction should be granted (see paragraph 96)."

[130] The most detailed consideration of the nature of the right/obligation arising under the *Through Transport* analysis is to be found in Moore-Bick J's judgment in *Through Transport No 2* [2005] 2 Lloyd's Rep 378. Following the Court of Appeal decision the P&I Club involved in that case applied to the court for an

appointment of an arbitrator pursuant to s 18 of the Act. New India argued that the court had no jurisdiction to do so as the Court of Appeal had held that it was not party to an agreement to arbitrate. Moore-Bick J rejected New India's argument and granted the application.

[131] Moore-Bick J considered para 52 of the Court of Appeal's judgment and explained it as follows:

> "15 In my view the debate in the present case has suffered to some extent from a misunderstanding of the significance of what the Court of Appeal said in paragraph 52 of its judgment. As I read it, all that the court was seeking to do in that paragraph was to dispose of the suggestion that New India had become a party to a contract with the Club as a result of the transfer to it of the rights and obligations of the insured under the Club's Rules. The court clearly thought that it had not, but it is equally clear that it did not think that that was the right question. Having disposed of that point, it went on to consider the nature of the claim being made by New India and whether it was one that had to be pursued in arbitration. It is quite clear from paragraph 60 of the judgment and from the declaration contained in the order drawn up to give effect to its decision that the court considered that New India was bound to pursue its claim in arbitration in England and was not entitled to act in disregard of the arbitration clause.
>
> 16 Similarly, the fact that the Court of Appeal reached the conclusion that it was inappropriate in this case to grant an anti-suit injunction against New India provides only limited support for the conclusion that there is nothing that can be regarded as amounting to an arbitration agreement between the Club and New India for any purposes. When discussing the nature of the relationship between New India and the Club the court pointed out that New India was not acting in breach of contract in commencing proceedings in Finland, despite the fact that it was under an obligation to pursue its claim in arbitration, but that does not of itself make it inappropriate to grant relief of this kind . . . ."

[132] Moore-Bick J then considered the analysis of the Court of Appeal in *The "Jay Bola"* [1997] 2 Lloyd's Rep 279 as to why and how an assignee of a contract is bound by an arbitration clause contained therein, as set out in particular in the judgment of Hobhouse LJ. Moore-Bick J concluded that the case was authority for the following:

> "22 . . . In my view the decision in this case is authority for the proposition that a person who obtains by an assignment or transfer of some other kind the right to pursue a claim under a contract can only enforce that right in accordance with the terms of the contract and subject to any restrictions or limitations which those terms may impose. In other words, what he obtains is a chose in action whose precise scope is determined by the contract under which it arises and which is inherently subject to certain incidents, in this case a requirement that it be enforced by arbitration."

[133] Moore-Bick J then addressed the application of that principle to the *Through Transport* case and stated as follows:

> "24 Although this distinction can be drawn between the position of New India in this case and the position of the insurer in *The Jay Bola*, it is not in my view one that is ultimately of any substance. In the present case the Court of Appeal has held, applying English rules of characterisation, that section 67 of the Finnish Insurance Contracts Act gives a person in the position of New India the right to enforce the obligations of the Club under the contract of insurance. Whether one describes New India as a statutory transferee or simply as the beneficiary of a statutory provision, therefore, the right it enjoys is a right to enforce a chose in action which is itself subject to certain inherent limitations. One of those is the pay to be paid clause; another is the obligation to enforce any claim by arbitration in London. In Finland those limitations may be disregarded if mandatory provisions of the relevant legislation so require, but in English law, as the Court of Appeal has held, that legislation is not recognised as capable of affecting the parties' rights and obligations.
>
> 25 For these reasons I am satisfied that, however one describes its position, New India is seeking to enforce a chose in action which is subject to certain inherent limitations, including the obligation to enforce it by arbitration in London. Section 82(2) of the Arbitration Act 1996 provides that references in Part I of the Act to a party to an arbitration agreement include any person claiming under or through a party to the agreement. An assignee seeking to enforce the contract clearly falls within that provision because he claims under or through the assignor, as the Court of Appeal recognised in The Jay Bola . Accordingly, if New India were to commence arbitration against the Club, I have no doubt that it could apply to the court for relief under section 18 . . . ."

[134] Moore-Bick J went on to consider whether it made any difference that it was the P&I Club who was

making the s 18 application and that New India did not wish to arbitrate and concluded that it did not. In this connection he referred to and relied upon s 82(2) of the Act which provides that "(2) References in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement"

[135] Moore-Bick J concluded as follows:

> "28 For the reasons given earlier I accept that New India's position is not quite the same as that of a simple assignee and I also accept that it has a right to choose whether to seek to enforce the rights of the insured against the Club. However, as soon as a third party in the position of New India makes a demand on the insurer there is the potential for a dispute to arise, as indeed happened in this case, and once a dispute has arisen in relation to the third party's right to recover from the insurer it is one which must be determined by arbitration in accordance with the contract. Clearly the third party can invoke the contractual arbitration machinery and as soon as he does so he becomes a person who claims under or through a party to the agreement within the meaning of section 82(2) of the Arbitration Act. However, I am unable to accept that once a dispute has arisen the insurer is powerless to act until the Claimant chooses to take a formal step of that kind. The arbitration clause in the present case contemplates that either party may refer disputes to arbitration and that necessarily allows for the possibility that the Club itself may commence proceedings. In my view it was not necessary for New India to commence proceedings in order to bring itself within the scope of section 82(2); it became a person claiming under or through a party to the arbitration agreement within the meaning of that subsection as soon as it sought an indemnity from the Club in the right of Bomeo Maritime Oy. Having rejected the claim, the Club was entitled to refer the resulting dispute to arbitration and to invoke section 18 of the Act against New India as a party to the arbitration agreement contained in the Club's Rules."

[136] I accept and adopt Moore-Bick J's helpful analysis of the legal position arising under the *Through Transport* analysis. When the third party makes a claim under an insurance policy containing an arbitration clause he becomes a person claiming under or through a party to the arbitration agreement and thereby a party to the arbitration agreement for the purposes of the Act. When that claim is disputed he becomes bound to refer the dispute to arbitration in accordance with that arbitration agreement. He is not an original party to the arbitration agreement, nor does he become a party to that agreement by reason of a novation or other legal transfer of the rights and obligations of the agreement. He is not therefore a party to the agreement "in the full sense". But he is bound by it and he is a party to the agreement for the purposes of the Act.

[137] The question which then arises is whether a State which becomes a party to an arbitration agreement in this sense "has agreed in writing" to submit a dispute to arbitration within the meaning of s 9(1) of the SIA.

[138] There is undoubtedly an agreement in writing. The State is bound by it by reason of the *Through Transport* analysis. The State is a party to that agreement for the purposes of the Act. Is that sufficient? I am satisfied that it is for a number of reasons.

[139] First, it would be surprising if the test for whether there was an agreement in writing in the SIA was different to that under the Act, and there is no language in s 9 to suggest that there is some further or added requirement. The SIA is an English statute. Section 9 is addressing matters relating to arbitration. The English law of arbitration is as set out in the Act.

[140] Secondly, this is borne out by the purpose of s 9 which is, I accept, to ensure that where a State is bound to arbitrate it is also bound to submit to the supervisory jurisdiction of the courts, to ensure that the arbitration is effective. As explained by Moore-Bick LJ in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2006] EWCA Civ 1529, [2007] QB 886 at 17, [2007] 2 WLR 876 "the principle underlying s 9 is that, if a state has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective".

not yet been ratified. It might be different if there was evidence that it reflected customary international law at the time of the SIA, but there is no such evidence.

[154] As to ii), s 2 of the SIA provides that:

> "(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.
>
> . . .
>
> (7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract."

[155] The Defendants submitted that what is envisaged by s 2 is express written consent by the State emanating from a person with authority to commit the State to that course of action and that the same must apply to s 9(1). However, as the Club submitted, the language of s 2(2) ("prior written agreement") is different to s 9(1) ("agreed in writing"). If anything, the use of different language in different parts of the Act indicates that a different approach is required. In any event, s 2(2) does not state that a State must have given its express written consent to submit to the jurisdiction of the English courts. Further, the emphasis on s 2(7) is misplaced: that provision is permissive (stating for clarity two particular persons who are deemed to have the requisite authority to bind a State) and is not in any way limiting.

[156] As to iii), the Defendants emphasised the importance attached in the *Svenska* case to the signed acknowledgment given by the government in considering whether it was bound by the arbitration agreement. They submitted that this showed that the Court of Appeal was looking for and found express written consent. However, I do not agree that the court was looking for such consent. The court held that the government could not go behind the arbitrators' decision that they were bound by the arbitration agreement and that that was sufficient for the purposes of s 9(1) of the SIA. What mattered was that it was bound by the arbitration agreement.

[157] The Defendants also made the general point that it would be surprising and unsatisfactory if a state was to lose its immunity by means of making a claim which it is entitled to do under its own law and in its own state. However, that is the consequence of the *Through Transport* analysis. You cannot seek to take the benefit of the insurance contract without accepting its incidents and limitations.

[158] For all these reasons I conclude that the Defendants have lost their immunity by reason of s 9(1) of the SIA.

Section 3(1)(b)

[159] Section 3(1)(b) provides:

> "(1) A State is not immune as respects proceedings relating to -

...

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom."

[160] There are therefore four requirements:

i) "An obligation of the State"

ii) which "by virtue of a contract (whether a commercial transaction or not)"

iii) "falls to be performed wholly or partly in the United Kingdom" and

iv) the relevant proceedings must be "proceedings relating to" the obligation.

[161] The Club submitted that all these requirements are satisfied.

[162] As to i), the relevant "obligation of the State" is the agreement to arbitrate. The Defendants are bound to arbitrate by reason of the *Through Transport* analysis.

[163] As to ii), the obligation to arbitrate arises "by virtue of a contract", namely the insurance contract between the Club and the insured and that that is the very nature and effect of the *Through Transport* analysis.

[164] As to iii), the obligation to arbitrate falls to be performed wholly or partly in the United Kingdom.

[165] As to iv), the s 66 application is a proceeding "relating to" the obligation to arbitrate. The application to enforce an arbitration award is "about" or "arising out of" the obligation to arbitrate in that it is an application seeking to honour and give effect to the arbitration agreement.

[166] The Defendants disputed that there was here any or any sufficient "obligation" to arbitrate on the grounds of the limited nature of any such obligation, as made clear by the Court of Appeal decision in *Through Transport*.

[167] The Defendants further submitted that the SIA deals with arbitration specifically in s 9. It cannot have been intended that a State could lose its immunity under s 3 even though the requirements of s 9 were not met. Further, there is no good reason for treating an arbitration which happens to have its seat here differently to any other arbitration agreement. Section 9 is clearly intended to be of general application.

[168] In the light of my ruling on s 9 it is not necessary to decide this issue, although I consider that there is force in the Defendants' contention that it is s 9 alone which governs loss of immunity under the SIA in matters relating to arbitration.

SECTION 2 OF THE SIA

[169] Section 2 provides:

> "(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> . . .
>
> (3) A State is deemed to have submitted -
>
> (a) if it has instituted the proceedings; or
>
> (b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
>
> (4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of -
>
> (a) claiming immunity; or
>
> (b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it."

[170] The Club submitted that the question of what amounts to a "step in the proceedings" must be answered in light of English procedural law as to the proper steps to be taken in relation to proceedings commenced in the English courts. English court procedural law is governed by the CPR.

[171] Pursuant to CPR Pt 11:

> "11.1(1) A Defendant who wishes to -
>
> (a) dispute the court's jurisdiction to try the claim; or
>
> (b) argue that the court should not exercise its jurisdiction
>
> may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
>
> (2) A Defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
>
> (3) A Defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.
>
> (4) An application under this rule must -
>
> (a) be made within 14 days after filing an acknowledgment of service; and
>
> (b) be supported by evidence.

(5) If the Defendant -

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim."

[172] The Club submitted that the Defendants had taken a step in the proceedings pursuant to s 2(3)(b) ie a step which impliedly affirms the correctness of the proceedings and the willingness of the Defendants to go along with a determination by the courts - see *Kuwait Airways v Iraqi Airways* [1995] 1 Lloyd's Rep 25. Such a step involves an election - ie an unequivocal act done with knowledge of the material circumstances - see *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 per Lord Denning at 361.

[173] The Club submitted that Spain had taken a step in the proceedings by reason of the following:

i) In its acknowledgment of service it did not tick the box indicating "I intend to dispute the court's jurisdiction".

ii) It failed to make an application to challenge the court's jurisdiction within 14 days of acknowledgment of service and accordingly it is to be treated as having accepted the court's jurisdiction pursuant to CPR Pt 11.1(5)(b) - see *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 2 All ER (Comm) 287, [2009] 1 Lloyd's Rep 475.

iii) On 28 June 2013 it applied for an extension of time to submit evidence in response to the s 66 application. Neither the arbitration claim form nor the application notice referred to any challenge to the court's jurisdiction to hear the s 66 application, although the supporting witness statement sought to reserve the right to do so.

iv) No mention of immunity was made in the skeleton for the hearing or the hearing itself.

v) When the s 67/72 applications were issued no application was made to challenge the court's jurisdiction to hear the s 66 application and the only mention of immunity was in the supporting witness statement.

vi) To date no application to dispute the court's jurisdiction has been made.

[174] In relation to point ii), whilst that may be the position as a matter of English procedural law, that does not mean that a step in proceedings has been taken for the purpose of the SIA. To do so requires an election - ie an act rather than a mere omission.

[175] As to the other points, I am satisfied that Spain's position throughout has been that it was disputing the jurisdiction of both the court and the arbitrator.

[176] Thus in the acknowledgment of service it stated that it was "reserving all rights of any description, whether jurisdictional or otherwise" and specifically stated that it "will rely on grounds of challenge available under the . . . Sovereign Immunity Act 1978".

[177] The assertion of immunity was repeated in its solicitors' letter of 21 June 2013 which was the first time Spain had set out its substantive position on the s 66 application. It was repeated in Mr Meredith's witness statements of 27 June 2013 and 5 August 2013.

[178] The other applications made must be seen in the context of these general reservations and the practical desirability of dealing with all the applications together. Its continuing objection to the court's jurisdiction was maintained and it was reasonably clear that this was to be raised in answer to the Club's own s 66 application. There was therefore no need for a separate application to be issued. Looking at Spain's conduct as a whole I am satisfied that it never affirmed the correctness of the proceedings and its willingness to go along with a determination by the courts.

[179] France's position is similar to that of Spain, although the CPR Pt 11.1(5)(b) point does not arise in its case. I find that the position is otherwise the same as in relation to Spain. Neither of the Defendants have taken a step in the proceedings within the meaning of s 2 of the SIA.

[180] In summary, I hold that immunity has been lost by reason of s 9(1) of the SIA. In those circumstances it is not necessary to consider the position separately in relation to the Defendants' own applications. I accordingly conclude that the court has jurisdiction over the Defendants.

(5) Should The Court Grant The Applications As A Matter Of Discretion?

[181] Section 66 of the Act provides:

> "(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
>
> (2) Where leave is so given, judgment may be entered in terms of the award.
>
> (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.
>
> The right to raise such an objection may have been lost (see section 73).
>
> (4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under the Geneva convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award."

[182] On an application under s 66, the court has a discretion whether or not to enforce the award - it "may" do so.

[183] In many cases the discretionary issue will relate to the validity of the award and it will be for the Respondent to "show" that the tribunal lacked jurisdiction. However, I accept that the discretion is a wide one to be exercised in the interests of justice and that it will embrace issues such as the utility of a declaratory

judgment, as is illustrated by *West Tankers Inc v Allianz SpA* [2012] EWCA Civ 27, [2012] 2 All ER (Comm) 113, [2012] 1 Lloyd's Rep 398.

[184] In *West Tankers* Toulson LJ, with whom Lloyd and Carnwath LLJ agreed, stated that:

> "37 . . . I cannot see why in an appropriate case the court may not give leave for an arbitral award to be enforced in the same manner as might be achieved by an action on the award and so give leave for judgment to be entered in the terms of the award.
>
> 38 I use the words 'in an appropriate case' because the language of the section is permissive. It does not involve an administrative rubber stamping exercise. The court has to make a judicial determination whether it is appropriate to enter a judgment in the terms of the award. There might be some serious question raised as to the validity of the award or for some other reason the court might not be persuaded that the interests of justice favoured the order being made, for example because it thought it unnecessary . . . ."

[185] The *West Tankers* case concerned whether the court had jurisdiction to give leave to enforce a declaratory award as a judgment under s 66 of the Act and, if so, whether the court should do so as a matter of discretion. The jurisdictional argument was that there was no power to enforce such an award since a declaratory judgment does not involve enforcement. This argument was rejected by Field J and the Court of Appeal. Field J's exercise of his discretion to make an order under s 66 was not challenged on appeal.

[186] The Club relied upon Field J's discretionary decision in *West Tankers* and submitted that it was on all fours with the present case. The Club's stated objective in these proceedings is to obtain an English judgment which, by virtue of art 34(3) of the Judgments Regulation, would take primacy over any inconsistent Spanish judgment which might be rendered in November. A similar issue arose in *West Tankers.* Field J decided that the declaratory award would be enforced because there was utility in so doing. He stated that:

> "28 The purpose of section 66(1) and (2) is to provide a means by which the victorious party in an arbitration can obtain the material benefit of the award in his favour other than by suing on it. Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. In short, in such a case, the grant of leave will not facilitate the realisation of the benefit of the award. Where, however, as here, the victorious party's objective in obtaining an order under section 66(1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a section 66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award.
>
> . . .
>
> 30 On an application under s 66 or to set aside a s 66 order, it is enough, in my view, in a case such as this, for the party seeking to enforce the award to show that he has a real prospect of establishing the primacy of the award over an inconsistent judgment. It is not necessary, nor is it appropriate, for the court finally to decide this hypothetical question - hypothetical because the unsuccessful party to the arbitration will not have obtained an inconsistent judgment in a member state at the time the court is dealing with the s 66 application."

[187] Similarly there is here a real prospect of establishing the primacy of the award over any inconsistent judgment which may be rendered in Spain and therefore a clear utility in granting leave to enforce. The prospect of so establishing primacy is borne out by cases in which it has been stated - T*he Wadi Sudr* [2009] EWCA Civ 1397, [2010] 2 All ER (Comm) 1243, [2010] 1 Lloyd's Rep 193 at 63 (per Waller LJ) - or assumed - *West Tankers* per Field J at 25-26 - that an award under s 66 is a "judgment" under s 34(3), and the decision to that effect of Beatson J in *African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG* [2009] EWCA Civ 1397, [2010] 2 All ER (Comm) 1243, [2010] 1 Lloyd's Rep 193 at 27-8.

[188] In the *African Fertilizers* case Beatson J followed and applied Waller LJ's obiter statement in *The Wadi Sudr* that art 34(3) could be relied upon. As he stated at 28:

> "(b) Mr Happé's submissions on this issue are inconsistent with the obiter statement of Waller LJ in *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] 2 CLC 1004 at 63. Waller LJ stated that, where the English court had granted a declaration that an arbitration clause was incorporated into a contract (in that case a bill of lading) and a court in another member state subsequently refused to stay proceedings in that state, '. . . the Claimant in England could proceed with the arbitration in England; if that were inconsistent with the judgment obtained in the member state then that would provide an answer on its own [see Article 34(3)]'."

[189] The Defendants challenged the correctness of Beatson J's decision, but I agree with Field J that it would not be appropriate to decide that issue in circumstances where any inconsistency is still hypothetical and that it is sufficient for there to be a real prospect of establishing primacy, as there clearly is on the current authorities.

[190] The Defendants submitted that there are two possibilities. The first is that the s 66 judgment is not a Regulation Judgment and therefore there is no utility in it. The second is that it is a Regulation Judgment, in which case it would be an inappropriate exercise of the court's discretion to grant leave for such a judgment to be entered. The same applies to the exercise of that discretion on the basis that there is a real prospect of it being a Regulation Judgment.

[191] The Defendants submitted that it would be an inappropriate exercise of the court's discretion because it would serve to subvert the Regulation jurisdictional regime because:

> i) The subject matter of the proceedings in Spain mean that they fall within the scope of the Regulation (art 1) and any resulting judgment will be a Regulation Judgment;
>
> ii) The subject matter of the enforcement proceedings in England is arbitration and thus outside the scope of the Regulation (art 1(2)(d));
>
> iii) The Spanish court was the court first seised for the purposes of art 27(1) of the Regulation and were it not for the fact that s 66 proceedings fall outside of the Regulation the English Court would be obliged to stay its proceedings until such time as the jurisdiction of the court first seised was established;
>
> iv) Thus if the English Court were to grant a Regulation Judgment in non-Regulation proceedings in the present case, it would be declining to respect the lis pendens provision in art 27 and the direct action provision in art 11, which it would be obliged to respect if these proceedings fell within the Regulation and by so doing, allocating itself primacy for the purposes of art 34 over the judgment of the Spanish court as that which was first seised.

[192] In short, the non-Regulation nature of the s 66 proceedings allows the court to ignore the mandatory stay imposed by the Regulation and yet it would assert the status of having issued a Regulation judgment in order to trump the judgment of the court first seised. The Defendants submitted that such a result is not countenanced by the Regulation and that the court should not exercise its discretion so as to encourage such a result.

[193] This argument assumes that the court should treat the present application as if it was regulated by the

Regulation. However, this is an arbitration application and arbitration falls outside the Regulation. Potentially inconsistent decisions and lack of co-ordination are recognised consequences of the arbitration exclusion. As the Club put it, why should the court refuse to grant a party the full benefit of an award which it has because to do so would run counter to the scheme of a Regulation that does not apply to arbitration?

[194] In my judgment, as in the *West Tankers* case, there is a clear utility in granting judgment and the Regulation regime is not a good or sufficient reason for preventing the Club from seeking to realise the full benefit of their awards.

[195] The Defendants raised a number of other matters which they submitted should persuade the court not to exercise its discretion. These included the effect of declaratory relief on parties not before the court; the risk of inconsistent judgments involving third parties; the fact that the Public Prosecutor is not party to these proceedings; and the potential effect of any judgment on criminal and civil proceedings which are all but concluded in which the Public Prosecutor is pursuing claims under the Spanish Penal Code in respect of matters of substantial public interest and importance in Spain and in France concerning the natural resources and heritage of those countries.

[196] As to the effect on third parties, the awards do not bind any third parties and therefore do not affect their rights. Nor is there a risk of inconsistent judgments since the judgments will involve different parties. Although the Public Prosecutor is not party to these proceedings, the evidence is that any judgment obtained in Spain in respect of the civil claims brought by him on behalf of other parties (including Spain) will be in the name of the relevant party. There will therefore be no civil judgment for the Public Prosecutor.

[197] As to the points made about the importance of and the public interest in the Spanish proceedings, I recognise the significance of the issues raised and the claims made in those proceedings, but there cannot be one rule for publicly important cases and another for less important cases. I also recognise that, if no English law advice was taken prior to bringing the direct claims against the Club, the Defendants might be surprised to learn that they are bound to bring those claims in arbitration. However, the Club entered into an English law insurance contract on agreed terms and priced the cover provided accordingly. Those terms involve no liability in the events which have happened over and above the CLC liability, an international convention limit of liability which has been fully met. This court has always upheld the principle of freedom of contract and supported the enforcement of contractual bargains freely entered into. The Club is doing no more than seeking to enforce its contractual rights in respect of a claim which is in substance a claim under the contract that it made.

[198] For all these reasons I conclude that there is utility in granting the declarations sought, that no good reason has been shown why the court should refuse to allow the Club to seek to realise the full benefit of the awards it has obtained, and that in the exercise of my discretion and in the interests of justice I should grant the s 66 application.

CONCLUSION

[199] I answer the Issues raised as follows:

i) The proper characterisation of the claims is contractual.

ii) The claims are arbitrable.

iii) There has been no waiver of the right to arbitrate France's claims.

iv) The court has jurisdiction because any state immunity has been lost pursuant to s 9(1) of the SIA.

v) In the exercise of its discretion the court should grant the s 66 applications.

[200] In the light of my conclusion on issues i) to iii) I refuse the Defendants' applications under ss 67/72.

[201] In the light of my conclusions on issues iv) and v) I grant the Club's applications under s 66.

Judgment accordingly.

TAB 17

All England Reporter/2004/December/Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd - [2004] All ER (D) 25 (Dec)

[2004] All ER (D) 25 (Dec)

Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd

[2004] EWCA Civ 1598

Court of Appeal, Civil Division

Lord Woolf CJ, Clarke and Rix LJJ

2 December 2004

Practice and procedure - Service of process - Injunction to prevent foreign proceedings - Reliance on English law and arbitration clause - Discretion of court.

A merchant shipped a container containing garments from Calcutta for carriage to Moscow under two through transport bills of lading issued by B Ltd, which was a member of the claimant mutual insurance association (the club). The bills of lading provided for the goods to be carried by sea to a Finnish port and thence by road to Moscow. The goods were insured against loss or damage in transit by the defendant. The container was lost in transit after having arrived in Finland. The merchant made a claim against the defendant, which was compromised, and as a result the defendant became entitled to exercise the merchant's rights against the carrier. The club rules contained a law and disputes clause providing for English law and arbitration in London. The defendant sued the club in Finland, under the Finnish Insurance Contracts Act 1994 (the Finnish statute). The club thereafter issued an arbitration claim form in the High Court seeking a declaration that the defendant was bound to pursue a claim in arbitration, and an injunction to restrain it from pursuing its claim in Finland. The club obtained permission to serve the claim form out of the jurisdiction. The defendant applied for that order to be set aside or, alternatively, for the English proceedings to be stayed. The judge held that: the defendant was bound to submit the claim under the Finnish statute to arbitration in London, because the essential nature of the right created by the Finnish statute was to enforce the terms of the contract, which was governed by English law, and which included the arbitration clause; that it followed that the court had jurisdiction to give permission to serve the claim form out of the jurisdiction under CPR 6.20(5)(c) and 62.5(1)(c), and that it had jurisdiction to grant an injunction to prevent the continuation of proceedings contrary to the terms of the arbitration clause; that the court was not bound to stay the English proceedings under art 27.1 of Council Regulation (EC) 44/2201 because by art 1.2(d) it did not apply to arbitration; that there was no basis for staying the proceedings or setting aside the service outside the jurisdiction; and that, applying the principles in the authorities as to anti-suit injunctions, the club was entitled to an injunction restraining the defendant from proceeding further in Finland. The defendant appealed.

The principal questions which arose on the appeal were: (i) whether the court should decline jurisdiction or stay the proceedings under the Regulation; (ii) whether the judge was right to hold that the defendant was bound to pursue its claim under the Finnish statute by arbitration in England; (iii) whether the permission to serve the claim form out of the jurisdiction should be set aside or the proceedings be stayed as a matter of discretion; (iv) whether the judge should have granted the declarations he did; and (v) whether he should have granted an anti-suit injunction.

The appeal would be allowed in part.

(1) The court should not decline jurisdiction or stay the proceedings under the Regulation. 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, and the judge was right to hold that the claim in England was within the arbitration exception and thus outside the Regulation.

(2) The judge was right to hold that, under English principles of conflicts of laws, the defendant was bound to pursue its claim under the Finnish statute by arbitration in England, because the club was entitled to rely on the arbitration clause, just as it was entitled to rely upon any other clause in the contract to defend the claim.

(3) The permission to serve the claim form should not be set aside and the proceedings should not be stayed as a matter of discretion. Once it had been held by the English court that the defendant was bound to submit its claim under the Finnish statute to arbitration it would not be just to stop the club seeking a declaration to that effect in proceedings in England.

(4) The judge was right to declare that the defendant was bound to refer any claims against the club in respect of the consignment to arbitration in England. However, his declaration that the Finnish proceedings were in breach of the arbitration clause should be set aside because the defendant was not in breach of contract in bringing them.

(5) In all the circumstances of the instant case, the judge should not have granted the anti-suit injunction, which should be set aside.

Decision of Moore-Bick J [2003] All ER (D) 360 (Dec) reversed in part.

Mark Howard QC and Ricky Dirwan (instructed by Birketts) for the club.

Christopher Smith (instructed by Holmes Hardingham Walser Johnston Winter) for the defendant.

Kate O'Hanlon Barrister.

Judgment

[2004] EWCA Civ 1598

COURT OF APPEAL, CIVIL DIVISION

2 DECEMBER 2004

LORD WOOLF CHIEF JUSTICE, LORD JUSTICE CLARKE and LORD JUSTICE RIX

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

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 because the proper law of the contract creating the obligation is English law: see *Adams v National Bank of Greece.*

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 International GmbH v Molino Boschi Srl* [1996] 1 Lloyd's Rep 510, *Lexmar Corporation and The Steamship Mutual Underwriting Association (Bermuda) Ltd v Nordisk Skibsrederforensig and Northern Tankers (Cyprus) Ltd ("The Lexmar case")* [1997] 1 Lloyd's Rep 289 and *Toepfer International GmbH v Société Cargill France* [1997] 2 Lloyd's Rep 98.

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.

TAB 18

Leroy Jensen and Roger Tolofson *Appellants*

v.

Kim Tolofson *Respondent*

and

Réjean Gagnon *Appellant*

v.

Tina Lucas and Justin Gagnon by their litigation guardian Heather Gagnon, Heather Gagnon personally, and Cyrille Lavoie *Respondents*

and

Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey, Aditha Le Blanc, Clarence S. Marshall, La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée and Allstate Insurance Co. of Canada *Interveners*

INDEXED AS: TOLOFSON *v.* JENSEN; LUCAS (LITIGATION GUARDIAN OF) *v.* GAGNON

File Nos.: 22980, 23445.

1994: February 21; 1994: December 15.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Conflict of laws — Torts — Traffic accident — Injured parties not resident in province where accident occurred — Actions instituted in home provinces of injured parties — Whether lex fori or lex loci delicti should apply

Leroy Jensen et Roger Tolofson *Appelants*

c.

Kim Tolofson *Intimé*

et

Réjean Gagnon *Appelant*

c.

Tina Lucas et Justin Gagnon par leur tutrice à l'instance Heather Gagnon, Heather Gagnon personnellement, et Cyrille Lavoie *Intimés*

et

Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey, Aditha Le Blanc, Clarence S. Marshall, La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée et Allstate Insurance Co. of Canada *Intervenants*

RÉPERTORIÉ: TOLOFSON *c.* JENSEN; LUCAS (TUTRICE À L'INSTANCE DE) *c.* GAGNON

Nos du greffe: 22980, 23445.

1994: 21 février; 1994: 15 décembre.

Présents: Les juges La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit international privé — Responsabilité délictuelle — Accident de la circulation routière — Blessés ne résidant pas dans la province où l'accident s'est produit — Actions intentées dans les provinces d'origine des bles-

— If substantive law that of jurisdiction where accident occurred, whether limitation period substantive law and therefore applicable in forum or procedural law and therefore not binding on court hearing case — Automobile Insurance Act, L.Q. 1977, c. 68, ss. 3, 4 — Code civil du Bas Canada, art. 6 — Limitation of Actions Act, R.S.S. 1978, c. L-15 — Vehicles Act, R.S.S. 1978, c. V-3, s. 180(1).

These appeals deal with the "choice of law rule": which law should govern in cases involving the interests of more than one jurisdiction specifically as it concerns automobile accidents involving residents of different provinces. The first case also raises the subsidiary issue of whether, assuming the applicable substantive law is that of the place where the tort arises, the limitation period established under that law is inapplicable as being procedural law and so not binding on the court hearing the case, or substantive law. The second case raises the issue whether the Quebec no-fault insurance scheme applies to situations where some or all the parties are non-residents.

Tolofson v. Jensen

The plaintiff, Kim Tolofson, a 12-year-old passenger in a car driven by his father Roger, was seriously injured in a car accident with Leroy Jensen. The accident occurred in Saskatchewan. The Tolofsons were residents of and their car was registered in British Columbia; Mr. Jensen was a resident of and his car was registered in Saskatchewan. Plaintiff brought an action eight years later in British Columbia on the assumption that the action was statute-barred under Saskatchewan law. Further, Saskatchewan law, unlike British Columbia law, did not permit a gratuitous passenger to recover, absent wilful or wanton misconduct of the driver of the car in which he or she was travelling. Neither defendant admitted liability. The defendants brought an application by consent to seek a determination as to whether the court was *forum non conveniens* or alternatively as to whether Saskatchewan law applied. The motions judge dismissed the application and ruled that choice of law was inextricably entwined with issues of jurisdiction and *forum conveniens*, and that choice of law fol-

sés — Y a-t-il lieu d'appliquer la lex fori ou la lex loci delicti? — Si la loi substantielle applicable est celle du ressort où l'accident s'est produit, le délai de prescription constitue-t-il une règle de fond qui est donc applicable dans le ressort du tribunal saisi, ou s'agit-il d'une règle de procédure qui ne lie pas le tribunal qui entend l'affaire? — Loi sur l'assurance automobile, L.Q. 1977, ch. 68, art. 3, 4 — Code civil du Bas Canada, art. 6 — Limitation of Actions Act, R.S.S. 1978, ch. L-15 — Vehicles Act, R.S.S. 1978, ch. V-3, art. 180(1).

Les présents pourvois portent sur la «règle du choix de la loi applicable», c'est-à-dire de la loi qui devrait régir les affaires où sont en jeu les intérêts de plus d'un ressort, en particulier en ce qui concerne les accidents d'automobile impliquant des résidents de différentes provinces. Le premier cas soulève également la question subsidiaire suivante: à supposer que la loi substantielle applicable soit celle du lieu où le délit a été commis, le délai de prescription établi en vertu de cette loi est-il inapplicable pour le motif qu'il s'agit d'une règle de procédure qui ne lie donc pas le tribunal qui entend l'affaire, ou constitue-t-il une règle de fond? Le second cas soulève la question de savoir si le régime québécois d'assurance sans égard à la faute s'applique aux situations où toutes les parties ou certaines d'entre elles sont non résidentes.

Tolofson c. Jensen

Le demandeur, Kim Tolofson, était âgé de 12 ans au moment où il a été grièvement blessé lors d'un accident survenu entre le véhicule de Leroy Jensen et la voiture conduite par son père Roger, dans laquelle il prenait place. L'accident s'est produit en Saskatchewan. Les Tolofson étaient résidents de la Colombie-Britannique et leur voiture était immatriculée dans cette province. Jensen était résident de la Saskatchewan où sa voiture était immatriculée. Huit ans plus tard, le demandeur a intenté une action en Colombie-Britannique en tenant pour acquis que son action était prescrite suivant la loi de la Saskatchewan. En outre, la loi de la Saskatchewan, à la différence de celle de la Colombie-Britannique, ne permettait pas qu'un passager à titre gratuit soit indemnisé en l'absence d'inconduite délibérée ou téméraire de la part du conducteur de la voiture dans laquelle il prenait place. Aucun des défendeurs n'a reconnu sa responsabilité. Les défendeurs ont présenté, avec le consentement des parties, une requête visant à faire déterminer si le tribunal était *forum non conveniens* ou, subsidiairement, si la loi de la Saskatchewan s'appliquait. Le juge saisi de la requête l'a rejetée en décidant que le choix de la loi applicable était inextricablement lié aux questions de compétence et de *forum conveniens*, et qu'il était donc

lowed these determinations. The Court of Appeal found that the law of the forum should apply.

Lucas (Litigation Guardian of) v. Gagnon

Mrs. Gagnon brought action on her own behalf and as litigation guardian of two children against her husband, Mr. Gagnon, for personal injuries suffered in a Quebec traffic accident involving her husband and Mr. Lavoie. The Gagnons were residents of Ontario; Mr. Lavoie was a resident of Quebec. Mrs. Gagnon discontinued her action against Mr. Lavoie following an Ontario Court of Appeal judgment that a Quebec resident's liability was governed by Quebec law. Mr. Gagnon, however, had cross-claimed against Mr. Lavoie and that cross-claim was not discontinued. Mrs. Gagnon obtained all of the no-fault benefits allowable under the Quebec scheme from Mr. Gagnon's Ontario insurer which was in turn reimbursed by the Régie de l'assurance automobile du Québec. The only legal avenue open to Mrs. Gagnon in seeking damages was to sue in Ontario because she was barred from bringing an action for damages in Quebec by operation of Quebec's *Automobile Insurance Act*.

The Ontario Court (General Division), on a motion brought by Mr. and Mrs. Gagnon (without notice to Mr. Lavoie) to determine specific points of law, decided that the Ontario court had jurisdiction, that the Ontario court should accept that jurisdiction, that Ontario law applied, and that Mr. Gagnon was entitled to maintain his action against Mr. Lavoie. Mr. Gagnon and Mr. Lavoie appealed on the questions of whether Ontario law applied and whether Mr. Gagnon could maintain his cross-claim against Mr. Lavoie. The Ontario Court of Appeal held that Ontario law applied in the action against Mr. Gagnon but that the law of Quebec applied with respect to any claim made against Mr. Lavoie since he was not a resident of Ontario and the accident occurred in Quebec.

Held (*Tolofson v. Jensen*, File No. 22980): The appeal should be allowed.

Held (*Lucas (Litigation Guardian of) v. Gagnon*, File No. 23445): The appeal should be allowed.

Per La Forest, Gonthier, Cory, McLachlin and Iacobucci JJ.: The rule of private international law that should generally be applied in torts is the law of the place where the activity occurred — the *lex loci delicti*.

fonction des décisions rendues à cet égard. La Cour d'appel a conclu que la loi du for devrait s'appliquer.

Lucas (Tutrice à l'instance de) c. Gagnon

Madame Gagnon, a intenté, contre son mari, M. Gagnon, une action en sa qualité personnelle et en sa qualité de tutrice à l'instance de deux enfants, pour les blessures subies lors d'un accident de la circulation survenu au Québec et impliquant son mari et M. Lavoie. Les Gagnon étaient résidents de l'Ontario; M. Lavoie était résident du Québec. Madame Gagnon s'est désistée de son action contre M. Lavoie à la suite d'un arrêt de la Cour d'appel de l'Ontario, selon lequel la responsabilité d'un résident du Québec était régie par la loi du Québec. Toutefois, M. Gagnon avait fait une demande entre défendeurs contre M. Lavoie et il n'y a pas eu désistement à l'égard de cette demande. Madame Gagnon a obtenu de l'assureur ontarien de M. Gagnon la totalité des prestations auxquelles elle avait droit en vertu du régime québécois d'assurance sans égard à la faute, et l'assureur ontarien a été remboursé par la Régie de l'assurance automobile du Québec. L'unique possibilité pour M^me^ Gagnon d'obtenir des dommages-intérêts était d'exercer son recours en Ontario, car elle ne pouvait pas intenter une action en dommages-intérêts au Québec en vertu de la *Loi sur l'assurance automobile* du Québec.

À la suite d'une requête présentée par M. et M^me^ Gagnon (dont M. Lavoie n'a pas été avisé) en vue de faire trancher certains points de droit, la Cour de l'Ontario (Division générale) a décidé que le tribunal de l'Ontario avait compétence, qu'il devait accepter d'exercer cette compétence, que la loi de l'Ontario s'appliquait et que l'action de M. Gagnon contre M. Lavoie était recevable. Messieurs Gagnon et Lavoie ont interjeté appel quant aux questions de savoir si la loi de l'Ontario s'appliquait et si la demande entre défendeurs que M. Gagnon avait faite contre M. Lavoie était recevable. La Cour d'appel de l'Ontario a conclu que la loi de l'Ontario s'appliquait à l'action intentée contre M. Gagnon, mais que la loi du Québec s'appliquait à toute demande contre M. Lavoie, étant donné qu'il n'était pas résident ontarien et que l'accident était survenu au Québec.

Arrêt (*Tolofson c. Jensen*, n° du greffe 22980): Le pourvoi est accueilli.

Arrêt (*Lucas (Tutrice à l'instance de) c. Gagnon*, n° du greffe 23445): Le pourvoi est accueilli.

Les juges La Forest, Gonthier, Cory, McLachlin et Iacobucci: La règle de droit international privé qui devrait généralement s'appliquer en matière de responsabilité délictuelle est la loi du lieu où l'activité s'est

This approach responds to the territorial principle under the international legal order and the federal regime. It also responds to a number of sound practical considerations. It is certain, easy to apply and predictable and meets normal expectations in that ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs.

The former British rule, adopted in *McLean v. Pettigrew*, that a court should apply its law (*lex fori*) when adjudicating on wrongs committed in another country, subject to the wrong's being "unjustifiable" in that country, cannot be accepted. This would involve a court's defining the nature and consequences of an act done in another country, which, barring some principled justification, flies against the territoriality principle. In practice, the courts of different countries would follow different rules in respect of the same wrong and invite forum shopping by litigants in search of the most beneficial place to litigate an issue. Applying the same approach to the units of a federal state like Canada would make forum shopping even easier.

No compelling reason exists for following the *lex fori*. The problem of proof of foreign law has been considerably attenuated given advances in transportation and communication. *McLean v. Pettigrew*, which applied the *lex fori* even though the action complained of was not actionable under the law of the place of the wrong, should be overruled. Its application in the federal context raises serious constitutional difficulties.

The nature of Canada's constitutional arrangements — a single country with different provinces exercising territorial legislative jurisdiction — supports a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favour of the *lex loci delicti* rule. In this respect, given the mobility of Canadians and the many common features in the law of the various provinces and the essentially unitary nature of Canada's court system, an invariable rule that the matter also be actionable in the province of the forum is not necessary. This factor should be considdéroulée, c'est-à-dire la *lex loci delicti*. Ce point de vue est conforme au principe de la territorialité des lois selon l'ordre juridique international et le régime fédéral. Il répond aussi à un certain nombre de considérations pratiques valables. La règle est certaine, facile à appliquer et prévisible. De plus, elle répond à des attentes normales en ce sens que les gens s'attendent habituellement à ce que leurs activités soient régies par la loi du lieu où ils se trouvent et à ce que les avantages et les responsabilités juridiques s'y rattachant soient définis en conséquence. Le gouvernement de ce lieu est le seul habilité à régir ces activités. Les autres États et les étrangers partagent normalement les mêmes attentes.

L'ancienne règle britannique, retenue dans l'arrêt *McLean c. Pettigrew*, suivant laquelle les tribunaux devraient appliquer leur propre loi (*lex fori*) aux fautes commises dans un autre pays, à la condition que la faute en question soit «injustifiable» dans cet autre pays, est inacceptable. Cela impliquerait la définition par un tribunal de la nature et des conséquences d'un acte accompli dans un autre pays, ce qui, en l'absence de quelque justification de principe, va à l'encontre du principe de la territorialité. En pratique, les tribunaux de différents pays suivraient des règles différentes à l'égard de la même faute et les justiciables, en quête du lieu le plus avantageux pour faire trancher un litige, seraient incités à rechercher un tribunal favorable. Si l'on appliquait la même solution aux composantes d'un État fédéral comme le Canada, la recherche d'un tribunal favorable en serait d'autant facilitée.

Il n'y a aucune raison sérieuse de suivre la loi du for. Le problème que constitue la preuve de la loi étrangère a été considérablement atténué par le progrès des transports et des communications. Il y a lieu de renverser l'arrêt *McLean c. Pettigrew* qui a appliqué la loi du for même lorsque que l'action reprochée n'ouvrait pas droit à une action en justice suivant la loi du lieu du délit. Son application dans le contexte fédéral soulève de graves difficultés sur le plan constitutionnel.

La nature des arrangements constitutionnels au Canada — un pays unique formé de provinces dotées d'une compétence législative territoriale — justifie l'adoption d'une règle certaine qui garantit qu'un acte commis dans une partie du pays aura le même effet juridique partout au pays. C'est là un puissant argument en faveur de la règle de la *lex loci delicti*. À cet égard, étant donné la mobilité des Canadiens et les nombreux traits communs de la loi de diverses provinces ainsi que la nature essentiellement unitaire du système judiciaire canadien, il n'est pas nécessaire d'adopter une règle invariable voulant que l'affaire ouvre également droit à

ered in determining whether there is a real and substantial connection to the forum to warrant its exercise of jurisdiction. Any problems that might arise could be resolved by a sensitive application of the doctrine of *forum non conveniens*.

Strict application of *lex loci delicti* also has the advantage of unquestionable conformity with the Constitution. This advantage is not to be ignored given the largely unexplored nature of the area and the consequent danger that a rule developed in a constitutional vacuum may, when explored, not conform to constitutional imperatives.

One of the main goals of any conflicts rule is to create certainty in the law. Any exception adds an element of uncertainty. However, since a rigid rule on the international level could give rise to injustice, the courts should retain a discretion to apply their own law to deal with such circumstances, although such cases would be rare. Indeed, if not strictly narrowed to situations that involve some timely and close relationship between the parties, an exception could lead to injustice.

The underlying principles of private international law are order and fairness, but order comes first for it is a precondition to justice. Considerations of public policy in actions that take place wholly within Canada should play a limited role, if at all. Arguments for an exception based on public policy are simply rooted in the fact that the court does not approve of the law that the legislature chose to adopt. The law of the land, however, is not usually ignored in favour of those who visit. The perception that the parties intend the law of their residence to apply is not valid.

On the international level, the rule that the wrong must be actionable under Canadian law is not really necessary, since the jurisdiction of Canadian courts is confined to matters where a real and substantial connection with the forum jurisdiction exists. The fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issue of *forum non conveniens* or whether entertaining the action would violate the public policy of the forum jurisdiction.

une action dans la province du tribunal saisi. Ce facteur devrait être pris en considération pour déterminer s'il existe, avec le tribunal saisi, un lien réel et substantiel qui justifie l'exercice de sa compétence. Tout problème qui risquerait de surgir pourrait être résolu par une application sensée de la règle du *forum non conveniens*.

L'application stricte de la *lex loci delicti* a également l'avantage d'être nettement conforme à la Constitution, ce qu'il ne faut pas passer sous silence étant donné la nature largement inexplorée du domaine et le danger consécutif qu'une règle établie en l'absence de tout cadre constitutionnel puisse, après examen, se révéler contraire à des impératifs de cet ordre.

L'un des principaux objectifs de toute règle de droit international privé est de créer la certitude dans la loi. Toute exception ajoute un élément d'incertitude. Cependant, étant donné qu'une règle stricte sur le plan international pourrait entraîner une injustice, les tribunaux devraient conserver le pouvoir discrétionnaire d'appliquer leur propre loi en pareil cas, encore que ces cas seraient rares. En fait, si elle n'est pas strictement limitée aux situations où il est question de rapports étroits et opportuns entre les parties, une exception pourrait entraîner une injustice.

L'ordre et l'équité sont les principes fondamentaux du droit international privé, mais l'ordre vient en premier étant donné qu'il est une condition préalable de la justice. Les considérations d'ordre public ne devraient jouer qu'un rôle limité, s'il en est, dans les actions qui se déroulent entièrement au Canada. Les arguments en faveur d'une exception fondée sur l'ordre public reposent simplement sur le fait que le tribunal n'approuve pas la loi que la législature a choisi d'adopter. Toutefois, on n'ignore pas ordinairement la loi interne en faveur des visiteurs. La perception selon laquelle les parties veulent que ce soit la loi de leur lieu de résidence qui s'applique n'est pas valable.

Sur le plan international, la règle voulant que la faute doive ouvrir droit à une action en vertu de la loi canadienne n'est pas vraiment nécessaire, étant donné que la compétence des tribunaux canadiens se limite aux questions à l'égard desquelles il existe un lien réel et substantiel avec le ressort du tribunal saisi. Le fait qu'une faute n'ouvrirait pas droit à une action dans le ressort du tribunal saisi, si elle y était commise, pourrait constituer un facteur susceptible d'être mieux soupesé en examinant la question du *forum non conveniens* ou celle de savoir si l'instruction de l'action serait contraire à l'ordre public dans le ressort du tribunal saisi.

Saskatchewan's substantive law applies in *Tolofson v. Jensen*. This includes its limitation rule. In any action involving the application of a foreign law the characterization of rules of law as substantive or procedural is crucial because the substantive rights of the parties to an action may be governed by a foreign law, but all matters of procedure are governed exclusively by the law of the forum. The forum court cannot be expected to apply the procedural rules of the foreign state whose law it wishes to apply. The forum's procedural rules exist for the convenience of the court, and forum judges understand them.

The bases of the old common law rule, which held that statutes of limitation are always procedural, are out of place in the modern context. The limitation period in this case was substantive because it created an accrued right in the defendant to plead a time bar. The limitation defence was properly pleaded here and all parties proceeded on the assumption that, if Saskatchewan law applied, it was a valid defence. It should not be rejected by a British Columbia court as contrary to public policy. The extent to which limitation statutes should go in protecting individuals against stale claims involves policy considerations unrelated to the manner in which a court must carry out its functions and the particular balance may vary from place to place.

In *Lucas (Litigation Guardian of) v. Gagnon*, Quebec law applies, both by virtue of Quebec's no-fault insurance scheme and through the operation of *lex loci delicti*. Barring other considerations, the legislature clearly intended that these provisions should apply to all persons who have an accident in Quebec regardless of their province of residence. This policy is clearly within the province's constitutional competence. The new *Civil Code*, which was not in effect at the time of the accident, did not change the situation of the parties. Even had it been operative, the language of the *Automobile Insurance Act* clearly overrode the general law. Section 4 removes not only rights of action but also "all rights . . . of any one".

Per Sopinka J. Concurrence with the reasons of La Forest J. was subject to the observations expressed by Major J.

La loi substantielle de la Saskatchewan s'applique à l'affaire *Tolofson c. Jensen*, ce qui inclut sa règle en matière de prescription. Dans toute action où il est question d'appliquer une loi étrangère, la qualification d'une règle de droit comme étant une règle de fond ou une règle de procédure revêt une importance cruciale car, bien qu'il se puisse que les droits substantiels des parties à une action soient régis par une loi étrangère, toutes les questions relevant de la procédure sont régies exclusivement par la loi du tribunal saisi. On ne saurait s'attendre à ce que le tribunal saisi applique les règles de procédure de l'État étranger dont il veut appliquer la loi. Les règles de procédure du tribunal saisi existent pour sa commodité et les juges de ce tribunal les comprennent.

Les raisons qui sous-tendent la vieille règle de common law, selon laquelle la prescription est toujours une règle de procédure, n'ont pas leur place dans le contexte moderne. Le délai de prescription en l'espèce était une règle de fond parce qu'il conférait au défendeur un droit acquis d'invoquer la prescription. La prescription comme moyen de défense a été dûment plaidée en l'espèce et toutes les parties ont tenu pour acquis qu'il s'agissait d'un moyen de défense valide si la loi de la Saskatchewan s'appliquait. Un tribunal de la Colombie-Britannique ne devrait pas le rejeter comme étant contraire à l'ordre public. La mesure dans laquelle les lois en matière de prescription devraient protéger les particuliers contre les demandes caduques fait intervenir des considérations de principe non liées à la manière dont un tribunal doit s'acquitter de sa tâche, et l'évaluation qui doit être faite à cet égard peut varier d'un endroit à l'autre.

Dans l'affaire *Lucas (Tutrice à l'instance de) c. Gagnon*, la loi du Québec s'applique tant en vertu du régime d'assurance sans égard à la faute en vigueur dans cette province qu'en vertu de la *lex loci delicti*. Abstraction faite d'autres considérations, il est clair que le législateur a voulu que ces dispositions s'appliquent à toutes les personnes ayant un accident au Québec, quelle que soit leur province de résidence, ce qui relève manifestement de la compétence constitutionnelle de la province. Le nouveau *Code civil*, qui n'était pas en vigueur au moment de l'accident, n'a pas modifié la situation des parties. Même s'il avait été applicable au moment de l'accident, le texte de la *Loi sur l'assurance automobile* l'emportait clairement sur le droit commun. L'article 4 supprime non seulement les droits d'action mais «tous les droits [. . .] de quiconque».

Le juge Sopinka: Les motifs du juge La Forest sont acceptés sous réserve des observations du juge Major.

Per Major J.: The question of which province's law should govern the litigation should be determined by reference to the *lex loci delicti* rule. An absolute rule admitting of no exceptions needed not be established. Parties have the ability to choose, by agreement, to be governed by the *lex fori* and a discretion exists to depart from the absolute rule in international litigation where the *lex loci delicti* rule would work an injustice. Recognition of a similar exception should not be foreclosed in interprovincial litigation.

Le juge Major: Il y a lieu de résoudre en fonction de la règle de la *lex loci delicti* la question de savoir quelle loi provinciale devrait régir le litige. Il n'était pas nécessaire d'établir une règle absolue n'admettant aucune exception. Les parties peuvent s'entendre pour choisir d'être régies par la *lex fori* et il existe un pouvoir discrétionnaire de déroger à la règle absolue dans le cas d'un litige international où l'application de la loi locale aurait pour effet de causer une injustice. Il n'y a pas lieu d'écarter la possibilité de reconnaître une exception similaire dans le cas d'un litige interprovincial.

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APPEAL (*Tolofson v. Jensen*, File No. 22980) from a judgment of the British Columbia Court of Appeal (1992), 65 B.C.L.R. (2d) 114, 89 D.L.R. (4th) 129, 11 B.C.A.C. 94, 22 W.A.C. 94, [1992] 3 W.W.R. 743, 9 C.C.L.T. (2d) 289, 4 C.P.C. (3d) 113, dismissing an appeal from a judgment of Macdonald J. (1989), 40 B.C.L.R. (2d) 90, Appeal allowed.

APPEAL (*Lucas (Litigation Guardian of) v. Gagnon*, File No. 23445) from a judgment of the Ontario Court of Appeal (1992), 11 O.R. (3d) 422, 99 D.L.R. (4th) 125, 59 O.A.C. 174, 15 C.C.L.T. (2d) 41, 15 C.C.L.I. (2d) 100, 42 M.V.R. (2d) 67, allowing an appeal, to the extent it held that a cross-claim for contribution and indemnity could not be maintained, from a judgment of Hurley J. (1991), 3 O.R. (3d) 38, 4 C.C.L.I. (2d) 194, 28 M.V.R. (2d) 155, determining that Ontario law applied to the cause of action and that a cross-claim could be maintained against appellant Lavoie. Appeal allowed.

Avon M. Mersey, *Elizabeth B. Lyall* and *Brian F. Schreiber*, for the appellants Leroy Jensen and Roger Tolofson.

Noreen M. Collins, for the respondent Kim Tolofson.

Allan Lutfy, *Q.C.*, and *Odette Jobin-Laberge*, for the appellant Réjean Gagnon.

Robert J. Reynolds, for the respondents Tina Lucas, Justin Gagnon and Heather Gagnon.

and Commercial Relations for Ontario (27 décembre 1978).

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POURVOI (*Tolofson c. Jensen*, nº du greffe 22980) contre un arrêt de la Cour d'appel de la Colombie-Britannique (1992), 65 B.C.L.R. (2d) 114, 89 D.L.R. (4th) 129, 11 B.C.A.C. 94, 22 W.A.C. 94, [1992] 3 W.W.R. 743, 9 C.C.L.T. (2d) 289, 4 C.P.C. (3d) 113, qui a rejeté un appel interjeté contre un jugement du juge Macdonald (1989), 40 B.C.L.R. (2d) 90. Pourvoi accueilli.

POURVOI (*Lucas (Tutrice à l'instance de) c. Gagnon*, nº du greffe 23445) contre un arrêt de la Cour d'appel de l'Ontario (1992), 11 O.R. (3d) 422, 99 D.L.R. (4th) 125, 59 O.A.C. 174, 15 C.C.L.T. (2d) 41, 15 C.C.L.I. (2d) 100, 42 M.V.R. (2d) 67, qui, dans la mesure où on a décidé qu'une demande, entre défendeurs, de contribution et d'indemnisation n'était pas recevable, a accueilli un appel interjeté contre un jugement du juge Hurley (1991), 3 O.R. (3d) 38, 4 C.C.L.I. (2d) 194, 28 M.V.R. (2d) 155, dans lequel on avait décidé que la loi de l'Ontario s'appliquait à la cause d'action et qu'une demande entre défendeurs était recevable contre l'appelant Lavoie. Pourvoi accueilli.

Avon M. Mersey, *Elizabeth B. Lyall* et *Brian F. Schreiber*, pour les appelants Leroy Jensen et Roger Tolofson.

Noreen M. Collins, pour l'intimé Kim Tolofson.

Allan Lutfy, *c.r.*, et *Odette Jobin-Laberge* pour l'appelant Réjean Gagnon.

Robert J. Reynolds, pour les intimés Tina Lucas, Justin Gagnon et Heather Gagnon.

Graeme Mew and *Adelina Wong*, for the respondent Cyrille Lavoie.

Written submission only by *Brian J. E. Brock* and *Lesli Bisgould*, for the intervener Clarence S. Marshall.

Written submission only by *Peter A. Daley*, for the interveners Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey and Aditha Le Blanc.

Written submission only by *W. T. McGrenere*, for the interveners La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée, and Allstate Insurance Co. of Canada.

The judgment of La Forest, Gonthier, Cory, McLachlin and Iacobucci JJ. was delivered by

LA FOREST J. — This Court has in recent years been called upon to review a number of the structural rules of conflict of laws or private international law. In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and *Hunt v. T & N plc*, [1993] 4 S.C.R. 289, the Court had occasion to revisit the law governing the jurisdiction of courts to deal with multi-jurisdictional problems and the recognition to be accorded by the courts of one jurisdiction to a judgment made in another jurisdiction. In *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, the Court also examined the rules governing when a court may refuse jurisdiction on the basis of *forum non conveniens*.

In the two appeals before us we are called upon to reconsider the "choice of law rule", i.e., which law should govern in cases involving the interests of more than one jurisdiction, specifically as it concerns automobile accidents involving residents of different provinces.

Graeme Mew et *Adelina Wong*, pour l'intimé Cyrille Lavoie.

Argumentation écrite seulement par *Brian J. E. Brock* et *Lesli Bisgould*, pour l'intervenant Clarence S. Marshall.

Argumentation écrite seulement par *Peter A. Daley*, pour les intervenants Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey et Aditha Le Blanc.

Argumentation écrite seulement par *W. T. McGrenere*, pour les intervenantes La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée et Allstate Insurance Co. of Canada.

Version française du jugement des juges La Forest, Gonthier, Cory, McLachlin et Iacobucci rendu par

LE JUGE LA FOREST — Au cours des dernières années, notre Cour a été appelée à examiner un certain nombre de règles structurelles du droit international privé. Dans les arrêts *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077, et *Hunt c. T & N plc*, [1993] 4 R.C.S. 289, la Cour a eu l'occasion de revoir le droit qui régit la compétence des tribunaux pour régler des problèmes qui touchent plusieurs ressorts, ainsi que la reconnaissance que les tribunaux d'un ressort doivent accorder au jugement rendu dans un autre ressort. Dans l'arrêt *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897, la Cour a également examiné les règles qui régissent les cas où un tribunal peut décliner compétence pour cause de *forum non conveniens*.

Dans les deux pourvois dont nous sommes saisis, nous sommes appelés à réexaminer la «règle du choix de la loi applicable», c'est-à-dire de la loi qui devrait régir les affaires où sont en jeu les intérêts de plus d'un ressort, en particulier en ce qui concerne les accidents d'automobile impliquant des résidents de différentes provinces.

The precise issue may be distilled from the facts of the two cases under appeal. The plaintiffs, residents of Province A, were passengers in an automobile registered and insured in that province. The driver of the automobile in which they were travelling was a resident of Province A. The passengers were injured in a collision with another automobile in Province B. The driver of that automobile was a resident of Province B, and his automobile was registered in that province. In one of the cases, liability from the operation of the automobile was covered by an insurance contract made in Province B; in the other, it was covered under the terms of Province B's "no-fault" insurance scheme. The plaintiffs instituted an action for the resulting personal injuries in Province A against both drivers. The issue that arises is what law should be applied in determining the liability of the defendant drivers.

The first of these cases also raises the following subsidiary issue. Assuming the applicable substantive law is that of the place where the tort arises, is the limitation period established under that law inapplicable as being procedural law and so not binding on the court hearing the case, or is it substantive law? For its part, the second case raises the issue whether the Quebec no-fault insurance scheme applies to situations where some or all the parties are non-residents.

Background

Tolofson v. Jensen

Facts

On July 28, 1979, the plaintiff (respondent) Kim Tolofson was a passenger in a car owned and driven by his father, the defendant (appellant) Roger Tolofson. He was seriously injured when the car was involved in an accident with a vehicle driven by the other defendant (appellant) Leroy

La question qui est précisément en litige peut se dégager des faits des deux affaires dont nous sommes saisis. Les demandeurs, résidents de la province A, étaient les passagers d'une automobile immatriculée et assurée dans cette province. Le conducteur de l'automobile dans laquelle ils voyageaient était également résident de la province A. Les passagers ont été blessés lors d'une collision avec une autre automobile, survenue dans la province B. Le conducteur de cette dernière automobile était résident de la province B et sa voiture était immatriculée dans cette province. Dans l'un des cas, la responsabilité découlant de la conduite de l'automobile était visée par une assurance contractée dans la province B; dans l'autre cas, elle était visée par le régime d'assurance «sans égard à la faute» de la province B. Les demandeurs ont intenté, dans la province A, contre les deux conducteurs, une action pour les blessures qu'ils avaient subies en raison de cette collision. La question en litige est de savoir quelle loi devrait s'appliquer pour déterminer la responsabilité des conducteurs défendeurs.

Le premier de ces cas soulève également la question subsidiaire suivante. À supposer que la loi substantielle applicable soit celle du lieu où le délit a été commis, le délai de prescription établi en vertu de cette loi est-il inapplicable pour le motif qu'il s'agit d'une règle de procédure qui ne lie donc pas le tribunal qui entend l'affaire, ou constitue-t-il une règle de fond? Quant au second cas, il soulève la question de savoir si le régime québécois d'assurance sans égard à la faute s'applique aux situations où toutes les parties ou certaines d'entre elles sont non résidentes.

Contexte

Tolofson c. Jensen

Les faits

Le 28 juillet 1979, le demandeur (intimé) Kim Tolofson prenait place, à titre de passager, dans une voiture appartenant à son père, le défendeur (appelant) Roger Tolofson, et conduite par ce dernier. Il a été grièvement blessé lors d'un accident survenu entre cette voiture et un véhicule conduit

Jensen. The accident occurred in Saskatchewan. The Tolofsons were and remain residents of British Columbia and the car in which they drove was registered and insured in that province. Jensen was and remains a resident of Saskatchewan, and his car was registered and insured in that province.

The plaintiff Tolofson alleges that he suffered head injuries in the collision which affected his learning capacity and his physical capabilities. He began an action in British Columbia against both defendants seeking damages for these injuries on December 17, 1987, more than eight years after the collision occurred. He was only 12 years old at the time of the accident. The parties both operated on the assumption that the plaintiff's action is barred under Saskatchewan law because it must be brought within 12 months of the accident. Such a suit is not barred in British Columbia. As well, under Saskatchewan law a gratuitous passenger cannot recover unless "wilful or wanton misconduct" can be established against the driver of the car in which he or she was a passenger. This is not the case in British Columbia. Neither defendant admits liability.

The defendants then brought an application by consent pursuant to Rule 34 of the Supreme Court Rules of British Columbia before Macdonald J. seeking determination of a point of law, namely, that the court was *forum non conveniens* or, in the alternative, that the law of Saskatchewan applied with respect to the limitation period and the standard of care for gratuitous passengers. That is the proceeding from which the first of these appeals arises.

par l'autre défendeur (appelant) Leroy Jensen. L'accident s'est produit en Saskatchewan. Les Tolofson étaient et sont toujours résidents de la Colombie-Britannique et la voiture dans laquelle ils circulaient était immatriculée et assurée dans cette province. Jensen était et est toujours résident de la Saskatchewan et sa voiture était immatriculée et assurée dans cette province.

Le demandeur Tolofson allègue avoir subi, lors de cette collision, des blessures à la tête qui ont diminué sa capacité d'apprentissage de même que ses capacités physiques. Le 17 décembre 1987, soit plus de huit ans après la collision, il a intenté, en Colombie-Britannique, contre les deux défendeurs, une action en dommages-intérêts pour ces préjudices. Il n'avait que 12 ans au moment de l'accident. Les parties ont toutes deux tenu pour acquis que l'action du demandeur était prescrite suivant la loi de la Saskatchewan parce qu'elle devait être intentée dans les 12 mois de l'accident. Cette action n'est pas prescrite en Colombie-Britannique. De même, suivant la loi de la Saskatchewan, un passager à titre gratuit ne peut être indemnisé que s'il est établi que le conducteur de la voiture dans laquelle il prenait place a fait preuve d'[TRADUCTION] «inconduite délibérée ou téméraire». Tel n'est pas le cas en Colombie-Britannique. Aucun des défendeurs ne reconnaît sa responsabilité.

Les défendeurs ont ensuite présenté, avec le consentement des parties, devant le juge Macdonald, une requête fondée sur la règle 34 des British Columbia Supreme Court Rules, en vue de faire trancher un point de droit, savoir que le tribunal était *forum non conveniens* ou, subsidiairement, que la loi de la Saskatchewan régissait le délai de prescription ainsi que la norme de diligence applicable dans le cas de passagers à titre gratuit. C'est de cette procédure que découle le premier des présents pourvois.

Judicial History

British Columbia Supreme Court (1989), 40 B.C.L.R. (2d) 90

On October 17, 1989, Macdonald J. dismissed the application. He concluded that while he was impressed with the logic of applying the "proper law of the tort", he was bound by *McLean v. Pettigrew*, [1945] S.C.R. 62, where this Court upheld an action in respect of a single car accident in Ontario which was successfully brought in Quebec under Quebec law by a passenger, a resident of Quebec, against the owner and operator of the car, also a resident of Quebec. Having considered the authorities, he concluded that choice of law was inextricably entwined with issues of jurisdiction and *forum conveniens*, and that choice of law followed these determinations.

British Columbia Court of Appeal (1992), 65 B.C.L.R. (2d) 114

On the appeal to the British Columbia Court of Appeal, the defendants no longer contended that the British Columbia courts are without jurisdiction or should decline jurisdiction as being *forum non conveniens*. They argued, however, that Macdonald J. had erred in failing to separate issues of jurisdiction and *forum non conveniens* from choice of law. In addition, they submitted that the applicable law was that of Saskatchewan. Cumming J.A., who gave reasons for the Court of Appeal, agreed, at p. 120, that "even when the court finds jurisdiction and refuses to stay an action based on forum non conveniens because a juridical advantage is found in the forum, it is still necessary to examine choice of law independently".

After an extensive review of the history of choice of law rules and their application in recent Canadian cases, Cumming J.A. reviewed the facts

Historique des procédures judiciaires

La Cour suprême de la Colombie-Britannique (1989), 40 B.C.L.R. (2d) 90

Le juge Macdonald a rejeté la requête le 17 octobre 1989. Il a conclu que, même s'il lui apparaissait tout à fait logique d'appliquer la [TRADUCTION] «loi appropriée au délit ou loi de la relation sous-jacente», il était lié par l'arrêt *McLean c. Pettigrew*, [1945] R.C.S. 62, dans lequel notre Cour a confirmé la recevabilité d'une action relative à un accident impliquant une seule voiture survenu en Ontario, qu'un passager, résident du Québec, avait intenté avec succès au Québec, en vertu de la loi de cette province, contre le propriétaire et conducteur de la voiture, également résident du Québec. Après avoir examiné la jurisprudence, le juge a conclu que le choix de la loi applicable était inextricablement lié aux questions de compétence et de *forum conveniens*, et qu'il était donc fonction des décisions rendues à cet égard.

La Cour d'appel de la Colombie-Britannique (1992), 65 B.C.L.R. (2d) 114

En appel devant la Cour d'appel de la Colombie-Britannique, les défendeurs ne prétendaient plus que les tribunaux de la Colombie-Britannique n'avaient pas compétence ou qu'ils devaient décliner compétence en tant que *forum non conveniens*. Ils ont fait valoir, cependant, que le juge Macdonald avait commis une erreur en ne séparant pas du choix de la loi applicable les questions de compétence et de *forum non conveniens*. De plus, ils ont soutenu que la loi applicable était celle de la Saskatchewan. Le juge Cumming, qui a exposé les motifs de la Cour d'appel, convient, à la p. 120, que [TRADUCTION] «même lorsque le tribunal conclut qu'il a compétence et qu'il refuse de surseoir à une action pour cause de forum non conveniens parce que le tribunal saisi présente, à son avis, un avantage juridique, il demeure nécessaire d'examiner indépendamment la question du choix de la loi applicable».

Après avoir examiné en profondeur l'historique des règles du choix de la loi applicable et leur application dans la jurisprudence canadienne

of *Lucas v. Gagnon* (then at the Ontario Divisional Court level). He concluded that it made no difference that in that case Lucas was a defendant on a cross-claim whereas in the present case Jensen was a co-defendant. He adopted the reasoning of Hurley J. in *Gagnon* that, not only was he bound by *McLean v. Pettigrew* even on the facts of the case at bar, but even if he were not so bound, he would hold that the law of the forum should apply since it had the most significant relationship with the parties. In *obiter*, Cumming J.A. stated that this decision was justified in that it met with the reasonable expectations of all the parties in that the Saskatchewan defendant would have reasonably expected to be subject to a lawsuit initially, and that both the limitation period and the gratuitous passenger laws of Saskatchewan had since been repealed.

Lucas (Litigation Guardian of) v. Gagnon

Facts

The *Gagnon* case is similar to the *Tolofson* case, except that in the *Gagnon* case the appellant does not seek to avoid a limitation period and a higher standard of care in the jurisdiction where the accident occurred; he seeks rather to avoid the limits on liability provided in the no-fault regime in effect in Quebec where the accident occurred. While the amount that can be recovered under that regime is greater than can be recovered under the unsatisfied judgment funds in other provinces, it is much less than can be recovered in a tort action against the party at fault. I note that Ontario has entered into an agreement regarding the application of the Quebec no-fault regime to Ontario residents who have an accident in Quebec which, it was argued, has an impact on the result of this case. This was not directly discussed in the courts below, and I shall only make reference to it later.

récente, le juge Cumming a passé en revue les faits de l'affaire *Lucas c. Gagnon* (alors devant la Cour divisionnaire de l'Ontario). Il a conclu qu'il ne faisait aucune différence que Lucas soit défendeur dans une demande entre défendeurs alors que Jensen était codéfendeur en l'espèce. Il a fait sien le raisonnement du juge Hurley, dans *Gagnon*, selon lequel non seulement il était lié par l'arrêt *McLean c. Pettigrew* même d'après les faits de l'affaire dont il était saisi, mais encore, même s'il n'était pas ainsi lié, il conclurait que la loi du for devrait s'appliquer parce que c'est elle qui a le lien le plus important avec les parties. Dans une remarque incidente, le juge Cumming a dit que cette décision était justifiée en ce qu'elle répondait aux attentes raisonnables de toutes les parties du fait que le défendeur de la Saskatchewan se serait attendu raisonnablement, au départ, à faire l'objet de poursuites, et que les règles de droit concernant le délai de prescription et le passager à titre gratuit avaient depuis été abrogées en Saskatchewan.

Lucas (Tutrice à l'instance de) c. Gagnon

Les faits

L'affaire *Gagnon* est semblable à l'affaire *Tolofson*, sauf qu'ici l'appelant ne cherche pas à éviter un délai de prescription et une norme de diligence plus stricte dans le ressort où l'accident est survenu; il cherche plutôt à éviter les limites qu'impose à la responsabilité le régime d'assurance sans égard à la faute en vigueur dans la province de Québec où l'accident s'est produit. Bien que l'indemnité qui peut être touchée en vertu de ce régime soit plus élevée que celle qui peut l'être en vertu des caisses des jugements inexécutés dans d'autres provinces, elle est de beaucoup inférieure au montant qui peut être obtenu dans une action en responsabilité délictuelle contre la partie fautive. Je souligne que l'Ontario a conclu une entente concernant l'application du régime québécois d'assurance sans égard à la faute aux résidents ontariens qui ont un accident au Québec, ce qui, a-t-on fait valoir, a une incidence sur l'issue de la présente affaire. Cette question n'ayant pas été débattue directement devant les tribunaux d'instance inférieure, je ne la mentionnerai que plus loin.

The essential facts, for present purposes, are these. The plaintiff, Mrs. Gagnon, brought action on her own behalf and as litigation guardian of two children against her husband, Mr. Gagnon, for personal injuries suffered in an accident that occurred in the Province of Quebec when there was a collision between an automobile driven by her husband, in which she was a passenger, and an automobile owned and operated by Mr. Lavoie. The Gagnons are all residents of Ontario; Mr. Lavoie is a resident of Quebec.

Mrs. Gagnon originally included Mr. Lavoie as a defendant, but after the Ontario Court of Appeal released its decision in *Grimes v. Cloutier* (1989), 61 D.L.R. (4th) 505, which distinguished *McLean v. Pettigrew*, *supra*, and held that a Quebec resident's liability in circumstances like the present case was governed by Quebec law, Mrs. Gagnon discontinued her action against Mr. Lavoie. However, the defendant, Mr. Gagnon, had cross-claimed against Mr. Lavoie and that cross-claim was not discontinued.

Mrs. Gagnon obtained 100% of the no-fault benefits (on the Quebec scale) to which she was entitled under the Quebec scheme from Mr. Gagnon's Ontario insurer. The Ontario insurer was reimbursed by the Régie de l'assurance automobile du Quebec ("La Régie"), pursuant to a 1978 agreement between the Régie and Ontario's Minister of Consumer and Commercial Relations. Mrs. Gagnon could not bring an action for damages in Quebec because of the prohibition in s. 4 of the Quebec *Automobile Insurance Act*, L.Q. 1977, c. 68. Her only option in seeking an award of damages was to sue in Ontario.

Mr. and Mrs. Gagnon then brought a motion on an agreed statement of facts for an order under Rule 22 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to determine the following questions: whether the Ontario court had jurisdiction; whether it should accept that jurisdiction;

Pour les présentes fins, les faits sont essentiellement les suivants. La demanderesse, M^me^ Gagnon, a intenté, contre son mari, M. Gagnon, une action en sa qualité personnelle et en sa qualité de tutrice à l'instance de deux enfants, pour les blessures subies lors d'un accident survenu dans la province de Québec quand l'automobile que conduisait son mari, et dans laquelle elle prenait place, est entrée en collision avec une automobile appartenant à M. Lavoie et conduite par celui-ci. Les Gagnon sont tous résidents de l'Ontario; M. Lavoie est résident du Québec.

À l'origine, M^me^ Gagnon avait inclus M. Lavoie comme partie défenderesse, mais elle s'est désistée de son action contre M. Lavoie à la suite de l'arrêt *Grimes c. Cloutier* (1989), 61 D.L.R. (4th) 505, dans lequel la Cour d'appel de l'Ontario a fait une distinction d'avec l'arrêt *McLean c. Pettigrew*, précité, et conclu que la responsabilité d'un résident du Québec, dans des circonstances analogues à la présente affaire, était régie par la loi du Québec. Toutefois le défendeur, M. Gagnon, avait fait une demande entre défendeurs contre M. Lavoie et il n'y a pas eu désistement à l'égard de cette demande.

Madame Gagnon a obtenu de l'assureur ontarien de M. Gagnon la totalité des prestations (selon le barème du Québec) auxquelles elle avait droit en vertu du régime québécois d'assurance sans égard à la faute. L'assureur ontarien a été remboursé par la Régie de l'assurance automobile du Québec («la Régie»), conformément à une entente conclue en 1978 entre cette dernière et le ministre de la Consommation et du Commerce de l'Ontario. Madame Gagnon ne pouvait pas intenter une action en dommages-intérêts au Québec en raison de la prohibition de l'art. 4 de la *Loi sur l'assurance automobile* du Québec, L.Q. 1977, ch. 68. L'unique possibilité pour elle d'obtenir des dommages-intérêts était d'exercer son recours en Ontario.

Monsieur et Madame Gagnon ont alors présenté une requête, fondée sur un exposé conjoint des faits, en vue de faire trancher les questions suivantes par voie d'ordonnance rendue en vertu de la règle 22 des *Règles de procédure civile* de l'Ontario, R.R.O. 1990, règl. 194: celles de savoir si le

whether Ontario law applied; and whether Mr. Gagnon was entitled to maintain his action against Mr. Lavoie. It is from this proceeding that the appeal to this Court emanates. Mr. Lavoie was not notified of the motion at first instance, did not concur with the questions stated and did not attend.

Judicial History

Ontario Court (General Division) (1991), 3 O.R. (3d) 38

The motion was heard by Hurley J. He replied in the affirmative to all the questions set forth in the motion. He began his analysis with *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1 (Ex. Ch.), which is the starting point for the law in this area. He cited the general rule stated therein to the effect that to found a suit in England for a wrong committed abroad, two conditions had to be met: (1) the wrong would have been actionable if committed in England and (2) was not justifiable by the law of the place where the act was committed. That case, he noted, had been followed by this Court in *McLean v. Pettigrew*, *supra*, where the second condition was held to be satisfied by the fact that the wrong was subject to a penal prohibition in the place where the act was committed even though it was not actionable there. *McLean* involved an action where the plaintiff and defendant were residents of the same province and the action was brought there. The situation was similar here as it related to the Gagnons. Assuming evidence of the second condition in *Phillips v. Eyre* was established by evidence at trial, he concluded that an action would lie.

Though he had made reference to *Grimes v. Cloutier*, *supra*, and other Ontario jurisprudence as it affected Quebec residents in relation to accidents that take place in Quebec, Hurley J. still thought the defendant's claim against Mr. Lavoie could be pursued. In his view, the fact that the defendant in the cross-claim was originally a defendant in the

tribunal de l'Ontario avait compétence, s'il devait accepter d'exercer cette compétence, si la loi de l'Ontario s'appliquait et si l'action de M. Gagnon contre M. Lavoie était recevable. C'est de cette procédure qu'émane le pourvoi devant notre Cour. Monsieur Lavoie n'a pas été avisé de la requête en première instance, il n'a pas souscrit aux questions posées et n'a pas comparu.

Historique des procédures judiciaires

La Cour de l'Ontario (Division générale) (1991), 3 O.R. (3d) 38

La requête a été entendue par le juge Hurley. Celui-ci a répondu par l'affirmative à toutes les questions formulées. Il a commencé par examiner l'arrêt *Phillips c. Eyre* (1870), L.R. 6 Q.B. 1 (C. de l'É.), qui est le point de départ du droit en la matière. Il a cité la règle générale qui y est énoncée, savoir que pour que des poursuites pour une faute commise à l'étranger soient justifiées en Angleterre, deux conditions devaient être remplies: (1) la faute aurait ouvert droit à une action en justice si elle avait été commise en Angleterre et (2) elle n'était pas justifiable suivant la loi du lieu où elle a été commise. Cet arrêt, a-t-il souligné, avait été suivi par notre Cour dans l'arrêt *McLean c. Pettigrew*, précité, où l'on a jugé que la seconde condition était remplie du fait que la faute faisait l'objet d'une prohibition pénale à l'endroit où elle avait été commise, même si elle n'y ouvrait pas droit à une action. Dans l'affaire *McLean*, la demanderesse et le défendeur résidaient dans la même province où l'action avait été intentée, une situation similaire à celle des Gagnon en l'espèce. Présumant que la preuve de la seconde condition de l'arrêt *Phillips c. Eyre* avait été établie au procès, il a conclu à la recevabilité de l'action.

Bien qu'il ait mentionné l'arrêt *Grimes c. Cloutier*, précité, et d'autres décisions ontariennes touchant des résidents québécois relativement à des accidents survenus au Québec, le juge Hurley a néanmoins estimé que le défendeur pouvait poursuivre sa demande contre M. Lavoie. À son avis, le fait que le défendeur, dans la demande entre défen-

action was irrelevant, since he was no longer so. Hurley J. stated, at p. 43:

> If I am not bound to apply *McLean* then, in my opinion, the reasonable expectations of the plaintiffs and the defendant are that this sort of litigation would take place in Ontario according to the law of Ontario, and I conclude that the defendant's assertion in the action of a claim over against a Quebec driver/owner does not alter those expectations. Rather, in my opinion it would be unfair to allow the addition of that claim over to alter the law applicable from that of Ontario, which has the most significant relationship with the parties, to that of Quebec.

Ontario Court of Appeal (1992), 11 O.R. (3d) 422

Mr. Lavoie and Mr. Gagnon then appealed to the Ontario Court of Appeal, but only on the questions of whether Ontario law applied and whether Gagnon was entitled to maintain his cross-claim against Lavoie. The late Tarnopolsky J.A. stated the main question as whether Ontario or Quebec law governed both the main action and the cross-claim. He examined whether the decision of *McLean v. Pettigrew*, *supra*, should be distinguished on the basis that the defendant to the cross-claim, who was not a party to the main action, was a resident of Quebec and that the accident occurred in Quebec. He also considered, if *McLean v. Pettigrew* applied to the main action, whether the choice of law with respect to the cross-claim was different having regard to the Court of Appeal's decision in *Grimes v. Cloutier*, *supra*.

After reviewing the case law, Tarnopolsky J.A. emphasized that *McLean v. Pettigrew* ought not to be applied rigidly to factual circumstances not closely similar to those in that case. He held that *McLean* applied to the main action. As for the cross-claim, he found the following, at p. 438:

deurs, était à l'origine défendeur dans l'action n'était pas pertinent puisqu'il ne l'était plus. Le juge Hurley affirme, à la p. 43:

> [TRADUCTION] Si je ne suis pas tenu d'appliquer l'arrêt *McLean*, j'estime alors que les demandeurs et le défendeur s'attendaient raisonnablement à ce que ce type de litige soit tranché en Ontario conformément à la loi de l'Ontario, et je conclus que l'affirmation du défendeur, dans l'action récursoire contre un conducteur/propriétaire québécois, ne change en rien ces attentes. Il serait au contraire injuste, à mon avis, de permettre que l'ajout de cette action récursoire ait pour effet de substituer, à titre de loi applicable, la loi du Québec à celle de l'Ontario qui a le lien le plus important avec les parties.

La Cour d'appel de l'Ontario (1992), 11 O.R. (3d) 422

Messieurs Lavoie et Gagnon ont alors interjeté appel devant la Cour d'appel de l'Ontario, mais seulement quant aux questions de savoir si la loi de l'Ontario s'appliquait et si la demande entre défendeurs que M. Gagnon avait faite contre M. Lavoie était recevable. Selon feu le juge Tarnopolsky de la Cour d'appel, il s'agissait principalement de déterminer laquelle, de la loi de l'Ontario ou de celle du Québec, régissait tant l'action principale que la demande entre défendeurs. Il s'est demandé si une distinction devait être faite d'avec l'arrêt *McLean c. Pettigrew*, précité, pour le motif que le défendeur, dans la demande entre défendeurs, qui n'était pas partie à l'action principale, était résident du Québec et que l'accident était survenu au Québec. Il s'est également demandé si, dans l'hypothèse où l'arrêt *McLean c. Pettigrew* s'appliquerait à l'action principale, le choix de la loi applicable à la demande entre défendeurs serait différent compte tenu de l'arrêt de la Cour d'appel *Grimes c. Cloutier*, précité.

Après avoir examiné la jurisprudence, le juge Tarnopolsky a souligné que l'arrêt *McLean c. Pettigrew* ne devait pas être appliqué de façon rigide aux circonstances factuelles qui ne sont pas très semblables à celles de cette affaire. Il a conclu que l'arrêt *McLean* s'appliquait à l'action principale. Quant à la demande entre défendeurs, il conclut ceci, à la p. 438:

In my opinion, given the facts of the case at bar it [would] be unjust if the action against Lavoie were not bound by *Grimes v. Cloutier*. After all, Lavoie was a Quebec resident driving his car in his own province. Therefore, when an Ontario resident is involved in an accident in Quebec with a Quebec resident, although both the passenger and his or her driver are residents of Ontario, a claim against the Quebec driver must be barred by the Quebec non-actionability law.

As a result, Ontario law, including conflict rules developed according to *Phillips v. Eyre*, *supra*, was held to apply in the action of the respondents against the appellant Gagnon. Since Lavoie was not a resident of Ontario and the accident occurred in Quebec, the facts and law of *Grimes v. Cloutier* applied to any claim against him. The action was remitted for trial on that basis.

Carthy J.A. agreed with Tarnopolsky J.A. but arrived at the conclusion that the cross-claim should not proceed by a different route. He reviewed s. 2 of the *Negligence Act*, R.S.O. 1990, c. N.1, and concluded, at p. 440, that, because Lavoie could not, on the authority of *Grimes v. Cloutier*, have been sued alone, he was not a person who was or "would if sued have been, liable" in respect of the damage suffered by the respondent.

Blair J.A., who found the views of his colleagues complementary rather than inconsistent, agreed with both of them.

Historical Highlights of Choice of Law Rule in Tort

The genesis of the existing Canadian rule for the determination of choice of law for torts arising outside a court's territorial jurisdiction is the seminal case of *Phillips v. Eyre*, *supra*. There the plaintiff brought an action in England for assault and false imprisonment against the defendant who at the time of the torts was governor of Jamaica. The acts of which the plaintiff complained were part of

[TRADUCTION] À mon avis, étant donné les faits de la présente affaire, il [serait] injuste que l'action intentée contre Lavoie ne soit pas régie par l'arrêt *Grimes c. Cloutier*. Après tout, Lavoie était un résident du Québec qui conduisait sa voiture dans sa propre province. Par conséquent, lorsqu'un résident ontarien a un accident au Québec avec un résident québécois, bien que le passager et son conducteur soient résidents ontariens, la demande contre le conducteur du Québec doit être déclarée irrecevable en raison de la loi du Québec qui exclut tout recours.

En conséquence, on a conclu que la loi de l'Ontario, y compris les règles de droit international privé établies conformément à l'arrêt *Phillips c. Eyre*, précité, s'appliquait à l'action des intimés contre l'appelant Gagnon. Quant à Lavoie, étant donné qu'il n'était pas résident ontarien et que l'accident était survenu au Québec, les faits et le principe de l'arrêt *Grimes c. Cloutier* s'appliquaient à toute demande contre lui. L'action a donc été renvoyée à procès pour ce motif.

Le juge Carthy a souscrit à l'opinion du juge Tarnopolsky, mais il est arrivé à la conclusion que la demande entre défendeurs ne devrait pas suivre un cours différent. Après avoir examiné l'art. 2 de la *Loi sur le partage de la responsabilité*, L.R.O. 1990, ch. N.1, il a conclu, à la p. 440, qu'étant donné que Lavoie n'aurait pu, suivant l'arrêt *Grimes c. Cloutier*, être poursuivi seul, il n'était pas responsable des dommages subis par l'intimée [TRADUCTION] «ou [ne] l'aurait [pas] été en cas de poursuite».

Le juge Blair, qui a conclu que les points de vue de ses collègues étaient complémentaires et non incompatibles, s'est dit d'accord avec les deux.

Survol historique de la règle du choix de la loi applicable en matière de responsabilité délictuelle

La règle canadienne actuelle du choix de la loi applicable aux délits survenus en dehors de la compétence territoriale d'un tribunal a son origine dans l'arrêt de principe *Phillips c. Eyre*, précité. Dans cette affaire, le demandeur avait intenté, en Angleterre, une action pour voies de fait et séquestration contre le défendeur qui, à l'époque de ces délits, était gouverneur de la Jamaïque. Les actes

a course of action taken by Jamaican authorities to suppress a rebellion. Later the governor caused an act of indemnity to be passed absolving all persons of liability for any unlawful act committed in putting down the rebellion. Much of the judgment given by Willes J. is devoted to questions concerning whether a colony like Jamaica could constitutionally enact such a statute; these the court answered in the affirmative. But the major import of the case relates to the final objection of the plaintiff that, assuming the colonial statute was valid in Jamaica, it could not have the effect of taking away a right of action in an English court. Willes J. replied that the objection rested on a misconception of a civil obligation and the corresponding right of action, which later he stated is only an accessory to the obligation and subordinate to it. As in the case of contract, the general rule was that "the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law" (emphasis added) (p. 28). The substantive law, he affirmed, is governed by the law of the place where the wrong has been committed. That, of course, would be Jamaica because the torts were wholly committed there.

Willes J. then went on to say that English courts are said to be more open to admit actions founded on foreign transactions than those of other European countries, but he added, at p. 28, that there are restrictions (e.g., trespass to land) that exclude certain actions altogether, and "even with respect to those not falling within that description our courts do not undertake universal jurisdiction" (emphasis added). He then immediately continued with the following frequently cited passage, at pp. 28-29:

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if

reprochés par le demandeur s'inscrivaient dans la foulée des mesures qu'avaient prises les autorités jamaïcaines pour réprimer une rébellion. Le gouverneur avait par la suite fait adopter une loi d'indemnisation qui exonérait de toute responsabilité les personnes ayant commis des actes illégaux dans la répression de cette rébellion. Une bonne partie du jugement rendu par le juge Willes est consacrée aux questions de savoir si une colonie comme la Jamaïque était constitutionnellement habilitée à adopter une telle loi, auxquelles le tribunal a répondu par l'affirmative. Mais l'importance majeure de cet arrêt découle de la dernière objection du demandeur, selon laquelle, à supposer que la loi coloniale était valide en Jamaïque, elle ne pouvait avoir pour effet de supprimer un droit d'action devant un tribunal anglais. Le juge Willes a répondu que l'objection reposait sur une conception erronée d'une obligation civile et du droit d'action correspondant qui, a-t-il affirmé plus tard, n'est qu'accessoire et subordonné à cette obligation. Comme en matière contractuelle, la règle générale voulait que [TRADUCTION] «la responsabilité civile résultant d'une faute [ait] son origine dans la loi locale, qui en détermin[ait] la nature» (je souligne) (p. 28). Les règles de fond, a-t-il affirmé, sont régies par la loi du lieu où la faute a été commise. Il s'agissait naturellement de la loi de la Jamaïque puisque les délits y avaient été entièrement commis.

Le juge Willes a poursuivi en disant que les tribunaux anglais avaient la réputation d'être plus disposés que les tribunaux d'autres pays européens à admettre des actions fondées sur des événements survenus à l'étranger. Il a toutefois ajouté, à la p. 28, qu'il y a des restrictions (p. ex., l'atteinte à la possession de biens-fonds) qui ont pour effet d'exclure certaines actions, et que [TRADUCTION] «même à l'égard des recours qui n'entrent pas dans cette catégorie, nos tribunaux n'exercent pas une compétence universelle» (je souligne). Il a alors immédiatement enchaîné en citant, aux pp. 28 et 29, le passage fréquemment cité que voici:

> [TRADUCTION] En règle générale, afin d'avoir un recours en justice en Angleterre pour une faute qui aurait été commise à l'étranger, il faut remplir deux conditions. D'abord, la faute doit être de telle nature que si elle

committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.

In this passage, Willes J. appears to commingle the law dealing with what we would today call jurisdiction and choice of law. The first rule is strictly related to jurisdiction as is evident from its context, which I have just related. The second rule we would normally think of as dealing with choice of law, which it is apparent from his earlier remarks was the place of the wrong, the *lex loci delicti*. It was not, however, necessary for Willes J. to engage in this type of modern analysis. All he was doing was expressing a rule of double actionability to permit suit in England; see *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, at pp. 536-37.

The law was not to remain in this form. In *Machado v. Fontes*, [1897] 2 Q.B. 231, (an interlocutory appeal heard in a summary way by two judges), Willes J.'s judgment was read in a rather wooden manner to mean something quite different from what he, in my view, had intended. In that case the plaintiff brought action in England for libel alleged to have been published in Portuguese in Brazil. Though the report leaves us to surmise, the names of the parties would indicate that they were Brazilian and, the language being Portuguese, the libel would seem to have taken place there. The court interpreted Willes J.'s language as meaning that an act committed abroad could be brought in England in the same way as if it had taken place in England, so long as it was not justified or excused under the law of the place where it was committed. It was, in other words, actionable under English law even if not actionable where it was committed if it was "unjustifiable" there, for example, if it constituted a criminal act there.

avait été commise en Angleterre, elle aurait ouvert droit à une action en justice [. . .] En second lieu, il ne faut pas que l'acte puisse être justifiable suivant la loi du lieu où il a été accompli.

Dans ce passage, le juge Willes paraît confondre le droit relatif à ce que nous appellerions aujourd'hui la compétence, et le choix de la loi applicable. La première règle est strictement liée à la compétence, comme le démontre son contexte que je viens tout juste d'exposer. La seconde règle, que nous considérerions normalement comme se rapportant au choix de la loi applicable et qui ressort de ses remarques précédentes, était celle du lieu de la faute, la *lex loci delicti*. Le juge Willes n'avait pas, toutefois, à entreprendre ce type d'analyse moderne. Il n'a fait que formuler une règle du double droit d'action afin de permettre des poursuites en Angleterre; voir *Chartered Mercantile Bank of India c. Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521, aux pp. 536 et 537.

L'état du droit n'allait pas rester inchangé. Dans l'arrêt *Machado c. Fontes*, [1897] 2 Q.B. 231 (appel interlocutoire entendu sommairement par deux juges), le jugement du juge Willes a été interprété de façon plutôt stricte en lui donnant, à mon avis, un sens fort différent de celui qu'il avait voulu qu'il ait. Il s'agissait en l'occurrence d'une action en diffamation intentée en Angleterre pour un écrit qui aurait été publié en portugais au Brésil. Bien que l'arrêt ne nous renseigne pas à cet égard, les parties étaient, d'après leur nom, des Brésiliens et il semblerait, du fait que la langue utilisée était le portugais, que la diffamation avait eu lieu au Brésil. Le tribunal a interprété les propos du juge Willes comme signifiant qu'un acte accompli à l'étranger ouvrait droit à une action en Angleterre tout comme s'il avait été accompli en Angleterre, dans la mesure où il n'était pas justifié ni excusé suivant la loi du lieu où il avait été accompli. En d'autres termes, l'acte pouvait donner lieu à des poursuites civiles sous le régime de la loi anglaise même si ce n'était pas le cas là où il avait été accompli, pourvu qu'il soit «injustifiable» à cet endroit comme, par exemple, s'il y constituait un acte criminel.

The approach taken in *Machado v. Fontes* was subjected to considerable judicial and academic criticism; see Professor Moffatt Hancock's biting Case and Comment on *McLean v. Pettigrew*, *supra*, (1945), 23 *Can. Bar Rev.* 348. In particular so far as Canadian cases are concerned, Viscount Haldane in *Canadian Pacific Railway Co. v. Parent*, [1917] A.C. 195, at p. 205, early expressed some reservations about it. For my part, I would have thought the question whether a wrong committed in Brazil by a Brazilian against another Brazilian gave rise to an action for damages should be within the purview of Brazil, and that its being made actionable under English law by an *ex post facto* decision of an English court would constitute an intrusion in Brazilian affairs which an English court, under basic principles of comity, should not engage in. I could understand the approach if the parties were both English nationals or domiciled in England and there is some support in English cases for that measure of intervention; see *Chaplin v. Boys*, [1969] 2 All E.R. 1085 (H.L.), *per* Lord Hodson, at p. 1094, and Lord Wilberforce, at p. 1104; see also Lord Denning in the same case in the Court of Appeal, [1968] 1 All E.R. 283, at pp. 289-90. I add parenthetically that it could well be argued (though the facts were not conducive to that possibility) that, unlike a motor vehicle accident, the tort of libel should be held to take place where its effects are felt, but the court simply assumed that the place of the tort was Brazil.

In England, *Machado v. Fontes* was ultimately overruled by the House of Lords in *Chaplin v. Boys*, *supra*. There the plaintiff, a passenger on a motorcycle, was injured through the negligence of the defendant whose car had hit the motorcycle. The plaintiff and defendant were British soldiers stationed in Malta. In upholding the action, their Lordships adopted a test of double actionability. Substantive British law would be applied if the conduct was actionable both in England and in the place where the conduct occurred, with a residual

Le point de vue adopté dans l'arrêt *Machado c. Fontes* a été critiqué abondamment dans la jurisprudence et la doctrine; voir le commentaire cinglant que le professeur Moffatt Hancock fait sur l'arrêt *McLean c. Pettigrew*, précité, à (1945), 23 *R. du B. can.* 348. En ce qui concerne notamment la jurisprudence canadienne, le vicomte Haldane a tôt fait d'exprimer certaines réserves à ce propos dans l'arrêt *Canadian Pacific Railway Co. c. Parent*, [1917] A.C. 195, à la p. 205. Pour ma part, j'aurais cru que la question de savoir si une faute commise au Brésil par un Brésilien envers un autre Brésilien ouvrait droit à une action en dommages-intérêts devrait relever de la compétence du Brésil, et que le fait qu'un tribunal anglais décide après coup que cette faute ouvrait droit à une action, suivant la loi anglaise, constituerait une intrusion dans les affaires brésiliennes dont un tribunal anglais ne devrait pas se mêler selon les règles fondamentales de la courtoisie. Je pourrais comprendre ce point de vue si les parties étaient toutes deux des ressortissants anglais ou si elles étaient toutes deux domiciliées en Angleterre, la jurisprudence anglaise appuyant jusqu'à un certain point cette intervention dans ce cas; voir *Chaplin c. Boys*, [1969] 2 All E.R. 1085 (H.L.), lord Hodson, à la p. 1094, et lord Wilberforce, à la p. 1104; voir également lord Denning dans la même affaire en Cour d'appel, [1968] 1 All E.R. 283, aux pp. 289 et 290. J'ajoute, entre parenthèses, qu'on pourrait bien faire valoir (bien que cette possibilité ne ressorte pas des faits) qu'à la différence d'un accident de véhicule automobile, le délit de diffamation devrait être réputé avoir été commis à l'endroit où ses effets se font sentir. Cependant, le tribunal a simplement présumé que le Brésil était le lieu du délit.

En Angleterre, l'arrêt *Machado c. Fontes* a été finalement renversé par la Chambre des lords dans l'arrêt *Chaplin c. Boys*, précité. Dans cette affaire, le demandeur, passager d'une motocyclette, avait été blessé à cause de la négligence du défendeur dont la voiture avait heurté la motocyclette. Le demandeur et le défendeur étaient des soldats britanniques stationnés à Malte. En confirmant la recevabilité de l'action, leurs Seigneuries ont adopté le critère du double droit d'action, savoir que la loi substantielle anglaise s'appliquerait si la

discretion to depart from the rule where justice warranted. Here the conduct was actionable both in England and in Malta, and there was no ground for a discretion to be exercised. The majority thus determined that the rule in *Phillips v. Eyre* was a double actionability test. While the ratio of the case is difficult to define with precision (see *Red Sea Insurance Co. v. Bouygues*, [1994] J.C.J. No. 29 (P.C.)), the summary of the result set forth in the well known text of Dicey and Morris, *Dicey and Morris on the Conflict of Laws*, vol. 2 (11th ed. 1987), at pp. 1365-66, has been generally accepted:

Rule 205. — (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both

(a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and

(b) actionable according to the law of the foreign country where it was done.

(2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.

Nonetheless it was on the insecure foundation of *Phillips v. Eyre* as interpreted in *Machado v. Fontes* that the existing Canadian law was erected by this Court's 1945 decision in *McLean v. Pettigrew*. There, it will be remembered, a driver and his gratuitous passenger, both domiciled in Quebec, had a car accident in Ontario, and the passenger sued the driver in Quebec. Under Ontario law, the claim would not have been actionable. It would, however, have been actionable in Quebec had it occurred there. Applying the prevalent English law, the Court found that since the tort was actionable in Quebec, and the driver's conduct, though not actionable in Ontario, was prohibited under the *Highway Traffic Act*, R.S.O. 1937, c. 288, s. 47, of that province, it was not "justifiable"

conduite ouvrait droit à une action à la fois en Angleterre et au lieu où elle est survenue, sous réserve d'un pouvoir discrétionnaire résiduel de déroger à cette règle dans l'intérêt de la justice. En l'occurrence, la conduite ouvrait droit à une action tant en Angleterre qu'à Malte, et rien ne justifiait l'exercice d'un pouvoir discrétionnaire. Les juges majoritaires ont donc décidé que la règle de l'arrêt *Phillips c. Eyre* était un critère de double droit d'action. Bien qu'il soit difficile d'établir avec précision le motif déterminant de cet arrêt (voir *Red Sea Insurance Co. c. Bouygues*, [1994] J.C.J. No. 29 (C.P.)), la synthèse qu'en font Dicey et Morris dans leur ouvrage bien connu *Dicey and Morris on the Conflict of Laws*, vol. 2 (11e éd. 1987), aux pp. 1365 et 1366, est généralement acceptée:

[TRADUCTION] **Règle 205.** — (1) En règle générale, l'acte accompli dans un pays étranger constitue un délit et ouvre droit, à ce titre, à une action en Angleterre, seulement s'il peut à la fois:

a) ouvrir droit à une action en responsabilité délictuelle conformément à la loi anglaise ou, en d'autres termes, s'il s'agit d'un acte qui, s'il était accompli en Angleterre, constituerait un délit; et

b) ouvrir droit à une action conformément à la loi du pays étranger où il a été accompli.

(2) Toutefois, une question particulière entre les parties peut être régie par la loi du pays qui, à l'égard de cette question, a le lien le plus important avec l'événement et les parties.

C'est néanmoins sur le fondement incertain de l'arrêt *Phillips c. Eyre*, tel qu'interprété dans l'arrêt *Machado c. Fontes*, que notre Cour a, dans l'arrêt *McLean c. Pettigrew* de 1945, établi la règle canadienne existante. On se souviendra que, dans cette affaire, le conducteur et sa passagère à titre gratuit, tous deux domiciliés au Québec, avaient eu un accident de voiture en Ontario et que la passagère avait poursuivi le conducteur au Québec. Suivant la loi de l'Ontario, il n'y aurait pas eu droit à une action en justice. Toutefois, il y aurait eu droit à une action en justice au Québec si l'accident était survenu dans cette province. Appliquant la loi anglaise existante, la Cour a conclu que la conduite du conducteur n'était pas «justifiable» en Ontario étant donné que le délit ouvrait droit à une action

in Ontario. It, therefore, upheld the plaintiff's action under Quebec law.

The law as enunciated in *McLean v. Pettigrew* has remained the basic rule in Canada ever since. However, its fundamental weaknesses began to be revealed in a series of Ontario cases beginning in the 1980s. The first requiring discussion is *Going v. Reid Brothers Motor Sales Ltd.* (1982), 35 O.R. (2d) 201 (H.C.). There the plaintiffs were seriously injured in a collision with the defendant's vehicle in Quebec owing to the negligence of the defendant. All the parties resided in Ontario. In an action in Ontario, Henry J. held that the plaintiffs were entitled to recover damages in accordance with Ontario law despite the fact that the no-fault scheme in Quebec, where the accident took place, extinguished any action in respect of bodily injuries arising out of the accident. Had there been no breach of Quebec law of any kind the action would not have been maintainable in Ontario; see *Walpole v. Canadian Northern Railway Co.*, [1923] A.C. 113 (P.C.). However, in *Going*, the defendant had been in breach of the Quebec *Highway Traffic Code*, R.S.Q. 1977, c. C-24. Thus the action was not "justifiable" in Quebec so, following the rule in *McLean v. Pettigrew*, the plaintiffs could recover under Ontario law. Henry J. noted that the effect was that the defendants, who had no relationship with the plaintiffs apart from the accident, were deprived of the protection of the law accorded them in Quebec where the action occurred; moreover, he added, the rule encouraged forum shopping. Had either the British rule in *Chaplin v. Boys*, *supra*, or the American rule (which applied the proper law of the tort), been in effect, that would not have been the case. I note in passing that in this and the cases that followed, reference is made to rules in other countries, but in

au Québec et que cette conduite, bien que n'ouvrant pas droit à une action en Ontario, était interdite par la *Highway Traffic Act*, R.S.O. 1937, ch. 288, art. 47, de cette province. La Cour a donc confirmé la recevabilité de l'action du demandeur sous le régime de la loi du Québec.

Le règle énoncée dans l'arrêt *McLean c. Pettigrew* est demeurée depuis lors le principe de base au Canada. Toutefois, ses faiblesses fondamentales ont commencé à ressortir dans une série de décisions ontariennes rendues à compter des années 1980. La première qu'il est nécessaire d'analyser est la décision *Going c. Reid Brothers Motor Sales Ltd.* (1982), 35 O.R. (2d) 201 (H.C.). Dans cette affaire, les demandeurs avaient été grièvement blessés lors d'une collision survenue au Québec avec le véhicule du défendeur, à cause de la négligence de ce dernier. Toutes les parties résidaient en Ontario. Dans une action intentée en Ontario, le juge Henry a conclu que les demandeurs avaient droit à des dommages-intérêts conformément à la loi de l'Ontario même si le régime d'assurance sans égard à la faute, en vigueur au Québec où s'était produit l'accident, avait éteint tout droit d'action à l'égard des lésions corporelles en résultant. S'il n'y avait eu aucune violation que ce soit de la loi du Québec, l'action aurait été irrecevable en Ontario; voir *Walpole c. Canadian Northern Railway Co.*, [1923] A.C. 113 (C.P.). Toutefois, dans l'affaire *Going*, le défendeur avait contrevenu au *Code de la route*, L.R.Q. 1977, ch. C-24, du Québec. L'acte n'était donc pas «justifiable» au Québec, de sorte que les demandeurs pouvaient donc, suivant la règle de l'arrêt *McLean c. Pettigrew*, se faire indemniser en vertu de la loi de l'Ontario. Le juge Henry a fait observer que cela faisait en sorte que les défendeurs, qui n'étaient liés aux demandeurs que par l'accident, étaient privés de la protection que leur accordait la loi du Québec où l'accident était survenu; de plus, a-t-il ajouté, la règle encourageait la recherche d'un tribunal favorable. Si la règle britannique de l'arrêt *Chaplin c. Boys*, précité, ou la règle américaine (consistant à appliquer la loi appropriée au délit) avait été en vigueur, tel n'aurait pas été le cas. Je souligne, en passant, que, dans cet arrêt comme dans ceux qui ont suivi, on s'est reporté aux règles

none of these cases was the rule approached on the basis of Canadian constitutional imperatives.

Ang v. Trach (1986), 57 O.R. (2d) 300 (H.C.), even more strongly underlines the deficiencies of the rule in *McLean v. Pettigrew*. There Ontario residents who were involved in a motor vehicle accident in Quebec with a Quebec resident were held entitled to sue the latter despite the fact that a Quebec resident must surely expect to be governed by Quebec law in such circumstances. As Henry J. observed, the rule, by applying the law of the forum as to liability and assessment, in essence constitutes an extraterritorial extension of the law of the forum. The situation in *Going* was at least supportable since the parties were all Ontario residents. In Henry J.'s view, the law of the place of the tort, or the proper law (i.e., the place having the most substantial connection with the tort) a concept which has been developed in the United States, would be more appropriate. He voiced the hope, since repeated in many cases including those before us, that the matter would be addressed by the appellate courts or by legislation.

Henry J.'s prayer was answered by the Ontario Court of Appeal, at least to the extent to which it could do so, in *Grimes v. Cloutier*, *supra*, and *Prefontaine Estate v. Frizzle* (1990), 71 O.R. (2d) 385. In effect what the court did in the latter two cases was to confine *McLean v. Pettigrew* to its particular facts. In other situations, it held, the rule of double actionability set forth in Dicey and Morris following *Chaplin v. Boys*, *supra*, should be followed. Accordingly, in *Grimes v. Cloutier*, it dismissed the action of an Ontario resident against a Quebec resident for personal injuries suffered in an automobile accident in Quebec. Since under the Quebec no-fault scheme no action existed in respect of the accident, no action could be brought in Ontario. The same rule was applied in *Prefontaine Estate v. Frizzle* where a Quebec resi-

d'autres pays, mais que, dans aucun de ces cas, on n'a abordé la règle en fonction des impératifs constitutionnels canadiens.

La décision *Ang c. Trach* (1986), 57 O.R. (2d) 300 (H.C.), fait ressortir encore davantage les lacunes de la règle de l'arrêt *McLean c. Pettigrew*. On y a jugé que des résidents ontariens, qui avaient eu un accident d'automobile au Québec avec un résident québécois, avaient le droit de poursuivre ce dernier même si un résident du Québec devait sûrement s'attendre à être régi par la loi du Québec en pareilles circonstances. Comme l'a fait observer le juge Henry, la règle consistant à appliquer à la loi du for en matière de responsabilité et d'évaluation des dommages-intérêts constitue essentiellement une extension extraterritoriale de cette loi. La situation était, tout au moins tolérable dans l'affaire *Going*, puisque toutes les parties résidaient en Ontario. De l'avis du juge Henry, il convenait davantage d'appliquer la loi du lieu du délit ou la loi appropriée (c.-à-d. celle du lieu qui avait le lien le plus important avec le délit) qui était un concept américain. Il a formulé l'espoir, réitéré depuis dans maintes affaires, y compris celles dont nous sommes saisis, que la question soit abordée par les tribunaux d'appel ou par le législateur.

La Cour d'appel de l'Ontario a exaucé la prière du juge Henry, tout au moins dans la mesure où elle pouvait le faire, dans les arrêts *Grimes c. Cloutier*, précité, et *Prefontaine Estate c. Frizzle* (1990), 71 O.R. (2d) 385. En fait, la cour a, dans ces deux affaires, confiné l'application de l'arrêt *McLean c. Pettigrew* à ses faits particuliers. Dans d'autres cas, a-t-elle statué, il convient de suivre la règle du double droit d'action énoncée par Dicey et Morris à la suite de l'arrêt *Chaplin c. Boys*, précité. En conséquence, la cour a, dans l'arrêt *Grimes c. Cloutier*, rejeté l'action qu'un résident ontarien avait intentée contre un résident québécois pour les blessures subies lors d'un accident d'automobile survenu au Québec. Étant donné que le régime québécois d'assurance sans égard à la faute excluait tout recours relatif à l'accident, aucune action ne pouvait être intentée en Ontario. La même règle a été appliquée dans l'arrêt *Prefontaine Estate c. Frizzle*, où un résident québécois

dent sued an Ontario resident in respect of an accident in Quebec.

It was against this background that the present cases arose. In *Tolofson*, we saw, the British Columbia Court of Appeal followed the rule in *McLean v. Pettigrew* strictly, holding that the British Columbia plaintiff could sue both the British Columbia defendant and the Saskatchewan defendant in British Columbia under the laws of that province for damages resulting from an automobile accident that occurred in Saskatchewan. Following the principles enunciated in its earlier decisions, the Ontario Court of Appeal in *Gagnon* held that the Ontario resident could sue the defendant who was also resident in Ontario, but further held that the latter could not cross-claim for contributory negligence against the Quebec defendant because that claim could not have been pursued in Quebec so the double actionability rule was not satisfied.

Under these circumstances it is incumbent on this Court to respond to the prayer originally appearing in the reasons of Henry J. in *Ang v. Trach* and repeatedly reiterated in subsequent cases.

Critique and Reformulation

What strikes me about the Anglo-Canadian choice of law rules as developed over the past century is that they appear to have been applied with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality. Often the rules are mechanistically applied. At other times, they seem to be based on the expectations of the parties, a somewhat fictional concept, or a sense of "fairness" about the specific case, a reaction that is not subjected to analysis, but which seems to be born of a disapproval of the rule adopted by a particular jurisdiction. The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not

avait poursuivi un résident ontarien relativement à un accident survenu au Québec.

C'est dans ce contexte que s'inscrivent les présentes affaires. Dans l'affaire *Tolofson*, nous l'avons vu, la Cour d'appel de la Colombie-Britannique a appliqué strictement la règle de l'arrêt *McLean c. Pettigrew* en concluant que le demandeur de la Colombie-Britannique pouvait poursuivre tant le défendeur de la Colombie-Britannique que celui de la Saskatchewan, en Colombie-Britannique sous le régime des lois de cette province pour le préjudice résultant d'un accident d'automobile survenu en Saskatchewan. Dans l'affaire *Gagnon*, la Cour d'appel de l'Ontario a suivi les principes énoncés dans ses décisions antérieures et conclu que le résident ontarien pouvait poursuivre le défendeur qui était lui aussi résident ontarien, mais que ce dernier ne pouvait faire une demande entre défendeurs pour négligence contributive contre le défendeur du Québec, puisque cette demande n'aurait pas pu être faite au Québec, de sorte que la règle du double droit d'action n'était pas respectée.

Dans ces circonstances, il incombe à notre Cour d'exaucer la prière qui figure pour la première fois dans les motifs rédigés par le juge Henry, dans l'arrêt *Ang c. Trach*, et qui a été répétée à maintes reprises dans la jurisprudence subséquente.

Critique et reformulation

Ce qui me frappe au sujet des règles anglo-canadiennes du choix de la loi applicable qui ont été établies au siècle dernier, c'est qu'elles semblent avoir été appliquées sans tenir compte suffisamment de la réalité sous-jacente qui les entourait et des principes généraux qui devraient s'appliquer en fonction de cette réalité. Souvent, les règles sont appliquées de façon mécaniste. Parfois, elles semblent fondées sur les attentes des parties, une notion quelque peu fictive, ou sur un sentiment d'«équité» au sujet du cas précis, une réaction qui ne fait pas l'objet d'une analyse mais qui semble émaner d'une désapprobation de la règle adoptée par un ressort particulier. En vérité, un système de droit fondé sur la conception qu'un tribunal particulier a des attentes des parties ou de l'équité, sans chercher davantage à découvrir ce qu'il entend par

bear the hallmarks of a rational system of law. Indeed in the present context it wholly obscures the nature of the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in that kind of interest balancing. We are engaged in a structural problem. While that structural problem arises here in a federal setting, it is instructive to consider the matter first from an international perspective since it is, of course, on the international level that private international law emerged.

On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. Moreover, to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, they will in great measure recognize the determination of legal issues in other states. And to promote the same values, they will open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state. These are the realities that must be reflected and accommodated in private international law.

The earlier 19th century English cases, such as *Phillips v. Eyre*, were alive to the fact that these are the realities and forces to which courts should respond in the development of principles in this area. By the turn of the century, however, the English courts adopted a positivistic rule-oriented approach that has since seriously inhibited the development of rational principles in this area; see *Morguard*, *supra*, for an illustration of this in a different context. It is to the underlying reality of the

là, n'a pas les caractéristiques distinctives d'un système juridique rationnel. En fait, il masque complètement la nature du problème dans le présent contexte. Lorsque nous examinons des questions juridiques ayant une incidence dans plus d'un ressort, nous ne procédons pas vraiment à ce genre de pondération d'intérêts. Nous avons affaire à un problème structurel. Bien que ce problème structurel se pose ici dans un contexte fédéral, il est intéressant d'examiner en premier lieu, la question sous un angle international puisque c'est naturellement au niveau international qu'est apparu le droit international privé.

Sur le plan international, la réalité sous-jacente pertinente est la territorialité des lois selon l'ordre juridique international. Le droit international public repose sur le principe voulant qu'en général chaque État ait compétence pour adopter des lois et les appliquer à l'intérieur de son propre territoire. Hormis la violation d'une norme dominante, les autres États auront ordinairement la «courtoisie» de respecter ces actes et hésiteront à s'immiscer dans ce qu'un État choisit de faire à l'intérieur de son territoire. De plus, afin de faciliter la circulation des personnes, des richesses et des compétences d'un pays à l'autre, fruit de la civilisation moderne, ils reconnaîtront dans une large mesure la façon dont les autres États auront tranché des questions juridiques. Et dans le but de promouvoir les mêmes valeurs, ils ouvriront leurs tribunaux nationaux à la résolution de litiges juridiques particuliers ayant pris naissance dans d'autres ressorts, en conformité avec les intérêts et les valeurs internes de l'État où se trouve le tribunal saisi. Voilà les réalités qu'il faut refléter et dont il faut tenir compte en droit international privé.

Les arrêts anglais du début du XIX^{e} siècle, tel *Phillips c. Eyre*, étaient sensibles au fait que ce sont là les réalités et les forces auxquelles les tribunaux devraient réagir dans l'établissement de principes en la matière. Au tournant du siècle, toutefois, les tribunaux anglais ont adopté une attitude axée sur une règle positiviste qui a, depuis lors, gravement inhibé l'établissement de principes rationnels dans ce domaine; voir *Morguard*, précité, pour un exemple de cela dans un contexte dif-

international legal order, then, that we must turn if we are to structure a rational and workable system of private international law. Much the same approach applies within a federal system with the caveat that these internal rules have their own constitutional imperatives and other structural elements. For example, in Canada this Court has a superintending role over the interpretation of all laws, federal and provincial, and can thus ensure the harmony that can only be achieved on the international level in the exercise of comity.

All of this is simply an application to "choice of law" of the principles enunciated in relation to recognition and enforcement of judgments in *Morguard*, *supra*. There this Court had this to say, at p. 1095:

> The common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century; see *Rajah v. Faridkote*, *supra*. This principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction.
>
> Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. . . . This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory.

As *Morguard* and *Hunt* also indicate, the courts in the various states will, in certain circumstances, exercise jurisdiction over matters that may have originated in other states. And that will be so as well where a particular transaction may not be limited to a single jurisdiction. Consequently, individuals need not in enforcing a legal right be tied to

férent. C'est donc vers la réalité sous-jacente de l'ordre juridique international qu'il nous faut nous tourner si nous voulons établir un régime rationnel et pratique de droit international privé. L'approche est sensiblement la même dans un régime fédéral, sauf que ces règles internes comportent leurs propres impératifs constitutionnels et d'autres éléments structurels. Au Canada, par exemple, notre Cour joue un rôle de surveillance en matière d'interprétation de l'ensemble des lois fédérales et provinciales, et est donc ainsi en mesure de garantir l'harmonie que seule la courtoisie permet d'atteindre au niveau international.

Tout ceci n'est qu'une application au «choix de la loi applicable» des principes énoncés relativement à la reconnaissance et à l'exécution des jugements dans l'arrêt *Morguard*, précité, où notre Cour affirme ceci, à la p. 1095:

> La common law sur la reconnaissance et l'exécution des jugements étrangers est profondément ancrée dans le principe de la territorialité tel que les tribunaux anglais l'interprétaient et l'appliquaient au XIX^e^ siècle; voir l'arrêt *Rajah of Faridkote*, précité. Ce principe traduit le fait, qui constitue l'un des préceptes fondamentaux du droit international, que les États souverains ont compétence exclusive sur leur propre territoire. Par conséquent, les États hésitent à exercer leur compétence sur des événements qui se sont produits sur le territoire d'un autre État. Puisque la compétence est territoriale, il s'ensuit que le droit d'un État n'a pas force exécutoire hors du territoire de celui-ci.
>
> Les États modernes ne peuvent cependant pas vivre dans l'isolement le plus complet et ils appliquent effectivement les jugements rendus dans d'autres pays dans certaines circonstances. [. . .] Cela a été jugé conforme aux exigences de la courtoisie, qui constitue le principe de fond du droit international privé et qu'on a définie comme la déférence et le respect que des États doivent avoir pour les actes qu'un autre État a légitimement accomplis sur son territoire.

Comme l'indiquent également les arrêts *Morguard* et *Hunt*, précités, les tribunaux des divers États exerceront leur compétence, dans certaines circonstances, sur des affaires qui ont pu prendre naissance dans d'autres États. Et il en sera ainsi également lorsqu'une opération particulière ne pourra être limitée à un seul ressort. Par consé-

the courts of the jurisdiction where the right arose, but may choose one to meet their convenience. This fosters mobility and a world economy.

To prevent overreaching, however, courts have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions. In Canada, a court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject matter of the litigation; see *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Morguard*, *supra*; and *Hunt*, *supra*. This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of *forum non conveniens* a court may refuse to exercise jurisdiction where, under the rule elaborated in *Amchem*, *supra* (see esp. at pp. 921, 922, 923), there is a more convenient or appropriate forum elsewhere.

The major issue that arises in this case is this: once a court has properly taken jurisdiction (and this was conceded in both the cases in these appeals), what law should it apply? Obviously the court must follow its own rules of procedure; it could not function otherwise; see *Chaplin v. Boys*, *supra*. What is procedural is usually clear enough though at times this can raise difficult issues. In the *Tolofson* case, for example, the parties have raised the much debated question of whether a statute of limitation is of a procedural or substantive character. I shall deal with that issue later. I will here turn to the more common "choice of law" problem, and the principal issue in these appeals, namely, what is the substantive law that should be applied in considering the present cases?

From the general principle that a state has exclusive jurisdiction within its own territories and that

quent, il n'est pas nécessaire que les particuliers qui se prévalent d'une garantie juridique soient liés aux tribunaux du ressort où cette garantie a pris naissance, mais ils peuvent en choisir un à leur convenance. Cela favorise la mobilité et l'économie mondiale.

Pour éviter que l'on aille trop loin, les tribunaux ont cependant établi des règles régissant et restreignant l'exercice de compétence sur les opérations extraterritoriales et transnationales. Au Canada, un tribunal ne peut exercer sa compétence que s'il existe un «lien réel et substantiel» (expression non encore entièrement définie) entre lui et l'objet du litige; voir *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393, ainsi que *Morguard* et *Hunt*, précités. Ce critère a pour effet d'empêcher un tribunal de s'immiscer indûment dans des affaires dans lesquelles le ressort où il est situé a peu d'intérêt. De plus, grâce au principe du *forum non conveniens*, un tribunal peut refuser d'exercer sa compétence lorsque, selon la règle de l'arrêt *Amchem*, précité (voir, en particulier, aux pp. 921, 922 et 923), il existe ailleurs un tribunal plus convenable ou approprié.

La principale question qui se pose en l'espèce est la suivante: une fois que le tribunal s'est régulièrement attribué compétence (ce qui a été reconnu dans les deux affaires dont il est question en l'espèce), quelle loi devrait-il appliquer? Il est évident que le tribunal doit suivre ses propres règles de procédure, sans quoi il ne pourrait fonctionner; voir *Chaplin c. Boys*, précité. Ce qui est procédural est habituellement assez clair, quoique cela puisse parfois soulever des questions difficiles. Dans l'affaire *Tolofson*, par exemple, les parties ont soulevé la question fort controversée de savoir si une règle relative à la prescription est de nature procédurale ou substantielle. Je reviendrai plus loin sur ce point. Pour le moment, je vais examiner le problème plus commun du «choix de la loi applicable» et la principale question en litige, dans ces pourvois, qui est de savoir quelle loi substantielle devrait être appliquée dans l'examen des présentes affaires.

Si on part du principe général selon lequel un État a compétence exclusive à l'intérieur de son

loci delicti as the rule governing the choice of law in litigation within Australia; see *Breavington v. Godleman* (1988), 80 A.L.R. 362 (H.C.).

There may be room for exceptions but they would need to be very carefully defined. It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did. The same considerations apply as between the Canadian provinces. What is really debatable is whether State A, or for that matter Province A, should be able to do so in respect of transactions in other states or provinces between its own citizens or residents.

It will be obvious from what I have just said that I do not accept the former British rule, adopted in *McLean v. Pettigrew*, that in adjudicating on wrongs committed in another country our courts should apply our own law, subject to the wrong being "unjustifiable" in the other country. As I see it, this involves a court's defining the nature and consequences of an act done in another country. This, barring some principled justification, seems to me to fly against the territoriality principle. As well, if this approach were generally adopted, it would, in practice, mean that the courts of different countries would follow different rules in respect of the same wrong, and invite forum shopping by litigants in search of the most beneficial place to litigate an issue. Applying the same approach to the units of a federal state like Canada would be even worse. Given the constant mobility between the provinces as well as similar legal regimes and other factors, forum shopping would be much easier.

dents britanniques en adoptant la *lex loci delicti* comme règle régissant le choix de la loi applicable dans les litiges à l'intérieur de ses limites territoriales; voir *Breavington c. Godleman* (1988), 80 A.L.R. 362 (H.C.).

Il peut y avoir place pour des exceptions, mais celles-ci devraient être définies très soigneusement. Il me semble aller de soi, par exemple, qu'il n'appartient pas à l'État A de définir les droits et obligations des citoyens de l'État B à l'égard d'actes accomplis dans leur propre pays, ni, quant à cela, les actions accomplies dans l'État B par des citoyens de l'État C, car il s'ensuivrait des résultats inéquitables et injustes si c'était le cas. Les mêmes considérations s'appliquent en ce qui concerne les provinces canadiennes. Ce qui est vraiment discutable c'est la question de savoir si l'État A, ou, quant à cela, la province A, devrait pouvoir le faire à l'égard des opérations intervenues entre ses propres citoyens ou résidents dans d'autres États ou provinces.

Il ressort à l'évidence de ce que je viens de dire que je n'accepte pas l'ancienne règle britannique, retenue dans l'arrêt *McLean c. Pettigrew*, suivant laquelle nos tribunaux devraient appliquer notre propre loi aux fautes commises dans un autre pays, à la condition que la faute en question soit «injustifiable» dans cet autre pays. Si je comprends bien, cela implique la définition par un tribunal de la nature et des conséquences d'un acte accompli dans un autre pays. En l'absence de quelque justification de principe, cela me semble aller à l'encontre du principe de la territorialité. De même, si cette solution était généralement adoptée, cela signifierait, en pratique, que les tribunaux de différents pays suivraient des règles différentes à l'égard de la même faute, et que les justiciables, en quête du lieu le plus avantageux pour faire trancher un litige, seraient incités à rechercher un tribunal favorable. La situation serait encore pire si l'on appliquait la même solution aux composantes d'un État fédéral comme le Canada. Étant donné la constante mobilité entre les provinces, la similarité des régimes juridiques ainsi que d'autres facteurs, la recherche d'un tribunal favorable en serait d'autant facilitée.

There were in the 19th century context in which the British approach was established a number of forces that militated in favour of the English rule. To begin with Great Britain was the metropolitan state for many colonies and dependencies spread throughout the globe over which it had sovereign legislative power and superintending judicial authority through the Privy Council. Because of its dominant position in the world, it must have seemed natural to extend the same approach to foreign countries, especially when this dominance probably led to the temptation, not always resisted, that British laws were superior to those of other lands (see *Chaplin v. Boys*, *supra*, at p. 1100). There was, as well, the very practical consideration that proof of laws of far-off countries would not have been easy in those days, and the convenience of using the law with which the judges were familiar must have proved irresistible. All the social considerations enumerated above are gone now, and the problem of proof of foreign law has now been considerably attenuated in light of advances in transportation and communication, as Lord Wilberforce acknowledged in *Chaplin v. Boys*. And as he further indicated (at p. 1100), one of the ways in which this latter problem can be minimized in practice is by application of the rule that, in the absence of proof of foreign law, the *lex fori* will apply. Thus the parties may either tacitly or by agreement choose to be governed by the *lex fori* if they find it advisable to do so.

Lorsque la solution britannique a été adoptée au XIX^e^ siècle, un certain nombre de facteurs militaient en faveur de la règle anglaise. Pour commencer, la Grande-Bretagne était la métropole de nombreuses colonies et dépendances disséminées un peu partout dans le monde, sur lesquelles elle exerçait un pouvoir législatif souverain et un pouvoir de surveillance judiciaire par l'entremise du Conseil privé. En raison de la position dominante qu'elle occupait dans le monde, il doit lui avoir semblé naturel d'étendre sa façon de voir à des pays étrangers, compte tenu surtout du fait que cette position dominante a probablement entraîné la tentation, à laquelle on n'a pas toujours résisté, de croire à la supériorité des lois britanniques (voir *Chaplin c. Boys*, précité, à la p. 1100). De plus, sur un plan très pratique, il n'aurait pas été facile, à l'époque, d'établir la preuve des lois de pays éloignés, de sorte que l'avantage de recourir à la loi avec laquelle les juges étaient familiers doit s'être révélé irrésistible. Toutes les considérations sociales énumérées ci-dessus sont maintenant disparues et le problème que constitue la preuve de la loi étrangère a été considérablement atténué par le progrès des transports et des communications, comme l'a reconnu lord Wilberforce dans l'arrêt *Chaplin c. Boys*. Il a de plus indiqué (à la p. 1100) que l'une des façons possibles d'atténuer ce dernier problème en pratique consiste à appliquer la règle voulant qu'en l'absence de preuve de la loi étrangère, la *lex fori* s'applique. Ainsi, les parties peuvent tacitement ou de concert choisir d'être régies par la *lex fori* si elles jugent souhaitable de le faire.

In sum, I can find no compelling reason for following the law of the forum either as enunciated in *Chaplin v. Boys* or in *McLean v. Pettigrew*, *supra*. The latter case has, of course, the further disadvantage of applying the law of the forum when the action complained of was not even actionable under the law of the place of the wrong. As well, as will be seen, the application of that case in other contexts raises serious constitutional difficulties. I would overrule it.

Somme toute, je ne puis voir aucune raison sérieuse de suivre la loi du for, telle qu'énoncée dans l'arrêt *Chaplin c. Boys* ou *McLean c. Pettigrew*, précités. Il va sans dire que ce dernier arrêt présentait au surplus le désavantage d'appliquer la loi du for même lorsque l'action reprochée n'ouvrait pas droit à une action en justice suivant la loi du lieu du délit. En outre, comme on le verra, l'application de cet arrêt dans d'autres contextes soulève de graves difficultés sur le plan constitutionnel. Je suis d'avis de le renverser.

What then can be said of the double actionability rule along the lines adopted in England in *Chaplin v. Boys*? I have already indicated, of course, that I view the *lex loci delicti* rule as the governing law. However, because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.

If one applies the *lex loci delicti* rule as the rule for defining the obligation and its consequences, the requirement under the English rule that the wrong must also be a tort when committed under English law seems to me to be related more to jurisdiction than choice of law. There appears to be some merit to the requirement, especially when coupled with a discretion not to enforce the requirement, but it may be wondered whether it is not excessive, particularly if this calls for a meticulous examination of the law. Some breathing room was allowed in *Chaplin v. Boys*, where the court there retained a discretion to deal with a case without complying with the double actionability rule and it is of interest that in the recent case of *Red Sea Insurance Co. v. Bouygues*, *supra*, the Privy Council used the discretion to deal with a contract under the law of the place where the contract was made rather than the law of the forum. However, given the fact that the jurisdiction of Canadian courts is confined to matters in respect of which there is a real and substantial connection with the forum jurisdiction, I seriously wonder whether the requirement that the wrong be actionable in that jurisdiction is really necessary. It may force or persuade litigants who are within the territorial jurisdiction of the court to sue elsewhere even though it may be more convenient for all or most of the parties to sue here. The fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issue of *forum non conveniens* or, on the international plane, whether entertaining the action would violate the public policy of the forum jurisdiction. Certainly where the place of the wrong and the forum are both in

Qu'en est-il alors de la règle du double droit d'action selon la formule adoptée en Angleterre dans l'arrêt *Chaplin c. Boys*? J'ai déjà indiqué naturellement qu'à mon sens la loi applicable est la *lex loci delicti*. Cependant, étant donné qu'une règle stricte sur le plan international pourrait entraîner une injustice dans certaines circonstances, je ne suis pas opposé à ce que les tribunaux conservent le pouvoir discrétionnaire d'appliquer nos propres lois en pareil cas. Je ne puis toutefois imaginer que peu de cas où cela serait nécessaire.

Si on applique la règle de la *lex loci delicti* pour définir l'obligation et ses conséquences, l'exigence de la règle anglaise que la faute constitue également un délit suivant la loi anglaise me semble liée davantage à la compétence qu'au choix de la loi applicable. Cette exigence semble avoir du mérite, particulièrement lorsqu'elle est conjuguée au pouvoir discrétionnaire de ne pas la faire respecter, mais on peut se demander si elle n'est pas excessive, surtout si cela exige un examen minutieux du droit. Une certaine marge de manœuvre a été laissée dans l'arrêt *Chaplin c. Boys*, où le tribunal a conservé le pouvoir discrétionnaire de connaître d'une affaire sans se conformer à la règle du double droit d'action, et il est intéressant de noter que, dans le récent arrêt *Red Sea Insurance Co. c. Bouygues*, précité, le Conseil privé a utilisé son pouvoir discrétionnaire de connaître d'un contrat en vertu de la loi du lieu où il avait été conclu plutôt qu'en vertu de celle du tribunal saisi. Cependant, étant donné que la compétence des tribunaux canadiens se limite aux questions à l'égard desquelles il existe un lien réel et substantiel avec le ressort du tribunal saisi, je me demande sérieusement s'il est vraiment nécessaire d'exiger que la faute ouvre droit à une action dans ce ressort. Cela peut contraindre ou persuader les justiciables qui se trouvent dans le ressort du tribunal d'intenter des poursuites ailleurs, même s'il peut être plus commode pour toutes les parties ou la plupart d'entre elles de les intenter ici. Le fait qu'une faute n'ouvrirait pas droit à une action dans le ressort du tribunal saisi, si elle y était commise, pourrait constituer un facteur susceptible d'être mieux soupesé en examinant la question du *forum non conveniens* ou, sur le plan international, celle de savoir si

Canada, I am convinced that the application of the *forum non conveniens* rule should be sufficient. I add that I see a limited role, if any, for considerations of public policy in actions that take place wholly within Canada. What I have to say about federal issues later strengthens my conviction that the appropriate rule is the *lex loci delicti*.

Should There Be an Exception Within Canada?

I turn then to consider whether there should be an exception to the *lex loci delicti* rule. As I mentioned earlier, the mere fact that another state (or province) has an interest in a wrong committed in a foreign state (or province) is not enough to warrant its exercising jurisdiction over that activity in the foreign state, for a wrong in one state will often have an impact in another. If we are to permit a court in a territorial jurisdiction to deal with a wrong committed in another jurisdiction solely in accordance with the law of that court's jurisdiction, then some rule must be devised to displace the *lex loci delicti*, and that rule must be capable of escaping the spectre that a multiplicity of jurisdictions may become capable of exercising jurisdiction over the same activity in accordance with their own laws. This would not only encourage forum shopping but have the underlying effect of inhibiting mobility.

A means of achieving this has been attempted in the United States through an approach often referred to as the proper law of the tort. This involves qualitatively weighing the relevant contacts with the competing jurisdictions to determine which has the most significant connections with the wrong. The approach was adopted by the majority in a strongly divided Court of Appeals of New York in *Babcock v. Jackson*, *supra*, a case whose facts were very similar to *McLean v. Pettigrew*, *supra*. The plaintiff, while a gratuitous passenger in the defendant's automobile, suffered

l'instruction de l'action serait contraire à l'ordre public dans le ressort du tribunal saisi. Chose certaine, lorsque le lieu de la faute et le tribunal saisi sont tous deux au Canada, je suis convaincu qu'il suffirait d'appliquer la règle du *forum non conveniens*. J'ajoute qu'à mon avis les considérations d'ordre public ne devraient jouer qu'un rôle limité, s'il en est, dans les actions qui se déroulent entièrement au Canada. Les propos que je tiens, plus loin, sur des questions fédérales renforcent ma conviction que la règle appropriée est celle de la *lex loci delicti*.

Devrait-il y avoir une exception au Canada?

Je vais maintenant examiner s'il devrait y avoir exception à la règle de la *lex loci delicti*. Comme je l'ai dit précédemment, le simple fait qu'un autre État (ou une autre province) ait un intérêt dans la faute commise dans un État étranger (ou une province étrangère) n'est pas suffisant pour le justifier à exercer sa compétence sur cette activité dans cet État étranger, car il arrive souvent qu'une faute commise dans un État ait une incidence dans un autre État. Si nous devons permettre à un tribunal d'un ressort donné de connaître d'une faute commise dans un autre ressort uniquement suivant la loi du ressort où se trouve ce tribunal, il faut alors concevoir une règle quelconque qui remplacerait celle de la *lex loci delicti* et qui pourrait éliminer le spectre de la multiplicité des ressorts pouvant devenir habiles à exercer leur compétence sur une même activité conformément à leurs propres lois. Cela aurait pour effet non seulement d'encourager la recherche d'un tribunal favorable, mais encore, de façon sous-jacente, d'entraver la mobilité.

On a tenté d'y parvenir aux États-Unis en recourant à la méthode souvent décrite comme celle de la loi appropriée au délit. Il s'agit d'apprécier qualitativement les points de contact pertinents entre les ressorts concurrents afin de déterminer celui dont les facteurs de rattachement à la faute sont les plus importants. Cette méthode a été adoptée par les juges majoritaires dans l'arrêt fortement partagé de la Court of Appeals de New York, *Babcock c. Jackson*, précité, dont les faits étaient très similaires à ceux de l'affaire *McLean c. Pettigrew*, précitée. La demanderesse, passagère à titre gratuit

injuries when the automobile was in an accident. Both plaintiff and defendant were residents of New York, but the accident occurred in Ontario where a statute absolved the owner and driver from liability for gratuitous passengers. In an action in New York, the defendant moved for dismissal on the ground that the law of Ontario applied. A majority denied the motion to dismiss. The court stated that while the jurisdiction where the wrongful conduct occurred will usually govern, justice, fairness and best practical results may better be achieved in tort cases with multi-state contacts by according controlling effect to the law of the jurisdiction which, because of its relationship and contact with the occurrence and the parties, has the greatest concern with the issue raised in the litigation. There has been a tendency to adopt that approach in a number of the American states, although it would appear the vast majority still apply the law of the place of the injury; see *Richards v. United States*, 369 U.S. 1 (1962), at pp. 11-14.

dans l'automobile du défendeur, avait subi des blessures lors d'un accident. La demanderesse et le défendeur étaient tous deux des résidents de l'État de New York, mais l'accident était survenu en Ontario où une loi exonérait le propriétaire et le conducteur de toute responsabilité envers les passagers à titre gratuit. Dans une action intentée dans l'État de New York, le défendeur a demandé le rejet pour le motif que la loi applicable était celle de l'Ontario. La cour à la majorité a rejeté cette requête. Elle a affirmé que, même si la loi qui s'applique est habituellement celle du ressort où la conduite dommageable a été adoptée, il était peut-être plus facile, dans les affaires de responsabilité délictuelle mettant en contact plusieurs États, d'assurer la justice et l'équité et de parvenir à de meilleurs résultats sur le plan pratique en accordant préséance à la loi du ressort qui, du fait de son lien et de ses rattachements avec l'événement et les parties, est le plus intéressé dans la question soulevée par le litige. On a eu tendance à adopter ce point de vue dans une certain nombre d'États américains, même s'il semblerait que la grande majorité continuent d'appliquer la loi du lieu du préjudice; voir *Richards c. United States*, 369 U.S. 1 (1962), aux pp. 11 à 14.

I leave aside for the moment the assumptions that a flexible rule better meets the demands of justice, fairness and practical results and underline what seems to be the most obvious defect of this approach — its extreme uncertainty. Lord Wilberforce in *Chaplin v. Boys*, *supra*, at p. 1103, after setting forth the complexities and uncertainties of the rule thus summarized his view:

> The criticism is easy to make that, more even than the doctrine of the proper law of the contract . . . where the search is often one of great perplexity, the task of tracing the relevant contacts, and of weighing them, qualitatively, against each other, complicates the task of the courts and leads to uncertainty and dissent (see particularly the powerful dissents in *Griffith's* case of Bell, Ch.J., and in *Miller's* case of Breitel, J.).

I agree with Lord Pearson too, at p. 1116, that the proposed rule is "lacking in certainty and likely to

Laissant de côté pour le moment les hypothèses voulant qu'une règle souple réponde mieux aux exigences de la justice et de l'équité tout en étant plus susceptible de conduire à des résultats pratiques, je souligne ce qui me semble la faiblesse la plus évidente de cette solution — son incertitude extrême. Après avoir fait état de la complexité et de l'incertitude de cette règle dans l'arrêt *Chaplin c. Boys*, précité, lord Wilberforce résume ainsi son opinion, à la p. 1103:

> [TRADUCTION] Il est facile de critiquer en disant que, plus encore que le principe de la loi appropriée au contrat . . . où la recherche débouche souvent sur la plus grande perplexité, la tâche de retracer les points de contact pertinents et de les apprécier qualitativement les uns par rapport aux autres complique le travail des tribunaux et conduit à l'incertitude et à la dissidence (voir notamment les fortes dissidences du juge en chef Bell dans l'arrêt *Griffith* et du juge Breitel dans l'arrêt *Miller*).

Je partage également l'avis de lord Pearson selon lequel la règle proposée [TRADUCTION] «manque de

create or prolong litigation". As illustrating the uncertainty, he referred to *Dym v. Gordon*, 209 N.E.2d 792 (N.Y.C.A. 1965), in which four members of the court held that the law of Colorado applied while the three dissenters would have applied the law of New York. Even more difficult problems would arise where more than two states had interests in the litigation. I therefore agree with the views expressed by the majority in *Chaplin v. Boys*.

There might, I suppose, be room for an exception where the parties are nationals or residents of the forum. Objections to an absolute rule of *lex loci delicti* generally arise in such situations; see *Babcock*, *supra*; *McLean v. Pettigrew*, *supra*. There are several reasons why it is considered appropriate that the home state of the parties apply its own law to them. It is perceived by some commentators to be "within the reasonable expectations of the parties" to apply their home law to them (an assumption with which I disagree). It is considered to be more convenient for both litigants and judges and to accord with forum notions of "public policy" or justice. In *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y.C.A. 1972), the underlying rationale of the "justice" theory was succinctly put by Fuld C.J., at p. 456: "It is clear that . . . New York has a deep interest in protecting its own residents, injured in a foreign state, against unfair or anachronistic statutes of that state." I shall consider the issue of "public policy" first.

The imputed injustice of applying the *lex loci delicti* in the seminal choice of law cases to which I have just referred arose from some aspect of the law of the *locus delicti* that the court considered contrary to the public policy of the forum, i.e., unfair. In *McLean*, *supra*, and *Babcock*, *supra*, it was Ontario's notorious gratuitous passenger law. In *Chaplin*, *supra*, it was the unavailability of general damages under Maltese law. In *LaVan v.*

certitude et est susceptible d'engendrer ou de prolonger des litiges» (p. 1116). Pour illustrer le caractère incertain de la règle, il mentionne l'arrêt *Dym c. Gordon*, 209 N.E.2d 792 (C.A.N.Y. 1965), dans lequel quatre juges de la cour ont conclu à l'application de la loi du Colorado alors que les trois juges dissidents auraient appliqué la loi de l'État de New York. Des problèmes encore plus difficiles se présenteraient si plus de deux États avaient des intérêts dans le litige. Je souscris donc aux opinions exprimées par les juges formant la majorité dans l'arrêt *Chaplin c. Boys*.

Il pourrait, je suppose, y avoir une exception lorsque les parties sont des ressortissants ou des résidents du lieu du tribunal saisi. C'est généralement dans ces cas que l'on s'oppose à une règle absolue de la *lex loci delicti*; voir *Babcock* et *McLean c. Pettigrew*, précités. Il y a plusieurs raisons de considérer qu'il convient que l'État d'origine des parties leur applique sa propre loi. Selon certains commentateurs, il est [TRADUCTION] «conforme aux attentes raisonnables des parties» de leur appliquer la loi de leur ressort d'origine (ce avec quoi je suis en désaccord). Cette solution est considérée comme étant plus commode à la fois pour les justiciables et les juges, et comme étant conforme aux notions d'«ordre public» ou de justice du ressort du tribunal saisi. Dans l'arrêt *Neumeier c. Kuehner*, 286 N.E.2d 454 (C.A.N.Y. 1972), le juge en chef Fuld expose succinctement, à la p. 456, la raison d'être du principe de la «justice»: [TRADUCTION] «Il est clair que [. . .] New York a grandement intérêt à protéger ses propres résidents, qui ont subi un préjudice dans un État étranger, contre les lois inéquitables ou anachroniques de cet État.» Je vais commencer par examiner la question de l'«ordre public».

Dans les arrêts de principe en matière de choix de la loi applicable que je viens de mentionner, l'injustice à laquelle donnerait lieu implicitement l'application de la *lex loci delicti* tient à un certain aspect de cette loi que la cour a jugé contraire à l'ordre public du lieu du tribunal saisi, c'est-à-dire inéquitable. Dans les arrêts *McLean* et *Babcock*, précités, c'était la célèbre loi sur les passagers à titre gratuit. Dans l'arrêt *Chaplin*, précité, c'était

pose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.

Such a step has already been judicially attempted by Stratton C.J.N.B. in *Clark v. Naqvi* (1990), 99 N.B.R. (2d) 271 (C.A.). In that case Clark, in 1978, received medical treatment from Dr. Naqvi in Nova Scotia. He commenced an action for injuries arising out of that treatment in New Brunswick in 1984. The limitation period in respect of such proceedings in Nova Scotia was one year. The majority of the New Brunswick Court of Appeal held that the action was statute barred (Ryan J.A. dissenting). Referring to both *Yew Bon Tew v. Kenderaan Bas Mara* and *Martin v. Perrie*, Stratton J.A. held, at p. 275, that the limitation period was substantive, notwithstanding that it was phrased "[t]he actions . . . shall be commenced within . . .", because it created an accrued right in the defendant to plead a time bar. Hoyt J.A., while concurring in the result, was reluctant to make such a categorical statement. Ryan J.A., dissenting, was unwilling to abandon the traditional common law rule that statutes of limitation are procedural, though he decided the case on different grounds.

In my view, the reasoning of Stratton C.J.N.B. is correct. He stated, at p. 276:

> When I read the words used in s. 2(1)(d)(i) of the Nova Scotia *Limitation of Actions Act* in their grammatical and ordinary sense, I conclude that the limitation period in respect of actions for negligence or malpractice against a registered medical practitioner is one year from the date of the termination of medical services. Moreover, in my view, the section was enacted by the Legislature with the purpose and intention of protecting the medical profession from stale claims when evidence

rement approprié de le faire en matière de droit international privé où, comme je l'ai dit précédemment, la classification «règle de fond — règle de procédure» vise à déterminer quelles règles assurent le bon fonctionnement du tribunal saisi, par opposition à celles qui déterminent les droits des deux parties.

Une tentative a déjà été faite en ce sens par le juge en chef Stratton du Nouveau-Brunswick dans l'arrêt *Clark c. Naqvi* (1990), 99 R.N.-B. (2e) 271 (C.A.). Dans cette affaire, M. Clark avait reçu en 1978 des soins médicaux du Dr Naqvi en Nouvelle-Écosse. En 1984, il a intenté une action au Nouveau-Brunswick pour le préjudice résultant de ces soins. Le délai de prescription pour ce type de procédures était d'un an en Nouvelle-Écosse. La Cour d'appel du Nouveau-Brunswick a conclu à la majorité que l'action était prescrite (le juge Ryan étant dissident). Se reportant aux arrêts *Yew Bon Tew c. Kenderaan Bas Mara* et *Martin c. Perrie*, le juge en chef Stratton, à la p. 275, a estimé que le délai de prescription était une règle de fond, même si la disposition qui le fixait commençait par les mots «[l]es actions [. . .] devront être intentées dans les délais . . .», parce qu'il conférait au défendeur un droit acquis d'invoquer la prescription. Bien que souscrivant au résultat, le juge Hoyt s'est montré réticent à faire une affirmation aussi catégorique. Quant au juge Ryan, dissident, il n'était pas disposé à abandonner la règle traditionnelle de common law selon laquelle les lois en matière de prescription sont de nature procédurale, bien qu'il ait tranché l'affaire en fonction d'autres motifs.

À mon avis, le raisonnement du juge en chef Stratton est juste. Voici comment il s'exprime, à la p. 276:

> Si je lis les termes employés au sous-alinéa 2(1)d)(i) de la *Limitation of Actions Act* de la Nouvelle-Écosse en leur donnant leur sens grammatical et ordinaire, je conclus que le délai de prescription, en ce qui a trait aux actions pour négligence ou faute professionnelle contre un médecin inscrit, est d'un an à compter de la date à laquelle les services médicaux ont pris fin. Je suis en outre d'avis que la Législature a adopté ce sous-alinéa dans l'intention et dans le but de mettre la profession médicale à l'abri des demandes caduques susceptibles d'être formées à un moment où il est possible que les

may no longer be available to defending litigants who come within the protection of the section. . . .

This is not to say that procedural rules of the forum may not affect the operation of the statute of limitation of the *lex loci delicti*. Thus, whether or not a litigant must plead a statute of limitation if he or she wishes to rely on it is undoubtedly a matter of procedure for the forum; some rules of court or judicial interpretations of the rules require the pleading of all or certain statutes. Limitation periods included in the various rules of court, such as those for the filing of pleadings, are also undoubtedly matters of procedure. These may be waived with leave of the court or the agreement of the other parties, as often happens. Additionally, a substantive limitation defence such as the one in the case at bar may be waived either by failure to plead it, if this is required, or by agreement.

The limitation defence has been properly pleaded in the case at bar and all parties proceeded before us on the assumption that, if Saskatchewan law applies, it is a valid defence. I do not accept that this defence is so repugnant to public policy that a British Columbia court should not apply it. The extent to which limitation statutes should go in protecting individuals against stale claims obviously involves policy considerations unrelated to the manner in which a court must carry out its functions, and the particular balance may vary from place to place. To permit the court of the forum to impose its views over those of the legislature endowed with power to determine the consequences of wrongs that take place within its jurisdiction would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflict of laws should seek to foster.

défendeurs bénéficiant de la protection visée au sous-alinéa ne disposent plus des éléments de preuve . . .

Cela ne veut pas dire que les règles de procédure du tribunal saisi ne peuvent pas influer sur l'application de la loi en matière de prescription que comporte la *lex loci delicti*. Ainsi, la question de savoir si un justiciable est tenu ou non de plaider la prescription qu'il souhaite invoquer relève incontestablement de la procédure du tribunal saisi; certaines règles de pratique ou certaines interprétations judiciaires de ces règles exigent que toutes les lois ou certaines d'entre elles soient plaidées. Les délais de prescription que prévoient les diverses règles de pratique, comme ceux impartis pour déposer les actes de procédure, sont aussi sans doute des questions de procédure. On peut y renoncer avec l'autorisation du tribunal ou l'accord des autres parties, comme c'est souvent le cas. En outre, il est possible de renoncer à invoquer la prescription comme moyen de défense au fond, comme celle dont il est question en l'espèce, soit en omettant de la plaider lorsqu'on est tenu de le faire, soit avec le consentement des parties.

La prescription comme moyen de défense a été dûment plaidée dans la présente affaire et toutes les parties ont tenu pour acquis, devant nous, qu'il s'agit d'un moyen de défense valide si la loi de la Saskatchewan s'applique. Je n'accepte pas que ce moyen de défense soit si contraire à l'ordre public qu'un tribunal de la Colombie-Britannique ne devrait pas le retenir. La mesure dans laquelle les lois en matière de prescription devraient protéger les particuliers contre les demandes caduques fait intervenir, de toute évidence, des considérations de principe non liées à la manière dont un tribunal doit s'acquitter de sa tâche, et l'évaluation qui doit être faite à cet égard peut varier d'un endroit à l'autre. Permettre au tribunal saisi de substituer son point de vue à celui de la législature investie du pouvoir de déterminer les conséquences des fautes commises dans son ressort inciterait à rechercher un tribunal favorable, ce qu'il faut éviter si l'on veut parvenir à la cohérence sur le plan des résultats, qu'un système efficace de droit international privé devrait chercher à encourager.

For these reasons I conclude that the Saskatchewan limitation rule applies in these proceedings.

Lucas (Litigation Guardian of) v. Gagnon

In addition to his argument that the Quebec law governs on the ground that the *lex loci delicti* was applicable, the appellant maintained that, in any event, Quebec law was the applicable law by virtue of Quebec's no-fault scheme. Since I have already decided that the *lex loci delicti* should govern, it would be unnecessary to enter into a discussion of the second argument, were it not for the fact that counsel for the respondent took a different view of the effect of Quebec law, in particular having regard to Quebec's new *Civil Code*.

The relevant portions of Quebec's no-fault scheme appear in ss. 3 and 4 of the Quebec *Automobile Insurance Act*, which read:

3. The victim of bodily injury caused by an automobile shall be compensated by the Régie in accordance with this title, regardless of who is at fault.

4. The indemnities provided for in this title are in the place and stead of all rights, recourses and rights of action of any one by reason of bodily injury caused by an automobile and no action in that respect shall be admitted before any court of justice.

Barring other considerations, it seems clear to me that the legislature intended that these provisions should apply to all persons who have an accident in Quebec regardless of their province of residence, a policy which I noted earlier is clearly within its constitutional competence.

This position is buttressed by the fact that, at the time of the accident, this was wholly consistent with art. 6 of the *Civil Code of Lower Canada* which was in effect at the time of the accident. That provision reads:

Pour ces motifs, je conclus que la règle de prescription de la Saskatchewan s'applique en l'espèce.

Lucas (Tutrice à l'instance de) c. Gagnon

En plus de faire valoir que la loi du Québec s'applique pour le motif que l'affaire est régie par la *lex loci delicti*, l'appelant a soutenu que la loi du Québec était applicable, en tout état de cause, en vertu du régime d'assurance sans égard à la faute en vigueur dans cette province. Comme j'ai déjà décidé que la *lex loci delicti* devrait s'appliquer, il serait inutile d'examiner ce second argument si l'avocat de l'intimé n'avait pas adopté une conception différente de l'effet de la loi québécoise, eu égard notamment au nouveau *Code civil* du Québec.

Les parties pertinentes du régime québécois d'assurance sans égard à la faute figurent aux art. 3 et 4 de la *Loi sur l'assurance automobile* du Québec, dont voici le texte:

3. La victime d'un dommage corporel causé par une automobile est indemnisée par la Régie et suivant les dispositions du présent titre, sans égard à la responsabilité de quiconque.

4. Les indemnités prévues au présent titre tiennent lieu de tous les droits, recours et droits d'action de quiconque en raison d'un dommage corporel causé par une automobile et nulle action à ce sujet n'est reçue devant une cour de justice.

Abstraction faite d'autres considérations, il me semble clair que le législateur a voulu que ces dispositions s'appliquent à toutes les personnes ayant un accident au Québec, quelle que soit leur province de résidence, ce qui, comme je l'ai déjà souligné, relève manifestement de sa compétence constitutionnelle.

Cette position est renforcée par le fait qu'au moment de l'accident, cela était tout à fait conforme à l'art. 6 du *Code civil du Bas Canada* alors en vigueur, qui se lisait notamment ainsi:

6 . . .

The laws of Lower Canada relative to persons, apply to all persons being therein, even to those not domiciled there. . . .

In my view, then, the appellant is entitled to succeed on this ground as well.

The Quebec and Ontario governments certainly thought the Quebec no-fault scheme applied to all accidents in Quebec, whatever the domicile of the persons involved. The interprovincial Memorandum of Agreement between the Régie and the Ontario Minister of Consumer and Commercial Relations, signed in 1978, is predicated on the assumption that the Act covers all victims of accidents in Quebec, whether resident or not. In the agreement, the Minister undertook to amend Schedule E of the Ontario *Insurance Act*, R.S.O. 1970, c. 224, to require that Ontario residents be indemnified by their respective Ontario insurers for injuries sustained in automobile accidents occurring in Quebec in accordance with Régie benefits and regardless of fault. The agreement begins with recitals describing the application of Ontario and Quebec's respective laws, of which the first and last are the most pertinent:

1.1 WHEREAS by virtue of article 8 of the Automobile Insurance Act (L.Q. 1977 C. 68) the victim of an automobile accident that occurred in Québec who is not resident therein is compensated by the Régie to the extent that he is not responsible for the accident unless otherwise agreed between the Régie and the competent authority of the place of residence of such a victim.

. . .

1.5 AND WHEREAS it is the desire of both parties that the resident of Ontario, other than the uninsured who is a victim of an automobile accident occurring in Québec, be entitled to compensation on the same basis as a resident of Québec and that his legal liability for such an accident be no greater than that of a Québec resident.

Now therefore, in consideration of the mutual covenants hereinafter, the parties hereby agree as follows . . . .

6 . . .

Les lois du Bas Canada relatives aux personnes sont applicables à tous ceux qui s'y trouvent, même à ceux qui n'y sont pas domiciliés . . .

À mon avis, l'appelant doit également avoir gain de cause sur ce point.

Les gouvernements du Québec et de l'Ontario croyaient sûrement que le régime québécois d'assurance sans égard à la faute s'appliquait à tous les accidents survenus au Québec, quel que soit le domicile des personnes en cause. Le protocole d'entente interprovinciale, signé en 1978, entre la Régie et le ministre de la Consommation et du Commerce de l'Ontario tient pour acquis que la Loi vise toutes les victimes d'accident au Québec, qu'elles y résident ou non. Le Ministre s'y engageait à modifier l'annexe E de *The Insurance Act* de l'Ontario, R.S.O. 1970, ch. 224, de manière à exiger que les résidents ontariens soient indemnisés par leurs assureurs ontariens respectifs pour le préjudice subi dans des accidents d'automobile survenus au Québec, conformément au barème de la Régie et sans égard à la faute. L'entente commence par décrire le champ d'application respectif des lois de l'Ontario et du Québec. Les premier et dernier paragraphes sont les plus pertinents:

1.1 ATTENDU QU'EN vertu de l'article 8 de la Loi sur l'assurance automobile (L.Q. 1977 c. 68) la victime d'un accident d'automobile survenu au Québec qui n'y réside pas est indemnisée par la Régie dans la proportion où elle n'est pas responsable de l'accident à moins d'une entente différente entre la Régie et la juridiction du lieu de résidence de cette victime.

. . .

1.5 ET ATTENDU QUE les deux parties souhaitent que tout résident de l'Ontario, autre que l'automobiliste non-assuré, victime d'un accident d'automobile au Québec, ait le droit d'être indemnisé sur la même base qu'un résident du Québec et que sa responsabilité légale pour un tel accident ne soit pas plus grande que celle du résident du Québec.

Par conséquent, en considération des ententes réciproques ci-après, les parties conviennent de ce qui suit . . .

The new *Civil Code* does not change the situation of the parties in the present action; as mentioned, it was not in effect at the time of the accident. In view of its implications for other cases, however, I think it wise to deal with the case on the assumption that the new *Civil Code* applies. The relevant provision reads as follows:

Art. 3126. The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur.

In any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies.

Even assuming this provision were the operative one at the time of the accident, I am convinced the language of the provisions of the *Automobile Insurance Act* is so clear that it must have been intended to override the general law. Section 3 provides without exception that all automobile accident victims (and one must read here in the province) shall be compensated by the Régie regardless of fault. Then s. 4 provides that these indemnities "are in the place and stead of all rights, recourses and rights of action of any one by reason of bodily injury caused by an automobile and no action in that respect shall be admitted before any court of justice". I observe that the provision removes not only rights of action but "all rights . . . of any one".

This method of approach receives support from the case of *Szeto c. Fédération (La), Cie d'assurances du Canada*, [1986] R.J.Q. 218, before the Quebec Court of Appeal where the court refused the claim of an accident victim against the Régie in respect of an automobile accident between two residents of Quebec in Ontario. That case, of course, arose out of quite different facts, but the manner in which the court dealt with the relation of the *Automobile Insurance Act* to the general law is of assistance. Paré J.A. (speaking for himself

Le nouveau *Code civil* ne modifie pas la situation des parties à la présente action; comme je l'ai dit, il n'était pas en vigueur au moment de l'accident. Toutefois, étant donné qu'il aura une incidence dans d'autres affaires, je crois qu'il est sage de tenir pour acquis qu'il s'applique. La disposition pertinente est ainsi formulée:

Art. 3126. L'obligation de réparer le préjudice causé à autrui est régie par la loi de l'État où le fait générateur du préjudice est survenu. Toutefois, si le préjudice est apparu dans un autre État, la loi de cet État s'applique si l'auteur devait prévoir que le préjudice s'y manifesterait.

Dans tous les cas, si l'auteur et la victime ont leur domicile ou leur résidence dans le même État, c'est la loi de cet État qui s'applique.

Même en supposant que cette disposition était applicable au moment de l'accident, je suis convaincu que le texte de la *Loi sur l'assurance automobile* est d'une telle clarté qu'on a dû vouloir qu'il l'emporte sur le droit commun. L'article 3 prévoit, sans exception, que toutes les victimes d'accident d'automobile (et il faut comprendre ici dans la province) doivent être indemnisées par la Régie sans égard à la faute. L'article 4 prévoit ensuite que ces indemnités «tiennent lieu de tous les droits, recours et droits d'action de quiconque en raison d'un dommage corporel causé par une automobile et [que] nulle action à ce sujet n'est reçue devant une cour de justice». Je note que cette disposition supprime non seulement les droits d'action mais «tous les droits [. . .] de quiconque».

Ce point de vue trouve appui dans l'arrêt *Szeto c. Fédération (La), Cie d'assurances du Canada*, [1986] R.J.Q. 218, où la Cour d'appel du Québec a refusé la demande qu'avait présentée contre la Régie la victime d'un accident d'automobile survenu en Ontario entre deux résidents du Québec. Il va sans dire que les faits de cette affaire sont fort différents, mais il est utile d'examiner la façon dont la cour a abordé la relation entre la *Loi sur l'assurance automobile* et le droit commun. Le juge Paré, s'exprimant en son propre nom et en

and L'Heureux-Dubé J.A.) (as she then was) had this to say, at p. 220:

[TRANSLATION] It is true that the *Automobile Insurance Act* must be interpreted so as to override the general law only to the extent that this is clearly stated. The fact remains that the principle underlying it denies in a general way a right of action to all accident victims. The statute thus clearly departs from the general rules of our civil law. The remedies retained by the statute are thus retained only as exceptions and I wonder whether as a consequence the provisions of s. 7 of the Act should not be so treated.

I, therefore, conclude that nothing in the provisions cited to us overrides the general rule that the *lex loci delicti* applies to this case. Indeed I think these provisions buttress this position by providing that Quebec law applies.

Disposition

Tolofson v. Jensen

The appeal should be allowed with costs throughout. The appellants' application for a declaration that the proper choice of law to be applied is the law of Saskatchewan and that the Saskatchewan limitation period is substantive should be granted, and the action should be referred to the Supreme Court of British Columbia Chambers for determination.

Lucas (Litigation Guardian of) v. Gagnon

The appeal should be allowed and the action of the respondents Tina Lucas and Justin Gagnon, by their litigation guardian Heather Gagnon, and Heather Gagnon personally should be dismissed. Question 2 of the agreed statement of facts should be answered as follows:

2(a) Does Ontario tort law or Quebec law, as set out in the *Automobile Insurance Act*, apply to this action?

celui du juge L'Heureux-Dubé (maintenant juge de notre Cour), affirme ceci, à la p. 220:

Il est vrai que cette *Loi sur l'assurance automobile* doit s'interpréter de façon telle qu'elle ne déroge au droit commun qu'en autant qu'elle l'exprime sans ambiguïté. Il n'en reste pas moins que le principe qui en est la base dénie le droit d'action de façon générale à tous les accidentés. Cette loi déroge donc ainsi de façon claire aux principes généraux de notre droit civil. Les recours que conserve cette loi ne sont ainsi conservés qu'à titre d'exception et je me demande si, en conséquence, on ne doit pas traiter comme telles les dispositions de l'article 7 de cette loi.

Par conséquent, je conclus que rien dans les dispositions citées devant nous ne l'emporte sur la règle générale voulant que la *lex loci delicti* s'applique en l'espèce. En fait, je crois que ces dispositions étayent cette position en prévoyant que la loi du Québec s'applique.

Dispositif

Tolofson c. Jensen

Il y a lieu d'accueillir le pourvoi avec dépens dans toutes les cours. Il y a également lieu d'accueillir la requête de l'appelant visant à obtenir un jugement déclarant qu'il convient de décider que la loi applicable est celle de la Saskatchewan et que le délai de prescription qui y est fixé constitue une règle de fond, et de déférer l'action à la Cour suprême de la Colombie-Britannique en chambre pour qu'une décision soit rendue.

Lucas (Tutrice à l'instance de) c. Gagnon

Il y a lieu d'accueillir le pourvoi et de rejeter l'action des intimés Tina Lucas et Justin Gagnon, par leur tutrice à l'instance Heather Gagnon, et Heather Gagnon personnellement. La deuxième question formulée dans l'exposé conjoint des faits devrait recevoir les réponses suivantes:

2a) Est-ce le droit de la responsabilité délictuelle de l'Ontario ou la loi du Québec énoncée dans la *Loi sur l'assurance automobile*, qui s'applique à la présente action?

Quebec law, as set out in the *Automobile Insurance Act.*

2(b) Is the appellant Réjean Gagnon entitled to maintain his cross-claim for contribution and indemnity against the respondent Cyrille Lavoie?

No.

As agreed between these parties, there should be no order as to costs against the respondents Tina Lucas and Justin Gagnon, by their litigation guardian Heather Gagnon, and Heather Gagnon personally, in this Court and the courts below. The respondent Cyrille Lavoie should have his costs against the appellant unless the two agree otherwise.

The following are the reasons delivered by

SOPINKA J. — Subject to the observations of Justice Major with which I agree, I concur in the reasons of Justice La Forest.

The following are the reasons delivered by

MAJOR J. — I have had the opportunity to read the reasons of Justice La Forest, and I agree that, in general, the question of which province's law should govern the litigation should be determined by reference to the *lex loci delicti* (law of the place) rule. I also agree that, in the present appeals, this rule governs which provincial laws should apply.

However, I doubt the need in disposing of these appeals to establish an absolute rule admitting of no exceptions. La Forest J. has recognized the ability of the parties by agreement to choose to be governed by the *lex fori* and a discretion to depart from the absolute rule in international litigation in circumstances in which the *lex loci delicti* rule would work an injustice. I would not foreclose the possibility of recognizing a similar exception in interprovincial litigation.

La loi du Québec énoncée dans la *Loi sur l'assurance automobile.*

2b) La demande, entre défendeurs, de contribution et d'indemnisation que l'appelant Réjean Gagnon a faite contre l'intimé Cyrille Lavoie est-elle recevable?

Non.

Tel que convenu entre ces parties, il n'y a pas lieu de condamner aux dépens, devant notre Cour et les tribunaux d'instance inférieure, les intimés Tina Lucas et Justin Gagnon, par leur tutrice à l'instance Heather Gagnon, et Heather Gagnon personnellement. L'intimé Cyrille Lavoie devrait avoir droit au paiement de ses dépens par l'appelant, à moins d'une entente contraire entre les deux.

Version française des motifs rendus par

LE JUGE SOPINKA — Sous réserve des observations du juge Major avec lesquelles je suis d'accord, je souscris aux motifs du juge La Forest.

Version française des motifs rendus par

LE JUGE MAJOR — J'ai eu l'occasion de lire les motifs du juge La Forest et je suis d'accord pour dire qu'il y a lieu, en général, de résoudre en fonction de la règle de la *lex loci delicti* (loi locale) la question de savoir quelle loi provinciale devrait régir le litige. Je conviens également que, dans les présents pourvois, cette règle permet de déterminer quelles lois provinciales devraient s'appliquer.

Cependant, je doute que, pour statuer sur les présents pourvois, il soit nécessaire d'établir une règle absolue n'admettant aucune exception. Le juge La Forest a reconnu la capacité des parties de s'entendre pour choisir d'être régies par la *lex fori* (loi du for), ainsi que l'existence d'un pouvoir discrétionnaire de déroger à la règle absolue dans le cas d'un litige international où l'application de la loi locale aurait pour effet de causer une injustice. Je n'écarterais pas la possibilité de reconnaître une exception similaire dans le cas d'un litige interprovincial.

Appeal allowed with costs (Tolofson v. Jensen, File No. 22980).

Appeal allowed (Lucas (Litigation Guardian of) v. Gagnon, File No. 23445).

Solicitors for the appellant Leroy Jensen: McQuarrie, Hunter, New Westminster.

Solicitors for the appellant Roger Tolofson: Russell & DuMoulin, Vancouver.

Solicitors for the respondent Kim Tolofson: Simpson & Company, Vancouver.

Solicitors for the appellant Réjean Gagnon: Lavery, de Billy, Ottawa.

Solicitors for the respondent Cyrille Lavoie: Smith, Lyons, Torrance, Stevenson & Mayer, Toronto.

Solicitors for the respondents Tina Lucas, Justin Gagnon and Heather Gagnon: Reynolds, Kline, Selick, Belleville.

Solicitors for the intervener Clarence S. Marshall: Dutton, Brock, MacIntyre & Collier, Toronto.

Solicitors for the interveners Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey and Aditha Le Blanc: Soloway, Wright, Ottawa.

Solicitors for the interveners La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée, and Allstate Insurance Co. of Canada: Fraser & Beatty, North York.

Pourvoi accueilli avec dépens (Tolofson c. Jensen, nº du greffe 22980).

Pourvoi accueilli (Lucas (Tutrice à l'instance de) c. Gagnon, nº du greffe 23445).

Procureurs de l'appelant Leroy Jensen: McQuarrie, Hunter, New Westminster.

Procureurs de l'appelant Roger Tolofson: Russell & DuMoulin, Vancouver.

Procureurs de l'intimé Kim Tolofson: Simpson & Company, Vancouver.

Procureurs de l'appelant Réjean Gagnon: Lavery, de Billy, Ottawa.

Procureurs de l'intimé Cyrille Lavoie: Smith, Lyons, Torrance, Stevenson & Mayer, Toronto.

Procureurs des intimés Tina Lucas, Justin Gagnon et Heather Gagnon: Reynolds, Kline, Selick, Belleville.

Procureurs de l'intervenant Clarence S. Marshall: Dutton, Brock, MacIntyre & Collier, Toronto.

Procureurs des intervenants Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey et Aditha Le Blanc: Soloway, Wright, Ottawa.

Procureurs des intervenantes La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée et Allstate Insurance Co. of Canada: Fraser & Beatty, North York.

TAB 19

1999 Folio No 536

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Before:

The Hon. Mr. Justice Aikens

B E T W E E N:

(1) JOHN RICHARD LUDBROOKE YOUELL
(Suing as a representative Underwriter for and on behalf of the members of Syndicate 79 at Lloyd's and on behalf of all other members at Lloyd's subscribing to policy no. HO478394)

and others

Claimants

-and-

(1) KARA MARA SHIPPING COMPANY LIMITED
and others

Defendants

Jonathan Gaisman QC and Rebecca Sabben-Clare instructed by Hill Taylor Dickinson appeared on behalf of the Claimants.

Stewart Boyd QC and Claire Blanchard instructed by Ince & Co. appeared on behalf of the Defendants.

I direct pursuant to CPR Part 39 P.D. 6.1. that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

The Hon. Mr. Justice Aikens
13 March 2000

JOHN RICHARD LUDBROOKE YOUEEL and others

Claimants

and

KARA MARA SHIPPING COMPANY LIMITED and others

First to Fifth Defendants

and

WORLD TANKER CARRIERS CORPORATION

Sixth Defendant

JUDGMENT

1. At about midnight on 20/21 December 1994 a collision took place between the bulk carrier ***"Ya Mawlaya"*** and the motor tanker ***"New World"***. It occurred in the Atlantic some 250 miles of Portugal in good visibility. ***"Ya Mawlaya"*** had loaded a cargo of soyabeans at Destrahan, Louisiana and was destined for Ancona and Porto Marghera. ***"New World"*** had loaded a cargo of West African crude oil in Gabon and was bound for Dunkerque. There may be argument about the precise sequence of events leading up to the collision but it is clear that the vessels were on *"crossing courses"*. Under the Collision Regulations ***"Ya Mawlaya"*** was the *"give way"* vessel. Although the vessels remained on a steady bearing, it appears that ***"Ya Mawlaya"*** did not take any action as the *"give way"* vessel until too late. As a result of the collision there was a fire on board ***"New World"***. In the fire eight crewmen were killed and others were injured. Both vessels and their cargo suffered extensive damage. This collision and the subsequent loss of life and damage has resulted in much litigation in the USA, particularly in Louisiana. There has also been litigation in Hong Kong, India and England. The present proceedings, begun when some of the Hull & Machinery insurers of the ***"Ya Mawlaya"*** issued an Originating Summons on 20 April 1999, constitute the latest episode in this worldwide litigation.

2. There are three principal applications before the court. First the Sixth Defendant, the owning company of the ***"New World"***, applies[i] under ***CPR Part 11 (I)*** to set aside the permission I gave to the Claimants on 14 June 1999, (without notice) to serve proceedings on them out of the jurisdiction. Those proceedings sought declaratory relief. Secondly the Claimants apply[ii] for an interim - suit injunction to restrain the Sixth Defendant from pursuing three sets of proceedings in Louisiana, in which the Claimants in this action are directly or indirectly interested. Thirdly the Claimants apply[iii] for permission to put in evidence to cure any procedural irregularity there may have been in their original application, (without notice), for permission to serve out of the jurisdiction and also to rely on a further paragraph ***Order 11 Rule 1(1) (paragraph (d))*** as the basis for permission to serve the original proceedings out of the jurisdiction. As an alternative in the same application, the Claimants seek an order that they have permission to issue and serve a Part 8 Claim Form on the Sixth Defendant containing the requested declaratory relief. The Claimants say they intend to rely on ***Order 11 Rule 1(1)© and/or (d) (i) to (iv)*** for the permission to serve the new Part 8 Claim Form on the Sixth Defendants out of the jurisdiction.

3. In the course of the hearing before me the Claimants also sought permission to amend the terms of their Originating Summons to claim, as additional relief, a permanent anti - suit injunction. They also sought permission to amend the terms of their Application for an interim anti - suit injunction. These applications were not set out in separate Application Forms. Both those applications were opposed.

A. The Parties

4. **The Claimants**. The First Claimant is a representative Lloyd's underwriter for syndicate 79 and other Lloyd's underwriters who subscribed to a Hull & Machinery policy H0478394 on the ***"Ya Mawlaya"***. That policy covered 15% of the risk. Cover ran from 19 April 1994 for one year, thus including the date of the collision. The Second to Fifteenth Claimants are ILU companies that wrote a further Hull & Machinery policy H0478294 covering 45% of the risk for the same period and on materially the same terms. I will refer to these two policies as "the H&M Policies". The balance of 40% of the risk was insured with Italian and Belgian insurers who have taken no part in this action. The total insured value of the vessel under the policies was US$ 4.5 million. The H&M Policies were written on the standard MAR 91 form and incorporated the 1983 Institute Time Clauses, Hulls (***"the ITC"***). Thus the policies contained an exclusive jurisdiction clause ("EJC") in favour of the English Courts and a clause that the insurance "*is subject to English law and practice*". The policy terms provided cover for "Three Fourths Collision Liability" on the terms set out under Clause 8.1 of the ITC[iv] They also provided cover for three - fourths of the legal costs incurred by the Assured or which the Assured may be compelled to pay in contesting liability or taking proceedings to limit liability, but only where the Assured had obtained the *"prior written consent of the Underwriters"*[v]. At the hearing before me Mr Gaisman QC and Miss Sabben - Clare represented the Claimants who I shall call ***"the "YM Insurers".***

5. **The Defendants.** The First to Fifth Defendants are companies that are or might be interested in the policies as assureds. The First Defendant was the demise charterer of ***"Ya Mawlaya"*** at the time of the collision. The Second to Fourth Defendants acted as her managers. The Fifth Defendant is or was a mortgagee of the vessel. These five defendants have not played any part in the hearing before me. However I shall have to refer to the First Defendant and will call it ***Kara Mara*** and will refer to the First to Fifth Defendants collectively as the ***"Ya Mawlaya** interests"* .

6. The Sixth Defendant is the company that owned ***"New World"***. It is a Liberian company. It was represented at the hearing before me by Mr Boyd QC and Miss Blanchard. I will refer to the Sixth Defendants as ***"World Tanker***."

B. Proceedings in various jurisdictions

7. On 30 December 1994 World Tanker began proceedings in a US Federal Court, which was the United States District Court for the Eastern District of Louisiana in New Orleans. The claim was for damages against ***"Ya Mawlaya"*** interests, including the present First to Fifth Defendants. I will call these ***the Louisiana liability proceedings***, to distinguish them from the later Louisiana actions which have given rise to the present English proceedings.

8. Following action to arrest sister vessels of ***"Ya Mawlaya"***, her P&I Club, the Newcastle, gave World Tanker security of US$20 million for potential claims against ***"Ya Mawlaya"***. On 20 December 1995 the Newcastle P&I Club stated to World Tanker that it would pay USS$15 million in respect of ***"Ya Mawlaya's"*** liability, plus a figure of proceedings in Hong Kong to which I refer below

9. On 28 January 1995 Kara Mara began limitation proceedings (on behalf of

9. On 28 January 1995 Kara Mara began limitation proceedings (on behalf of ***"Ya Mawlaya"*** interests) in Hong Kong. On 8 February 1995 Kara Mara began liability proceedings against World Tanker in Hong Kong. Subsequently, in September 1995, the Hong Kong court stayed all proceedings there on the ground that Louisiana was clearly the more appropriate forum.

10. On 12 May 1995 the managers of ***"Ya Mawlaya"*** began proceedings against World Tanker in India, claiming limitation of liability, an indemnity from the owners of the vessel and an anti -suit injunction to stop the Louisiana proceedings. In November 1995 the YM Insurers disavowed all interest in the Indian proceedings. They were dismissed by the Indian Supreme Court in April 1998.

11. On 19 June 1995 Kara Mara started limitation proceedings in Louisiana. But Kara Mara stated that this was a protective measure only and it contested jurisdiction.

12. On 26 February 1999 Kara Mara began *"in personam"* proceedings in the English Admiralty Court and sought leave to serve those proceedings out of the jurisdiction on World Tanker. Master Miller granted permission to do so on 4 March 1999. In that claim Kara Mara sought a declaration that any Louisiana

judgment was unenforceable; it also claimed a right to limit liability under the Merchant Shipping Act 1979. World Tanker applied to Judge Lemmon in the Louisiana court for an anti - suit injunction to stop Kara Mara proceeding with this limitation action. But on 8 April 1999 Judge Lemmon refused World Tanker's application on the ground that it had not been shown that the Louisiana judgment on liability (referred to below), which had been handed down on 3 March 1999, would not be shown proper respect.

C. The progress of the Louisiana Liability Proceedings by World Tanker

13. Kara Mara and the other ***"Ya Mawlaya"*** interests entered appearances in the Louisiana proceedings, but contested jurisdiction, venue and forum. The US District Court ordered discovery and interrogatories against those parties, but only in relation to jurisdiction issues. Ultimately the ***"Ya Mawlaya"*** interests decided not to give the discovery ordered and dismissed their attorneys. On 14 May 1997 the Louisiana court dismissed the jurisdiction challenges of Kara Mara because of its refusal to comply with the discovery orders the court had made. The Court held that Kara Mara's failure to respond to enquiries about its business dealings in the USA meant that it was admitting that it was doing business in the USA. The court also stated that the failure of Kara Mara to comply with court orders could lead to further sanctions against it.

14. On 23 July 1998 the Judge in charge of the Louisiana liability proceedings, Judge Lemmon, ordered sanctions against Kara Mara, holding that it was now clear that Kara Mara had made a conscious decision to ignore the court. The sanctions included an order that Kara Mara should post security for the claim of US$45 million. If it failed to do so then the Judge ordered that the Hull & Machinery underwriters of ***"Ya Mawlaya"*** would be required to shew cause why they should not put up security up to the limit of the insurance policies. It is possible, although this was not the reason expressed, that the basis for the Judge's order against the YM insurers was that Louisiana has a statute, known as the ***"Direct Action Statute"***,[vi] that enables claims to be made directly by an *"injured person"* against a liability insurer in certain circumstances. The Judge may have contemplated that World Tanker might be able to utilise this statutory provision at a later stage in the proceedings.

15. Kara Mara did not post security. The H&M underwriters of ***"Ya Mawlaya"*** protested to the Louisiana Court that they were not then party to any Louisiana proceedings and that the ***Direct Action Statute*** had no application in the present case[vii]. Despite this, Judge Lemmon ordered, on 16 September 1998, that the H&M underwriters should shew cause why they should not put up security to the limits of the policy.

16. On 3 March 1999 Summary Judgment was entered in the Louisiana Liability Proceedings against Kara Mara for US$21.4 million, including pre-judgment interest.[viii] In the judgment it was also held that Kara Mara was not entitled to limit its liability. The findings of fact and law[ix] included the following:

(1) ***"Ya Mawlaya"*** was unseaworthy with the privity of Kara Mara upon departure from New Orleans;

(2) no or inadequate repairs were made to the bridge equipment of ***"Ya Mawlaya"*** including the radar and HVF radios, before her departure;

(3) her officers were incompetent;

(4) a "one man watch system", which was not permissible, was in operation on board ***"Ya Mawlaya"***;

(5) ***"Ya Mawlaya"*** failed to comply with the Collision Regulations;

(6) Kara Mara, whilst *"thumbing their noses"* at the Louisiana court, had embarked on a *"forum shopping spree"* in India and Hong Kong. Because Kara Mara had acted in bad faith, the court would exercise its power to assess attorneys' fees.[x]

D. The aftermath of the judgment in the Louisiana liability action

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17. On 1 April 1999 World Tanker's New York lawyers, Haight Gardner, wrote to the London solicitors for the YM Insurers (Hill Taylor Dickinson - "HTD") and informed them that as Louisiana was a "direct action" jurisdiction, World Tanker could now claim directly from the YM Insurers for *"some proportion and perhaps all of the judgment"*. Haight Gardner said that the YM Insurers could avoid any litigation by *"paying off the judgment on their own"*. HTD's response to this was to issue the current proceedings on 20 April 1999.

18. **The Originating Summons in the current proceedings**

As originally framed the Originating Summons named Kara Mara as the First Defendant and World Tanker as the Second Defendant.[xi] The YM Insurers sought only declaratory relief against both defendants. In the form for which permission was sought to serve the proceedings on World Tanker out of the jurisdiction, the relief claimed was as follows:

(1) That, in accordance with Clauses 8.1 and 8.2 of the ITC[xii] the YM Insurers were not liable to pay any sum to the assureds under the H&M policies until the assureds, had actually made payments to another person in consequence of any collision liability;[xiii]

(2) That the limit of liability of the YM Insurers under the three - fourths collision clause was no greater than their proportion (ie. 60%) of three - quarters of the insured value of the vessel, ie. US$4.5 million, less sums already paid;

(3) That the YM Insurers were not liable to the assureds to pay legal costs (under Clause 8.3 of the ITC) unless they had been incurred with the prior written consent of the YM Insurers or they had been incurred or were payable under compulsion in contesting or limiting liability and that the YM Insurers were not liable to pay the sum of US$5,317,882.05 in respect of legal costs in India and Hong Kong which Kara Mara had been ordered by Judge Lemmon to pay to World Tanker in the Louisiana Liability proceedings;

(4) That the YM Insurers were not liable under the H&M policies to indemnify the assured against any liability for loss of life and personal injury; liability for loss of or damage to cargo laden on board ***"Ya Mawlaya"***; or liability for the removal or disposal of cargo from ***"Ya Mawlaya"***.

19. The Kara Mara interests, which are represented by Clyde & Co, acknowledge service of the proceedings on 27 May 1999. The acknowledgement of service stated that the claims would be contested *"in part"*.

20. The YM Insurers then sought permission to serve the Originating Summons on the Fifth Defendant[xiv]and World Tanker out of the jurisdiction on the basis that it was a *"necessary or proper party"* to the proceedings (ie. under ***RSC Order 11 Rule 1 (1)()).*** At that stage it was not suggested that World Tanker could be served out of the jurisdiction on the basis of ***RSC Order 11 Rule 1(1)(d)***, ie. that the claim was one *"brought to enforce...or otherwise effect a contract...which - (iii) is.... governed by English law; or (iv) contains a terms to the effect that the High Court shall have jurisdiction to hear and determine any claim in respect of the contract"*. I granted permission, without notice, on 14 June 1999. The evidence before me was an affidavit of Mr CS Zavos, a partner of HTD, together with an exhibit CSZ1. It is now accepted that in his affidavit Mr Zavos did not formally and specifically depose to the fact that there is a real issue which the court may reasonably be asked to try as between the Claimants and the First to Fourth Defendants, as he should have done in accordance with ***Order 11 Rule 4(1)(d)***.[xv]

21. On 20 August 1999 World Tanker issued an Application Notice, stating that it would apply to set aside the order giving permission to serve the Originating Summons on World Tanker out of the jurisdiction. The grounds given were: first that World Tanker is not a necessary or property party to the action against the First to Fourth Defendants; and secondly that there is no *"real issue"* as between the Claimants and the First to Fourth Defendants.

22. **The Enforcement Proceedings in Louisiana**

On 17 September 1999 World Tanker filed a claim against the YM Insurers in the Louisiana Federal Court: Action No 99 - 2861.[xvi] This claim is made under the ***"Direct Action statute"*** of Louisiana. I shall

refer to it as the ***"Direct Action Claim".*** The Complaint asserts that all the YM Insurers (and the remaining insurers not involved in the current English proceedings) do business in Louisiana or the USA. It pleads the judgment in the Louisiana liability proceedings, in particular the finding of fact that the casualty was the result of negligence of ***"Ya Mawlaya"*** and her unseaworthiness *"in Louisiana".*[xvii] It alleges that these facts gave rise to a cause of action pursuant to the ***Direct Action Statute.*** The Complaint says that by virtue of the H&M policies and their terms there is a cause of action against the insurers to the extent of coverage under the policies. There is a reference to the insurers being obliged to pay the damages pursuant to the judgment in favour of World Tanker in the Louisiana liability proceedings. The prayer claims: *"a decree directly against the Defendants, jointly, severally and in solido, for amounts due under [the insurers'] policies for the judgment against their insureds".*[xviii]

23. The YM Insurers made two responses to the Direct Action Claim. First, in the Direct Action Claim the YM Insurers filed an answer in which they took issue with jurisdiction, *forum conveniens* and service of the proceedings. They also pleaded defences under the Direct Action statute and under the terms of the H&M Policies.[xix] After this World Tanker served interrogatories and requests for documents on the issue of jurisdiction.

24. Secondly, in the current proceedings, the YM Insurers issued an application on 12 January 2000 for an interim anti - suit injunction. This claimed an injunction to restrain World Tanker from continuing or prosecuting any claim or application in the US Courts for direct payment to World Tanker of any sum allegedly payable under the H&M policies until the determination of the matters raised in the Originating Summons seeking declaratory relief.

25. Two further enforcement proceedings have been started by World Tanker in Louisiana. First, on 14 December 1999 Judge Lemmon approved the citation of the YM Insurers as garnishees of sums due from the H&M policy insurers to the assureds under those policies. That led to World Tanker filing a Supplementary Complaint in the original liability action in the Federal Court *"in aid of execution of judgment"*,[xx] seeking to garnish debts *"owed"* by all the H&M Insurers (who are specifically named in the Supplementary Complaint) to the judgment debtors, ie. Kara Mara.[xxi]The relief sought includes *"orders adjudicating all sums owed by the judgment debtors....to be turned over to the Plaintiff".*[xxii] I will refer to these proceedings as the ***"garnishee proceedings"***.

26. Secondly World Tanker began a further action (No 99 - 2056) in the New Orleans Civil District Court (a State Court), against the insurers under the H&M Policies. World Tanker brought this claim in response to the challenge to the jurisdiction of the Federal Court by the insurers. In this action World Tanker claims declarations on what sums are due and payable by the insurers to the assureds under the H&M policies. World Tanker pleads that such declarations will *"serve the salutary purpose of terminating the present and actual controversies between these parties and enable the insurers to pay proceeds found due and owing pursuant to a definitive judgment of a court of competent jurisdiction".*[xxiii] The prayer asks for declaratory orders including *"the determination and quantifying with specificity the insurance proceeds due and payable as a result of the tort giving rise to such liability under each applicable policy of insurance".* [xxiv] I will refer to these proceedings as the ***"State Court action"***.

27. Interlocutory proceedings in the Direct Action Claim have continued. World Tanker has taken depositions from thirteen insurers on the issue of jurisdiction. It has also pressed for answers to the interrogatories it has served and for discovery on the issue of jurisdiction to be given by the insurer defendants.

E. The Current state of the English Originating Summons Proceedings

28. As I have already mentioned, in the course of the two day hearing before me (on 8 and 9 February 2000) the YM Insurers applied orally to amend both the Originating Summons and the Application for an interim anti - suit injunction.

29. **The proposed amendments to the Originating Summons**

The claim that the YM Insurers wish to make in the Originating Summons now falls into two parts. The original claim for declaratory relief on the proper effect of the H&M Policies is still pursued. But it has really taken second place to the proposed additional claim. This is for a permanent anti - suit injunction

against World Tanker. The drafting of the new claim went through several editions, but in the final version the claim is for an injunction to restrain World Tanker from pursuing in any court, other than the English court, any proceedings for relief which is connected to any liability of the YM Insurers under the H&M Policies in respect of the collision between ***"Ya Mawlaya"*** and "***World Tanker***". The grounds for this relief are stated to be that the H&M Policies contain an Exclusive Jurisdiction Clause in favour of the English Courts and an English proper law clause. Therefore the YM Insurers have an equitable right not to be the subject of any proceedings of any nature in relation to which World Tanker seeks any relief based upon those H&M Policies that is connected with the collision, except proceedings in the English Courts.

30. The alternative basis stated is that the YM Insurers have an equitable right not to be subjected to *"vexatious, oppressive and unconscionable proceedings"* in any courts other than those of England and Wales which seek any relief based on the H&M Policies that is connected with the collision. The Louisiana Enforcement Proceedings are alleged to be vexatious, oppressive and unconscionable.

31. **The proposed amendments to the Application Notice of an interim anti - suit injunction**

There were two main changes in the proposed amendment to the Application Notice. The first was that World Tanker should be enjoyed from pursuing any proceedings anywhere in the world other than the Courts of England and Wales from pursuing any relief in relation to the liability of the YM Insurers on the H&M Policies in respect of the collision.[xxv] The second is that the interim injunction now sought should continue *"until further order"* instead of until the determination (by the English Courts) of the issues on which the YM Insurers sought declaratory relief under the terms of the Originating Summons as it originally stood. The first version of the Application Notice had stated the grounds (which continued to be relied upon by the YM Insurers) for the interim injunction. They were that the Louisiana enforcement proceedings ignored the EJC in the H&M Policies or that the Louisiana enforcement proceedings were vexatious and oppressive.

32. The final version of the re-re-amendments of the Originating Summons was only available to those advising World Tanker at the very end of the oral hearing before me. It was agreed that any submissions of both parties on the proposed re-re-amendments and the application to issue and serve this version on World Tanker should be made in writing. The submissions of World Tanker[xxvi]are that the proposed relief of a permanent anti - suit injunction is misconceived in principle Therefore permission for the re-re-amendment should be refused. Further World Tanker submits that the proposed relief for a permanent anti - suit injunction cannot be the subject of an application for leave to serve out of the jurisdiction under what is now ***CPR Schedule 1 Rule 11.1 (1)(c) or (d).*** World Tanker also submitted that there ought to be a fresh application for permission to serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction. World Tanker says that such an application would be bound to fail because the YM Insurers would not be able to depose to a belief that they had a good cause of action for a permanent anti - suit injunction. Further, even if the court were prepared to treat that application as having been made and the necessary formal evidence as having been provided, then World Tanker asked the court to treat the application for leave to serve out of the jurisdiction as being without notice. Therefore, even if it were granted World Tanker would be able to renew its challenge to this court "on notice", rather than the Court of Appeal.

33. In relation to the proposed amendment to the Application Notice for an interim anti - suit injunction, World Tanker objected to the fact that the injunction now sought was much wider, a it sought to enjoin any proceedings throughout the world, rather than just in the USA or Louisiana. World Tanker said that the YM Insurers should not be permitted to "ambush" them with this new and much wider application.

34. The YM Insurers' responses[xxvii] to these submissions are that: (i) there is no need for a party to obtain permission to issue and serve out of the jurisdiction an amendment to any originating process which claims a new cause of action; but (ii) if there is then the court can either rely on the existing evidence or the YM Insurers would undertaken to file any necessary formal evidence, in particular stating that the YM Insurers believed that they had a good cause of action in respect of the claim for a permanent anti - suit injunction; (iii) the claim for a permanent anti - suit injunction is a cause of action which could be the subject matter of originating process; (iv) although the interim injunction now sought is in wider terms, the points were all argued at the hearing and as there is no suggestion of prejudice to World Tanker (in the sense that it has not had the chance to argue a point or put in evidence), then the Court should deal with the

new relief claimed. The YM Insurers accepted that if they failed in their submission that World Tanker was bound by the EJC, then any interim anti - suit injunction could only be limited to the current Louisiana enforcement proceedings.

F. The Issues that have to be determine

35. **A Threshold Question**. The YM Insurers' claim for an anti - suit injunction is now clearly the more important of the two claims made in the Originating Summons as re-re-amended. World Tanker submits that such a claim cannot be the subject of originating process where the relevant defendant is outside the jurisdiction. Therefore leave to re-re-amend the Originating Summons should not be granted nor should the Court entertain an application for leave to issue and serve the re-re-amended Originating Summons out of the jurisdiction. So I think that the first, threshold question is whether an anti - suit injunction can be the subject of a claim by the YM Insurers when the defendant sought to be enjoined has to be served outside the jurisdiction. Because the YM Insurers claims that they are entitled to an anti - suit jurisdiction on the basis of either (i) the existence of the EJC in the H&M Policies; or (ii) the existence of the English proper law clause in the H&M Policies, both these potential claims against World Tanker have to be considered.

36. **Permission for leave to re-re-amend and to issue and serve the claim for an anti - suit injunction out of the jurisdiction.** If either one of those claims for an anti - suit injunction can be the subject of an Originating |Summons when the defendant has to be served outside the jurisdiction, then the next issues must be: (i) whether the Court should grant permission to re-re-amend the Originating Summons; and (ii) grant permission to issue and serve the re-re-amended Originating Summons on World Tanker outside the jurisdiction. The points are inextricably bound up. The Court will not grant leave to re-re-amend unless it is satisfied that the new claim is one for which ***Rule 11.11 (1)*** leave would be granted. That question therefore involves three sub - issues. They are:

(1) Whether the YM Insurers can bring themselves within ***R11.1 (1) paragraph (d) sub paragraph (iii) or (iv)***in ***Schedule 1*** to the ***CPR***. Although paragraph six of the proposed re-re-amended Originating Summons claimed an anti - suit injunction generally against "*the Defendants*" this relief is clearly aimed only at the Sixth Defendants, World Tanker. Therefore ***paragraph (c)*** *("necessary or proper party")* is irrelevant for this particular application, because no similar claim is brought against a party within or outside the jurisdiction;

(2) If the YM Insurers can rely on ***paragraph (d) (iii) or (iv)*** in relation to the claim for an "anti - suit" injunction against World Tanker, then can the YM Insurers also satisfy the Court that this is a proper case to permit service out of the jurisdiction under ***Rule 11.4(2);***

(3) If the YM Insurers can do so in principle, then should permission be refused on the ground that the application was made by re-re-amendment and there has been no formal submission of evidence in support of this new application so as to satisfy ***Rule 11.4(1) and (2)***. Alternatively if the Court grants permission, should it be on the basis that the application was "without notice", so that World Tanker could reapply to set the permission aside.

37. **Should the original permission to issue and serve the declaratory proceedings on the Sixth Defendant be set aside.** Whether or not the application to issue and serve the claim for an anti - suit injunction on World Tanker is refused, the next question must be whether the permission I gave to serve out of the jurisdiction the unamended Originating Summons, claiming the declaratory relief in respect of the points on the H&M Policies, should be set aside. That involves the following issues:

(1) Whether the YM Insurers can show that the declaration claim comes within either ***Rule 11.1 (1) paragraph (c) or (d);***

(2) If the YM Insurers can only rely on ***paragraph (c)***[xxviii], then is there a *"real issue to be tried"* between the YM Insurers and the First to Fourth Defendants. If there is then is the formal defect in Mr Zavos' first affidavit (which is admitted) fatal to this application or not;[xxix]

(3) If the YM Insurers have got a good cause of action against the First to Fourth Defendants on which they can rely, then have they got a *"good cause of action"* against World Tanker in respect of the claims for Declarations;

(4) If they have then is this a case where the Court ought to exercise its discretion to serve out under ***Rule 11.4 (2).***

38. **The Application for an interim anti - suit injunction.** Mr Gaisman accepts that if he loses on the issue of whether leave should be given to serve World Tanker out of the jurisdiction (on the basis of either the original claim or the new claim for a permanent anti - suit injunction), then the issue of whether there should be an interim anti - suit injunction becomes irrelevant. However if the YM Insurers should win on the issue of leave to serve out on either basis, then the Court has to consider whether an interim injunction should be granted. The YM Insurers claim an injunction on two grounds, which are:

(1) That World Tanker is bound by the EJC in favour of the English Courts in the H&M Policies; or

(2) That World Tanker is not bound by the EJC but is attempting to make a claim on the basis of the H&M Policies that are expressly governed by English law.

G. The YM Insurers application for leave to serve out of the jurisdiction for an "anti - suit" injunction against World Tanker.

39. **The parties' arguments.**

The arguments of the YM Insurers are as follows:

(1) In the Direct Action claim in Louisiana World Tanker asserts a right to make a claim under the H&M Policies directly against the YM Insurers World Tanker claims that it can do so under Louisiana law by virtue of a statutory right of action conferred on it by the Louisiana ***Direct Action Statute.***

(2) Once World Tanker claims that the ***Direct Action Statute***, confers on it rights to make claims under the H&M Policies, then, so far as the English Court is concerned, World Tanker must be regarded as being subject to all the bundle of rights and obligations that are contained in those contracts. Those include the ECJ in favour of the English Courts and there is not *"good reason"*[xxx] why World Tanker should not be bound by it.

(3) Alternatively, World Tanker has accepted in these proceedings that if the Louisiana Federal Court has to deal with a claim by World Tanker to rely on its statutory rights under the ***Direct Action Statute,*** then the Court must, in the first place, construe the H&M Policies for the purpose of seeing whether there would be any right by the Kara Mara interests to make claims under the policies as assureds. World Tanker has also accepted that the H&M Policies are governed by English law. It has further accepted that this exercise of construction will be done by the Louisiana Court in accordance with English law.[xxxi] If the Louisiana Court does so, then it would be bound to conclude that the H&M Policies contain EJCs in favour of the English Courts. Although it is possible (or even likely[xxxii]) that the Louisiana Courts would strike down the EJC as being *"unlawful"* within the meaning of ***paragraph (C)*** of the ***Direct Action Statute §655***, that is irrelevant to an English Court when considering whether World Tanker should be treated as being bound by the EJC.

(4) Once it is shown that World Tanker is attempting to make claim on the H&M Policies by means of the ***Direct Action Statute*** and the H&M Policies contain an EJC in favour of the English Courts and they are governed by English law, then that means that World Tanker is trying to rely upon contractual rights but is also evading compliance with terms of the contracts that govern the law and forum by which those claims should be determined.

(5) The YM Insurers, being a party to the H&M Policies, are entitled not to be subjected to proceedings of any nature in any Courts other than those of England or Wales where a party

claims relief connected with alleged liability of the YM Insurers to their assureds under those polices in relation to the collision If World Tanker made any claim under the H&M Policies, then it should be bound by all the terms, including the EJC.

(6) The fact that the Louisiana Court might hold the EJCs *"unlawful"* for the purposes of deciding whether World Tanker could enforce a claim against the YM Insurers under the ***Direct Action Statute***, is not a good reason to hold that World Tanker can evade being subject to the EJC in the H&M Policies.

(7) Accordingly the YM Insurers can show that they have a claim to enforce an equitable right,[xxxiii] which is based upon an EJC so that it falls within ***paragraph (d)(iv)*** of the ***Rule 11.1 (1).***

(8) Alternatively, if the YM Insurers cannot rely on the EJC the fact remains that World Tanker wishes to make a claim based upon the H&M Policies that are subject to English law, so the case falls within ***paragraph (d)(iii).*** In all the circumstances, particularly where the Louisiana Court may not give effect to the terms of the policies in relation to the provisions concerning *"pay to be paid"* and the *"prior consent of underwriters"* to legal costs, then it would be vexatious and oppressive to permit World Tanker to pursue the claim under the ***Direct Action Statute*** in the Louisiana Courts.

(9) The action by World Tanker claiming a right to garnish any proceeds from the H&M Policies payable by the YM Insurers to their assured also concerns the issue of what sums (if any) are due to the assureds under the policies. That is a contractual issue under a contract governed by English law and containing an EJC in favour of the English Courts. The State Action raises broadly the same issues, but in that case directly against the YM Insurers. The only reason for those proceedings is so that ultimately, World Tanker can benefit from contractual rights under the H&M Policies. Therefore the same considerations apply to all three types of enforcement proceedings in the Louisiana Courts.

40. The arguments of World Tanker are as follows:

(1) For the purposes of obtaining leave to serve proceedings on a party out of the jurisdiction under ***Rule 11.1*** there must be an underlying cause of action. A claim by the YM Insurers for a permanent anti - suit injunction is not a "cause of action" for the purposes of ***Rule 11.1(1)***. An injunction is only a remedy.

(2) If, in principle, an anti - suit injunction can be regarded as a cause of action in itself, World Tanker is not a party to the H&M Policies and therefore is not bound by the EJC. Nor is it bound by the EJC just because it is asserting *"a right of direct action against the insurer within the terms of the policy"*[xxxiv] in the Louisiana Court under the ***Direct Action Statute.***

(3) Even if the English Court should regard the Louisiana Enforcement Proceedings by World Tanker as effectively making claims on the H&M Policies which are subject to an EJC, nonetheless the English Court must place itself in the position of the Louisiana Court and consider whether, in the context of the ***Direct Action Statute***, the EJC would be enforced. It obviously would not because that would defeat the whole object of the statute as the rights granted by the Louisiana statute could not be enforced in any other court.

(4) Therefore the YM Insurers could not bring themselves within ***Rule 11.1(1) paragraph (d)*** because there is no claim either to *"enforce* the ECJs in the H&M Policies, nor is there a claim *"otherwise to effect"* those contracts.

(5) Alternatively there should be no leave to serve out because it would not be a proper case to permit it under ***Rule 11.4(2).***

(6) In any event the YM Insurers did not claim an anti - suit injunction in their Originating Summons for which they obtained leave without notice. It is an entirely new "cause of action" for which the

Claimants must obtain fresh leave, on the principle established in ***Parker v Schuller (1901) 17 TLR 299*** and many cases subsequently.[xxxv] The Claimants have not put the proper evidence before the Court in support of this new "cause of action". They should not be allowed to rely on the existing evidence (in support of leave to serve out in relation to the Declaratory relief originally sought in the Originating Summons) to support the new claim. Even if permission were to be granted, World Tanker must be entitled to treat it as an application "without notice" and could apply to set it aside again.

41. Anti - suit injunctions: the Basic Principles

Mr Boyd is obviously correct in submitting that an injunction is not, in itself, a cause of action. It is a remedy which the English court has power to grant when it is *"just and convenient to do so"* within the wording of ***section 37(1)*** of the ***Supreme Court Act 1981***. The right to obtain an injunction depends on there being a pre-existing cause of action against a defendant. That has to arise out of *"an invasion, actual or threatened [by the defendant] of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court"*: ***per Lord Diplock in Siskina (Owners of Cargo lately laden on board) v Distos Compania Naviera SA [1979] AC 210 at 256.***

42. Lord Diplock applied that analysis (used in ***The Siskina*** in relation to ***"Mareva"*** injunctions) to the question of the juridical basis on which a claimant could obtain an anti - suit injunction in ***British Airways Board v Laker Airways Ltd [1985] AC 58 at 81B-D***. He held that there could be a legal or equitable right not to be sued in a foreign court if the action of the defendant in suing there was *"unconscionable"*. Lord Scarman applied the same analysis in his speech in the same case: ***see page 95D-H.*** In ***South Carolina Insurance Co v Assurantie Maatschappij "de Zeven Provincien" NV [1987] AC 24***, Lord Brandon of Oakbrook said that the English Courts had power to grant an anti - suit injunction even in cases where no legal or equitable right had been infringed or was threatened and even when the actions of the party bringing the foreign proceedings was not "unconscionable": ***see page 40F***[xxxvi].

43. In subsequent cases in which the House of Lords or the Privy Council has considered the juridical basis for the grant of anti - suit injunctions, they have made it clear that the remedy of an injunction is available because some legal or equitable right is or may be infringed by the foreign proceedings that the claimant wishes to restrain. The court can invoke the jurisdiction when *"the ends of justice require it"*,[xxxvii] although certain other criteria must be fulfilled as well. I think that this is the effect of the analysis in the ***Aerospatiale case (see footnote below); Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 335 at B-D per Lord Mustill;***[xxxviii] ***Mercedes - Benz AG v Leiduck [1996] 1 AC 284 at 310G-H per Lord Nicholls;***[xxxix] and ***Airbus Industrie GIE v Patel [1999] 1 AC 119 at 133E and 134F per Lord Goff of Chieveley.***

44. So I am quite satisfied that a claim for an anti - suit injunction could be the sole relief sought in the YM Insurers' Originating Summons and that it would be a legitimate claim. There can be two bases for the relief sought. The first is that there had been a breach of a contractual provision which binds the defendant and by which the parties have agreed that claims falling within the provision should be pursued exclusively in the English Courts[xl] or an arbitration tribunal.[xli] In those cases the prosecution of proceedings in a foreign court is an actual infringement of a legal right of the claimant for an anti - suit injunction. The English courts' general approach is to enforce those contractual provisions unless there is good reason not to do so.

45. The second basis is that the prosecution of the foreign proceedings is, in the circumstances, unjust. If the English court finds it is unjust, then that will amount to the actual (or if proceedings are threatened) a potential invasion of an equitable right not to be the subject of unjust or "unconscionable" action. In the most recent statement of the principles upon which the English courts will grant anti - suit injunctions, the House of Lords' decision in ***Airbus Industrie GIE v Patel [1999] 1 AC 119,*** Lord Goff of Chieveley drew a distinction between "alternative forum" cases and "single forum" cases. In the former he said the anti - suit injunction jurisdiction will be exercised where the pursuit of the relevant proceedings is *"vexatious and oppressive"*.[xlii] In the case of "single forum" cases the jurisdiction will be exercised by the English court where the pursuit of proceedings overseas is *"unconscionable"*.[xliii] But in both cases the court has to focus on *"the character of the defendant's conduct, as befits an equitable remedy such as an injunction"*.[xliv]

46. Anti - suit injunctions and Rule 11.1(1)

Rule 11.1 (1) (as scheduled to the ***CPR***) provides that a *claim form may be served out of the jurisdiction with the permission of the court if"* the *"claim"* comes within one of the lettered paragraphs of ***Rule 11.1(1).*** The *"claim"* will usually be framed in terms of a remedy that the claimant wishes the court to grant because the defendant has infringed the legal or equitable rights of the claimant, in the manner set out in the Claim Form. The remedy sought could be damages or it could be a final injunction. Once it is accepted, as I think it must be, that a claim for an anti - suit injunction is based on the actual or threatened invasion of legal or equitable rights, then it is clear, contrary to Mr Boyd's submission, that such a *"claim"* can be the subject of proceedings which the claimant intends to seek permission to serve on a defendant out of the jurisdiction.

47. In cases where the foundation for anti - suit injunction is that the defendant has brought foreign proceedings in breach of an EJC in favour of the English courts by which he is bound, the Claimant can say that, for the purposes of ***Rule 11.1(1),*** the *"claim"* falls within ***paragraph (d)***. It will be a *"claim"* to *"enforce...or otherwise affect a contract...being a contract which ...(iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine any claim in respect of the contract"*. That was the analysis and conclusion of the Court of Appeal in relation to an English arbitration clause in ***Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 2 Lloyd's Rep 279;***[xlv] see particularly the judgment of Hobhouse LJ at ***page 287*** and Sir Richard Scott V-C at ***page 291***. I note that in that case it does not seem to have occurred to anyone that there were any difficulties in making a claim for an injunction to restrain the Brazilian proceedings the subject of an action for which leave to serve out of the jurisdiction under ***RSC Order 11 Rule 1*** was needed.

48. In my view the analysis of the Court of Appeal in ***DVA v Voest*** must apply also in relation to an EJC. That is equally a contractual agreement that disputes will be resolved by a tribunal that has been chosen by the parties. A claim for an injunction to restrain a defendant who, it is said, is bound by the terms of the English EJC, must therefore be a claim to *enforce* the relevant contract; alternatively it is one that *otherwise affects* the relevant contract.

49. Where there is no English EJC or English arbitration clause, the claimant may have more difficulty in persuading the English court that his *"claim"* comes within one of the paragraphs of ***Rule 11.1(1).*** But I think that Mr Gaisman is correct in submitting that if the claim for an anti - suit injunction is in connection with a contract that is expressly governed by English law, then in principle the *"claim"* for an anti - suit injunction will be one *"brought to...otherwise affect a contract...which (iii) is by its terms, or by implication, governed by English law"*. In ***Gulf Bank KSC v Mitsubishi Heavy Industries Ltd [1994] 1 Lloyd's Rep 323*** Hobhouse J emphasised that the wording of the first part of ***paragraph (d)*** was intended to cover every possible category of contractual claim. He said that a claim for a declaration that a claimant was not bound by a contract (eg. because it has been frustrated) *"affects the contract"*. He continued: *"A claim for a negative declaration cannot be described as a claim to enforce a contract; it is the converse of that. It is a claim which affects a contract"*: ***see page 327 RHS.***

50. In my opinion Hobhouse J's analysis[xlvi] must meant that a claim for an anti - suit injunction which is made in connection with a contract that is governed by English law, is a claim *"which affects a contract"*. Thus, provided that the claimant can demonstrate that the relevant contract satisfies one or other of the criteria set out in the sub - paragraphs (i) to (iv) of ***paragraph (d)***, the claim for an anti - suit injunction in connection with a contract is capable of falling within ***paragraph (d)(iii) of Rule 11.1(1).***

51. However it is important to emphasise that, whether the claim for an anti - suit injunction is based upon an EJC or the fact that the contract is governed by |English law and the prosecution of the foreign proceedings would be *"unjust"*, there are three further hurdles that the claimant must surmount before it could obtain permission to serve the claim for an anti - suit injunction out of the jurisdiction. First the claimant must show that there is a *"good arguable case"* that (i) there is a contract; and (ii) the intended defendant is, by some means, ***bound*** by the contract, in particular the EJC. Otherwise the claim would not fall within ***paragraph (d)(iv)*** at all. I think that this is clear from the speech of Lord Goff of Chieveley in ***Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438; see particularly at 455A and 457A***. Secondly it must show that there is a serious question to be tried on whether there should be an anti - suit injunction. Thirdly it must demonstrate, in accordance with ***Rule 11.4(2)*** that it has been

made *"sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order".*[xlvii]

52. **Can the YM Insurers show that they have a "*good arguable case*" that the claim comes within *paragraph (d)(iv)*?**

There is a fundamental division between the parties on this issue. Mr Gaisman for the YM Insurers submits that once World Tanker asserts, in the Direct Action Claim, that it has statutory rights under the ***Direct Action Statute*** to bring claims on the H&M Policies, then, by the terms of the statute itself, World Tanker is asserting *"a right of direct action against the insurer within the terms and limits of the policy".* This is a contractual claim, he says, and it does not matter that World Tanker was not originally a party to the H&M Policies with the YM Insurers. He submits that World Tanker's position is no different from a person suing as an assignee of a contract[xlviii] or a person making a claim under ***section 1*** of the ***Third Parties (Rights against Insurers) Act 1930***.[xlix] Both types of claimant have been held to be bound by arbitration clauses concluded between the original parties to the contracts. Mr Gaisman says that the same principle should apply to World Tanker and the EJC in the H&M Policies. Therefore as far as an English court is concerned a person who claims on a contract by a statute that grants him a *"right of direct action against the insurer within the terms and limits of the policy"*[l] must be bound by all its terms, including the EJC. So the claim by the YM Insurers for an anti - suit injunction is one to *"enforce"* the terms of the H&M Policies, including the EJC or is one that *"otherwise affects"* those contracts. In either case there is sufficient of a contract nexus between the YM Insurers (who have always been a party to those contracts) and World Tanker, the claimants pursuant to the ***Direct Action Statute***, to say that there is a good arguable case that the claim comes within ***paragraph (d)(iv).***

53. Mr Boyd for World Tanker accepts that, in the Direct Action Claim, the Louisiana Court would be bound to construe the H&M Policies according to English law principles in the first place, but he submits that this does not mean that World Tanker would, in the eyes of the Louisiana courts, be bound by the EJC. He relies upon ***paragraph C*** of the provisions of ***§ 655***, which state that *"any action brought under the provisions of this Section shall be subject to all of the* ***lawful*** *conditions of the policy or contract and the defenses which could be urged by the insurer to a direct actin brought by the assured,* ***provided the terms and conditions of such policy or contract are not in violation of the laws of this State".***[li] Mr Boyd submits that if the Louisiana Courts were to give effect to the EJC then it would defeat the whole object of the ***Direct Action Statute***, therefore it would not do so. The English Court should put itself in the same position as the Louisiana Court which was enforcing the ***Direct Action Statute*** and so hold that World Tanker would not be bound by the EJC.

54. Although the claim for an anti - suit injunction relates to all three Louisiana Enforcement Proceedings, I think it is sensible to concentrate first on the Direct Action Claim in which World Tanker directly asserts rights against the YM Insurers. In my view there are two stages to the exercise of seeing whether there is a good arguable case that the claim by the YM Insurers for an anti - suit injunction is one *"to enforce"* or *"otherwise affects"* a contract within the four sub - paragraphs of ***Rule 11.1 (1) paragraph (d)(iv)***. The first stage is to see whether the claim by World Tanker against the YM Insurers in the Louisiana Enforcement Proceedings under the ***Direct Action Statute*** is contractual in nature. If it appears to be so, then the second stage must be to see if it there is a good arguable case that the claim by the YM Insurers in the English proceedings for an anti - suit injunction is one *"to enforce"* or *"otherwise effects"* a contract within ***paragraph (d)(iv).***

55. When the English court is considering each stage it has to decide on the nature of the claim: is it contractual or not. In doing this the English Court must, I think, perform the analysis from the viewpoint of English law concepts of a "contractual" claim. It must do so because ultimately the question is whether the claimant has a *"good arguable case"* that the type of claim comes within a procedural rule of the English Court: viz. ***Rule 11.1(1)(d)***. The English procedural rule is obviously framed with English law concepts of contract and contractual claims in mind. There is thus every practical reason for performing the analysis according to English concepts rather than those of the law of another jurisdiction where claims might be brought or are being brought. So in principle I would reject Mr Boyd's submission that I should consider the nature of the claim by World Tanker under the ***Direct Action Statute*** through "Louisiana law spectacles".

56. I also think that this was the approach of the Court of Appeal in ***DVA v Voest***. It is particularly clear in the judgment of Hobhouse LJ. The facts of the case are complicated. A ship, the ***"Jay Bola"***, had been time chartered then sub - voyage chartered. Both the time and voyage charter contained an English arbitration clause. The cargo was damaged on a voyage from Brazil to Bangkok. The Brazilian cargo insurers indemnified the voyage charterers. In return the voyage charterers gave the insurers a "subrogation receipt" that assigned to the insurers all rights of action arising out of the damage to the cargo. The Brazilian insurers then sued the shipowners and time charterers in Brazilian proceedings, doing so in their own name as statutory assignees (by Brazilian law) of the rights of the assured cargo owners. Hobhouse J held[liii]that the action of the insurers against the shipowners was irrelevant. But he held that, as against the time charterers, the rights being asserted by the Brazilian insurers were derived from the voyage charterers. He further held [liii]that, as the rights of the parties to the time charter were governed by English law, then the Brazilian insurers, as statutory assignees of the voyage charterers' rights, acquired those rights subject to the English arbitration clause. The time charterers wished to claim an injunction to restrain the Brazilian insurers from pursuing the Brazilian proceedings on the basis that they were bound by the English arbitration clause and so should arbitrate disputes in English arbitration proceedings.

57. Having held that the Brazilian insurers took their rights under the time charter subject to the arbitration clause, Hobhouse LJ then considered whether the time charterers' claim for an injunction fell within ***RSC Order 11 Rule 1 (1)(d).*** He held that it did. As I understand his reasoning, (at ***pages 285 to 288***), it was as follows: (i) the English Court is entitled to analyse, using English law concepts, the nature of the claim being brought by the Brazilian insurers in Brazil; (ii) the claim asserted by the Brazilian insurers is that of a statutory assignee (under Brazilian law) of the rights of the voyage charterers; (iii) the claim is made against the time charterers under the voyage charter; (iv) because that contract is governed by English law the question of whether the statutory assignee is bound by the arbitration clause is also governed by English law, at least so far as an English Court is concerned; (iv) as a matter of English law the statutory assignee is bound by the arbitration clause in that English law contract; (vi) the time charterers wish to prevent the statutory assignees from pursuing Brazilian proceedings in breach of the English arbitration clause; (vii) therefore the time charterers are *"enforcing"* an English law contract, so (viii) the case comes within ***paragraph (d)(iv).***

58. The position in the present case is that World Tanker has asserted a claim on the H&M Policies by virtue of the ***Direct Action Statute*** in the Direct Action Claim. It is true that World Tanker have not become a party to the policies by a mechanism of statutory novation or of statutory assignment.[liv] But in my view the nature of the rights that the ***Direct Action Statute*** confers to World Tanker is contractual; it confers a statutory right to make a claim on a contract to which World Tanker was not originally a party. And (subject to paragraph C of the Statute) the rights are confined to the *"terms and limits of the policy"*.

59. If the statutory claim by World Tanker (in the Direct Action Claim) is based on the H&M Policies and is to be characterised as contractual, then the next question is, following Hobhouse LJ's analysis in ***DVA v Voest;*** what are the terms of that contact on which World Tanker wishes to rely in order to make its claim against the YM Insurers? World Tanker accepts that the H&M Policies contain an English proper law clause and an EJC in favour of the English Courts. If World Tanker wishes to rely on some contract terms then, to an English lawyer, it must at least be highly arguable that it is subject to all the terms of that contract. So the YM Insurers would be entitled to say that if World Tanker wishes to make a claim based on the H&M Policies terms, it must be subject to all the bundle of rights and obligations contained in that contact, including the EJC.

60. It would seem that if this analysis is correct in English law, then this would also have to be the conclusion of the Louisiana courts, at least at this first stage. This is because it was accepted by Mr Boyd for World Tanker that the Louisiana court would, in the first place, construe the H&M Policies according to English law.[lv] The only reason that the Louisiana court might subsequently strike down the EJC is if it declared that it was not "*lawful*" or that it was *"in violation of the laws of this State"*.[lvi] But in my view, contrary to the submission of Mr Boyd, there is no reason why the English court should have regard to the Louisiana law concept of whether an EJC in favour of the English courts is lawful, at least when, upon an English conflicts of laws analysis, the contract is governed by English law. Hence in ***Aggeliki Charis Compania Maritima SA v Pagnan Sp (The "Angelic Grace") [1995] 1 Lloyd's Rep 87*** the Court of Appeal held that it need not have regard to the fact that the Italian court might not give effect to the English arbitration clause.[lvii] And in ***Akai v People's Insurance Co [1998] 1 Lloyd's Rep 90***, Thomas J disregarded the fact that the Australian High Court would not have given effect to the EJC in the insurance contract.

61. Therefore I conclude that the nature of the claim by World Tanker against the YM Insurers in the Direct Action Claim is contractual and the terms of that contract would include the English proper law clause and the EJC.

62. The next question must be: is the contractual nexus between World Tanker and the YM Insurers sufficient to enable the YM Insurers to say that their claim for an anti - suit injunction is one to *"enforce"* a contract that contains an EJC. In my view it is. Mr Boyd submitted that ***Finnish Maritime v Protective National Insurance Co [1989] 2 Lloyd's Rep 99*** established that for the purposes of obtaining permission to serve out of the jurisdiction under ***paragraph (d)***, the claimant and the defendant had to be parties (*"in the fullest sense"*)[lviii] to the contract upon which the claim was made. I think that the position is more subtle than that, as Hobhouse LJ makes clear in ***DVA v Voest: see page 287***.

63. In the ***Finnish Maritime case*** the claimant sought a declaration that it was ***not*** a party to a contract with the defendant and obtained leave (without notice) under ***RSC Order 11 Rule 1 (1)(d)(ii)*** to serve the proceedings on the defendant. Mr Adrian Hamilton QC, sitting as a Deputy High Court Judge, held that a claim for a declaration that there was no contract between the claimant and the defendant could not be within ***Order 11 Rule 1 (1) (d)***. So he set the leave aside. In ***DVA v Voest*** Hobhouse LJ accepted that analysis, holding that for the purposes of ***paragraphs (d) and (e) of Order 11 Rule 1(1)*** *"it is necessary to assert that there is a contract".*[lix] But he went on to hold that if the Claimant in the English proceedings ***does*** assert, for the purposes of the English proceedings, that there ***is*** a contract by which the defendant is bound and the Claimant wishes to enforce an arbitration clause in that contract, then it does not matter that one or other of parties has become bound because it is an assignee or by virtue of some other legal mechanism.

64. That is the position in this case in the Direct Statute Action. There World Tanker asserts that it has a statutory right to enforce contractual rights against the YM Insurers under the H&M Policies. The YM Insurers accept that this may be so for the purpose of the present English proceedings. The YM Insurers then say that, if that claim based on the H&M Policies is made in Louisiana, then World Tanker must be bound by all the terms, including the EJC in favour of the English Courts. And it is because the YM Insurers wish to enforce the English EJC that they bring the English proceedings for an anti - suit injunction.

65. For the purposes of seeing whether a claim fell within ***paragraph (d)***, Hobhouse LJ posed two questions in ***DVA v Voest at page 287***: *"Is there a contract? Is the [claimant] seeking to enforce that contract against the defendant?"* In the present case, in relation to the Direct Action Claim I think that the two relevant questions can be expanded to: "does the Claimant in the English proceedings rely on a contract on which the proposed defendant asserts claims in the foreign proceedings; if so is it seeking to enforce that contract against the defendant?" The answer to both question is "yes". Alternatively the claim for an anti - suit injunction against the Direct Action Claim is one that *"otherwise effects"* the H&M Policies that are governed by English law and have an EJC in favour of the English Courts. Therefore I have concluded that there is a sufficient contractual nexus between the claimant and the defendant to come within ***paragraph (d)(iv).***

66. The next issue is: does the claim for an anti - suit injunction against the Garnishee Proceedings and the State Action also fall within ***paragraph (d)(iv)***. Mr Boyd submitted generally that none of the Louisiana Enforcement Proceedings were contractual in nature. He did not advance any additional arguments on this point in relation to the Garnishee Proceedings and the State Action. But he did suggest that the nature of those two actions was so well known to the English Courts that it could not be argued that World Tanker's action in bringing them to aid enforcement was *"unconscionable"*.[lx] In argument Mr Boyd did accept that all three sets of proceedings were brought to enforce the judgment in the Louisiana Liability Proceedings. Mr Gaisman submitted that all three actions in the Louisiana Enforcement Proceedings raised the same question: what is the scope of the H&M Policies underwriters' contractual obligations under the H&M Policies. In the Garnishee Action World Tanker seeks a direct payment of sums due under the policies to the assured; in the State Action World Tanker seeks declaration of rights under the H&M Policies.

67. It seems to me that once the YM Insurers have satisfied the Court that they have a good arguable case that they can rely on a contract (the H&M Policies); that they are seeking to enforce it or that it otherwise

affects it; and that it contains an EJC in favour of the English Courts, then that must be enough to satisfy the first requirement for obtaining permission to serve out of the jurisdiction, ie. by coming within ***Rule 11.1 paragraph (d)(iv).*** The issue of whether the permission should extend to a claim for an anti - suit injunction against all the Louisiana Enforcement Proceedings, including the Garnishee Proceedings and the State Action must, I think, depend on the answers to the next two questions: is there a serious issue to be tried on the merits of the claim for an anti - suit injunction against one or more of the foreign proceedings and, if so, is this a proper case for permission to serve out of the jurisdiction.

68. But if necessary I would hold that the claims for an anti -suit injunction against those two proceedings also come directly within ***paragraph (d)(iv)***. The three Louisiana Enforcement Proceedings are all closely related. The ultimate aim of all of them is to enforce the judgment in the Louisiana Liability Proceedings. And they all seek relief (against the YM Insurers amongst others) concerning contractual rights under the H&M Policies. In the current proceedings, in relation to all the Louisiana Enforcement Proceedings, the YM Insurers rely upon the H&M Policies and say that they wish to enforce one of the terms: that is the EJC. I appreciate that, in the Garnishee and State Action proceedings, World Tanker is not asserting a direct statutory right to claim on the HP against the YM Insurers under the ***Direct Action Statute***. But I think that fact is not crucial to this issue. ***Paragraph (d)(iv)*** and the cases do not state that, in order to come within the paragraph the proposed defendant must for all purposes be bound by the EJC in the English law sense of being in privity of contract with the Claimant. Indeed ***DVA v Voest*** holds that this is not necessary. I think it is enough that for the YM Insurers to satisfy the Court that they have a good arguable case that, in relation to each of the foreign proceedings (i) they can rely on a contract (the H&M Policies); and (ii) they can *"enforce"* the EJC in relation to those proceedings; alternatively (iii) that the claim for an anti - suit injunction in relation to those proceedings is one that *"otherwise affects"* the H&M Policies.

69. Accordingly I hold that the YM Insurers have a good arguable case that the claim that the YM Insurers makes for an anti - suit injunction comes within ***paragraph (d)(iv)***. If I had concluded that there was not a good arguable case that the claim for an anti - suit injunction based on the EJC came within ***paragraph (d)(iv)***, then the same result must obtain if the claim were based on ***paragraph (d)(iii)***, relying on the English proper law clause in the H&M Policies. This is because the same issues are involved in both instances. The first is whether the claim of World Tanker is sufficiently contractual; the second is whether there a sufficiently close contractual nexus between the claimant and the defendant to come within ***paragraph (d)(iii) or (iv)***. Therefore in practice the YM Insurers can only advance their claim for an anti - suit injunction on the basis that there is an arguable case under ***paragraph (d)(iv).***

70. Are there *"serious issues to be tried"* on the YM Insurers claim on the merits for an anti - suit injunction?

Again I consider the point first in relation to the claim for an anti - suit injunction against the Direct Action Claim. The issues here will be: is World Tanker bound by the EJC; if so should it be held to that contractual provision? On both points the answer to this question must be "yes" in the light of the approach of the CA in ***Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 588*** and ***Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87.*** Mr Boyd advanced arguments that there were good reasons under ***Louisiana law*** why World Tanker should not be held bound by the EJC in the H&M Policies. But I am satisfied that the basic position, so far as the English Court is concerned, is that if someone asserts rights under a contract which contains an EJC, then that person has to show good reason why it should not be bound by that clause. Therefore there must be *"serious issues to be tried"* on the question of whether or not World Tanker should not be bound by the EJC. I would go further and say that the YM Insurers have a good arguable case that World Tanker should be bound and so the YM Insurers are entitled to the anti - suit injunction that they seek.

71. Mr Body did not suggest that, in relation to this particular point, there were distinctions in the position of World Tanker on each of the three Enforcement proceedings in Louisiana. He was right in this. They are all proceedings to enforce the Louisiana Liability judgment. All three of the actions are based on World Tanker's assertion of rights to declaratory relief or payment under the H&M Policies. Therefore there must be serious issues to be tried on the issue of whether the YM Insurers are entitled to an anti - suit injunction in relation to all three of the Louisiana Enforcement Proceedings.

72. **Has it been demonstrated that a proper case for permission to serve out: *Rule 4(2)***

Mr Boyd's arguments under this heading were, broadly, as follows. First he said that permission should not be granted because it would effectively enable the English Courts to decide on whether the Louisiana ***Direct Action Statute*** could be used when there is an EJC in the policy of insurance relied upon by the claimant in Louisiana. He said that this is a decision that should be left to the Louisiana Courts and if the English Courts did interfere it would be contrary to accepted notions of judicia comity. Secondly, he submitted that it would be wrong, by giving permission to serve out, to deprive World Tanker of its juridical advantage in Louisiana, being the right to claim under the ***Direct Action Statute*** and obtain the relief sought in the other two Enforcement Proceedings. Thirdly he submitted that the YM Insurers had agreed, by the H&M Policies, to meet liabilities of their insureds arising out of a collision and that the effect of the ***Direct Action Statute*** was to enable the insurers' liability to be enforced directly; this was a laudable policy which the English proceedings would only subvert.

73. I cannot accept these submissions. The fundamental position is that World Tanker wishes to take advantage of insurance policies that are governed by English law. The original parties to those policies agreed that disputes under them should be determined by the English Courts. If World Tanker wishes to assert claims under those policies, using a statutory right or otherwise, then I think that the English Courts' view must be that World Tanker has to accept all the terms of those policies, including the EJC, unless it can show a good reason why it should not be bound by it. I think that it is not contrary to accepted notions of comity to hold that English Court will give permission to serve proceedings on a party outside the jurisdiction when the contract relied upon in foreign proceedings contains a clause giving the English Court jurisdiction over claims arising under the contract.

74. I accept that the effect of granting permission to serve out could be, ultimately, to deprive World Tanker of the juridical advantage of the right to claim under the Direct Action Statute or other relief in the Enforcement Proceedings. But when the claim is made on a contract that contains an EJC in favour of the English Courts, it must be questionable whether that advantage is a legitimate one. I think it is certainly not so powerful an argument to be sufficient reason to refuse permission to serve out.

75. The third argument of Mr Boyd is another way of saying that the English Court should do nothing to prevent the Louisiana Courts from enforcing the ***Direct Action Statute*** That would be a powerful argument if there were no EJC in favour of the English Courts. But as there is one in the contracts on which World Tanker relies, I conclude that it is not a good reason to refuse permission to serve out.

76. **Leave to make the re-re-amendment of the Originating Summons to claim the anti - suit injunction**

The overall conclusion that emerges from the discussions above is that, in my view: (i) the YM Insurers have a good arguable claim for an anti - suit injunction against World Tanker; and (ii) subject to any deficiencies in the formalities, it is a claim for which the Court would grant permission to issue and serve proceedings out of the jurisdiction on World Tanker under ***Rule 11.1(1)(d)(iv) and Rule 11.4.*** But, logically, the prior issue is whether the YM Insurers should have leave to make the re-re-amendment to claim the anti - suit injunction. As all the relevant arguments were made at the oral hearing before me and i the written submissions afterwards, I should deal with that issue. There are two tests that the YM Insurers must satisfy. First, is the claim properly arguable and secondly, is it one for which permission to serve the claim out of the jurisdiction on World Tanker would be granted? I have concluded (for reasons set out above) that the claim is readily arguable. I have also concluded that permission to issue and serve the proceedings on World Tanker could be given, although in this particular case it is subject to the formalities point. Therefore I think that permission to make the re-re-amendment to the Originating Summons should be granted and I do so.

77. However that still leaves two further points taken by Mr Boyd, which he says are obstacles to the YM Insurers' pursuit of the claim for a permanent anti - suit injunction. They are: (i) that the YM Insurers require further permission to issue and serve the new claim on World Tanker out of the jurisdiction; and (ii) if permission is needed, the YM Insurers' failure to make any formal application or serve formal evidence before the hearing before me is fatal to the YM Insurers' application.

78. **The *"Parker v Schuller"* point**

The claim for an anti - suit injunction simply did not appear in the Originating Summons that was issued by the YM Insurers on 20 April 1999. So the first affidavit of Mr Zavos that was sworn in support of the application for permission to serve the Originating Summons out of the jurisdiction on World Tanker did not deal with this claim for an anti - suit injunction at all. The affidavit did not verify a cause of action for an anti - suit injunction or say that this was a proper case for the exercise of the English Court's powers under ***Order 11*** to grant permission to serve the proceedings on World Tanker in respect of an anti - suit injunction claim.[lxi] When the YM Insurers were granted permission (without notice) to serve the Originating Summons claiming declaratory relief upon World Tanker, the Court was not claiming to exercise jurisdiction over a person beyond the jurisdiction in respect of a claim for a permanent anti - suit injunction.

79. It is very established that if a claimant in English proceedings needs permission to serve those proceedings on a potential defendant out of the jurisdiction, then the claimant must take care to include all the causes of action on which he relies in the originating process for which he seeks leave to be served on the foreign defendant. That is the basis on which the court decides whether it will exercise this "exorbitant" jurisdiction on the foreign defendant. It is also the basis on which a foreign defendant can decide whether to take part in the English proceedings or to challenge them. This strict rule was recently reconfirmed by the Court of Appeal in ***DVA v Voest: see page 290 per Hobhouse LJ.***

80. If permission to serve a defendant outside the jurisdiction is granted under ***Order 11***, and the defendant then submits to the jurisdiction, a claimant will often wish to amend the proceedings against the defendant to expand the nature of the claim. The formal position is that the English Court will not give permission to amend unless it is satisfied that the new claim is one for which permission to serve out of the jurisdiction under ***Rule 11.1 and 4*** would be granted. A recent example of this is ***Credit Suisse First Boston (Europe) Ltd v. MLC (Bermuda) Ltd [1999] 1 Lloyd's Rep 767***, where the Claim Form was amended to add two new claimants and to add a claim for an anti - suit injunction after the original proceedings had been served within the jurisdiction.[lxii] Rix J permitted the two new claimants and the claim for an anti - suit injunction to be added, as he was satisfied that the new claimants would come within ***RSC Order 11 Rule 1(1)(d)(iii) or (iv).***[lxiii] Thus in circumstances where a foreign defendant ***has submitted to the jurisdiction*** and the claimant wishes to amend his claim to add a new cause of action, I accept that Mr Gaisman is correct in stating[lxiv]that it is not the law that *"upon a claimant applying for leave to amend existing proceedings brought against a foreign defendant a fresh application for leave must be made and fresh service out of the jurisdiction actually affected".*

81. I think a good way of testing the position is to ash what would have happened if permission to serve the Originating Summons (containing only the claim for declaratory relief) had been obtained without notice, but before World Tanker had acknowledged service the YM Insurers had decided that they wished to amend the Originating Summons to claim a permanent anti - suit injunction. I am sure that in those circumstances the YM Insurers would have had to obtain permission to amend and to issue and serve the amended Originating Summons on World Tankers out of the jurisdiction. To obtain that permission they would have had to serve evidence verifying the claim; stating that they had a good cause of action and also saying which paragraph of ***Rule 11.1(1)*** they relied on and why it was a proper case for service out of the jurisdiction.

83. I think that the same analysis ought to apply to the current situation, with some modification to take account of the unusual circumstances in this case. This is because I think that, in principle, when a foreign defendant has not already submitted to the jurisdiction of the English Court, it should not have to be subjected to a claim unless the English Court has decided that the claim is one that can and should be served on the foreign defendant under ***Rule 11.1.*** But, for the reasons that I have already given at length above, I have concluded that the anti - suit injunction claimed by the YM Insurers is a claim for which permission to serve out of the jurisdiction on World Tanker ought, in principle, to be granted. Therefore the question is what should be done in view of the fact that the YM Insurers have not complied with the formalities.

84. The failures to observe the formalities are very serious. The formalities involved are: (i) the requirement that the claimant must seek and obtain permission to issue and serve the claim on the defendant out of the jurisdiction; and (ii) the requirement that the claimant should file evidence supporting its belief that the claimant has a good cause of action in respect of the particular claim made (in this case the relief claimed

in paragraph 6 of the re-re-amended Originating Summons) and that it is a suitable case for service out of the jurisdiction.

85. However, in practice World Tanker knew from 12 January 2000 that the YM Insurers were seeking an injunction to restrain World Tanker from prosecuting any Louisiana proceedings until determination of the issues raised by the Originating Summons seeking the declaratory relief. World Tanker also knew of all the facts on which the YM Insurers relied in support of the anti - suit injunction. They had been set out in the second and third affidavits and the three witness statements of Mr Zavos that were served prior to the hearing before me in support of maintaining the permission to issue and serve the Originating Summons and in support of the interim anti - suit injunction. World Tanker also knew, at the latest from the first morning of the hearing before me, that the YM Insurers wished to re-re-amend the Originating Summons so as to claim a permanent anti - suit injunction. Therefore World Tanker could not say, nor did Mr Boyd submit, that there was any prejudice to it because there had been no formal application to obtain permission to issue and serve the claim for an anti - suit injunction on World Tanker out of the jurisdiction.

86. Further, in the course of argument all the points in favour of the YM Insurers' claim that it had a good cause of action for an anti - suit injunction and that it was a proper case for service out of the jurisdiction were canvassed by Mr Gaisman. Mr Boyd for World Tanker had the opportunity to deal with all the points and he did so comprehensively in his oral and written submissions.

87. In these circumstances it seems to me that ***in practice*** the hearing before me ought to be treated as if it were an application on notice for leave to issue and serve out of the jurisdiction a claim for a permanent anti - suit injunction at which the court had all the relevant evidence. But because there has been a failure to comply with the CPR (incorporating the old ***RSC Order 11***), then I have to consider whether I should exercise the powers I have under ***CPR 3.10*** to waive the irregularities in the formalities. ***CPR 3.10*** provides:

> *"Where there has been an error of procedure such as a failure to comply with a rule or practice direction-*
>
> *(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and*
>
> *(b) the court may make an order to remedy the error".*

88. Unless the regime of the ***RSC*** the Court of Appeal has said that the judges should exercise great care and caution when being asked to waive irregularities in procedure when it concerns an application to issue and serve proceedings out of the jurisdiction.[lxv] But Staughton LJ pointed out in ***Kuwait Oil Tanker Co SAR v Al Bader [1997] 1 WLR 1410 at 1418 - 9*** that the attitude of the Court of Appeal seemed to have been modified by the majority judgments[lxvi] in ***Golden Ocean Assurance Ltd v Martin (The "Goldean Mariner") [1990] 2 Lloyd's Rep 215.*** In the ***Kuwait Oil Tanker*** case Staughton LJ said at ***page 1419G***, that the majority in ***The "Goldean Mariner"*** concluded[lxvii] that the test should be whether there was *"good reason"* or *"good cause"* for the exercise of the discretion to waive the irregularity where service out of the jurisdiction is involved. Waite and Aldous LJ agreed with him.

89. In this case there has been very serious failures to observe the formalities. But in practical terms World Tanker has suffered no prejudice at all. I see no point in treating the hearing before me as an application by the YM Insurers, without notice, for permission to re-re-amend the Originating Summons and for leave to issue and serve the re-re-amended Originating Summons on World Tanker outside the jurisdiction. That would only lead to a repeat of the hearing before me if World Tanker wished to try to set the leave aside again.

90. I therefore conclude that there is *"good reason"* or *"good cause"* to make an order remedying the irregularities of the YM Insurers in relation to the application to re-re-amend the Originating Summons and the application to issue and serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction. In so far as this necessitates granting permission to extend the validity of the Originating Summons I will grant it. But this must be on conditions,[lxviii] which are:

(1) That the YM Insurers undertake that within 7 days of this judgment being handed down, they will file evidence that: (i) verifies their belief that the Claimants have a good cause of action in respect of the claim for a permanent anti - suit injunction as claimed in paragraph 6 of the re-re-amended Originating Summons; (ii) verifiys which paragraph of ***Rule 11.1 (1)*** the YM Insurers rely upon and why; and (iii) states why there are good reasons that the court should exercise its discretion to grant permission to issue and serve out of the jurisdiction the claim for a permanent anti - suit injunction.

(2) That World Tanker have permission (if so advised) to amend its existing Application Notice[lxix] to include an application to set aside the leave to re-re-amend the Originating Summons and the leave that I will be giving to issue and serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction.

(3) That the issue of costs be left open for argument.

91. On the assumption that the undertaking in (1) is to be given, I give permission to issue and serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction.

H. The Claim for an interim anti - suit injunction

92. It is sensible to deal with this issue at this point, having concluded that the YM Insurers have a good arguable case for an anti - suit injunction against World Tanker for the purposes of the application for leave to serve out of the jurisdiction on World Tanker. The points that were made by Mr Boyd in opposition to the application for leave were repeated in the context of the claim for an interim anti - suit injunction. I cannot accept them in that context either.

93. No specific additional points were raised on the issue of *"balance of convenience"*. In my view the balance of convenience lies in preserving the present position. By that I mean that the rights of the YM Insurers to have any claims upon them under the H&M Policies determined by the English Courts and by English law should be preserved. This does not prejudice World Tanker except that its Louisiana Enforcement Proceedings will have to be suspended until there is a trial of the issue of whether a permanent anti - suit injunction should be granted. (I deal with the declaratory relief issue below). If there is to be a trial on the anti - suit injunction issue then it should be expedited.

I. Application to set aside the permissions to serve out in relation to the declaratory relief

94. The arguments raised by Mr Boyd for World Tanker on this aspect of the case were as follows:

(1) The YM Insurers have no right to claim declaratory relief of the nature set out in the Originating Summons against World Tanker. Just as World Tanker could not sue the YM Insurers for declarations as to the scope of the H&M policy cover, so the reverse must be true. This is because, in the words of Lord Diplock in ***Gouriet v Union of Post Office Workers [1978] AC 435 at 501,*** there is no issue on *"contested legal rights, subsisting or future, of the parties represented in the litigation before it and not of anyone else"*. World Tanker particularly relies upon the Court of Appeal decision in ***Meadows Indemnity Co Ltd v The Insurance Corporation of Ireland PLC [1989] 2 Lloyd's Rep 298***. Mr Boyd submits that the effect of this is that there is no *"serious issue to be tried"* between the YM Insurers and World Tanker.

(2) The YM Insurers cannot satisfy the test that there should be a *"good arguable case"* that the claim falls within ***Rule 11.1(1)(c)***. World Tanker is not a *"necessary"* party to the claims for declaratory relief; nor can it be said to be a *"proper"* party. This is because there is no right to claim the declaratory relief against World Tanker.

(3) Because the YM Insurers have no right to obtain declaratory relief against World Tanker, they cannot satisfy the test that there is *"a serious issue to be tried"* between the parties, even if there is a *"good arguable case"* that World Tanker is a *"proper"* party;

(4) The YM Insurers cannot rely upon ***Rule 11.1(1)(d)*** because there is an insufficiently close contractual nexus between the YM Insurers and World Tanker. Also, as against World Tanker,

it is not a claim to *"enforce"* the H&M Policies nor is it one that *"otherwise affects"* those contracts.

(5) Further the claims for declarations would serve no useful purpose as World Tanker is not pursuing any claims against the YM Insurers here in England. The Louisiana Courts can deal with any issues of English law and any questions of the application of the ***Direct Action Statute*** should be left to the Louisiana Courts. Therefore this is a case of a claimant using the mechanism of a claim for a "negative declaration" to found jurisdiction in a non - natural form. Thus this is not a proper case for leave to serve the Originating Summons out of the jurisdiction under ***Rule 11.4(2).***

95. In the Application Notice and at the start of the hearing it appeared that Mr Boyd was also taking a further point that there was not a serious issue to be tried as between the YM Insurers and the First to Fourth Defendants who had been served with the proceedings within the jurisdiction.[lxx] The suggestion was that there might be some "collusion" between the assureds under the H&M Policies and the YM Insurers. But in the course of the hearing Mr Boyd did not rely on this point and I will assume that it is not being pursued.

96. **Are the YM Insurers entitled to pursue the claim for declaratory relief against World Tanker?**

Mr Boyd submits that there are no contested legal rights in issue between World Tanker and the YM Insurers. The position is, he says, the same as that between the insured and the reinsurers in the ***Meadows Indemnity case***. There the Court of Appeal struck out a claim by the ***reinsurers*** who claim a declaration as against the ***insured*** that the ***insurers*** were entitled to avoid the insurance contact, when no claim had yet been made on the ***reinsurance*** contract. Mr Boyd submitted that as there is no contract as between the YM Insurers and World Tanker, then there cannot be any contested legal right between the two parties that can give rise to a right by the YM Insurers to claim declaratory relief, as against World Tanker, on the scope of the H&M Policies. He relies particularly on the statement of May LJ in the ***Meadows Indemnity case at page 309.***

97. I cannot accept that the position in the present case is analogous to that in the ***Meadows Indemnity case***. World Tanker has brought three sets of proceedings in Louisiana in which it claims, either directly or indirectly, to be entitled to assert rights under the H&M Policies by virtue of the Louisiana ***Direct Action Statute*** or claims for declaratory relief. All those rights are challenged by the YM Insurers in two ways. They say that World Tanker has no right to make claims concerning the H&M Policies in any court other than the English Courts and also that World Tanker would have no rights or restricted rights on the proper construction of the policy terms in any case. To my mind that demonstrates that there are contested rights between the YM Insurers and World Tanker. In particular in the Direct Action Claim, although there is no direct contact between the parties, World Tanker is relying on a statutory right to claim under the H&M Policies. SO I think that there is a sufficiently direct issue between the parties to gives the YM Insurers the right to claim declaratory relief.

98. **Can the YM Insurers shows that they have a good arguable case that the claim falls within *Rule 11.1(1)(c)*?**

Mr Gaisman accepts that World Tanker is not a *"necessary"* party to the proceedings for declaratory relief. But he asserts that World Tanker is a *"proper"* party. I accept that submission. For the reasons I have already given I conclude that the YM Insurers are entitled to claim declaratory relief as to the scope of the H&M Policies as against World Tanker. Therefore World Tanker is a *"proper"* party in the sense that there is a right to claim the relief sought against it. Further, in view of the fact that the First to Fourth Defendants have stated that they will contest the claims for declarations "in part", it seems to me that there is a *"real issue"* to be tried as between the YM Insurers and the defendants who have been served within the jurisdiction. I appreciate that, as yet, the assured under the H&M Policies have made no claim against the YM Insurers for any liability arising out of the collision. But that does not preclude the insurer from obtaining declaratory relief as against his assured if it would serve a useful purpose. In my view it would do so for two reason. First there obviously is some dispute between the YM Insurers and the assureds on the H&M Policies' terms. Secondly because the same points will arise, as a matter of English law, in the Louisiana Enforcement proceedings.

99. **Can the YM Insurers show that they have a *"good arguable case"* that the claim for declaratory relief, as against World Tanker, comes within *Rule 11.1(1)(d)?***

In my view they can do so. I have already concluded, in the section above dealing with the issue of permission to serve out of the jurisdiction on the claim for an anti - suit jurisdiction, that because of the claims by World Tanker in the Louisiana Enforcement Proceedings, there is a sufficient contractual nexus between the YM Insurers and World Tanker. I also note that in the proceedings in the Orleans District (State) Court, World Tanker is itself claiming declaratory relief as to the proceeds *"due"* under the policies. It does so as a *"person interested..or whose rights.. or legal relations are affected by ... contract"* within the meaning of Article 1872 of the Louisiana Code of Civil Procedure.[lxxi]

100. IN my view the declaratory relief claimed by the YM Insurers on the scope of the H&M Policies constitutes a claim which *"otherwise effects"* the contract on which World Tanker is basing its claims in the Louisiana Enforcement proceedings. It is also, I think, a claim to *"enforce"* the contract in the sense that the YM Insurers wish to have a declaration of who the contract terms are to be enforced. Either way the claim comes within the wording of ***paragraph (d)*** as explained by Hobhouse J in ***Gulf Bank KSC v Mitsubishi Heavy Industries Ltd [1994] 1 Lloyd's Rep 323 at 329.***

101. **The procedural difficulty for the YM Insurers.**

There is a procedural difficulty for the YM Insurers in basing their claim for permissions to serve out of the jurisdiction in respect of the declaratory relief claim on ***paragraph(d)***. This paragraph was not relied on, as against World Tanker, when the application was made without notice in June 1999. But a further Application Notice was issued by the YM Insurers on 1 February 2000 in which they sought permission to serve the re-amended Originating Summons[lxxii] on the basis that the claim came within ***paragraph (d) (i), (ii), (iii) or (iv).*** Mr Gaisman submits that the procedural failure to base the original application on ***paragraph (d)*** should be remedied by the Court, exercising its powers under ***CPR 3.10.***

102. The same test of *"good reason"* or *"good cause"* to remedy these procedural irregularities must apply to this issue as it did to the procedural failures of the YM Insurers in relation to the claim for an anti - suit injunction. World Tanker has not suffered any prejudice. It had notice of the amended application and all the evidence that the YM Insurers relied on. It would be pointless to teat the hearing before me as an application without notice. Therefore I think there is *"good reason"* or *"good cause"* to remedy the procedural irregularities. The proceedings before me will be treated as the hearing on notice. World Tanker will be permitted to amend its Application Notice under ***CPR Part 11.1*** so as to challenge this ground as well. All questions on costs must be reserved.

103. **Is this a proper case for permitting service out of the jurisdiction in accordance with Rule 11.4(2)?**

Mr Boyd has two principal arguments under the hearing of "discretion". First he says that the English proceedings for a declaration will serve no useful purpose, because World Tanker is not pursuing its claims under the ***Direct Action Statute*** or the Garnishee or State Action in England, but in Louisiana. The Courts there are perfectly capable of dealing with issues of English law and the proper construction of English law contracts. The real issues will arise in the Louisiana courts once the questions of English law raised in the declaratory proceedings have been determined. Then (for example) an issue will arise in the Direct Action Claim on whether the *"pay to be paid"* clause in Clause 8.1 of the ITC (Hulls) is a *"lawful condition of the policy"* within the meaning of ***paragraph C*** of the Direct Action Statute, *§ 655.*[lxxiii]

104. I agree with Mr Boyd that if the only question was whether the English Court or the Louisiana Court should decide on the proper construction of an English law contract, then it might not be a proper case to exercise discretion to permit proceedings to be served out of the jurisdiction in relation to the declaration relief. But that is not the only issue. I cannot consider the claim for the declaratory relief in isolation. The YM Insurers have now also sought a permanent anti - suit injunction and I have held that they are entitled to serve proceedings out of the jurisdiction in respect of that claim. I have also held that they are entitled to an interim injunction. So I have held that, on the face of it, the YM Insurers are entitled to have any issues on the policies decided by the English Courts by virtue of the EJC. The YM Insurers do wish the English Courts to decide issues of construction of the H&M Policies that will bind World Tanker. Therefore the balance must be in favour of permitting service out of the jurisdiction of the claim for the declaratory relief sought on the issues of construction.

105. Mr Boyd's second point is that this is yet another case of a claimant using proceedings to obtain a "negative declaration" to found jurisdiction in the English Courts when they are not the natural forum for the resolution of the dispute between the parties. Mr Boyd submits that the Louisiana Courts must be the natural forum for the resolution of claims for enforcement of the Louisiana Liability judgment and in particular for claims under the Direct Action Statute. He relies on the well - known decisions of ***Saipem SpA v Dredging VO2BV and Geosite Surveys Ltd (The "Volvox Hollandia") [1988] 2 Lloyd's Rep 361;***[74] ***Sohio Supply Co v Gatoil (USA) Inc [1989] 1 Lloyd's Rep 588;*** and ***First National Bank of Boston v Union Bank of Switzerland [1990] 1 Lloyd's Rep 32.***[75] However my attention was drawn, after the conclusion of the oral argument, to a new recent decision of the Court of Appeal in ***Messier - Dowty Ltd v Sabena SA (21 February 2000),*** in which Lord Woolf MR stated, at ***paragraph 36*** of his judgment, that the observations of Kerr LJ in the first and last of the cases referred to above should be *"treated with reserve"* because the use of negative declarations domestically had expanded over recent years. He said *"In the appropriate case their use can be valuable and constructive".*

106. Once again I think that the problem with Mr Boyd's submission is that it ignores the facts that (i) World Tanker is asserting a claim in Louisiana under the ***Direct Action Statute*** on the H&M Policies asserts other claims concerning the H&M Policies in the other Enforcement Proceedings; and (ii) that I have held that the YM Insurers have a good arguable case for enforcing the EJC by means of an anti - suit injunction. If those conclusions are correct then the English Courts are the proper forum to claim the EJC and they are also the proper forum for the resolution of any issues on the proper construction of the policy terms. Mr Boyd was unable to rely on any case in which the Court has refused permission to serve out of the jurisdiction under ***Order 11 Rule 1***(or the new CPR) where there is an enforceable EJC in favour of the English Courts and the claimant seeks a negative declaration in the English proceedings. But there are two cases where the English Courts have held that it is proper to claim negative declaratory relief where the contract concerned was expressly governed by English law: ***HIB Ltd v Guardian Insurance Co Inc [1997] 1 Lloyd's Rep 412 at 417 per Longmore J;*** and ***Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90 at 106 per Thomas J.*** In the former case Longmore J also held that although a "negative declaration" was sought he would still exercise his discretion to permit service of the proceedings out of the jurisdiction under ***Order 11 Rule 1 (1) (d) and Rule 4 (2).***

107. It seems to me that if, in addition to being expressly governed by English law, the relevant contract is one containing an EJC in favour of the English Courts then there can be no objection to a claimant using the mechanism of a "negative declaration" if that is the only means by which the relevant issue can be brought before the English courts. So I conclude that the fact that the YM Insurers claim "negative declarations" is not, of itself, a good reason to set aside the permission to serve out of the jurisdiction the Originating Summons for declaratory relief.

J. Conclusions

108. I will summarise my conclusions. They are:

(1) A claim for an anti - suit injunction is a legitimate type of claim that can be made in an originating process for which permission is needed to serve it out of the jurisdiction under ***Rule 11.1*** on a proposed defendant;

(2) If the basis of the claim for an anti - suit injunction is that the potential defendant is attempting to rely on contractual rights, whether directly or indirectly, eg. under a statutory right of action, then the claim can, in principle, come within ***Rule 11.1 (1) (d);***

(3) In this case World Tanker is relying on the Louisiana ***Direct Action Statute*** to make claims under the H&M Policies against the YM Insurers. World Tanker's reliance on the H&M Policies, through the ***Direct Action Statute,*** establishes a sufficiently close contractual nexus between the parties for the purpose of ***Rule 11.1 (1) paragraph (d);***

(4) Because the H&M Policies contain an EJC in favour of the English Courts, the YM Insurers' claim for an anti - suit injunction is a claim to *"enforce"* the EJC in the H&M Policies within ***paragraph (d)(iv)***. It is also a claim that *"otherwise affects"* that contract;

(5) That is enough to bring the claim for an anti - suit injunction against all three Louisiana Enforcement Proceedings within ***paragraph (d).*** But, if necessary, I would hold that the claim for an anti- suit injunction against the Garnishee Proceedings and the State Action also come directly within ***paragraph (d)(iv);***

(6) Therefore the YM Insurers have a *"good arguable case"* that they bring their claim for an anti - suit injunction within ***Rule 11.1 (1) (d)(iv).***

(7) If I had concluded that there was not a good arguable case that the claim for an anti - suit injunction came within ***paragraph (d)(iv)***, then I would have reached the same conclusion in relation to ***paragraph (d)(iii)***, if the YM Insurers relied on the English proper law clause, because the same issues arise in relation to that sub - paragraph;

(8) Because World Tanker is claiming rights (under the ***Direct Action Statute*** and otherwise) to make claims concerning the H&M Policies which contains an EJC in favour of the English Courts, there is a *"serious issue to be tried"* as between World Tanker and the YM Insurers on whether an anti - suit injunction (based on the EJC) should be granted. On the facts of this case the YM Insurers have a good arguable case that they should have an anti - suit injunction;

(9) As a matter of discretion if there had been no problems of procedural irregularities I would have exercised a discretion to permit service out of the jurisdiction of a claim for an anti - suit injunction;

(10) Therefore the YM Insurers have satisfied me that they should have leave to re-re-amend the Originating Summons to claim a permanent anti - suit injunction because: (a) the claim is arguable; and (b) it is one for which permission to serve out of the jurisdiction can and should (in principle) be granted;

(11) There have been serious procedural irregularities because there had been no original claim for an anti - suit injunction and even by the time of the oral hearing the formal requirements were not completed by the YM Insurers. However World Tanker has suffered no prejudice. Therefore, exercising the Court's powers to cure irregularities under ***CPR 3.10*** I would permit the YM Insurers to make the application for permission to re-re-amend the Originating Summons and to serve it out of the jurisdiction, upon certain conditions being fulfilled.

(12) The application of the YM Insurers for an interim anti - suit injunction will be granted;

(13) The application by World Tanker to set aside the permission to serve the original claim for declaratory relief on the basis of ***Order 11 Rule 1 (1) (c)*** will be rejected;

(14) The application by the YM Insurers for permission to serve the original claim for declaration relief on the further basis of ***Rule 11.1 (1) (d)*** would be permitted, despite the formal irregularities, which I cure exercising the Court's powers under ***CPR 3.10.***

109. A great many points were raised in the course of the two days of argument and in the written submissions that were made after the oral hearing. I am very grateful to counsel for the clear and exceptionally interesting arguments put forward on all the points. As arranged at the end of the oral hearing, the parties should attempt to agree what the consequences of my conclusions should be so that an order can be prepared.

Endnotes

1. The Application Notice is dated 20 August 1999: ***Bundle 1/Tab 2***. Although the Originating Summons of the Claimants was issued under the old procedure, it has been accepted by both sides that I should use the CPR to determine the present applications.

2. The Application Notice, as originally framed, is dated 12 January 2000: ***Bundle 1/Tab 1/pages 1-2.*** During the course of the hearing before me an amended version was issued for which permission was sought: ***Bundle 1/Tab 1/pages 7A-7C***.

3. The Application Notice is dated 1 February 2000: ***Bundle 1/Tab 1/pages 5-7.***

4. The ITC terms are: *"The Underwriters agree to indemnify the Assured for three-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for: 8.1.1. loss of or damage to any other vessel or property on any other vessel..."* [The emphasis on ***"paid"*** is mind]. ***Bundle 2/page 45.***

5. See: ***ITC clause 8.3: Bundle 2/page 45***

6. The statute was passed as Act 55 of 1930, ie. in the same year as the ***Third Parties (Rights against Insurers) Act 1930.*** The Louisiana statute was subsequently amended and was re-enacted in 1958 and again in 1988. It is now known as ***Louisiana Revised Statute 22§655.***

7. The ***Direct Action Statute*** states that an *"injured person"* has a *"right of action against the insurer"* whether or not the policy of insurance sued upon was written or delivered in the state of Louisiana and whether or not such policy contains a provision forbidding such direction action, *"provided the accident or injury occurred within the state of Louisiana"*: ***§ 655 B(2): Bundle 3/page 539*** . As I have stated, the collision was about 250 miles off Portugal.

8. The full claim, as found by the court, was for damages of US$ 29.4 million plus US$5.3 million interest. But the court gave credit for US$ 12,262,000 that the Newcastle P&I Club had paid World Tanker in respect of ***"Ya Mawalay's"*** liability for the collision. There is a dispute on the nature of the payment by the Newcastle P&I Club which is referred to in paragraph 8 above. But it is agreed that the balance of the judgment is US$21.4 million.

9. In accordance with Louisiana procedure, World Tanker's lawyers had submitted draft findings of fact and law to the Judge. The judgment followed the draft findings almost to the letter.

10. **See judgment of Judge Lemmon at para 30 of the Conclusions of Law: Bundle 2/page 252.**

11 The other Kara Mara interests were added as defendants by amendment permitted by Cresswell J on 21 May 1999. He also permitted amendments to the terms of the relief sought in the Originating Summons. **Order at *Bundle 1/Tab 4/page 24***

12 That is the "three-fourths" collision liability clause.

13 This is commonly called the "pay to be paid" provision and it was dubbed the "pay to be paid" point at the hearing.

14 Sperex Shipping Company Limited was thought to be a mortgagee of the vessel and so, possibly, an assured under the H&M Policies. **Zavos Aff 1: Bundle 1/Tab 7/page 41 para 11**

15 Para 33.1 of the affidavit simply said: *"The Plaintiffs have a good arguable case in relation to each of the declarations which they seek..."* without identifying either the First to Fourth Defendants specifically or ***Rule 4(1)(d).*** **Zavos Aff.1: Bundle 1/Tab 7/page 51**

16 The Complaint is at: ***Bundle 3/page 341***

17 **Direct Action Complaint: Section VI:** ***Bundle 3/page 346.***

18 ***Bundle 3/page 347***

19 It seems that the Italian insurers participating in the two H&M policies did not plead to the merits of the claim at this stage but are contesting jurisdiction and *forum conveniens* in the Direct Action Claim: **Marsh 3:** ***Bundle 1/Tab 14/page 123 para 9***. Four Lloyd's syndicates have subsequently accepted that the Louisiana Court has jurisdiction because they have to accept that they have sufficient *"business contacts"* in Louisiana as they write insurance in favour of Louisiana insureds and/or on property situated in Louisiana: **Zavos Aff.3:** ***Bundle 1/Tab 13/page 117 para 35***

20 Heading of the ***"Supplemental Complaint": Bundle 3/page 388.***

21 See: ***Bundle 3/page 388.***

22 See: ***Bundle 3/page 391.***

23 **Para 5 of the Petition: Bundle 3/page 399.** The purpose is thus similar to that of the Declaratory relief sought by the YM insurers in the present action.

24 See: ***Bundle 3/page 403.***

25 The original version of the Application Notice had only sought to restrain World Tanker from pursuing their claims *"in the Courts of the USA"* generally and then specifically identified the three Louisiana proceedings.

26 Set out in the letter from Mr Boyd QC and Miss Blanchard dated 10 February 2000.

27 Set out in the letter from Mr Gaisman QC and Miss Sabben - Clare dated 10 February 2000.

28 That is the *"necessary or proper party"* paragraph.

29 The second Application Notice of the YM Insurers dated 12 February 2000 **(Bundle 1/Tab 1/pages 5-7)** for leave to waive any formal defects or for fresh leave to serve the Originating Summons can be dealt with under this heading.

30 Relying on the phrase of Millett LJ in ***"Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87 at 96.***

31 Second witness statement of Mr Marsh, filed on behalf of World Tankers: Bundle 1/Tab 15/page 123 para 7.

32 It was in fact Mr Boyd's submission that it was inevitable that the Louisiana Court would strike down the English EJC, because if it upheld the clause it would defeat the purpose of the ***Direct Action Statute.***

33 That is a right not to be sued in a Court contrary to the terms of the EJC.

34 The wording of §**655 B (1)** of the *Direct Action Statute:* ***Bundle 3/page 539***

35 See: ***"The Eras EIL Actions" [1992] 1 Lloyd's Rep 570 at 612 RHS, per Mustill LJ; Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 2 Lloyd's rep 279 at 290 per Hobhouse LJ.***

36 The other members of the House of Lords agreed with Lord Brandon, although Lord Goff of Chieveley preferred to regard the grant of an anti - suit injunction as *"one example of circumstances in which, in the interests of justice, the power to grant an injunction may be exercised".*:**see page 44H**

37 ***See Societe Nationale Industrielle Aerosaptiale v Lee Kui Jak [1987] AC 871 at 892B per Lord Goff of Chieveley***

38 That case was dealing with the power of the court to grant an interlocutory injunction in the context of a dispute that fell within an arbitration clause. But Lord Mustill dealt generally with the juridical basis on which the remedy of an injunction could be sought: *"...the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action":* **at 362C.**

39 This was a dissenting Advice in which he advised that the Hong Kong court could grant leave to serve a writ out of the jurisdiction where the only claim was for an interim ***"Mareva"*** injunction. But Lord Nicholls relied on the ***Laker case*** to make the point, in relation to claims for injunctions to restrain foreign proceedings, that the *"underlying right, if sought to be identified, can only be defined along the lines that a party has a right not to be sued abroad when that would be unconscionable".*:**see 310H**.

40 *As in* **Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 589:** ***see particularly at 589E-F per Steyn LJ***

41 As in ***Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87; see particularly at 96 per Millett LJ***

42 ***See page 134D.*** In that case the House of Lords emphasised that the English courts would not interfere if the English courts had no interest in the matter. Where they do, because England is a possible alternative forum, then the court will not usually interfere unless it is established that England is ***the*** natural forum: see the ***Aerospatiale case at page at 896G***

43 *See page 134E.*

44 ***Ibid.***

45 Hereafter ***"DVA v Voest"***.

46 Which was adopted and approved by the Court of Appeal in ***DVA v Voest: see*** the judgment of Hobhouse LJ at ***page 287***.

47 The second and third points are also dealt with in ***the Seaconsar case: see pages 455E and 457A, per Lord Goff of Chieveley.***

48 As in ***DVA v Voest (supra)*** where the claim in the Brazilian courts was made by the Brazilian insurers who were, by Brazilian law, the assignees of the claims of their assured against the shipowners and the time charterers. The assignees were held to be bound by the arbitration clause: see ***pages 283-4***

49 As in ***The "Padre Island" No 1 [1984] 2 Lloyd's Rep 408***, where Leggatt J held that third party cargo interests making a claim under the ***1930 Act*** were bound by the arbitration clause in the P&I Club Rules to

submit their claim for an indemnity from the Club to arbitration. Leggatt J's decision was approved in the second stage of that litigation ***sub non: Firma C-Trade SA v Newcastle P&I Association [1991] 2 AC 1 at page 33B per Lord Goff of Chieveley.***

50 The wording of ***para B(1) of the Direct Action Statute: §655: Bundle 3/page 539***

51 My emphasis.

52 See: ***page 284.***

53 See: ***pages 285-6***

54 Compare the English ***Third Parties (Rights against Insurers) Act 1930 section 1(1).*** It is often said that this section gives third parties a "statutory assignment" of rights under policies if the preconditions are fulfilled.

55 Outline Submissions of World Tanker: ***para 25.***

56 That is the wording of ***paragraph C of §655.***

57 See: ***page 94 per Leggatt LJ; page 96 per Millett LJ; page 97 per Neill LJ.***

58 The phrase used by Hobhouse LJ to characterise the same argument in ***DVA v Voest: page 287.***

59 See: ***page 287 RHS***.

60 World Tanker's Outline Argument: ***paras 47 and 48***

61 So the requirements of ***Order 11 Rule 4(1)***were not complied with.

62 Service within the jurisdiction was possible because of an express provision for a place of service in the contract between the original claimant and the defendant. But the proposed two additional claimants could not rely on that clause as they were not party to that contract.

63 See: ***page 775***

64 As he does in para 2 of the Written Submissions made by the YM Insurers on the issue of the proposed re-re-re-amendment of the Originating Summons that I invited from the parties at the close of the oral hearing before me.

65 See: ***Leal v Dunlop Bio - Processes International Ltd [1984] 1 WLR 874; Camera Care Ltd v Victor Hasselblad Aktiebolag [1986] 1 FTLR 348.***

6 Those of McCowan LJ and Sir John Megaw; Lloyd LJ dissented.

67 Their analysis had relied, by analogy, upon the restatement of the test for renewing writs under ***Order 6 Rule 8*** as stated by Lord Brandon in the House of Lords' decision in: ***Kleinwort Benson Ltd v Barbrak Ltd (The "Myrto" No 3) [1987] AC 597 at 619E.***

68 In the Written Submissions of the YM Insurers they undertook to fulfil conditions if required: ***see para 3.***

69 This was issued on 20 August 1999: ***Bundle 1/Tab 2***

70 As already noted the first affidavit of Mr Zavos had failed specifically to verify that there was a "*real issue*" to be tried between the YM insurers, as claimants, and the First to Fourth Defendants, as required by ***Rule 11.4(1)(d).*** But World Tanker's Application Notice to set aside the leave to serve the Originating Summons out of the jurisdiction did not take this technical point. It was not relied upon in argument by Mr Boyd.

71 See: para 3 of the ***"Petition for Damages in Contract and in Tort With a Request for Declaratory Judgment and Trial by Jury": Bundle 3/page 399***

72 That did not contain the claim for an anti-suit injunction at that stage.

73 ***See: Bundle /page 539.***

74 In particular the comments of Kerr LJ at ***page 371.***

75 In particular the comments of Sir Michael Kerr at ***page 38***.

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[i] The Application Notice is dated 20 August 1999: ***Bundle 1/Tab 2***. Although the Originating Sumons of the Claimants was issued under the old procedure, it has been accepted by both sdies that I shuold use the CPR to determine the present application.

[ii] The Application Notice, as originally framed, is dated 12 January 2000: ***Bundle 1/Tab 1/pages 102.*** During the course of the hearing before me an amended version was issued for which permission was sought: ***Bundle 1/Tab 1/pages 7A-7C.***

[iii] The Application Notice is dated 1 February 2000: ***Bundle 1/Tab 1/pages 5-7.***

[iv] The ITC terms are: *"The Underwriters agree to indemnify the Assured for three-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for: 8.1.1: loss of or damage to any other vessel or property on any other vessel...."* [The emphasis on ***"paid"*** is mine]. ***Bundle 2/page 45***.

[v] See: *ITC clause 8.3: Bundle 2/page 45*

[vi] The statute was passed as Act 55 of 1930, ie. in the same year as the ***Third Parties (Rights against Insurers) Act 1930***. The Louisiana statute was subsequently amended and was re-enacted in 1958 and again in 1988. It is now known as ***Louisiana Revised Statute22§655.***

[vii] The ***Direct Action Statute*** states that an *"injured person"* has a *"right of action against the insurer"* whether or not the policy of insurance sued upon was written or delivered in the state of Louisiana and whether or not such policy contains a provision forbidding such direction action, *"provided the accident or injury occurred within the state of Louisiana"*: ***§655 B (2): Bundle 3/page 539***. As I have stated, the collision was about 250 miles off Portugal.

[viii] The full claim, as found by the court, was for damages of US$29.4 million plus US$5.3 million interest. But the court gave credit for US$ 12,262,000 that the Newcastle P&I Club had paid World Tanker in respect of ***"Ya Mawlaya's"*** liability for the collision. There is a dispute on the nature of the payment by the Newcastle P&I Club which is referred to in paragraph 8 above. But it is agreed that the balance of the judgment is US$21.4 million.

[ix] In accordance with Louisiana procedure, World Tanker's lawyers had submitted draft findings of fact and law to the Judge. The judgment followed the draft findings almost to the letter.

[x] **See judgment of Judge Lemmon at para 30 of the Conclusions of Law: Bundle 2/page252.**

[xi] The other Kara Mara interests were added as defendants by amendment permitted by Cresswell J on 21 May 1999. He also permitted amendments to the terms of the relief sought in the Originating Summons. **Order at *Bundle 1/Tab 4/page 24***

[xii] That is the "three - fourths" collision liabilty clause.

[xiii] This is commonly called the "pay to be paid" provision and it was dubbed the "pay to be paid" point at the hearing.

[xiv] Sperex Shipping Compnay Limited was thought to be a mortgagee of the vessel and so, possibly, an assured under the H&M policies. **Zavos Aff 1: Bundle 1/Tab 7/page 41 para 11**

[xv] Para 33.1 of the affidavit simply said: *"The Plaintniffs have a good arguable case in relatino to each of th declarations which they seek...."* without identifying either the First to Fourth Defendants specifically or ***Rule 4(1)(d).*** **Zavos Aff.1: Bundle 1/Tab 7/page 51**

[xvi] The Complaint is at: ***Bhundle 3/page 341***

[xvii] **Direct Action Complaint: Section VI:** ***Bundle 3/page 346.***

[xviii] ***Bundle 3/page 347.***

[xix] It seems that the Italian insurers participating in the two H&M policies did not plead to the merits of the claim at this stage but are contesting jurisdiction and *forum conveniens* in the Direct Action Claim: **Marsh 3:** ***Bundle 1/Tab 14/page 123 para 9***. Four Lloyd's syndicates have subsequently accepted that the Louisiana Court has jurisdiction becuase they ahve to accept that they ahve sufficient *"business contacts"* in Louisiana as they write insurance in favour of Louisiana insureds and/on proerty situated in Louisiana: **Zavos Aff.3:** ***Bundle 1/Tab 13/page 117 para 35***

[xx] Heading of the ***"Supplemental Complaint": Bundle 3/page 388***.

[xxi] See: ***Bundle 3/page 388.***

[xxii] See: ***Bundle 3/page 391.***

[xxiii] **Para 5 of the Petition: Bundle 3/page 399**. The purpose is thus similar to that of the Declaratory relief sought by the YM Insurers in the present action.

[xxiv] See: ***Bundle 3/page 403***.

[xxv] The original version of the Applicatoin Notice had only sought to restrain World Tanker from pursuing their claims *"in the Courts of the USA"* generally and then specifically identified the three Louisiana proceedings.

[xxvi] Set out in the letter from Mr Boyd QC and Miss Blanchard dated 10 February 2000.

[xxvii] Set out in the letter from Mr Gaisman QC and Miss Sabben - Clare dated 10 February 2000.

[xxviii] That is the *"necessary or proper party"* paragraph.

[xxix] The second Application Notice of the YM Insurers dated 12 February 2000 **(Bundle 1/Tab 1/pages 5-7)** for leave to waive any forma defects or for fresh leave to serve the Originating Summons can be daelt with under this heading.

[xxx] Relyong in the phrase of Millet LJ in ***"Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87 at 96.***

[xxxi] **Second witness statement of Mr Marsh, filed on behalf of World Tanker: Bundle 1/Tab 15/page 123 para 7.**

[xxxii] It was in fact Mr Boyd's submission that it was inevitable that the Louisiana Court would strike down the English EJC, because if it upheld the clause it would defeat the purpose of the ***Direct Action Statute.***

[xxxiii] That is a right not to be sued in a Court contrary to the terms of the EJC.

[xxxiv] The wording of *§655 B (1) of the Direct Action Statute: Bundle 3/page 539*

[xxxv] See: ***"The Eras EIL Actions" [1992] 1 Lloyd's Rep 570 at 613 RHS, per Mustill LJ; Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 2 Lloyd's rep 279 at 290 per Hobhouse LJ.***

[xxxvi] The other members of the Huose of Lords agreed with Lord Brandon, althuogh Lord Goff of Chieveley preferred to regard the grant of an anti - suit injunction as *"one example of circumstances in which, in the interests of justice, the power to grant an injunction may be exercised":* ***see page 44H.***

[xxxvii] ***See Société Nationale Industrielle Aerosaptiale v Lee Kui Jak [1987] AC 871 at 892B per Lord Goff of Chieveley***

[xxxviii] That case was dealing with the power of the court to grant an interlocutory injunction in the context of a dispute that fell within an arbitration clause. But Lord Mustill dealt generally with the juridical bassi on which the remedy of an injunction could be sought: *"...the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action":* ***at 362C.***

[xxxix] This was a dissenting Advice in which he advised that the Hong Kong court could grant leave to serve a writ out of the jurisdiction where the only claim was for an interim ***"Mareva"*** injunction. But Lord Nicholls relied on the ***Laker*** case to make the point, in relatoin to claims for injunctions to restrain foreign proceedings, that the *"underlying right, if sought to be identified, can only be defined along the lines that a party has a right not to be sued abroad when that would be unconscionable":* ***see 310H.***

[xl] As in ***Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 589; see particularly at 59E-F per Steyn LJ***

[xli] As in ***Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87; see particulary at 96 per Millett LJ***

[xlii] ***See page 134D***. In that case the Huose of Lords emphasised that the English courts would not interfere if the English courts had no interest in the matter. Where they do, because England is a possible alternative forum, then the court will not usually interfere unless it is established that England is ***the*** natural forum see the ***Aerospatiale case at page at 896G***.

[xliii] ***See page 134E***.

[xliv] ***Ibid.***

[xlv] Hereafter ***"DVA v Voest".***

[xlvi] Which was adopted and approved by the Court of Appeal in *DVA v Voest: see* the judgment of Hobhouse LJ at *page 287.*

[xlvii] The second and third points are also dealt with in ***the Seaconsar case: see pages 455E and 457A, per Lord Goff of Chieveley.***

[xlviii] As in ***DVA v Voest (supra)*** where the claim in the Brazillian courts was made by the Brazillian insurers who were, by Brazillian law, the assignees of the claims of their assured against the shipowners and the time charterers. The assignees were held to be bound by the arbitration clause: see pages 283-4

[xlix] As in ***The "Padre Island" No 1 [1984] 2 Lloyd's Rep 308,*** where Leggatt J held that third party cargo interests making a claim under the ***1930 Act*** were bound by the arbitration claus ein the P&I Club Rules to submit their claim for an indemnity from the Club to arbitration. Leggatt J's deciion was approved in the second stage of that litigation ***sum nom: Firma C-Trade SA v Newcastle P&I Association [1991] 2 AC 1 at page 33B per Lord Goff of Chieveley.***

[l] The wording of ***para B(1) of the Direct Action Statute: §655: Bundle 3/page 539***

[li] My emphasis.

[lii] See: ***page 284.***

[liii] See: *pages 285 - 6.*

[liv] Compare the English ***Third Parties (Rights against Insurers) Act 1930 section 1(1).*** It is often said that this section gives third parties a "statutory assignement" of rights uner policies if the preconditoins are fulfilled.

[lv] Outline Submissions of World Tanker: ***para 25.***

[lvi] That is the wording of ***paragraph C of § 655.***

[lvii] See: ***page 94 per Leggatt LJ: page 96 per Millett LJ; page 97 per Neill LJ.***

[lviii] The phrase used by Hobhouse LJ to characterise the same argument in ***DVA v Voest: page 287.***

[lix] See: ***page 287 RHS.***

[lx] World Tanker's Outline Argument: ***paras 47 and 48.***

[lxi] So the requirements of ***Order 11 Rule 4(1)*** were not complied with.

[lxii] Service within the jurisdiction was psosible because of an express provison for a place of service in the contract between the original claimant and the defendant But the proposed two additional claimants could not rely on that clause as they were not party to that contract.

[lxiii] See: page 775.

[lxiv] As he does in para 2 of the Written Submissions made by the YM Insurers on the issue of the proposed re-re-re-amendment of the Originating Summons that I invited from the parties at the close of the oral hearing before me.

[lxv] See: ***Leal v Dunlop Bio - Processes Internatial Ltd [1984] 1 WLR 874; Camera Care Ltd v Victor Hasselblad Aktiebolag [1986] 1 FTLR 348.***

[lxvi] Those of McCowan LJ and Sir John Megaw; Lloyd LJ dissented.

[lxvii] Their analysis had relied, by analogy, upon the restatement of the test for renewing writs under ***Order 6 Rule 8*** as stated by Lord Barndon in the House of Lords' decision in ***Kleinwort Benson Ltd v Barbrak Ltd (The "Myrto" No 3) [1987] AC 597 at 619E.***

[lxviii] In the Written Submissions of the YM Insurers they undertook to fulfil conditios if required: see ***para 3.***

[lxix] This was issued on 20 August 1999: ***Bundle 1/Tab 2***

[lxx] As already noted the first affidavit of Mr Zavos had failed specifically to verify that there was a *"real issue"* to be tried between the YM Insurers, as caimatns, and the First to Fourth Defenadnts, a required by ***Rule 11.4(1)(d)***. But World Tanker's Applicaiotn Notice to set aside the leave to serve the Originating Summons out of the jurisdiction did not take this technical point. It was not relied upon in argument by Mr Boyd.

[lxxi] See: para 3 of the ***"Petitoin for Damage in Contract and in Tort with a Request for Declaratory Judgment and Trial by Jury": Bundle 3/page 399***

[lxxii] That did not contain the claim for an anti - suit injunction at that stage.

[lxxiii] See: ***Bundle/page 539.***

TAB 20

BANKRUPTCY AND INSOLVENCY ACT

RSC 1985, c B-3

Partners and separate properties

142 (1) Where partners become bankrupt, their joint property shall be applicable in the first instance in payment of their joint debts, and the separate property of each partner shall be applicable in the first instance in payment of his separate debts.

Surplus of separate properties

(2) Where there is a surplus of the separate properties of the partners, it shall be dealt with as part of the joint property.

Surplus of joint properties

(3) Where there is a surplus of the joint property of the partners, it shall be dealt with as part of the respective separate properties in proportion to the right and interest of each partner in the joint property.

Different properties

(4) Where a bankrupt owes or owed debts both individually and as a member of one or more partnerships, the claims shall rank first on the property of the individual or partnership by which the debts they represent were contracted and shall only rank on the other estate or estates after all the creditors of the other estate or estates have been paid in full.

Costs out of joint and separate properties

(5) Where the joint property of any bankrupt partnership is insufficient to defray any costs properly incurred, the trustee may pay such costs as cannot be paid out of the joint property out of the separate property of the bankrupts or one or more of them in such proportion as he may determine, with the consent of the inspectors of the estates out of which the payment is intended to be made, or, if the inspectors withhold or refuse their consent, with the approval of the court.

TAB 21

BUSINESS CORPORATIONS ACT

[SBC 2002] C 57

Capacity and powers of company

30 A company has the capacity and the rights, powers and privileges of an individual of full capacity.

Joint tenancy in property

31 (1) Every corporation is capable of acquiring and holding property, rights and interests in joint tenancy in the same manner as an individual, and, if a corporation and one or more individuals or other corporations become entitled to property, rights or interests under circumstances or by virtue of an instrument that would, if the corporation had been an individual, have created a joint tenancy, they are entitled to the property, rights or interests as joint tenants.

(2) Despite subsection (1), acquiring and holding property, rights or interests by a corporation in joint tenancy is subject to the same conditions and restrictions as attach to acquiring and holding property, rights or interests by a corporation in severalty.

(3) On the dissolution of a corporation that is a joint tenant of property, rights or interests, the property, rights or interests devolve on the other joint tenant.

Liability of shareholders of unlimited liability companies

51.3 (1) Subject to subsection (2), shareholders and former shareholders of an unlimited liability company are jointly and severally liable as follows:

> (a) if the company liquidates, the shareholders and former shareholders are jointly and severally liable, from the commencement of the company's liquidation to its dissolution, to contribute to the assets of the company for the payment of the unlimited liability company's debts and liabilities;

(b) whether or not the company liquidates, the shareholders and former shareholders are jointly and severally liable, after the company's dissolution, for payment to the company's creditors of the unlimited liability company's debts and liabilities.

TAB 22

PARTNERSHIPS ACT

[RSBC 1996] Ch 348

Definitions

"firm" is the collective term for persons who have entered into partnership with one another;

Partnership Defined

2 Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

Liability of partners

7 (1) A partner is an agent of the firm and the other partners for the purpose of the business of the partnership.

(2) The acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member bind the firm and his or her partners, unless

(a) the partner so acting has in fact no authority to act for the firm in the particular matter, and

(b) the person with whom he or she is dealing either knows that the partner has no authority, or does not know or believe him or her to be a partner.

No pledge of credit for nonfirm business

9 (1) If one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound unless the partner is in fact specially authorized by the other partners.

(2) This section does not affect any personal liability incurred by an individual partner.

Liability of firm

12 If, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his or her partners, loss or injury is caused to any person who is not a partner in the firm or any penalty is incurred, the firm is liable

for that loss, injury or penalty to the same extent as the partner so acting or omitting to act.

Execution against partnership property

26 (1) A writ of execution must not issue against partnership property except on a judgment against the firm.

(2) The Supreme Court within its territorial jurisdiction, may,

(a) on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest on it, and

(b) by the same or a subsequent order appoint a receiver of that partner's share of profits, whether already declared or accruing, and of any other money that may be coming to him or her in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions that might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or that the circumstances of the case may require.

(3) The other partner or partners is or are at liberty at any time to redeem the interest charged, or, in case of a sale being directed, to purchase it.

TAB 23

TOBACCO DAMAGES AND HEALTH CARE COSTS RECOVERY ACT
SBC 1997, CHAPTER 41

[eff July 19, 1999 to January 23, 2001]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Part 1 -- Introductory Provisions

SECTION 1

Definitions

1 (1) In this Act:

"affiliate" means affiliate as defined in section 1 of the Company Act;

"beneficiary" means a spouse, parent or child, as defined in the Family Compensation Act, of a deceased insured person;

"benefits claim" means a claim for the recovery of the cost of health care benefits;

"cost of future health care benefits" means the estimated total amount of the cost of health care benefits, resulting from tobacco related disease, that could reasonably be expected will be provided to an insured person after the date of settlement of a benefits claim or the first day of trial of an action for a benefits claim, whichever first occurs;

"cost of health care benefits" means the total amount of

(a) the cost of past health care benefits provided to an insured person, and

(b) the cost of future health care benefits to be provided to that insured person;

"cost of past health care benefits" means the total cost of the health care benefits, resulting from tobacco related disease, that are provided to an insured person before the date of settlement of a benefits claim or the first day of trial of an action for a benefits claim, whichever first occurs;

"disease" REPEALED: SBC 1998-45-2 effective November 12, 1998 (B.C. Reg. 394/98).

"exposure" means any contact with, or ingestion, inhalation or assimilation of, a tobacco product, including any smoke or other by-product of the use, consumption or combustion of a tobacco product;

"health care benefits" means

(a) benefits as defined under the Hospital Insurance Act, and

(b) benefits as defined under the Medicare Protection Act,

and includes any other health care benefits designated by regulation;

"insured person" means

(a) a person, including a deceased person, who was provided with health care benefits, or

(b) a person who is entitled to be provided with health care benefits;

"joint venture" means an association of 2 or more persons, if

(a) the relationship among the persons does not constitute a corporation, a partnership or a trust, and

(b) the persons each have an undivided interest in assets of the association;

"manufacture" includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

"manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

(a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,

(b) owns a trade-mark, trade name or brand name, registered or not, under which a tobacco product is promoted to the public,

(c) is related to a person described in this definition and has a right to use a trade-mark, trade name or brand name, registered or not, for the purpose of promoting a tobacco product to the public,

(d) for any fiscal year of the person, generates at least 10% of its worldwide revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products,

(e) is related to a person described in this definition and is engaged in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

(f) is a trade association primarily engaged in

(i) the advancement of the interests of manufacturers,

(ii) the promotion of a tobacco product, or

(iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

"person" includes a trust, joint venture or trade association;

"personal representative" means a person

(a) who is the personal representative of a deceased insured person, and

(b) who has the right to bring an action under section 3 of the Family Compensation Act on behalf of the beneficiaries,

and includes a person described in section 3 (4) of that Act;

"promote" or "promotion" includes, for a tobacco product, the marketing, distribution or sale of the tobacco product and research with respect to the tobacco product;

"tobacco product" means tobacco and any product that includes tobacco;

"tobacco related disease" means a disease caused or contributed to by exposure to a tobacco product;

"tobacco related wrong" means a tort or breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons who have been exposed or might become exposed to a tobacco product that causes or contributes to disease;

"type of tobacco product" means one or a combination of the following categories:

(a) cigarettes;

(b) loose tobacco intended for incorporation into cigarettes;

(c) cigars;

(d) cigarillos;

(e) pipe tobacco;

(f) chewing tobacco;

(g) nasal snuff;

(h) oral snuff;

(i) a prescribed form of tobacco.

(2) For the purposes of this Act, a person is related to another person if, directly or indirectly, the person is an affiliate of the other person or of an affiliate of the other person.

(3) For the purposes of subsection (2), a person is deemed to be an affiliate of another person if the person

(a) is a corporation and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, owns a beneficial interest in shares of the corporation

(i) carrying at least 50% of the votes for the election of directors of the corporation and the votes carried by the shares are sufficient, if exercised, to elect a director of the corporation, or

(ii) having a fair market value, including a premium for control if applicable, of at least 50% of the fair market value of all the issued and outstanding shares of the corporation, or

(b) is a partnership, trust or joint venture and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has an ownership interest in the assets

of that person that entitles the other person or group to receive at least 50% of the profits or at least 50% of the assets on dissolution, winding up or termination of the partnership, trust or joint venture.

(4) For the purposes of subsection (2), a person is deemed to be an affiliate of another person if the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has any direct or indirect influence that, if exercised, would result in control in fact of that person except if the other person deals at arm's length with that person and derives influence solely as a lender.

(5) For the purposes of determining the market share of a defendant manufacturer for a type of tobacco product sold in British Columbia, the court must

(a) consider the defendant manufacturer and the manufacturers related to that defendant manufacturer to be one manufacturer, and

(b) calculate the defendant manufacturer's market share for the type of tobacco product by the following formula:

$$dms = \frac{dm}{MM} \times 100\%$$

where

dms = the defendant manufacturer's market share for the type of tobacco product from the date of the earliest tobacco related wrong committed by that defendant manufacturer to the date of trial;

dm = the quantity of the type of tobacco product manufactured or promoted by the defendant

manufacturer that is sold within British Columbia from the date of the earliest tobacco related wrong committed by that defendant manufacturer to the date of trial;

MM = the quantity of the type of tobacco product manufactured or promoted by all manufacturers that is sold within British Columbia from the date of the earliest tobacco related wrong committed by the defendant manufacturer to the date of trial.

Part 2 -- Recovery of the Cost of Health Care Benefits

SECTION 13

Direct action by government

13 (1) The government has a direct and distinct action against a manufacturer to recover the cost of health care benefits that have been incurred, or will be incurred, by the government resulting from a tobacco related wrong.

(2) An action under subsection (1) is brought by the government in its own right and not on the basis of a subrogated claim.

(3) In an action under subsection (1), the government may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage resulting from the tobacco related wrong committed by the person against whom the government's action is brought.

(4) REPEALED: SBC 1999-39-62 (b) effective July 19, 1999 (B.C. Reg. 236/99).

(5) In an action under subsection (1), the government may recover the cost of health care benefits

(a) that have been provided or will be provided to particular individual insured persons, or

(b) on an aggregate basis, that have been provided or will be provided to that portion of the population of insured persons who have suffered disease as a result of exposure to a type of tobacco product.

(6) If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

(a) it is not necessary

(i) to identify particular individual insured persons,

(ii) to prove the cause of disease in any particular individual insured person, or

(iii) to prove the cost of health care benefits that have been provided or will be provided to any particular individual insured person,

(b) the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits to particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

(c) no person is compellable to answer questions with respect to the health of, or the provision of health care benefits to, particular individual insured persons,

(d) despite paragraphs (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed, and

(e) if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the names or identities of any particular individual insured persons must be deleted from any documents that are disclosed.

SECTION 13.1

Recovery of cost of health care benefits on aggregate basis

13.1 (1) In an action under section 13 for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) applies if the government proves, on a balance of probabilities, that, in respect of a type of tobacco product,

(a) the defendant manufacturer breached a common law, equitable or statutory duty or obligation owed to persons who have been exposed or might become exposed to the type of tobacco product,

(b) exposure to the type of tobacco product can cause or contribute to disease, and

(c) during all or part of the period of the breach referred to in paragraph (a), the type of tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, was offered for sale in British Columbia.

(2) Subject to subsections (1) and (4), the court must presume that

(a) the population of insured persons who were exposed to a tobacco product, manufactured or promoted by the defendant manufacturer or the manufacturers related to the defendant manufacturer, would not have been exposed to the product but for the breach referred to in subsection (1) (a), and

(b) the exposure described in paragraph (a) caused or contributed to disease in a portion of the population described in paragraph (a).

(3) If the presumptions under subsection (2) (a) and (b) apply,

(a) the court must determine the aggregate cost of health care benefits that have been, or will be, provided after the date of the breach referred to in subsection (1) (a) resulting from disease caused or contributed to by exposure to a type of tobacco product, and

(b) each defendant manufacturer to which the presumptions apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in that type of tobacco product.

(4) The amount of a defendant manufacturer's liability assessed under subsection (3) (b) may be reduced, or the proportions of liability assessed under subsection (3) (b) readjusted amongst the defendant manufacturers, to the extent that a defendant manufacturer proves, on a balance of probabilities, that the breach referred to in subsection (1) (a) did not cause or contribute to the exposure referred to in subsection (2) (a) or to the disease referred to in subsection (2) (b).

SECTION 14

Population based evidence to establish causation and quantify damages or cost

14 Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting a tobacco related wrong in an action brought

(a) by or on behalf of an insured person in the person's own name or as a member of a class of persons under the Class Proceedings Act, or

(b) by the government under section 13.

SECTION 16

Liability based on risk contribution

16 (1) This section does not apply to an action under section 13 for the recovery of the cost of health care benefits on an aggregate basis.

(2) If a plaintiff is unable to establish which defendant manufacturer caused or contributed to the exposure described in paragraph (b) and, as a result of a breach of a common law, equitable or statutory duty or obligation,

(a) one or more defendant manufacturers causes or contributes to a risk of disease by exposing persons to a type of tobacco product, and

(b) the plaintiff has been exposed to the type of tobacco product referred to in paragraph (a) and suffers disease as a result of the exposure,

the court may find each defendant manufacturer that caused or contributed to the risk of disease liable for a proportion of the damages or cost of health care benefits incurred equal to the proportion of its contribution to that risk of

disease.

(3) The court may consider the following in apportioning liability under subsection (2):

(a) the length of time a defendant manufacturer or the manufacturers related to the defendant manufacturer engaged in the conduct that caused or contributed to the risk of disease;

(b) the market share the defendant manufacturer had in the type of tobacco product that caused or contributed to the risk of disease;

(c) the degree of toxicity of any toxic substance in the type of tobacco product manufactured or promoted by a defendant manufacturer or the manufacturers related to the defendant manufacturer;

(d) the amount spent by a defendant or the manufacturers related to the defendant manufacturer on promoting the type of tobacco product that caused or contributed to the risk of disease;

(e) the degree to which a defendant manufacturer collaborated or acted in concert with other manufacturers in any conduct that caused, contributed to or aggravated the risk of disease;

(f) the extent to which a defendant manufacturer or the manufacturers related to the defendant manufacturer conducted tests and studies to determine the risk of disease resulting from exposure to the type of tobacco product;

(g) the extent to which a defendant manufacturer or the manufacturers related to the defendant manufacturer assumed a leadership role in manufacturing or promoting the type of tobacco product;

(h) the efforts a defendant manufacturer or the manufacturers related to the defendant manufacturer made to warn the public about the risk of disease resulting from exposure to the type of tobacco product;

(i) the extent to which a defendant manufacturer or the manufacturers related to the defendant manufacturer continued manufacture or promotion of the type of tobacco product after it knew or ought to have known of the risk of disease resulting from exposure to the type of tobacco product;

(j) affirmative steps that a defendant manufacturer or the manufacturers related to the defendant manufacturer took to reduce the risk of disease to the public;

(k) other considerations considered relevant by the court.

SECTION 19

Regulations

19 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the Interpretation Act.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations:

(a) designating a health care benefit for the purposes of section 1;

(b) prescribing a form of tobacco for the purposes of paragraph (i) of the definition of "type of tobacco product" in section 1.

TAB 24

DICEY, MORRIS AND COLLINS
ON
THE CONFLICT OF LAWS

FIFTEENTH EDITION

UNDER THE GENERAL EDITORSHIP OF

LORD COLLINS OF MAPESBURY
P.C., LL.D., LL.M., F.B.A.

WITH

SPECIALIST EDITORS

VOLUME 1

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were not subject to the jurisdiction of the English courts. If the bondholders had sued in Greece, the Greek courts would have applied the moratorium legislation.

2–032 In 1953, however, a Greek law provided for the amalgamation of the National Bank of Greece and a third Greek bank, the Bank of Athens. The new bank was called the National Bank of Greece and Athens. The Greek law provided that the new bank was the universal successor to all the assets and liabilities of the old banks. This meant that the National Bank of Greece and Athens was liable on the bonds, though, of course, the moratorium legislation prevented any action being brought against it in Greece. However, the Bank of Athens had been carrying on business in England and the new amalgamated bank continued to do so. Consequently, it was subject to the jurisdiction of the English courts, and a bondholder, Metliss, brought action in England claiming that it was liable under the guarantee. In *National Bank of Greece and Athens v Metliss*[52] the House of Lords held in favour of Metliss. The moratorium legislation was held to be inapplicable since it purported to alter obligations under a contract and was therefore to be characterised as contractual. Consequently, it could not affect a contract governed by English law.

2–033 Four days after the judgment at first instance was given, the Greek government passed a new law amending the law under which the banks were amalgamated. The new law provided that the amalgamated bank would be the universal successor to all the rights and obligations of the old banks, except obligations, whether as principal or guarantor, under bonds payable in foreign currency. The National Bank of Greece and Athens, which subsequently changed its name to the National Bank of Greece, immediately stopped making payments under the bonds. Another bondholder, Adams, brought new proceedings in the English courts. Did the new law relieve the National Bank of Greece from its liability under the bonds? This depended on how it was characterised. There can be no doubt that the new law was intended by those responsible for its enactment to be characterised as relating to the amalgamation of the banks. If this characterisation had been adopted by the English courts, they would have been obliged to hold that it was applicable in the case before them and that it gave a defence to the banks. The House of Lords, however, rejected this approach and gave judgment for Adams.

2–034 The whole point of the second Greek law was to force the English courts to apply the moratorium rule by re-enacting it as part of the amalgamation legislation. The House of Lords, however, refused to be taken in by this: they took the view that if the effect of the law was to discharge or alter a contractual right, it had to be regarded as contractual, whatever label might be attached to it by its author.[53] The purpose of the Greek law was to relieve the new bank of liability under the bonds and this purpose was not affected by the attempt of the Greek legislator to disguise it as something else.[54]

2–035 This case shows the undesirability of characterising rules of foreign law according to the legal system to which they belong. Attempts by foreign legislatures to force English courts to apply particular rules of law will, of

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[52] [1958] A.C. 509.

[53] [1961] A.C. 255, at p.274, *per* Viscount Simonds.

[54] See also at p.283, *per* Lord Reid: " . . . we must look at the substance and effect of a foreign law . . . "

course, be rare. But even when there is no deliberate manipulation, there is no reason why the English court should allow foreign law to decide whether a particular rule should be applied in the case before it.

2–036 It is apparent that whenever an issue of characterisation arises, the court is required to assess the arguments on their individual merits in the particular context, and will endeavour to avoid undue generalisation. The point can be made by reference to two recent decisions on legislative acts done in relation to contractual debts. In *Wight v Eckhardt Marine GmbH*,[55] the Privy Council characterised Bangladeshi statutory rules which provided for the restructuring of the business of an insolvent bank, and which had the effect of extinguishing claims against that bank and creating new claims against a new bank, as relating to the discharge of debts rather than the confiscation of property. They therefore concluded that the debt had been discharged by an act done under its proper law, and that it was not available for admission to proof in the insolvency. By contrast, in *Société Eram Shipping Co Ltd v Hong Kong and Shanghai Banking Corp Ltd*,[56] where an application was made to garnish, and thereby to discharge, a debt which was governed by the law of Hong Kong, the House of Lords held that the English statutory procedure for garnishment[57] of debts could not be applied to a debt owed by a Hong Kong debtor. Lord Hoffmann, in particular, expressed the view[58] that the compulsory discharge of debts by garnishment was akin to the confiscation of property and so was properly a matter for the *lex situs* rather than the *lex contractus*.

In *Through Transport Mutual Assurance Association (Eurasia) Ltd v New India Assurance Co Ltd*[59] the court characterised a direct claim before the Finnish courts and founded on a Finnish statute, brought by the victim of a tort against the liability insurer of the insured person who had caused loss, as contractual in nature, and therefore as a claim which fell within the scope of a contractual obligation to submit claims under the insurance to arbitration. It is unclear whether the construction of a contractual agreement to arbitrate raised a question of characterisation properly so called,[60] but to the extent that it did the court reached its conclusion without being constrained by the view of the matter which would have been taken by a Finnish court.[61]

2–037 **Equitable claims.** It will be apparent from what has been said that there may well be a lack of exact correspondence between the internal divisions of English domestic law and those of the conflict of laws. One area in which the problem of characterisation may be seen to be particularly acute is when an

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[55] [2003] UKPC 37, [2004] 1 A.C. 147.

[56] [2003] UKHL 30, [2004] 1 A.C. 260.

[57] Now known as the Third Party Debt Order procedure: CPR Pt 72, and discussed further below, Ch.24.

[58] At [54].

[59] [2004] EWCA Civ 1598, [2005] 1 Lloyd's Rep. 67 (CA).

[60] Because the question before the court was not one of choice of law to apply to a substantive dispute, but the interpretation of the obligations of an insurance contract which was governed by English domestic law.

[61] For further examples, see *Sweedman v Transport Accident Commission* [2006] HCA 8, (2006) 226 C.L.R. 362 (claim for reimbursement after payment to victim of traffic accident); *Gerling Australia Insurance Co Pty Ltd v Ludgater Holdings Ltd* [2009] NZCA 297, [2010] 2 N.Z.L.R. 145 (direct claim against insurer of tortfeasor).

TAB 25

2005

New Business Entities in Evolutionary Perspective

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THE NEW BUSINESS ENTITIES IN EVOLUTIONARY PERSPECTIVE

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The new types of business forms that have developed over the past thirty years all combine the freedom of contracting that is traditional to the partnership with the pattern of creditors' rights that is traditional to the business corporation. Legal scholars differ on the issue of whether these new business forms are more partnership-like or corporation-like. Those taking the partnership-like view argue that the degree of freedom of contract is the essential difference between the traditional corporation and partnership forms, while those adhering to the corporation-like view argue that the pattern of creditors' rights is the essential difference. The authors support the latter view. They argue that an examination of the evolution of business entities reveals that the traditional inflexibility in corporations served importantly to protect creditors' rights, but as substitute sources developed to protect the rights of all investors, the need for inflexibility diminished and freedom of contracting in the corporate form flourished.

In this essay, the authors first discuss the historical evolution of business entities, focusing on the primary role that creditor protection has played in that evolution. Next, the authors argue that, although legal scholars generally focus on limited liability when discussing creditor protection and the distinction between the corporation and the partnership, the principal feature distinguishing the corporation from the partnership is "entity shielding"—a term referring to the allocation of different rights to different groups of creditors in the assets of a firm. After discussing the importance of strong entity shielding—a characteristic of the corporation but not the partnership—and how it complements limited liability, the authors conclude that the devel-

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opment of new business forms is the culmination of the process of extending strong entity shielding to unrestricted types of entities and, therefore, the new business forms should be viewed as generalizations of the business corporation rather than the partnership.

The many legal forms for business organizations that first appeared during the last thirty years—the limited liability company (LLC), the limited liability partnership (LLP), the limited liability limited partnership (LLLP), and the statutory business trust—all combine the pattern of creditors' rights (or, as we have characterized it elsewhere, the rules of "asset partitioning"[1]) that are traditional to the business corporation with the freedom of contract among investors and managers that is traditional to the partnership. To view these new entities as partnership-like is to treat the degree of freedom of contract as the essential difference between the traditional corporation and partnership forms; to view them as corporation-like is to treat the pattern of creditors' rights as the essential difference. We believe the latter is more accurate. To be sure, both views capture important aspects of the evolution of business entities. But history shows that much of the contractual inflexibility in the traditional corporation served merely to buttress its pattern of creditors' rights, and that this inflexibility fell away upon the development of substitute sources of investor protection. The new forms are thus better understood as part of the continuing development of the corporate form rather than as entities more akin to the traditional partnership which has, in fact, been evolving in a different direction.

We develop this argument first in terms of the tradeoff between contractual freedom and the form of asset partitioning that to date has received the most scholarly attention—that is, limited liability. We then explore the evolution of the new forms from a less familiar perspective, focusing on what we term the "entity shielding" component of asset partitioning.[2]

I. THE HISTORICAL DEVELOPMENT OF BUSINESS ENTITIES

From ancient Roman times until the end of the nineteenth century, the partnership was the dominant form for organizing jointly owned business firms. In fact, until the seventeenth century the partnership was the *only* form available for most types of business. Partners bore unlimited personal liability for the contractual obligations of the firm, and this was the basis for the firm's creditworthiness.

1. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393 (2000).

2. We draw here heavily upon our working paper, Henry Hansmann, Reinier Kraakman, & Richard Squire, Legal Entities, Asset Partitioning, and the Evolution of Organizations (Oct. 2004) (unpublished manuscript, on file with the University of Illinois Law Review), which explores these themes, and the relevant history, in substantially greater depth and detail.

By the latter half of the nineteenth century, an alternative form of organization, the statutory business corporation, had also become available for most types of business activity. Because the shareholders in a business corporation had limited liability, the obligations of these companies were bonded only by the assets held in the name of the firm itself. This meant that, for the firms to be creditworthy, creditors had to have some reason to believe that the firms would generally maintain reasonable levels of assets and, in particular, that the owners of the firms would not opportunistically withdraw assets from the firms or otherwise keep firms undercapitalized.

For the small firms that dominated Western economies prior to the Industrial Revolution, a firm's owners could not credibly make such a pledge to the firm's creditors. The opportunity and incentive to siphon off assets from the firm were too great—a problem that was accentuated by poor accounting standards and weak bankruptcy procedures. Personal liability for the firm's owners was the only way to make the firm creditworthy, and thus the partnership was the dominant mode of organization.

In general, the only means for an equity investor to achieve limited liability in a creditworthy firm were through the limited partnership—a form that has ancient roots and that became available for business of all types, at least on the European continent, beginning in the fifteenth century. The limited partnership obtained credibility toward creditors by permitting limited liability only for those investors who exercised no control over the firm. The advantage of this rule was that the limited partners, while having an incentive to withdraw assets from the firm opportunistically, lacked power to do so. At the same time, the general partners, who did have the power to dissipate the firm's assets, had little incentive to do so if that would threaten the firm's solvency, as they would be personally liable for any shortfall.

In short, until the rise of the business corporation, an equity investor in a firm could enjoy control with unlimited liability, or limited liability without control, but not both control and limited liability. This last combination evidently was inconsistent with making a firm creditworthy.

II. FORMALISM AND CREDITOR PROTECTION

What permitted the business corporation to succeed in combining limited liability and control? A variety of factors were evidently important, including improved accounting, larger scale for enterprise, better bankruptcy procedures, and more robust securities markets. But the business corporation also dealt with the problem of creditworthiness by adopting a formal structure that constrained shareholder opportunism toward creditors. The early general corporation statutes in the United States were principally designed for large firms with numerous share-

holders of roughly equal status in terms of earnings and control rights, and with strong delegation of operational authority to an elected board. Control structures that expanded the powers normally attendant upon stock ownership, such as partnership-like arrangements that permitted shareholders to exercise control over management directly, were prohibited.[3] As a consequence, the withdrawal of assets by owners was conspicuous and easy to monitor. Also, the interests of noncontrolling shareholders were largely aligned with those of creditors, so that efforts by noncontrolling shareholders to protect themselves from exploitation by control persons would also redound to the benefit of the firm's creditors. Legal capital requirements were imposed and given serious effect, as they could be in such large and formal structures.

Such rigid structures were not, however, well-suited to small or closely-held firms, which required customized allocations of earnings and control. Consequently, small firms generally continued to be organized in the partnership form, in which these attributes were not just easy to establish, but were in fact the default rules.

Beginning in the late nineteenth century, the restrictions on the corporate form began to be relaxed, making the form increasingly suitable for—and thus increasingly used by—small-scale enterprises of the type that previously would have become partnerships. At the same time, legal capital requirements became increasingly flexible. In part this liberalization occurred through the revision of the general business statutes and their judicial interpretation, and in part through the adoption of special close corporation statutes.[4]

What accounts for this liberalization? An important factor, we suggest, was increasing sophistication in financial contracting that permitted firm creditors to evaluate, monitor, and control more precisely the creditworthiness of the firms in which they invested. Improved accounting and disclosure, the adoption of federal bankruptcy law in 1898 and its subsequent evolution, the imposition of federal corporate income taxation in 1909 (which demanded clear and accurate accounting), the growth of credit rating agencies, greater financial literacy among businesspersons, and better communications, presumably all contributed to this development. It became possible to give both control and limited liability to the owners of small firms without rendering the firms uncreditworthy.

The new entity forms of the past thirty years represent a continuation of this process. Although such entities provide limited liability, they also permit the freedom of internal structure that was long available only in the general partnership. How much of an incremental change they

3. *See* JESSE H. CHOPPER ET AL., CASES AND MATERIALS ON CORPORATIONS 18–22, 712 (5th ed. 2000); Lawrence M. Friedman, A HISTORY OF AMERICAN LAW 511–25 (2d ed. 1985); George D. Hornstein, *Judicial Tolerance of the Incorporated Partnership*, 18 LAW & CONTEMP. PROBS. 435, 439–48 (1953).

4. *See* CHOPPER ET AL., *supra* note 3, at 712.

constitute is, to be sure, debatable; by the time they arose, there was already great flexibility available in the close corporation. In fact, the new forms were at first motivated largely by tax considerations rather than by a desire for increased flexibility in business entities. Nevertheless, the new forms now offer at least some degree of flexibility that was previously unavailable in limited liability entities. Indeed, Delaware's business trust statute of 1988[5] arguably represents the logical culmination of this evolution: by eliminating all remaining ambiguity as to the availability of limited liability for the beneficiaries of private trusts,[6] it established a limited liability form that provides nearly complete freedom of contract as to control, allocation of earnings, and even fiduciary duties.

These developments have rendered the control rule of the limited partnership anachronistic, and with the availability of the LLP and the LLLP, that rule effectively has been abandoned.[7]

III. THE CONTINUING ROLE OF THE PARTNERSHIP

These developments do not mean, however, that the partnership has been rendered obsolete. To the contrary, the partnership remains useful for situations where the firm's own assets might not constitute a credible bond and thus the firm's owners, whether they are individuals or other firms, must pledge all of their respective assets in support of the firm's obligations to make the firm creditworthy. In fact, the partnership's suitability to this role recently was enhanced. In 1715, the Anglo-American partnership was given a modest degree of limited liability. An English court of equity ruled that year that, if a partner and his partnership were both bankrupt, the partner's personal creditors enjoyed a claim prior to that of the partnership creditors to the partner's personal assets.[8] That is, partnership creditors could levy upon a partner's personal assets only if the personal creditors had already paid in full. This rule remained in effect in the United States until 1978, when it was abandoned in favor of the rule that had prevailed for thousands of years before 1715: partnership creditors share equally with a partner's personal creditors in the partner's personal assets.[9]

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5. DEL. CODE ANN. tit. 12, §§ 3801–3862 (2001). For a thoughtful study of the development and character of the statutory business trust, see Robert Sitkoff, *Trust As Uncorporation: A Research Agenda*, 2005 U. ILL. L. REV. 31.

6. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 474–75 (1998).

7. This is not to say that most limited partnership statutes do not retain this rule. *See, e.g.*, CAL. CORP. CODE § 15632 (West 1991 & Supp. 2005); N.Y. PARTNERSHIP LAW § 121–303 (McKinney Supp. 2005). But practically speaking, if one wants to have limited liability and also exercise all the control powers typical of a partner, one can simply form one's business as an LLP, LLLP, or statutory business trust.

8. *Ex parte* Crowder, 21 Eng. Rep. 870 (Ch. 1715).

9. The change was a result of the Bankruptcy Act of 1978. *See* 11 U.S.C. § 723 (2000). It has also become a substantive rule of partnership law in those states adopting the Revised Uniform Part-

Why the reversion? The evident rationale is that the 1715 priority rule worked a compromise. Partnerships of the time were creditworthy without personal liability. At the same time, efficiency considerations suggested that firm creditors could monitor firm assets more cheaply than could personal creditors, who enjoyed a corresponding advantage with respect to personal assets. So partnership creditors were given (in 1682) priority in partnership assets,[10] but were then (in 1715) subordinated in their claim to personal assets. When, however, the corporate form with its full limited liability became a feasible means of organizing small firms, there was no longer a need for the compromise of 1715. The partnership form could be tailored to those who wanted to pledge their personal assets in full to their business ventures, and the corporate form could be employed by firms whose business creditors were willing to rely solely on business assets. Positions between these extremes could be achieved by mixing or modifying the forms, or by customized contracting between the firm and its creditors.

In short, the partnership continues to play its historical role as the business form that allows owners to pledge their personal assets to bond the firm's contracts, while corporate-type entities—including each of the new forms of the past thirty years—serve to bond the firm's contracts only with the firm's own assets. The important change over time—and it has been gradual rather than sudden—has been the emergence of various economic, technological, and legal factors that broaden the set of firms whose debts can be bonded with their own assets (i.e., that have limited liability).

This view of organizational evolution suggests a reason why European jurisdictions were far ahead of U.S. jurisdictions in adopting highly flexible limited liability forms for small businesses. The German LLC form (the GmbH) appeared in the 1890s, while the French LLC form (the SARL) dates from the 1920s.[11] Both are highly contractual limited liability vehicles for closely-held businesses. Perhaps Germany and France were offered these flexible forms so long ahead of U.S. jurisdictions because of the pro-creditor orientation of European law as contrasted with the pro-debtor orientation of U.S. law. The traditionally strong European creditor-protection measures—such as mandatory disclosure of financial statements by closely-held companies, minimum capital requirements, and creditor-oriented bankruptcy rules[12]—may have been the precondition for increased contractual freedom among investors.

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nership Act. *See generally* WILLIAM ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 56–58 (2003). The 1715 rule remains in effect in England.

10. Craven v. Knight, 21 Eng. Rep. 664 (Ch. 1682–83).

11. *See* Jacques Treillard, *The Close Corporation in French and Continental Law*, 18 LAW & CONTEMP. PROBS. 546, 553–54 (1953).

12. REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW 97–99 (2004).

IV. ENTITY SHIELDING

We have spoken so far as if limited liability were the principal feature that distinguishes the corporation from the partnership. An even more important distinction, however, lies in what we have elsewhere termed "affirmative asset partitioning,"[13] and what here we simply will call "entity shielding."[14] In a sense, entity shielding is the reverse of limited liability: while limited liability shields the assets of a firm's owners from the claims of the firm's creditors, entity shielding protects the assets of the firm from the claims of the owners' personal creditors. Entity shielding and limited liability are forms of asset partitioning in that they allocate claims to the assets of a firm and claims to the personal assets of the firm's owners to different groups of creditors.

Entity shielding, for our purposes here, comes in two forms. "Weak" entity shielding is what one finds in the traditional partnership: firm creditors enjoy first claim, over the owners' personal creditors, to firm assets. This has the virtue of reducing monitoring costs for firm creditors by giving them, in effect, a security interest in firm assets. "Strong" entity shielding, in turn, is what one finds in the business corporation. It adds to weak entity shielding a rule of liquidation protection, under which neither an owner nor his personal creditors may demand unilaterally a payout of the owner's share of firm assets. In effect, with strong entity shielding an owner and his personal creditors lose the withdrawal right that characterizes the traditional partnership at will. Strong entity shielding has the advantage of protecting a firm's going-concern value (or, as economists would put it, the value of firm-specific investments).

The corporation, then, is characterized by both strong entity shielding and limited liability, while the traditional partnership lacks limited liability and has been characterized by only weak entity shielding or (prior to the seventeenth century) none at all. This pattern of differentiation is not accidental. Strong entity shielding and limited liability are highly complementary; the presence of one generally calls for the other. The loss of the withdrawal right that constitutes strong entity shielding would render an owner's investment in the firm illiquid if the investment were not transferable. Transferability of shares, in turn, calls for limited liability.[15] Moreover, the loss of withdrawal rights removes an important source of protection for owners of minority shares against exploitation by

13. Hansmann & Kraakman, *supra* note 1, at 393.

14. This terminology, and the concepts of weak and strong entity shielding described immediately below, are taken from Hansmann, Kraakman, & Squire, *supra* note 2.

15. *See* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 92 (1985). In fact, unlimited liability is compatible with tradable shares so long as the liability is pro rata rather than joint and several. *See* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1903–04 (1991).

control persons. Limited liability has the advantage of capping the losses that minority shareholders can suffer from such exploitation.

Conversely, limited liability generally requires strong entity shielding, largely because limited liability increases the incentive for owners to withdraw from the firm when its prospects are doubtful. That incentive, in turn, creates the threat of a run on the firm's assets, which would destroy going-concern value to the detriment of both the firm's creditors and its owners.[16] By denying owners the power to withdraw unilaterally, strong entity shielding prevents such runs.

We have argued above that limited liability requires accounting innovations and monitoring technology that permit creditors to rely on a firm's assets. But accounting and monitoring methods for small firms, until recently, were highly imperfect with the consequence that limited liability tended to be confined to large firms with a standardized and easy-to-monitor ownership structure. Improvements in the technology of financial monitoring have permitted the extension of limited liability to smaller and more closely-controlled firms.

A similar argument can be offered for strong entity shielding. As we have noted, the loss of withdrawal rights that characterizes strong entity shielding removes an important source of protection for owners of minority shares in a firm. When general incorporation statutes were first enacted in the nineteenth century, the rigid structure that these statutes imposed compensated for the loss of the withdrawal right by constraining control-person opportunism toward shareholders as well as toward creditors. Important in this respect were rules designed to prevent the decoupling of control and income rights from shareholdings, such as prohibitions on shareholder voting agreements, rigid prohibitions on self-dealing transactions, and narrow interpretations of corporate purposes. Early corporate law also forbade restrictions on the free alienability of shares, thereby ensuring that shareholders who lacked withdrawal rights might have an alternate source of liquidity.

While such rigidity mitigated governance and liquidity problems associated with strong asset partitioning, it was, as we observed above, often incompatible with the needs of small, closely-held firms, in which flexibility in allocating control and income rights, and restrictions on alienation of shares, can be essential. The relaxation of this rigidity in corporate law over the intervening century suggests that sources of protection for noncontrolling owners have arisen that are superior both to the withdrawal right and to formal restrictions on the allocation of earnings and control.

In part, these new sources of protection are the same as those that redounded to the benefit of firm creditors—developments that have

16. Another important reason why limited liability requires strong entity shielding is that without it firm creditors would be exposed to excessive opportunism by the firm's owners.

made it easier for outsiders to monitor a firm's financial status and performance. Another source of protection, which appears particularly important for the viability of strong entity shielding, is increased sophistication on the part of courts in evaluating the behavior of corporate insiders. This has permitted courts to employ refined fiduciary duties in place of outright bans on particular ownership structures or transaction types. Increased sophistication in valuation techniques also reduces the need to rely upon liquidation of a firm to determine the value of an owner's share if he or his creditors need to be bought out.

The new forms of the past thirty years are the culmination of this process of extending strong entity shielding to less restricted entity types. Strong entity shielding in perpetuity is available in the LLC.[17] And recent statutory changes make clear that owners may opt for strong entity shielding for a defined period in even the partnership by forming a partnership for a term or specific undertaking.[18] Such strong entity shielding in the partnership can be combined with limited liability through the LLP or LLLP. Finally, strong entity shielding is the default rule in the statutory business trust, with its unrestricted liberty of structure.[19]

Meanwhile, the traditional partnership still plays a role with respect to entity shielding as it does with respect to limited liability. With only weak rather than strong entity shielding, the traditional partnership-at-will continues to provide a convenient entity form for owners who wish to retain a right of unilateral withdrawal as a governing device or source of liquidity.

V. HOW MANY NEW FORMS?

In short, the new statutory forms for commercial enterprise—the LLC, the LLP, the LLLP, and the business trust—are best seen as generalizations of the business corporation. They combine the pattern of asset partitioning provided by the traditional corporation—strong entity shielding and full limited liability—with the greater flexibility in internal

17. In the Uniform Limited Liability Company Act of 1996 (ULLCA), the default regime for member withdrawal is the same as under the Revised Uniform Partnership Act: a member may withdraw, rightfully or wrongfully, at any time; if the company is at will he must be bought out immediately, but if the company is for a term then buyout need not occur until the term's expiration. UNIF. LTD. LIAB. CO. ACT §§ 602(a), 701(a), 6A U.L.A. 610, 614 (2003). ULLCA expressly provides, however, that most of its rules may be altered in the company's operating agreement, including those respecting a member's withdrawal voluntarily or due to his bankruptcy. *Id.* §§ 103, 601(1),(7), at 567–68, 608–09. Moreover, ULLCA explicitly provides that the rules for determining whether a member's withdrawal is wrongful apply only "[i]f the operating agreement has not eliminated a member's power to dissociate." *Id.* § 602(b), at 610. Members of an LLC thus may contract for strong-form entity shielding and full liquidation protection in perpetuity with respect to themselves and their personal creditors. The only exception is that companies must retain procedures for dissolution or the expulsion of members upon a judicial finding of persistent misconduct or that the purpose of the company has been frustrated. *Id.* § 103 (5),(6), at 568.

18. *See* UNIF. P'SHIP ACT §§ 701(h), 801(2) (1997), 6 U.L.A. (pt. I) 189 (2001).

19. *See* DEL. CODE ANN. tit. 12, § 3808(a)–(b) (1999 & Supp. 2004).

structure that the corporate form has evolved to offer. Meanwhile, the general partnership continues to provide a very different pattern of asset partitioning—weak entity shielding and unlimited personal liability—for those firms that require it.

How many different corporate-type forms are required for the sake of efficiency, and how these forms are best structured, are questions that remain subject to debate and experimentation. In theory, any entity that can be formed as a business corporation, an LLC, an LLP, or an LLLP could be fashioned instead as a statutory business trust, simply by specifying the necessary structure in the trust's governing instrument. If the more restricted forms continue to serve a purpose, it is perhaps that they permit types of signaling and bonding that the business trust cannot provide. Alternatively, the various alternative forms may have the virtue of offering specialized sets of default rules that are suitable to different types of firms and that, if put instead in a firm's governing instrument, might prove either too flexible or too rigid.[20] Unfortunately, we do not understand these functions of legal forms well enough to reach a consensus on their appropriate number and structure.[21] Not surprisingly, then, the new entity forms have been protean, and we can expect further sorting among them.

20. *See* Henry Hansmann, Corporation and Contract 5–6 (July 2004) (unpublished manuscript, on file with the University of Illinois Law Review).

21. This is not to say that the new forms have not been the subject of thoughtful analysis. Their emergence has elicited insightful commentary by, in particular, Larry Ribstein, whose extensive writings on these forms provide our most substantial source of wisdom concerning them. *See, e.g.*, Larry Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L.J. 183 (2004).

TAB 26

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or community as being vested in the entity concerned,[27] but it did not visualize that property as belonging to the entity itself. Rather, the property belonged to the members of the entity—in other words, they were the joint rights of the entity, and the obligations of the entity were their joint obligations.[28] This is closer to the common law conception of a partnership, than of a corporation, in which it is the entity which owns the rights and is subject to the obligations. The distinction was the standing granted to *corporati* or *collegia* to enforce the collective rights and defend the collective property of its members.

§6.16 While legal standing (*i.e.*, the right to sue) was an important step towards legal personality, it was not sufficient to make corporations truly distinct legal entities under Roman law—as least as the concept of distinct entities would now be understood. For instance, there was no clear understanding (as there is under the common law) that a corporation could commit a tort.[29] In addition, Rome never moved towards the modern business corporation form, as the common law did with the development of joint stock companies. The attributes of a *societates* (an entity formed for the conduct of business in common) seem closer to the common law notion of a partnership than a corporation.[30] The rights of the *collegia* were the collective rights of the members.

§6.17 Generally, all business corporations and other companies serve as administrative devices, and are employed in connection with the acquisition, ownership, holding and controlling the use of assets. As corporations have been found to be very successful for these purposes, the vast majority of the productive assets of the economy are now owned by corporations. However, a company may just as easily be used as a device for collecting and controlling liabilities. In either case, corporations are useful as an administrative device largely because the law recognizes them as being separate persons.

§6.18 It has been said that corporate personality is essentially a metaphorical use of language, clothing the group which comprises the corporation with a separate legal identity by analogy with a natural person.[31] However, the implications of separate personality are far from

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27 Rudlolf Sohm, (tr. J.C. Ledlie), *The Institutes of Roman Law* (Oxford: Clarendon Press, 1842), at 102.

28 Rudlolf Sohm, *The Institutes of Roman Law*, at 103.

29 S. Willison, "History of the Law of Business Corporations Before 1800," 2 Harv. Law Rev. (No. 3) 105, at 107.

30 Willison, "History of the Law of Business Corporations Before 1800," 2 Harv. Law Rev. (No. 3) 105, at 107.

31 J.H. Farrar, *Company Law* (London: Butterworths, 1985), at 56. See also L.L. Fuller, *Legal Fictions* (Stanford, CA: Stanford University Press, 1967), at 19.

metaphorical. Not only is personality the basic attribute of a corporation that separates it from other forms of organization, it is that unique personality that distinguishes that corporation from its members.[32] Most of the other attributes of corporate existence are no more than a logical outgrowth of this separate personality. The separate personality of the corporation is relevant in determining to whom particular acts, rights, duties, liabilities, powers and capacities are to be attributed: the corporation or its members,[33] for separate personality implies that any of these which belong to the company or its members are distinct from those which belong to the other.[34] Similarly, where two corporations are owned by the same shareholder, the acts, rights, duties, liabilities, powers and capacities of each are distinct from those which are attributable to the other.[35] For instance, a corporation is not bound by any principle of *res judicata* or *issue estoppel* as a result of a judgment obtained against one of its shareholders.[36] From the time when a corporation is legally incorporated,[37] it is considered to be a legal person and will be bound by any rule of law applying to persons generally.[38] It will be treated as an independent person with rights and liabilities belonging to itself,[39] even where there is only a single owner of the corporation.[40]

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32 *Meadow Farm Ltd. v. Imperial Bank of Canada*, [1922] 2 W.W.R. 909, 66 D.L.R. 743 (Alta. C.A.).

33 *Meadow Farm Ltd. v. Imperial Bank of Canada*, [1922] 2 W.W.R. 909, 66 D.L.R. 743 (Alta. C.A.); *Discount & Loan Corp. of Canada v. Canada (Superintendent of Insurance)*, [1938] Ex. C.R. 194, aff'd [1939] S.C.R. 285.

34 *Meadow Farm Ltd. v. Imperial Bank of Canada*, [1922] 2 W.W.R. 909, 66 D.L.R. 743 (Alta. C.A.); *Keewatin Tribal Council Inc. v. Thompson (City)*, [1989] M.J. No. 295, 5 W.W.R. 202 (Q.B.).

35 *Northern Electric Co. v. Frank Warkentin Electric Ltd.*, [1972] M.J. No. 21, 27 D.L.R. (3d) 519 at 530 (C.A.), *per* Dickson J.A. But compare *Bagby v. Gustavson International Drilling Co.*, [1980] A.J. No. 743, 24 A.R. 181 at 199 (C.A.), var'g [1979] A.J. No. 767, 20 A.R. 244 (S.C.T.D.), *per* Laycraft J.A.

36 See, generally, *Kuin v. 238682 Alberta Ltd.*, [1997] A.J. No. 1115, 56 Alta. L.R. (3d) 329 (M.C.); compare, however, *Barakot Ltd v. Epiette Ltd.*, [1997] B.C.L.C. 303.

37 A company cannot become subject to a legal obligation (*e.g.*, by entering a contract) prior to its incorporation: *Omista Credit Union Ltd. v. Thomson*, [1982] N.B.J. No. 389, 43 N.B.R. (2d) 628 at 631, 113 A.R. 628 (C.A.), *per* La Forest J.A. See Chapter 5 regarding pre-incorporation contracts at para. 3.149, *et seq.*

38 See, for instance, *R. v. Esam Construction Ltd.*, [1973] O.J. No. 2266, 2 O.R. (2d) 344 (H.C.J.) (corporation bound by by-law requiring all persons to obtain a building permit).

39 *Salomon v. Salomon & Co.* [1897] A.C. 22 (H.L.); see also *Rielle v. Reid* (1899), 26 O.A.R. 54 at 60; *Clarkson Co. v. Zhelka*, [1967] 2 O.R. 565 (H.C.); *Re H.E.P.C. and Thorold* (1924), 55 O.L.R. 431, leave to appeal ref'd. 26 O.W.N. 386 (C.A.); *Rogers-Majestic Corp. v. Toronto*, [1943] S.C.R. 440; *Mission Hill Tire & Auto Centre Ltd. v. Killerney Group Ltd.*, [1989] A.J. No. 904, 38 C.P.C. (2d) 64 (Master).

40 *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.); *Waldron v. Hogan*, [1934] 3 D.L.R. 800 at 801 (B.C. Co. Ct.), *per* Swanson Co. Ct. J. Compare, however, the decision of Winter J. in *Royal Stores Ltd. v. Brown* (1956), 5 D.L.R. (2d) 146 (Nfld. T.D.).

as an independent entity (so that the benefit of the contract or transaction flows primarily to its own account) or whether it is acting simply for and on behalf of some other person.[198] To establish such a relationship, the facts must be such that a finding of agency would be made even if the purported principal had no shareholding in the corporation.[199] Moreover, where a person believes that he or she is contracting with a corporation rather than its owner, a claim of agency is untenable.[200]

§6.79 Separate personality also implies that the shareholder of a corporation has no legal or equitable interest in the assets of the corporation. The sole shareholder of a corporation may be convicted of theft of the property of the corporation.[201] So strictly is this rule applied that at one time a shareholder was seen to possess no insurable interest in the assets belonging to the corporation.[202]

§6.80 This extreme view no longer represents the law in Canada. In *Constitution Insurance Co. of Canada v. Kosmopoulos*,[203] Wilson J. (giving the opinion of the majority) held that the restriction of the scope of insurable interest to a direct proprietary interest was not realistic in the modern economy. The policies underlying the requirement for an insurable interest (prevention of wagering; lack of risk to the insured if the property is damaged) were held not to require such a restrictive view of insurable interest. Where an insured can demonstrate some relation to or concern in the insured property, the insured has a sufficient insurable interest. A person has an insurable interest where that person has a normal expectation of deriving an advantage or benefit from the insured property, but for the risk or damages against which the insurance is

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198 *Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co.*, [1921 2 A.C. 465 (H.L.); *Patton v. Yukon Consolidated Gold Corp.*, [1934] O.W.N. 321 at 324, *per* Middleton, J.A., additional reasons at [1936] O.R. 308 (C.A.); *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, [1997] O.J. No. 3773 (H.C.J.), [1998] O.J. No. 4368, 41 B.L.R. (2d) 42 (C.A.).

199 See, generally, *E.B.M. Co. v. Dominion Bank*, [1937] 3 All E.R. 555 at 564 (P.C.), *per* Lord Russell of Killowen; *Clarkson Co. v. Zhelka*, [1967] 2 O.R. 565 at 578 (H.C.), *per* Thompson J.; *Keewatin Tribal Council Inc. v. Thompson (City)*, [1989] M.J. No. 295, [1989] 5 W.W.R. 202 (Q.B.); *Pioneer Concrete Services Ltd. v. Yelnah Pty. Ltd.* (1987), 5 A.C.L.C. 467, 11 A.C.L.R. 108 (S.C.N.S.W.). Compare, however, *Smith, Stone & Knight Ltd. v. Birmingham Corp.*, [1939] All E.R. 116, *per* Atkinson J.; *DHN Food Distributors Ltd. v. Tower Hamlets London Borough Council*, [1976] 1 W.L.R. 852, [1976] 3 All E.R. 462 (C.A.).

200 *Bank of Montreal v. Canadian Westgrowth Ltd.*, [1990] A.J. No. 125, 102 A.R. 391 (Q.B.), aff'd [1992] A.J. No. 371, 135 A.R. 49 (C.A.).

201 *Re A.G.'s Reference (No. 2 of 1982)*, [1984] Q.B. 624 (C.A.), *per* Kerr L.J.; *R. v. Phillippou* (1989), 89 Cr. App. R. 290 (C.A.), *per* O'Connor L.J.

202 *Macaura v. Northern Assurance Co.*, [1925] A.C. 619 at 626 (H.L.). The problem was not simply one of lack of a proprietary (and therefore insurable interest), but also the difficulty of accurately measuring loss — *per* Lord Buckmaster. See also *Guarantee Co. of North America v. Aqua-Land Exploration Ltd.*, [1965] S.C.J. No. 65, [1966] S.C.R. 133; *Constitution Insurance Co. of Canada v. Kosmopoulos*, [1987] S.C.J. No. 2, 36 B.L.R. 283 at 291, *per* Wilson J.

203 [1987] S.C.J. No. 2, 36 B.L.R. 283.

TAB 27

THE CONFLICT OF LAWS

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1

The Legal Issue

1. Characterization

1. Characterization

Rule 1: The characterization of facts into a legal issue is carried out according to the concepts and characterizations of the lex fori.

Courts of law do not, in the conflict of laws, rule on the rights of the parties on the basis of the facts alone. Rather, to determine if an action may be brought and to determine which country's laws will apply to the facts in issue, the court must decide what legal issue is presented by the facts. Since the same facts may give rise to different legal issues in different countries the court must decide whether to characterize the facts into a legal issue according to the concepts of the forum, or some other system of law.

It is universally accepted that such characterization must be carried out on the basis of the concepts of the forum, i.e., the *lex fori*, since a court generally applies its own law to all definitional functions and since the entire conflict of laws analysis of the forum depends on the initial formulation of the legal issue. Moreover, at the initial stage in the analysis there is no other system of law available which can be regarded as legally relevant and which can demonstrate a greater right to determine the issue than the *lex fori*. As a general rule, a court applies its own laws to all matters before it unless there is some reason in point of policy to lead the conflict of laws rules to indicate the application of another system of law. In addition, in some cases it is not always evident that a conflict of laws issue is present at this beginning stage in the litigation process.

In *Ogden v. Ogden*[1], a woman domiciled in England went through a marriage ceremony in England with a 19-year-old man domiciled in France. The marriage took place without the consent of the groom's parents which was by French law a prerequisite to a valid marriage. An issue arose in England as to the validity of the marriage. If the legal issue fell to be determined by French law, an issue of essential validity of marriage would have arisen. If, on the other hand, English law was determinative of the legal issue, an issue of formal validity would have arisen. The court adopted the English (the *lex fori*) characterization of the facts into a legal issue, and found the lack of parental consent to involve a problem of formal validity.

1 [1908] P. 46 (C.A.).

substance/procedure doctrine, problems may develop. It is logically possible to envisage a case where the burden of proof in the forum is regarded as procedural and yet the burden of proof according to the *lex causae* is so intimately connected with the right as to be regarded as substantive. In this case there would be two conflicting burdens of proof. Similarly, the burden of proof in the forum may be so closely connected with the right as to be regarded as substantive, and yet the burden of proof in the *lex causae* may be regarded as procedural. Although such a conclusion is somewhat embarrassing with respect to the statute of limitations cases, it is not insurmountable. In the case of the burden of proof, however, it grinds litigation to a halt. In the interests of convenience, the traditional view should be continued and the burden of proof for issues before the court ought to be regarded as procedural.

C. Proof of foreign law

When foreign law is relevant to a conflict of laws case it is regarded as a fact and must be proved as any other fact. Accordingly, the rules with respect to the proof of foreign law are procedural and peculiar to the individual forum.[123]

D. Witnesses

Whether a witness is competent or compellable pertains to the method whereby facts are proven and is therefore a matter of procedure, to be determined exclusively by reference to the *lex fori*.[124] Where the prohibition or the enabling rule of the forum turns on the status of a person, for example, a wife, the appropriate issue of status may have to be determined in accordance with the conceptual framework as a preliminary issue.

E. Admissibility

Questions as to the admissibility of evidence are procedural since they are concerned with the proof of facts as opposed to the existence of a right.[125] Where a document in writing is in issue, a distinction must be drawn between extrinsic evidence introduced to interpret the written document and extrinsic evidence introduced to add, to vary, or contradict the document (parol evidence rule).[126] Questions as to the admissibility of a document *per se* are determined in accordance with the *lex fori*.[127] In Canada, copies of foreign documents are generally inadmissible at common law. This position has been altered by statute when dealing with many official documents.[128] To determine the inroads on the common law, resort must be had to the statutory

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123 See, as to proof of foreign law, *supra*, pp. 32-41.

124 See *Bain v. Whitehaven & Furness Ry. Co.* (1850), 3 H.L. Cas. 1 at 19; see also *Kennedy v. Anderson* (1919), 50 D.L.R. 105 (Sask. C.A.).

125 *Malo v. Clement*, [1943] 4 D.L.R. 773 (Ont.); *Yates v. Thompson* (1835), 6 E.R. 1541 (H.L.); and *Bain v. Whitehaven & Furness Ry. Co.*, *supra*, note 124.

126 Such evidence is regarded as a matter of interpretation governed by the proper law of the contract: *S. Pierre v. South Amer. Stores (Gath & Chaves) Ltd.*, [1937] 1 All E.R. 206 at 209, affirmed [1937] 3 All E.R. 349 (C.A.).

127 *Bristow v. Sequeville* (1850), 155 E.R. 118; and *Brown v. Thornton* (1837), 112 E.R. 70.

128 See, e.g., the Evidence Act, R.S.N.S. 1967, c. 94, ss. 62, 63; and the Evidence Act, R.S.A. 1980, c. A-21, s. 37.

(a) Constitutional Law

Marriage, in the common law sense, is generally described as the voluntary union of one man to one woman for all time, a major purpose of which is the propagation of the species.[28] The importance of marriage in society is reflected in the laws which have been established to regulate marriage and the resultant rights and obligations.[29] The concept of marriage in Anglo-Canadian law contains both contractual and status aspects.[30] Although the laws of the various countries in the world are similar in their regulation of the marital relationship, they are not identical. It becomes, therefore, of crucial importance to determine which system of law determines the validity and nature of a marriage.

In Canada, the Constitution Act[31] divides legislative authority, with respect to marriage, between the federal and provincial governments. Pursuant to section 91(26) the federal Parliament has exclusive authority with respect to "Marriage and Divorce". By section 92(12) and (13), the provincial legislatures have exclusive jurisdiction to make laws concerning "Solemnization of Marriage in the Province" and "Property and Civil Rights in the Province". In a number of court decisions, it was held that the division of legislative powers resulted in the federal Parliament having jurisdiction over what is commonly referred to as essential validity and the provincial legislatures having jurisdiction over formal validity.[32] Although the provincial legislatures have made substantial legislative enactments in their spheres of influence,[33] the federal Parliament has devoted the bulk of its legislative attention to divorce. Accordingly, the laws in Canada with respect to the validity of marriage are a mixture of statute law and common law.

(b) Polygamy

(i) Definition

The laws originally developed by the courts and the legislatures were created with reference to the Anglo-Canadian concept of marriage. In *Hyde v. Hyde*[34] an issue arose as to the availability of the English matrimonial law to a party to a marriage which did not conform to this ideal. In his petition, a husband sought a divorce from his wife on the ground of adultery. The parties, members of the Mormon church, had been married in Utah in accordance with Mormon law. By this law, the husband was free to take more than one spouse. Sir J.P. Wilde held that the petitioner's claim must be dismissed since the marriage was tainted by polygamy even though no additional spouse had been taken.

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28 *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130 at 133.

29 The past ten years have seen extensive family law reform throughout the provinces of Canada, e.g., the Family Relations Act, R.S.B.C. 1979, c. 121; the Family Law Reform Act, R.S.O. 1980, c. 152; and the Family Law Reform Act, 1978 (P.E.I.), c. 6.

30 McLeod and Baker, *Contracts and the Family* (1980), pp. 16 et seq.

31 1867.

32 *Re The Marriage Law of Can.* (1912), 7 D.L.R. 629 (P.C.); and *Kerr v. Kerr*, [1934] S.C.R. 72.

33 See the various provincial marriage acts, which regulate *inter alia*, who may obtain a marriage licence, who may perform marriage ceremonies, who must consent to marriage and the ability to dispense with consent.

34 (1866), L.R. 1 P. & D. 130.

35 *Ibid.*, at p. 133.

carriage of goods by sea. The Canada Shipping Act[242] contains provision in accordance with general maritime law. Although common law conflict of laws rules would lead to the rejection of any claim based on foreign revenue laws, various tax conventions have provided a mechanism to rationalize the competing taxing jurisdictions.[243]

The bulk of contract-related legislation has been generated by the provincial governments. Under the Constitution Act,[244] the provincial governments have exclusive legislative jurisdiction over property and civil rights[245] in general, and over particular types of contracts such as insurance.[246] Where the legislature has exclusive jurisdiction, in a subject area, it also has jurisdiction to enact choice of law provisions. Although the constitution restricts provincial legislation to activities within the province, indirect extraprovincial application can be accomplished through the conflict of laws rules. These provisions may take the form of choice of law rules which will give extraprovincial effect to the provincial legislation if the law of the province becomes the *lex causae* by its application,[247] or may simply provide that whenever a matter is before its courts certain statutory provisions apply.[248] Such devices have been used extensively in legislation concerning marriage contracts or settlements, personal property security, and consumer protection.

8. Particular Contracts

(a) Agency

(i) Rights and obligations of principal and agent inter se

Rule 160: The mutual rights and obligations of the principal and agent are governed by the proper law of the agency.

In dealing with legal problems resulting from an agency situation, it is important to distinguish between problems concerning the rights of the principal and agent *inter se* and problems concerning the rights and obligations of the principal or agent and third persons.[249] The former is governed by the proper law of the contract of agency, i.e., the system of law with reference to which the agency was constituted.[250] Such law

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242 R.S.C. 1970, c. S-9.

243 As to the various tax conventions see Stikeman, *Income Tax Act* (1980-81), 11th Tax Reform Addition (1981).

244 1867, c. 3.

245 *Ibid.*, s. 92(13).

246 See *In Re ss. 4 and 70 of The Canadian Insurance Act 1910*, 48 S.C.R. 260, affirmed [1916] 1 A.C. 588 (P.C.); and *A.G. Ont. v. Reciprocal Insurers (R. v. Craigon; R. v. Otte)*, [1924] 1 D.L.R. 789.

247 See *Morin v. Gen. Motors Accept. Corp.* (1972), 27 D.L.R. (3d) 46 (Ont. H.C.); and *Indust. Accept. Corp. v. Jordan* (1969), 6 D.L.R. (3d) 625 (N.W.T.).

248 See, e.g., the Family Law Reform Act, 1978 (Ont.), c. 2, s. 57 [now Family Law Reform Act, R.S.O. 1980, c. 152, s. 57] regarding domestic contracts.

249 But see *Ruby S.S. Corp. Ltd. v. Commercial Union Assur. Co.* (1933), 150 L.T. 30 (C.A.), where the above rule was approved as a principle affecting third parties; see the criticism by Falconbridge, *Essays in the Conflict of Laws*, 2nd ed. (1954), p. 437; and Dicey and Morris, *The Conflict of Laws*, 10th ed. (1980), p. 910, at note 38.

250 *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79 (C.A.); *The Tolla*, [1921] P. 22; *The Luna*, [1920] P. 22; *Employers' Liability Assur. Corp. v. Sedgewick Collins & Co.*, [1927] A.C. 95 (H.L.); *First Russian Ins. Co. v. London & Lancashire Ins. Co.*, [1928] Ch. 922; and *Sinfra Akt. v. Sinfra Ltd.*, [1939] 2 All E.R. 675.

TAB 28

ESSENTIALS OF
CANADIAN LAW

CONFLICT OF LAWS

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C. THE CHOICE OF LAW PROCESS

The traditional choice of law process uses a series of rules, each of which links a legal category or issue with a particular system of law by means of a connecting factor.[16] For example, one such rule could be that claims in tort are governed by the law of the place where the tort was committed. In this example, tort is the legal category or issue and the connecting factor is the place of the tort. To apply the rule, we identify the place of the tort and that place, as the connecting factor, leads us to the applicable law. This rule covers only tort, and so we would need a separate rule for other legal categories or issues such as contract, unjust enrichment, the transfer of property, trusts, and so on.

One hallmark of the traditional process is that it chooses the applicable law without focusing on the content of that law or on the result it will reach when applied. An Ontario court could use the rule in the example above to identify Texas law as the law applicable to a tort claim without first knowing anything about that law. In this sense the choice of law process operates at one step removed from the resolution of the underlying dispute.

As we will see, the selection of the connecting factor is critical in formulating a choice of law rule. There are many possible connecting factors. Some are relatively certain and predictable. These include a person's domicile or habitual residence and the place where a specific act occurs, such as the commission of a tort or the making of a contract. These sorts of connecting factors have a relatively narrow focus. They are quite specific and can therefore be described as rigid connecting factors. Other connecting factors have a broader focus and are thought to be more flexible. These include the "proper law" of a contract, ascertained by weighing several factual connections to various legal systems. One of the core debates in choice of law is how rigid or how flexible the connecting factor should be for a particular rule.

Most choice of law rules use a single connecting factor, whether rigid or flexible. However, it is possible to have a choice of law rule that uses multiple connecting factors. For example, a rule could provide that the formal validity of a contract is governed by either the law of the place of contracting or the proper law of the contract. If each connecting factor pointed to a different legal system, the contract would need to be formally valid only under one of the two. For another example, a rule could provide that claims in tort are governed by both the law of the place where the tort occurred and by the law of the forum.

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16 See von Savigny, above note 8 at 27, 89, and 148–51.

must determine which French legal rules are part of that law.[28] Causes of action, issues, and legal rules are all characterized in different situations.

A related issue at the second stage flows from statutes with explicit territorial limitations. If Ontario law has been identified as the applicable law in a contract case, this includes its legislation relating to contract. But if a particular aspect of that legislation provides that it applies only to cases with a specific territorial connection to Ontario, can it be applied even where that connection is absent, by virtue of having been determined to be the applicable law? For example, *The Arthur Wishart Act (Franchise Disclosure), 2000*, applies only if the "the business operated by the franchisee under the franchise agreement or its renewal or extension is to be operated partly or wholly in Ontario."[29] Ontario courts have held that if, on a choice of law analysis, the applicable law is that of Ontario then the statute applies notwithstanding this provision.[30]

2) The Approach to Characterization

Characterization cannot be done in a vacuum: it must be done within the context of a specific system of law. A cause of action is only in tort, for example, if within a particular legal system it is characterized as such. There is no such thing as a tort claim in the abstract. This raises the second debate, which concerns whether characterization is done with reference to the law of the forum or some other system of law.

The mainstream approach is to characterize using forum law. Just as the choice of law rules are those of the forum, the process of interpreting those rules to determine what causes of action or issues they cover would also use forum law. If a plaintiff brings a claim in Ontario, we ask how Ontario law characterizes the claim and then use the relevant choice of law rule. This approach almost seems so obvious that it is hard to see any other viable approach.

But the situation becomes less clear in certain cases. Suppose the plaintiff is alleging a claim that is available only under German law and does not exist in Ontario law. How can the Ontario court characterize that claim under Ontario law? Doing so seems to demand that a square peg be fitted into a round hole. To address such cases, some

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28 As *Re Cohn*, above note 26, and *Re Maldonado's Estate*, [1954] P 223 (CA), illustrate, at this second stage the characterization can concern either the distinction between substance and procedure (as in the former) or the difference between two legal categories (as in the latter).

29 SO 2000, c 3, s 2(1).

30 *405431 Ontario Ltd v Midas Canada Inc*, 2010 ONCA 478; *Trillium Motor World Ltd v General Motors of Canada Ltd*, 2015 ONSC 3824 at paras 119–42.

commentators have proposed that the characterization should be done not with reference to the law of the forum but instead with reference to the law that would end up governing the claim, often called the *lex causae*. Under this approach, the Ontario court would characterize the claim as German law would. In this example, the likely result is that Ontario would then not have a choice of law rule for that legal category and would need to formulate one.

The idea that characterization should be done according to the *lex causae*, the law which the choice of law rule is itself trying to identify, has been widely criticized as entirely circular. The plaintiff cannot simply assert a claim under German law and then insist the choice of law process follow German characterization; the point of the choice of law process is to see whether there is any basis for looking to German law rather than the law of the forum to resolve the dispute. In addition, *lex causae* characterization breaks down if there are two possibly applicable foreign legal systems, for example German law and Austrian law, and they each characterize the cause of action or issue differently, leaving no answer to the question of which is to be preferred.[31]

As a result, the common law characterizes using the law of the forum. However, some modifications are made to attempt to better address these more difficult cases. First, if the claim is unknown to the law of the forum, it is characterized as its closest functional equivalent under that law. For example, German law recognizes contracts of inheritance. There is no directly comparable legal institution in Ontario law, but using a functional analysis it seems likely that the closest analogy would be to a will and the law of succession rather than to contract law.[32]

Second, there is some limited willingness to adjust the forum legal system's domestic divisions to better align with international norms. Kahn-Freund and others call this approach one using the "enlightened" law of the forum.[33] The leading example of this is in the choice of law rules on property. As will be explained in Chapter 16, while the common law generally distinguishes between real and personal property, most other legal systems instead distinguish between immovable

31 Rogerson, above note 22 at 270; Kahn-Freund, above note 2 at 372. Forsyth addresses additional problems with *lex causae* characterization such as those of cumulation and gap: above note 22 at 152.

32 See Kahn-Freund, above note 2 at 376.

33 *Ibid* at 373–77; Forsyth, above note 22 at 153–54. Kurt Lipstein is a leading advocate of this approach: see his "Characterization" in Kurt Lipstein, ed, *International Encyclopedia of Comparative Law*, vol 3, above note 15 at 5–7; and also Kurt Lipstein, *Principles of the Conflict of Laws, National and International* (The Hague: Martinus Nijhoff, 1981) at 96–97.

TAB 29

CANADIAN CONFLICT OF LAWS

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it would be unreasonable to have each of these interests governed by a different law, the courts have adopted the rule that succession is governed by the law of the deceased's last domicile. Predictability gives security to the parties.[58]

v. *Convenience, Simplicity, and Ease in the Determination and Application of the Law to Be Applied*

Conflict of laws rules should be simple and easy to apply; they should facilitate the judicial task. Preference for the law of the forum simplifies the judicial task. For instance, it is more convenient for a court to apply its own rules of procedure than foreign rules. However, simplification of the judicial task is not the only objective of a system of conflict of laws, and opposing considerations may outweigh it.

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[1] *The Choice of Law Process* (1965) at 65.

[2] Cavers, "A Critique of the Choice of Law Process" (1933) 47 Harv. L. Rev. 173 at 189.

[3] For an example of a rule-selecting approach, see *Babcock v. Jackson*, 12 N.Y. 2d 473 (C.A. 1963), discussed in chapter 35, Torts.

[4] See section 1.14.c, Principles of Preference.

[5] "A Critique of the Choice of Law Process" (1933) 47 Harv. L. Rev. 173 at 203.

[6] See, for instance, *Clark v. Clark*, 107 N.H. 351 (1966) discussed in chapter 35, Torts.

[7] *The Choice of Law Process* (1965) at 9.

[8] Currie, "Notes on Methods and Objectives in the Conflict of Laws" (1959) Duke L.J. 171 at 177.

[9] See chapter 3, Characterization and the Incidental Question, and chapter 5, Renvoi.

[10] His proposals were later modified in (1963) 63 Col. L. Rev. 1233 at 1242–43, the text of which appears here. © 1963 by the Directors of the Columbia Law Review Association, Inc. All rights reserved. Reprinted by permission. See also Currie, *Selected Essays on the Conflict of Laws* (1963) at 183–84, 188–89; "The Disinterested Third State" (1963) 28 L. & Contemp. Probs. 754. Currie did not invent the method of governmental interest analysis. He found it in cases involving workmen's compensation, such as *Alaska Packers Assoc. v. Industrial Accident Comm.*, 294 U.S. 532 at 547 (1935), *per* Stone J.

[11] *The Choice of Law Process* (1965) at 63–64.

[12] A false-conflict situation; this is discussed below.

[13] See, for instance, *Re Paris Air Crash of March 13, 1974* (1975), 399 F. Supp. 732.

[14] In later writings, Currie no longer maintained that the *lex fori* must always prevail in a case in which the court can find a reasonable basis for the application of its own law. In such a situation the forum's interest may be construed away by "a moderate and restrained interpretation of its policy."

[15] "Notes on Methods and Objectives in the Conflict of Laws" (1959) Duke L.J. 171 at 176–77 and *Selected Essays on the Conflict of Laws* (1963) at 181–82.

[16] Cavers, The Choice of Law Process (1965) at 74.

[17] For a criticism of Professor Currie's views see also Ehrenzweig, "Choice of Law: Current Doctrine and 'True Rules'" (1961) 49 Cal. L. Rev. 240 at 243–48; Hill, "Governmental Interest and the Conflict of Laws: A Reply to Professor Currie" (1960) 27 U. Chi. L. Rev. 463; Mann, "The Doctrine of International Jurisdiction Revisited: After Twenty Years" (1984) 186 Rec. des Cours 13 at 27; Juenger, "Conflict of Laws: A Critique of Interest Analysis" (1984) 32 Am. J. Comp. L. 1; Brilmayer, "Government Interest Analysis: A House without Foundations" (1985) 46 Ohio St.L.J. 459. For an illustration of the judicial process involved in identifying governmental interests, see *William v. Rawlings Truck Line*, 357 F.2d 581 (D.C. Cir. 1965). Some courts define interests broadly

to the capacity to marry of persons domiciled in Canada. In the absence of legislation by the Dominion, that question does not arise here and is fully reserved. All that we decide in regard to it is that the Dominion legislation, as it stands, does not affect the present case.[22]

Characterization in the conflict of laws is akin to characterization as it may present itself in connection with the division of legislative power in Canada. In order to determine whether a particular statute is legislation in relation to a matter coming within a particular class of subjects in section 91 or section 92 of the *Constitution Act, 1867*, the true nature and character of the legislation must be determined, and regard must be had as to what the legislation was aimed at or devised for and what object it had in view. In the conflict of laws, the classes of questions or issues mentioned in various conflict of laws rules are described in such general terms as sometimes to render the rules ambiguous, and in order to decide whether a particular provision of the law of a given country relates to a matter which falls within the question or issue identified in one rule or the question or issue identified in another rule, it is necessary to determine the underlying nature or character of the provision in question. It happens that the *Kerr* and *Underwood* cases not only illustrate the solution of questions or issues of characterization in general, but they turn upon the distinction between formalities of solemnization of marriage on the one hand, and capacity to marry or intrinsic validity of marriage on the other hand, a distinction which is also material in the conflict of laws.

The nature of the requirement of a civil ceremony for a marriage was the main issue in *Berthiaume v. Dastous*.[23] The Privy Council decided that it pertained to form and not capacity, therefore a marriage celebrated in France by a priest without the prior civil ceremony required by French law was declared invalid even though the religious ceremony was sufficient according to the law of the domicile of the spouses.

In the common law provinces the courts have characterized the nature of an interest in a thing by the law of the place where it is located.[24] At common law the basic distinction between proprietary interests in things is the distinction between realty and personalty. In the conflict of laws, however, Anglo-American courts have generally adopted the civil law distinction between movables and immovables, although this is by no means universal, in order to arrive at a common basis on which to determine questions between persons living under different legal systems. This distinction is not co-extensive with the distinction between realty and personalty. Some courts, however, have held that the civil law distinction is not necessary when the conflict is between two jurisdictionsthat both recognize the distinction between realty and personalty.[25] This view was criticized as unsound by Robertson[26] and by Falconbridge.[27] Of course, after the governing law has been selected on the basis of the distinction between movables and immovables, the distinction between realty and personalty may become relevant again in order to apply the governing law.

In *Hogg v. Provincial Tax Commission*,[28] the Saskatchewan Court of Appeal had to characterize mortgages charged upon lands in British Columbia that were owned by a person who died domiciled in Saskatchewan. Applying the law of British Columbia, the Court held that they were immovables and thus not subject to the Saskatchewan *Succession Duty Act* of 1938 which applied only to "devolution by or under the law of the province."[29] If the mortgages had been characterized as movables they would have

CHAPTER 30

FOREIGN CORPORATIONS

§30.1 STATUS, POWERS, DOMICILE, RESIDENCE AND NATIONALITY

Corporations and other legal persons or juridical entities duly created in foreign states or in other provinces or territories, are recognized and permitted to sue and be sued[1] in Canada in their corporate capacity[2] subject, in certain cases,[3] to registering or obtaining a local licence.[4] However, a foreign corporation's failure to obtain a provincial licence does not immunize it against suits brought against it in any of the provinces or territories nor does it affect its corporate existence.[5]

Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation.[5.1] This domicile is in the state, province or territory of incorporation or organization and it cannot be changed during the corporation's existence even if the corporation carries on business elsewhere.[6]

The law of the state, province or territory under which a corporation has been incorporated or organized determines whether it has come into existence, its corporate powers and capacity to enter into any legal transaction,[7] the persons entitled to act on its behalf[8] including the extent of their liability for the corporation's debts,[9] and the rights of its shareholders.[10] Furthermore, the instrument of incorporation and the laws of a corporation's domicile govern not only its creation and continuing existence, but also all matters of internal management, the creation of share capital and related matters.[11] The issues governed by the law of the corporation's domicile include its capacity to sue, the authority of directors, who may be appointed a director, its power to make contracts, the validity of conveyances of corporate property, the corporation's right to issue stock, and the validity of transfers of its stock.[12]

While the state, province or territory in which the foreign corporation intends to carry on business has the right to prescribe the extent to which the corporation may exercise its corporate powers and capacity, this does not mean that proceedings may be taken in this jurisdiction to affect its status as a corporation.[13] However an important exception to this exists in respect of a foreign partnership formed solely for the purposes of creating a tax loss in the forum and not for doing business. The existence of such a partnership will be determined by the law of the forum.[14]

There is some controversy over which law determines the liability of a corporation for the obligations of a foreign subsidiary. Since the personality and status of the subsidiary is called into question, it would seem that the law applicable to the status and capacity of the subsidiary should determine whether its corporate veil can be pierced. Alternatively, under the technique of *depeçage* the court could apply the *lex fori* to jurisdiction as a matter of procedure in order to determine the identity of the true defendant but this would encourage forum shopping for the jurisdiction most favourable to piercing the corporate veil. For other matters, the law governing the contract or tort that

gives rise to the litigation against the foreign subsidiary would determine whether its corporate veil should be pierced since, arguably, piercing the corporate veil should be characterized as a function of the dispute and not of the status of the corporation.

In Quebec, according to article 307 of the *Civil Code*, the domicile of a legal person is at the place and address of its head office, which is generally where it has been incorporated. However, article 3083 of the *Civil Code* makes it clear that: "The status and capacity of a legal person are governed by the law of the country under which it was formed subject, with respect to its activities, to the law of the place where they are carried on." The law of the place of incorporation prevails.

A corporation may have more than one residence[15] for different purposes, as for instance, for liability to taxation,[16] liability to suit,[17] security for costs,[18] and enemy character.[19] Each case depends upon its own facts and on the purpose and wording of the relevant statute or rule.[20] For purposes of international law, a corporation has the nationality of the state under the law of which it has been organized, that is, the place of incorporation and the place of the registered office.[21] For the purposes of the conflict of laws, many legal systems subject a corporation to the law of its nationality, which depends upon the place where its head office is located.[22]

Where an association is incorporated simultaneously in two or more jurisdictions or reincorporated in another jurisdiction, it has more than one legal personality and domicile but "there is in reality only one association, and a body incorporated by two or more states must not be treated as though it were a partnership of two or more associations. The same association is the subject of the various incorporations. There is but one entity in existence, but one organization. To treat the association as a number of separate though closely united bodies would be to disregard the actual situation and invert the view of the business world."[23] This is particularly true where the association, although incorporated in several places, has its central management located in one place and has only one board of directors.

Canadian courts should recognize multiple incorporations or reincorporations if permitted by the law of the jurisdictions in which each incorporation or reincorporation took place. Therefore, depending upon the issue, any act done by the association should be recognized and given effect in Canada, if it is valid by the law of the relevant place of incorporation or reincorporation. In case of conflict among the requirements of the laws of the places of incorporation or reincorporation, the law of the place of incorporation or reincorporation most closely connected with the issue should prevail. Where the association is recognized as one entity by the legal system where it is incorporated or reincorporated, it should be recognized in Canada. In other words, the association must be permitted to exist at one time as a single entity under all legal systems where it is incorporated or reincorporated.

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[1] *Browning-Ferris Industries Inc. v. Browning-Ferris Industries Inc.*, Remple, [1976] B.C.J. No. 12, [1976] 3 W.W.R. 759 (S.C.); *Canadian Stock Breeders Service Ltd. v. Reimer and Reimer*, [1976] B.C.J. No. 31, [1976] 3 W.W.R. 448 (S.C.), revd on other grounds [1976] B.C.J. No. 9, [1976] 5 W.W.R. 405 (C.A.); *International Assn. of Science and Technology for Development v. Hamza*, [1995] A.J. No. 87, 122 D.L.R. (4th) 92 (C.A.) (The right of a foreign litigant to sue is governed by the *lex fori*, including its rules relating to private international law applicable to foreign litigants.

1987). The tax conventions also use residence as a connecting factor.

[17] *A.G. v. Niagara Falls International Bridge Co.*, [1873] O.J. No. 197, 20 Gr. 490 at 497 (Can.).

[18] See *infra*, para. 30.3, note 17 and *Pet Milk Canada Ltd. v. Olympia & York Developments* (1974), 4 O.R. (2d) 640 (M.C.).

[19] *Daimler Co. Ltd. v. Continental Tyre & Rubber Co. (Great Britain) Ltd.*, [1916] 2 A.C. 307 at 339 (H.L.).

[20] *Charron v. La Banque Provinciale du Canada*, [1936] O.J. No. 78, [1936] O.W.N. 315 (H.C.J.); *Tytler v. C.P.R.*, [1898] O.J. No. 150, 29 O.R. 654 at 657; *Archer v. Society of the Sacred Heart of Jesus*, [1905] O.J. No. 141, 9 O.L.R. 474 at 487 (C.A.).

[21] *E.g.*, *Janson v. Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484 at 497, 498, 501, 505 (H.L.); *Barcelona Traction, Light & Power Co. Ltd.*, [1970] I.C.J. Rep. 3. A corporation could have more than one nationality, for example, if it were incorporated in more than one state.

[22] Siège social.

[23] Foley, "Incorporation, Multiple Incorporation and the Conflict of Laws" (1929), 42 Harv. L. Rev. 516 at 520; Smart, "Corporate Domicile and Multiple Incorporation in English Private International Law," [1990] J. of Bus. L. 126 (A.C.). See also *Arab Monetary Fund v. Hashim (No. 3)*, [1991] 2 A.C. 114 (H.L.), *per* Lord Templeman at 162 and *Westland Helicopters v. Arab Organization for Industrialization*, [1995] 2 All E.R. 387 at 403 (Q.B.) (principle of unity of the association in spite of multiple incorporation).

§30.2 CHANGES IN STATUS: AMALGAMATION, DISSOLUTION AND WINDING-UP

a. Amalgamation

If a foreign corporation is amalgamated with another foreign corporation under the law of the place of incorporation, the new entity will be recognized in Canada, and if that law provides for the new corporation to succeed to the assets and liabilities of its predecessors, the corporation will be recognized as having done so.[1] However, the law of the place of incorporation cannot discharge the new corporation from the liabilities of the old one unless it happens to be the proper law of the contract giving rise to those liabilities.[2]

b. Continuance and Dissolution

A corporation may, for a variety of reasons, such as amalgamation, wish to leave the jurisdiction where it was incorporated and to be continued and governed by the law of another jurisdiction. For such a continuance to be possible it must be possible by the law of the exporting jurisdiction and by the law of the importing jurisdiction.[3]

Canadian law recognizes that a foreign corporation can be dissolved under the law of its place of incorporation.[4] If, according to that law, the corporation is in the process of being wound up, it can still sue and be sued in Canada;[5] but if this process has ended and the corporation has been dissolved, it no longer exists in the eyes of Canadian law.[6] Neither the foreign corporation nor an unincorporated Canadian branch can sue or be sued in Canadian courts.[7] Whether the corporation has been so dissolved is a question of fact based on the evidence of the foreign law concerned.[8] A corporation dissolved by the law of the place of its incorporation ceases to be a legal person, and its Canadian assets belong to the Crown as *bona vacantia* since they cannot vest in a non-existent person. However, it has been held that the Crown, in right of the province[9] where land belonging to a foreign