COURT OF APPEAL

Dec 12, 13, 2000; Jan. 26, 2001

RAIFFEISEN ZENTRALBANK OSTERREICH A.G.
v.
FIVE STAR GENERAL TRADING L.L.C. AND OTHERS

(THE "MOUNT I")

[2001] EWCA CIV 68

Before Lord Justice ALDOUS,
Lord Justice MANCE
and Mr. Justice CHARLES

Conflict of laws — Insurance (Marine) — Assignment — Vessel insured with French insurers — First defendants assigned insurance on vessel to claimant bank — Notice of assignment not given in accordance with French law — Vessel in collision with cargo carrying vessel — Vessel arrested and sold through Malaysian Court — Cargo-owners obtained attachments in France of insurance and their proceeds — Whether assignment governed by English law — Effect of art. 12 of Rome Convention.

The claimants were a bank (RZB) who agreed on Sept. 16, 1997 to lend money to the first defendants (the owners) (Five Star) to assist them in the purchase of a vessel *Mount Athos I* (to be renamed *Mount I*) for the purpose of sailing her to India and there selling her for her scrap value.

On Sept. 17, 1997 the owners mortgaged the vessel to the bank and agreed to assign to the bank the insurance on the vessel. Written notice of the assignment was sent to the French insurers and an endorsement was attached to the policy.

On Sept. 26, 1997 the vessel collided with *ICL Vikraman* in the Malacca Straits. That vessel sank and was a total loss. The owners of cargo loaded on *ICL Vikraman* arrested *Mount I* in Malaysia and *Mount I* had now been sold through the Malaysian Court which held the proceeds of that sale.

The cargo-owners, suspecting that those proceeds might not be enough to meet their claims, obtained attachments in France of the insurance and their proceeds on Oct. 9 and Dec. 19, 1997.

It was agreed that under French law the assignment of the insurance policy did not bind the arresting creditors since it was not notified through a bailiff.

The issue for decision was whether an assignee of a marine insurance policy made with French insurers but governed by English law was entitled to recover to the extent of his interest even though French law would deny his claim because notice of the assignment was by French law required to be (but had not been) given to the French insurers by or through a French bailiff.

RZB argued that art. 12 of the Rome Convention applied. This provided:

> 1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.
>
> 2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

———*Held*, by Q.B. (Com. Ct.) (LONGMORE, J.), that (1) in any case which involved a foreign element it might be necessary to decide what system of law was to be applied; and to find that law it was necessary (a) to characterize the issue before the Court: (b) to select the rule of law which laid down a connecting factor for the issue in question; and (c) to identify the system of law (the lex causae) which was tied by the connecting factor to the issue;

(2) the issues in this case could be characterized as contractual and proprietary;

(3) as a matter of English law the Rome Convention should apply to any assignment of a contract unless on its wording such application was inappropriate;

(4) art. 12 of the Rome Convention provided an answer to the problem in this case; the real question was whether the claimant bank could invoke as against the insurers the assignment to them of the contract relating to the vessel *Mount I*; the question was which law English or French was to determine the conditions under which the assignment could be invoked against the debtor; art. 12(2) did provide an express answer to this question, i.e. it was the law governing the right to which the assignment related, or in other words, the law of the underlying obligation;

(5) the insurer and the insured had agreed that the law of the contract of insurance was English law and English law was thus the law which was to determine whether RZB, as assignee had a good claim against the insurers;

(6) under English law there was no doubt that RZB did have a good claim; by s. 50 of the Marine Insurance Act, 1906 a policy of marine insurance was freely assignable; even if the policy was assigned by way of security rather than absolutely and even if notice of assignment had to be given to the insurers, because for that reason, the assignment was to be treated as an assignment in equity rather than an assignment at law, English law did not require that notice to be given in any formal manner; any notice required by English law was in fact given to the insurers.

The defendant cargo-owners (the 11th–15th defendants) appealed.

———*Held*, by C.A. (ALDOUS and MANCE, L.JJ. and CHARLES, J.), that (1) art. 12.2 of the Rome Convention manifested the clear intention to embrace the issue and to state the appropriate law by which it must be determined; art. 12(1) regulated the position of the assignor and assignee as between themselves; on its

face art. 12(2) treated as matters within its scope, and expressly provided for, issues both as to whether the debtor owed moneys to and must pay the assignee (their "relationship") and under what "conditions" e.g. as regards givng of notice (*see* p. 606, col. 2; p. 607, col. 1);

(2) art. 12(1) concentrated on its face on the contractual relationship between assignor and assignee; in contrast there was no hint in art. 12(2) of any intention to distinguish between contractual and proprietary aspects of the assignment; the wording appeared to embrace all aspects of the assignment; and an assignee could not succeed to any other relationship with the debtor than that established by the contract assigned and he could not avoid any conditions prescribed by the contract (*see* p. 607, col. 1);

(3) the Rome Convention viewed the issue i.e. what steps by way of notice or otherwise, require to be taken in relation to the debtor for the assignment to take effect as between the assignee and debtor — not as involving any property right but as involving — a contractual issue to be determined by the law governing the obligation assigned (*see* p. 607, col. 2);

(4) art. 12(2) of the Rome Convention applied and the effect as between the insurers, Five Star (the owners) and RZB, of Five Star's assignment to RZB fell to be determined by English law (*see* p. 610, col. 1).

(5) the operation of s. 50 of the Marine Insurance Act, 1906 depended upon there having been an assignment of the beneficial interest in such policy; if the assignment of the insurances to RZB embraced the protection and indemnity and collision cover at all, it could not have done more than transfer to RZB the benefit of any claims that might subsequently accrue under such cover; the insurable interest in the subject matter to which such cover related namely Five Star's pecuniary interest in maintaining its patrimony free of the burden of such expenditure or liability must then have remained with Five Star; and s. 50 did not apply (*see* p. 611, col. 1; p. 612, col. 1; p. 613, cols. 1 and 2);

————*The Evelpidis Era*, [1981] 1 Lloyd's Rep. 54 considered.

(6) the requirement of s. 136 of the Law of Property Act, 1925 was that there should have been an absolute assignment of the legal thing in action i.e. the policy as a whole or a right of claim under it; s. 136 was not applicable because there was no assignment of the whole benefit of the insurance cover and therefore no absolute assignment; the most that the assignment might have achieved was to assign the benefit of any particular claims arising and an assignment of future not present claims meant the assignment could not be regarded as having been absolute; the assignment could not take effect under s. 50 or s. 136 (*see* p. 614, cols. 1 and 2);

(7) there was nothing about the collision insurance cover which either made assignment impossible or was inimical to the concept or purpose of such insurance; the assignment was in the widest terms and the content did not require any exclusion of the benefit of the collision insurance claims; they were duly assigned; and there was an assignment in equity of the benefit of any claims under the policy including collision liability claims (*see* p. 615, cols. 1 and 2; p. 616, col. 1);

(8) the situation was on the face of it one in which RZB as assignee became entitled in equity as against Five Star and the insurers to the whole benefit of all claims arising from the collision; even if Five Star could be said, under the loss payable clause, to retain any interest in any part of any claim that might have arisen, RZB was entitled in equity in relation to and by virtue of the assignment of the remainder of such claim, and as all parties were before the Court there was no obstacle to giving effect to any partial interest (*see* p. 616, col. 1);

(9) this was an appropriate case for the granting of declaratory relief (*see* p. 616, col. 2; p. 617, cols. 1 and 2);

(10) the appeal would be dismissed in so far as it maintained, on the basis of the evidence of French law before the Court, that the assignment to RZB was invalid, that RZB acquired no right or title by virtue thereof as against Five Star and the insurers and that RZB's claim to any insurance proceeds was bound to fail; the appeal would also be dismissed in so far as it maintained that declaratory relief was not appropriate (*see* p. 617, col. 2).

The following cases were referred to in the judgment of Lord Justice Mance:

Brandsma q.q. v. Hansa Chemie A.G., May 16, 1997 (RvdW 1997 126C);

Central Insurance Co. Ltd. v. Seacalf Shipping Corporation, (The *Aiolos*), [1983] 2 Lloyd's Rep. 25;

Deutsche Schachtbau-und-Tiefbohr G.m.b.H. v. Shell International Petroleum Co. Ltd., (H.L.) [1988] 2 Lloyd's Rep. 293; [1990] 1 A.C. 295;

Firma C-Trade S.A. v. Newcastle P. & I. Association (The *Fanti*), (H.L.) [1990] 2 Lloyd's Rep. 191; [1991] 2 A.C. 1;

First National Bank of Chicago v. West of England Shipowner's Mutual P. & I. Association (The *Evelpidis Era*), [1981] 1 Lloyd's Rep. 54;

Italia Express, The (No. 2) [1992] 2 Lloyd's Rep. 292;

Lloyd v. Fleming, (1872) L.R. 7 Q.B. 299;

Macmillan Inc. v. Bishopsgate Investment Trust Plc., (C.A.) [1996] 1 W.L.R. 387;

Maudslay Sons & Field, Re [1900] 1 Ch. 602.

Meadows Indemnity Co. Ltd. v. Insurance Co. of Ireland plc, [1989] 2 Lloyd's Rep. 298;

Messier-Dowty Ltd. v. Sabena S.A., (C.A.) [2000] 1 Lloyd's Rep. 428; [2000] 1 W.L.R. 2040;

Pickersgill (William) & Sons Ltd. v. London and Provincial Marine and General Insurance Co. Ltd., [1912] 3 K.B. 614;

Queensland Mercantile and Agency Co., In re (C.A.) [1892] 1 Ch. 219; [1891] 1 Ch. 536;

Russian Commercial and Industrial Bank v. British Bank for Foreign Trade, (H.L.) [1921] 2 A.C. 438;

Sim Swee Joo Shipping Snd. Bhd. v. Shirlstar Container Transport Ltd., Feb. 17, 1994 unreported;

Swan v. Maritime Insurance Co. Ltd., [1907] 1 K.B. 116;

Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd., [1903] A.C. 414;

Torkington v. Magee, (C.A.) [1903] 1 K.B. 644; [1902] 2 K.B. 427;

Williams v. Atlantic Assurance Co. Ltd., (C.A.) (1932) 43 Ll.L.Rep. 177; [1933] 1 K.B. 81;

Weddell v. J.A. Pearce & Major, [1988] Ch. 26.

This was an appeal by the 11th to 15th defendants, AN Feng Steel Co. Ltd. and others, in the action between the claimants Raiffeisen Zentralbank Osterreich A.G. and the first defendants Five Star General Trading L.L.C. and the second to 10th defendant insurers, from the decision of Mr. Justice Longmore ([2000] 2 Lloyd's Rep. 684) given in favour of the claimants and holding inter alia that the notice of assignment had been validly given to the insurers and that the claimants were entitled to declarations that Five Star had no right, title and interest in and to the vessel's insurances; and that all moneys payable by the insurers arising out of the casualty were payable to RZB.

Mr. Jeffrey Gruder, Q.C. (instructed by Messrs. Stephenson Harwood) for the claimants; Mr. Alexander Layton, Q.C. and Mr. Michael Davey (instructed by Messrs. Howard Kennedy) for the 11th to 15th defendant cargo-owners.

The further facts are stated in the judgment of Lord Justice Mance.

Judgment was reserved.

Friday Jan. 26, 2001

JUDGMENT

Lord Justice MANCE:

Introduction and facts

1. This appeal from a judgment of Mr. Justice Longmore now reported at [2000] 2 Lloyd's Rep. 684 concerns rival attempts to obtain the benefit of the proceeds of claims arising under an English law marine insurance policy placed by Dubai owners of the vessel *Mount I* with French insurers. The insurance claims arise out of a collision between *Mount I* and *ICL Vikraman*. The respondent is an Austrian mortgagee bank claiming as assignee of the benefit of the insurance. The appellants are Taiwanese companies, who, as owners of cargo on *ICL Vikraman*, have obtained provisional attachment orders in France against any insurance proceeds.

2. The appeal raises at least one moot issue of private international law. The Judge was warned that he was being set an examination question on the applicable law. We have to consider the Judge's response, conscious that our own may itself be reviewed. Although a central issue involves the scope of the Rome Convention (given the force of law in the United Kingdom under the Contracts (Applicable Law) Act, 1990), there is, as yet, no Court to which such an issue may be referred to ensure a uniform international interpretation.

3. The collision occurred in the Malacca Straits on Sept. 26, 1997. *ICL Vikraman* sank, with the tragic loss of life of her 29 crew, and also loss of her cargo. The appellants, who are the 11th to 15th defendants in the proceedings, claim as owners of cargo of *ICL Vikraman* and on the basis that *Mount I* was responsible for the collision. *Mount I* was on a voyage from Singapore to India or Bangladesh for scrapping. She had been purchased for this purpose by the first defendants, Five Star General Trading L.L.C. ("Five Star"), a Dubai company. To enable her purchase and scrapping, the respondent, the claimant in the proceedings, Raffeisen Zentralbank Osterreich A.G. ("RZB"), through its London branch, had agreed on Sept. 16, 1997 to lend Five Star up to U.S.$3,760,219. The facility letter of that date required as a condition of drawdown the provision of, inter alia, a mortgage over the vessel, the insurance policies and other documents relative to the insurance effected on her, an assignment of such insurances ("in such form as the Bank may require") and notice of such assignment duly signed.

4. The mortgage executed on the next day under the laws of St. Vincent and the Grenadines included further extensive provision regarding insurance. The vessel was to be and remain insured against marine risks (for her full market value and in any event not less than 120 per cent. of the loan), entered in a protection and indemnity association or club, insured against oil pollution risks and insured against excess and war risks (cl. 5.1). RZB was to approve in advance the markets with which such insurances were placed, and Five Star was not to alter their terms without RZB's prior written consent and was to supply RZB "from time to time on

request and at least annually (sic)" with such information as RZB might require regarding the insurances (cl. 5.3). Five Star was to procure letters of undertaking from the brokers or P. & I. associations or clubs in such form as RZB might approve (cl. 5.6). By cl. 5.7 Five Star agreed that, at any time after the occurrence or during the continuation of an event which was (or would be with notice, or the passage of time or the satisfaction of any materiality test) an event of default as defined, RZB should be entitled to collect, sue for, recover and give a good discharge for all claims in respect of the insurance, and by cl. 5.11 it was agreed:

> In the event that any sums shall become due under any protection and indemnity entry or insurance, such sums shall be paid to the Owners to reimburse them for, and in discharge of, the loss, damage or expense in respect of which such sums shall have become due PROVIDED THAT if at the time such sums become due, there shall have occurred and be continuing an Event of Default or any event which, with the giving of notice and/or the passage of time and/or the satisfaction of any materiality test would constitute an Event of Default, the Mortgagees shall be entitled to receive such sums and to apply them either in reduction of the indebtedness or, at the option of the Mortgagees, to the discharge of the liability in respect of which they were paid.

5. The deed of assignment dated Sept. 17, 1997 dealt with insurance in different terms. Five Star thereby purported to "assign absolutely and unconditionally and agree to assign to the Bank all their right, title and interest in and to the Insurances" (cl. 2.1) and undertook to give notice to the insurers in a form recording that it had "assigned absolutely to [RZB] all insurances effected or to be effected in respect of the above vessel, including the insurances constituted by the policy whereon this notice is endorsed, including all moneys payable and to become payable thereunder or in connection therewith (including returns of premium" (cl. 2.3.2 and Appendix A)). However, by cl. 2.3.4 Five Star also covenanted that it would procure that a loss payable clause in the form of Appendix B (or such other form as RZB might approve) or in the case of P. & I. entries a note of RZB's interest in such form as RZB should approve should be endorsed upon or attached to the relevant policies and that letters of undertaking in such form as RZB should approve would be issued to RZB by the brokers. The terms of the form of loss payable clause contemplated by Appendix B are set out later in this judgment. The deed was entered into in London and made expressly subject to English law and to the jurisdiction of the English Courts as regards "any disputes which may arise out of or in connection with [it]". Finally, also on Sept. 17, 1997 Five Star signed a notice of the absolute assignment of the insurances in favour of RZB in the form of Appendix A.

6. As from Sept. 17, 1997, the vessel was insured by Five Star for U.S.$4.8 m. (or 125 per cent. of the market value of the vessel as scrap at the time of sailing, whichever was less) against total loss only. The policy terms further conferred protection and indemnity cover in terms of cl. 9 of the Institute Time Clauses Hulls Port Risks (July 20, 1977) with certain amendments and, most importantly in this case, cover in respect of collision liability in terms of cl. 6 of the Institute Voyage Clauses — Hulls — Total Loss (Oct. 1, 1983) with amendments to read as follows:

> 6.1 The Underwriters agree to indemnify the Assured for four-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:
>
> 6.1.1 loss of or damage to any other vessel or property on any other vessel . . .

7. The insurers were the second to 10th defendants, companies incorporated and carrying on business in France ("the insurers"). The second and 10th defendants were joint leaders for the purposes of the insurance. The insurance was placed through C. E. Heath (Insurance Broking) Ltd. (U.A.E. Office) ("C. E. Heath") who in turn used subbrokers, Philmar Assurances S.A. ("Philmar") of Paris. It was on terms evidenced by these brokers' cover notes dated respectively Sept. 15 and 22, 1997. By such terms the insurance was expressly subject to English law. On Sept. 19, 1997 RZB's solicitors, Stephenson Harwood, wrote to C. E. Heath asking that RZB's interest be noted on the policy. By fax on Oct. 7, 1997 Philmar sent a memorandum to the two leaders, enclosing a copy of Five Star's notice of assignment to RZB dated Sept. 17, 1997 together with a draft policy memorandum No. 2, by which it was "further noted and agreed to register interest of RZB Bank as Mortgagee on vessel 'MOUNT I' with effect from Sept. 17, 1997, and corresponding Notice of Assignment is attached". The second defendants agreed to this memorandum by fax on Oct. 10, 1997. Despite the terms of cl. 2.3.4 of the deed of assignment, the notice of assignment given to the insurers was, so far as appears, given in unqualified terms. No clause along the lines of Appendix B was attached to it or ever endorsed upon or attached to the policy or any cover note or certificate.

8. After the collision of Sept. 26, 1997, *Mount I* was arrested in Malaysia by the owners of *ICL Vikraman*. She was later sold by order of the Malaysian Court. Her sale realized U.S.$3,082,805 which is presently held by the Malaysian Court. The substantive issue of liability for the collision is

being litigated in Malaysia by both vessels' owners and the appellants. We were told by Mr. Gruder, Q.C. for RZB that, under Malaysian law, third party claimants such as the appellants will, if successful in establishing liability on the part of Five Star, take priority over RZB's claim as mortgagees as against the Malaysian fund. However that may be, the appellants evidently do not regard the Malaysian fund as sufficient to satisfy all their claims. They have obtained from the Tribunal de Commerce of Paris five orders dated between Oct. 9 to Nov. 6, 1997. These orders authorized saisies conservatoires or, as I may call them, preventive attachments in respect of proceeds of the insurance, by way of security for the appellants' claims against Five Star. Thus, the specimen order put before us (relating to the 14th and 15th defendants' claims) authorized such appellants:

> . . . to carry out a seizure of all sums in the hands of [the insurers] held for the account of Five Star General Trading . . . in their capacity as owner of the vessel "MOUNT I" for security and conservation of their [i.e. the arrestors] maritime lien which we value provisionally at the principal sum of $2,685,005.63 or the equivalent in French Francs

9. The bailiff's order notifying the insurers of the attachments in favour of the 14th and 15th defendants related specifically to "sums owed by you to the debtors: Five Star . . . Owner of the vessel 'MOUNT I' ". It advised insurers that "the present order freezes the sums which you hold for the account of the debtor [i.e. Five Star]", and requested the insurers to inform the bailiff of the sums held for the debtor's account. It went on:

> Any third parties whose property has been seized are required to declare to the Applicants the extent of the debtor's claims against them, the extent of any future modes of enforcement which might come to affect these claims and the existing satisfaction of any claims, the existing assignment of any debts or the existence of prior Orders.

10. Since the hull and machinery insurance on *Mount I* was total loss only, the insurance's only relevance may well lie in the potential claims under the collision liability cover. Mr. Gruder, Q.C. said (without contradiction from Mr. Layton, Q.C. for the appellants) that it is the appellants' probable aim (a) to receive the Malaysian fund, (b) to treat such receipt as a payment pro tanto of their claims, so triggering the insurers' liability under the collision liability cover to indemnify Five Star in a like amount and then (c) relying on the French attachments, to seek payment of that amount also, up to the amount of their full loss. This plan, if successful, would ensure that the appellants received payment in respect of their full loss, before RZB as mortgagee received any sum at all.

The present proceedings

11. On Oct. 25, 1997 RZB started the present proceedings in the Commercial Court. The claim recites the relevant facts, and claims four declarations, in summary: (1) that notice of the assignment dated Sept. 17 was validly given to the insurers and that the assignment took effect as a legal assignment under s. 136 of the Law of Property Act, 1925 on Sept. 19, 1997; (2) that as from Sept. 17, 1997 Five Star had no right, title and interest in and to the vessel's insurances, particularly that with the insurers; (3) that as from Sept. 17, 1997, RZB had all right, title and interest in such insurances; and (4) that all money payable by the insurers arising out of the casualty are payable to RZB and not to Five Star. The claim was served on Five Star and on the insurers, in each case by consent through their solicitors, on Oct. 28, 1997.

12. On Nov. 12, 1997 RZB applied for permission to serve a concurrent copy of the claim form and particulars of claim out of the jurisdiction on the appellants in Taiwan. Permission was sought on the primary basis that the appellants were necessary and proper parties to the claims brought against and duly served on Five Star and the insurers, and on the alternative bases that the claims were to enforce Five Star's contract of assignment to RZB, which had been made in England, was by its terms governed by English law and contained a term conferring jurisdiction on the English Courts to hear and determine any action in respect of the assignment. Permission was granted by order dated Nov. 17, 1997. Service was effected, and acknowledged on Jan. 6, 2000 with a statement of intention to contest jurisdiction. On Jan. 19, 2000 the appellants through their solicitors gave notice that they no longer intended to contest jurisdiction, but intended to defend; they entered a further acknowledgement of service accordingly.

13. On Feb. 1, 2000 RZB verified its claim through Mr. Foord of Stephenson Harwood and applied for summary judgment, on the basis that the appellants had on the evidence no real prospect of successfully defending the claim. By witness statement of their solicitor, Ms. O'Keefe, and by defence served Mar. 30, 2000, the appellants took issue with this. The defence denies that the notice of assignment was valid and binding on the appellants. It alleges that the notice's validity "with respect to third parties is governed by French law, being the law of the country of domicile of the insurers"; that by art. 1690 of the French Civil Code an assignment is not binding on third parties unless notice is served on the debtor (i.e. the

insurers) by a bailiff; that this did not occur; that the appellants had "attached in France the insurances and/or the proceeds thereof, to which [Five Star] are or were entitled"; that "the effect of the attachment as a matter of French law is that entitlement to the insurances and/or the proceeds thereof is frozen as at the date of attachment and [RZB] are not entitled thereafter to serve notice of the assignment through a bailiff"; and, in the premises that the appellants are not bound by the assignment, and, further, that Five Star remained the insured under the policy. Alternative allegations are made that the assignment was made by way of security and, in the light of the loss payable clause, that it did not operate to divest Five Star of its beneficial interest or its entire such interest.

14. Ms. O'Keefe's statement records advice from a M. Nicolas of the appellants' French lawyers on French law. According to this advice, unless and until RZB serve notice through a bailiff, the appellants as "third parties" are entitled to proceed against the insurances and their proceeds as the property of the assignor, Five Star; further, the attachments prevent any payments of the insurance proceeds and preclude service of notice through a bailiff. The appellants have subsequently amplified their case on French law by producing an opinion from Professor Emeritus Philippe Malaurie of the University of Panthéon-Assas (Paris II). He sets out art. 1690:

> The assignee is only *saisi* in relation to third parties through notification of the assignment to the debtor ("*signification de transport faite au débiteur*").
>
> Nevertheless, the assignee may also be *saisi* by acceptance of the assignment in the form of a legal deed, passed in front of a *Notaire*. ("*l'acceptation du transport faite par le débiteur dans un acte authentique*")

15. Professor Malaurie is more specific than the defence or M. Nicolas. According to his opinion, "third parties" within art. 1690 does not refer to "persons who are completely strangers to the assignment, the *penitus extranei*". The position of such persons, he indicates, would be governed by art. 1165, whereby —

> . . . agreements are only valid between contracting parties: they cannot harm third parties and they may profit from them only in the case provided for in Article 1121.

16. Rather, "third parties" in art. 1690 includes both (a) the assigned debtor, i.e. here the insurers, and (b) those deriving title from the assignor, e.g. "another assignee or, as in this case, a creditor of the assignor, whether or not he has executed an enforcement measure, such as an attachment, on the claim". Professor Malaurie also says that, when a claim has been assigned without fulfilment of the formalities provided by art. 1690, the assignor and the assignee become joint and several creditors of the debtor, and both may claim payment; but that, once due notice has been given, the claim no longer belongs to the assignor who can therefore no longer claim. He adds that, although the Cour de Cassation's jurisprudence was that only those attachments ordered prior to due notice of the assignment took priority, by a law on civil execution proceedings dated July 9, 1991 (in force since Jan. 1, 1993), priority in such a case was also conferred on any subsequently ordered attachments. These statements of French domestic law are not admitted. But, for the purposes of the present appeal we must, like the Judge below, take them as accurate. It is clear, however, that they relate to situations all aspects of which are subject to French law.

The order under appeal

17. The application for summary judgment came before Mr. Justice Longmore on May 11, 2000. On May 26, 2000 he handed down judgment in favour of RZB. By his order of the same date he declared, in relation to the first declaration claimed, that notice of the assignment contained in the deed dated Sept. 17, 1997 had been validly and effectively given to the insurers. In relation to the remaining three heads, he granted declarations as sought.

18. Mr. Justice Longmore started by seeking to characterize the issues. His initial analysis suggested that the issues arising from claims (1) and (4) were contractual, while those arising from claims (2) and (3) were proprietary. But he concluded that the "real" question was whether RZB "can invoke, as against the insurers, the assignment to them of the contract of insurance". On that basis, in his view, art. 12(2) of the Rome Convention, as scheduled to the Contracts (Applicable Law) Act, 1990, provided the key to identification of the applicable law. English law, governing the contract of insurance, was thus the law by which to determine whether RZB had a good claim against the insurers.

The issue(s)

19. I turn to the opposing analyses of the issue. In RZB's submission, the issue is whether the insurance contract, and/or the right to claim unliquidated damages from insurers for failure to pay under it, was effectively and validly assigned by Five Star to RZB. This, in its submission, is a contractual issue. The Judge was therefore right in his general approach. The appellants, in contrast, maintain that the relevant issue concerns the validity against "third parties" of an assignment of an

intangible right of claim against insurers. In support of their analysis, the appellants submit that the dispute is essentially between RZB as purported assignee and the appellants, who attached the insurance claim and have no other nexus, let alone contractual, with anyone. So viewed, the dispute in their submission raises an essentially proprietary issue, to be resolved by the lex situs of the attached debt, that is by French law. Under French law, they submit, their attachment prevails over RZB's assignment in the absence of any bailiff's notification or debtor's acceptance by acte authentique.

20. These opposing analyses both assume that the factual complex raises only one issue and, in their differing identification of that issue, emphasize different aspects of the facts. In my judgment a more nuanced analysis is required. This can be demonstrated by a chronological approach. Prior to Oct. 9, 1997 there was no attachment or competing claim to any insurance moneys at all. On Oct. 7, 1997 notice of assignment was given by fax by the sub-brokers to the insurers. From Oct. 7 to 9, 1997, the only persons with any conceivable right to claim or receive sums payable under the insurance were Five Star and/or RZB. The first issue for consideration raised by the parties' opposing cases is whether, in the light of the assignment and notice and apart from any attachment, the right or title to such claim and sums as against the insurers was and is in RZB or Five Star (or both). This is an issue concerning the effect on insurers' liability under the contract of insurance of Five Star's voluntary assignment to RZB (coupled with RZB's notice of such assignment to insurers).

21. If, consequent on such assignment and notice, RZB acquired no right or title to any insurance claim arising, the matter ends there. But, even if RZB had such right and title from Oct. 7 to 9, 1997, it is possible to conceive of a second issue, arising from Oct. 9, 1997. That is whether the appellants' attachments of any insurance claim in France override such right and title, or, putting the point the other way around, whether the appellants as attachors are bound to recognize the transfer of Five Star's right or title to RZB. This second issue (if it arises at all — see below) concerns the effect (involuntary as regards all three contracting parties) of the preventive attachments obtained by third parties (the appellants) in the French Courts.

22. If each of these issues now arises before us, it is our task to identify and apply the appropriate law to decide each in turn. But in Mr. Gruder's submission, we are only concerned, at least at this stage, with the first issue. He points out that the attachments were obtained on the basis that any insurance claims on the insurers belonged to Five Star. On this basis, he submits, all that RZB would need to demonstrate is that, applying the appropriate law, the insurers had by Oct. 9, 1997 become liable to pay any insurance claims to RZB, and not Five Star. No-one has produced evidence to show that, if this issue were to be decided in RZB's favour, the French attachments could still apply, or that any second issue would remain. Professor Malaurie's opinion addresses French domestic law in purely domestic factual situations, and is predicated upon the first issue being decided by reference to French law. If all parties were French residents and the insurance claims arose under a French law policy, art. 1690 would mean that (without a bailiff's notification or debtor's acceptance by acte authentique) RZB would not acquire the sole right and title in respect of the insurance claim, even as against the insurers, and would not (therefore) be able to assert any right or priority in relation to attachment creditors of Five Star like the appellants. Article 1690 is thus a provision limiting both the passing from Five Star to RZB of the right and title to sue the insurers and so the effect on (other) third parties. But, if the issue of entitlement to the insurance moneys, as between the insurers, Five Star and RZB, falls to be referred to English law, and if, applying that law, RZB acquired the sole right and title to the insurance claim and proceeds as against Five Star and the insurers on Oct. 7, 1997, then there is nothing in Professor Malaurie's opinion to suggest that, under French law, the attachments could override this position. On the other hand, it is right to add that there is also nothing positive to assist us as to what attitude French law would take in this situation. Nor, before us, did Mr. Layton's submissions address any further issue discretely. Mr. Layton's consistent submission was that the validity of the assignment was for all purposes referable to French law, against both the insurers prior to Oct. 9, 1997 and the appellants thereafter.

23. I note the terms of the judgment dated Oct. 18, 2000 by the Judge de l'Execution of the Tribunal de Grande Instance de Paris, granting to the insurers a stay, of proceedings brought by the appellants and other cargo interests, pending resolution of the present proceedings. She drew attention to the nature of RZB's claim in England and the fact that English jurisdiction had not been contested, and expressed the view that the "cause" and "objet" of the present proceedings and those brought before the French Court were identical. This is at least consistent with the possibility that the resolution of the first issue may be regarded in France as determinative of the whole matter.

24. Mr. Gruder did not however submit that we could, on the information before us, rule out the possibility of any further or separate argument on the lines of the second issue altogether. He said that it will, if it ever arises, have to be identified and

dealt with later. In these circumstances and in the light of the way in which this case has been presented and argued on both sides, it seems to me that we must proceed on the basis for which Mr. Gruder submits. If there is any scope at all for any second issue, after determination of the first issue identified above, that second issue will have to be identified and considered separately, whether in these or in the French proceedings. This means however that the scope of any declarations should be appropriately limited.

25. I turn to the first issue. The parties' respective positions have already been stated. They throw up a choice between the proper law of the insurance and the lex situs of the insurance claim. But a proper legal analysis cannot depend exclusively upon the legal systems for which two parties happen to contend in their own partisan interests. The jurisprudential and academic material which we have been shown indicates the existence of other possible candidates — such as the law of the assignor's place of residence or business and the law governing the contract of assignment — which may need to be kept in mind.

Principles governing identification of the appropriate law

26. Both parties accept that, at common law, the identification of the appropriate law may be viewed as involving a three-stage process: (1) characterisation of the relevant issue; (2) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue: see *Macmillan Inc. v. Bishopsgate Investment Trust Plc*, [1996] 1 W.L.R. 387 at pp. 391–392 per Lord Justice Staughton. The process falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum, here England.

27. While it is convenient to identify this three-stage process, it does not follow that Courts, at the first stage, can or should ignore the effect at the second stage of characterizing an issue in a particular way. The overall aim is to identify the most *appropriate* law to govern a particular issue. The classes or categories of issue which the law recognizes at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognized accompanied by new rules at stage 2, if this is necessary to achieve the overall aim of identifying the most appropriate law (cf. also Dicey & Morris on The Conflict of Laws, 13th ed., par. 2–005). That is implicit in the discussion in academic texts of the appropriate law by which to judge the validity of voluntary assignment: see e.g. Dicey at par. 24–049, Cheshire and North's Private International Law (13th ed.) at pp. 957–958 and articles by P.J. Rogerson "The Situs of Debts in the Conflict of Laws — Illogical, Unnecessary and Misleading" (1990) C.L.J. 441 and M. Moshinsky "The Assignment of Debts in the Conflict of Laws" (1992) 109 L.Q.R. 591. So also, Professor Sir Roy Goode, while generally favouring as the appropriate law the lex situs of the debt assigned, prefers the law of the assignor's place of business in the context of global assignments of receivables, e.g. by factoring or discounting: cf. Commercial Law (2nd ed.) p. 1128).

28. The three-stage process identified by Lord Justice Staughton cannot therefore be pursued by taking each step in turn and in isolation. As Lord Justice Auld said in *Macmillan* at p. 407:

> . . . 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 . . . (emphasis added).

29. There is in effect an element of inter-play or even circularity in the three-stage process identified by Lord Justice Staughton. But the conflict of laws does not depend (like a game or even an election) upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations.

30. England, in common with France, is party to and has incorporated into its domestic law the principles of the Rome Convention. This led before us to abstract argument about whether an assignee's right or title to claim under the contract involves a question of contract or of (intangible) property. Viewing the issue of RZB's right or title to sue the insurers as involving a dispute about property, albeit intangible, the appellants submit that all issues relating to property are subject to the lex situs of the relevant property; and that here that means French law, since the claim is on insurers

resident in France. RZB in contrast submits that the case involves a dispute about contractual rights, the right to sue the insurers, and that the relevant law is, under art. 12(2) of the Rome Convention, that governing the insurance contract.

31. Article 12 provides:

> 12.–1 The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between assignor and assignee.
>
> 2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

32. The appellants emphasize that the Rome Convention is concerned with the law applicable to contractual obligations. The Guiliano-Lagarde report, which (under s. 3 (3) of the Contracts (Applicable Law) Act, 1990) "may be considered in ascertaining the meaning or effect of any provision of that Convention", states in its commentary on art. 1 (scope of the Convention):

> First, since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions. An Article in the original draft had expressly so provided. However, the Group considered that such a provision would be superfluous in the present text, especially as this would have involved the need to recapitulate the differences existing between the various legal systems of the Member State of the Community.

33. National Courts must clearly strive to take a single, international or "autonomous" view of the concept of contractual obligations, that is not blinkered by conceptions — such as perhaps consideration or even privity — that may be peculiar to their own countries. Further — and perhaps particularly so when the search is for an autonomous international view — the man-made concepts of contractual obligations and proprietary rights are neither so clear nor so inflexible that they may not receive shape from the subject matter and wording of the Convention itself.

Application of principles to present case

34. Approaching the present issue on this basis, I confess to an initial impression that the case fits readily into a contractual, and less readily into a proprietary, slot. The dominant theme influencing the modern international view of contract is party autonomy. Parties are free to determine with whom they contract and on what terms. They are free to cancel or novate their contracts and make new contracts with third parties. A simple issue whether a contractual claim exists or has arisen in these situations cannot be regarded as an issue about property, however much an acknowledged contractual right may be identified as property in certain other contexts. An issue whether a contract has been novated appears to me essentially contractual. Under a contract which, from its outset, purports to confer on a third party a right of action, an issue whether the third party may enforce that right appears to me again essentially contractual. An issue whether, following an assignment, the obligor must pay the assignee rather than the assignor falls readily under the same contractual umbrella.

35. The appellants seek to redescribe the issue, as being whether the title to the right of suit or cause of action which formerly vested in the assignor was vested in or was now owned by the assignee. In this way they seek to give the issue a proprietary aspect. However, it is unclear why it is necessary to talk of "title to the right", or to focus on its transfer from assignor to assignee, rather than upon the simple question: who was in the circumstances entitled to claim as against the debtor? The artificiality seems to me to be underlined at the next stage of the argument, which seeks to refer any dispute about title to sue to the place where the "property" consisting of such title is "situated" (see below).

36. Mr. Layton relies upon various factors as supporting a categorization of the issue as involving property rights. He argues that there should be a single rule for all types of property, tangible and intangible. The rationale of the characterization of issues as proprietary, and of the rule of English law referring such issues to the lex situs, is that control of property is exercisable at the place it is sited. In the case of intangible property, English law has, for various purposes (e.g. inheritance) traditionally allocated to it a situs at the place of the debtor's residence. This is on the basis that the debtor is there directly subject to the coercive power of the Courts to enforce the obligation. The location of a right of action in this or any way is, however, evidently artificial. Parenthetically, I add that "coercive power" would itself appear to be an unstable international concept, capable of widely differing interpretation — indeed, a "power theory" forms the basis on which American Courts exercise and recognize *long-arm* jurisdiction, which may extend to allow personal jurisdiction in respect of overseas defendants having "minimum contacts" in the form of acts directed to the forum (cf. Kevin M. Clermont on Jurisdictional Salvation and the Hague Treaty (1999) 85 Cornell L.R. 89).

37. Modern conditions underline the artificiality of selecting supposed control at the debtor's residence as an appropriate basis for characterization or choice of the relevant law to determine questions regarding the validity or effect as against the debtor of an assignment. Jurisdiction may be grounded on consent and various other bases apart from residence. Obligations are commonly enforced today not against the person, but against assets. Debtors often trade or hold some or even all of their assets overseas. Proceedings are as a result often begun and enforced against debtors in countries other than that of their residence (as in this case). The move towards single legal markets, like those involving countries party to the Brussels and Lugano Conventions, makes judgments readily exportable between countries. Even at the world level, with the preliminary draft Convention on Jurisdiction and Judgments in Civil and Commercial Matters adopted for further negotiation in the context of the Hague Conference on private international law, there is the ambition, at least, of greater legal coherence. To my mind, the "control" or coercive power over a debt which may be exercised by the Courts of a debtors' residence is not a persuasive reason either for treating a debt as property in the present context or for looking to the law of the place of the debtor's residence to determine the effect of an assignment as between the assignee and the debtor.

38. Advocates of a proprietary view themselves acknowledge that the application of the lex situs cannot provide a satisfactory solution in all cases. Thus, they accept that in cases of global assignments (e.g. under factoring or discounting arrangements) it may well not be appropriate to adopt a rule which would make the validity of assignment depend upon consideration of the residence of each debtor and lex situs of each debt assigned: see Commercial Law (2nd ed.) by Professor Sir Roy Goode at p. 1128 (cited above) and The Assignment of Debts in the Conflict of Laws by M. Moshinsky (1992) 109 L.Q.R. 591 at p. 613. Professor Goode and Mr. Moshinsky both favour the law of the assignor's residence as the applicable law in such cases. In the present case it happens that all the co-insurers were French resident companies. But this is by no means typical in international insurance business. Under a typical co-insurance involving insurers from different countries, the lex situs rule could require the separate consideration of each of a large number of different laws of the situs, with a view to determining separately, as regards each insurer's proportionate share, the validity of a purported assignment of insurance proceeds. That would undermine the general intention (evident in the present case in the leading underwriter provisions) that there should be a homogeneous treatment of insurance underwriting and claims, despite the ultimate limitation of each insurer's financial liability to its own proportionate share.

39. Mr. Layton submits that a proprietary analysis is appropriate, because any assignment diminishes the assignor's assets to the potential detriment of its creditors; and that the lex situs ought to determine the validity of any such assignment. This argument may have force in relation to physical assets in the apparent ownership of an assignor in his country of residence. But, it also demonstrates why it is not necessarily appropriate to attempt an analogy between physical assets and intangible rights. Whether a person has acquired or retains contractual rights is a matter about which creditors are (especially in modern business conditions) often unlikely to know anything.

40. Mr. Layton argues that the application of the lex situs in cases of voluntary assignment would be consistent with its application in cases of involuntary assignment (such as In *re Queensland Mercantile and Agency Co.*, [1891] 1 Ch. 536; affd. [1892] 1 Ch. 219, to which I return below). But consensual and non-consensual situations are, in their nature, quite different, and it is neither surprising nor even inconvenient, if the differences lead to the application of different laws.

41. Mr. Layton next submits that any potential assignee or a third party can without difficulty consider the lex situs in order to assess the validity of any assignment. The submission assumes knowledge about the original contract and the assignment. Assuming such knowledge, the same submission can be made in favour of either the proper law of the obligation assigned or, indeed, the proper law of the assignor's place of business.

42. For his part, Mr. Gruder suggests that a contractual analysis is assisted by the consideration that a claim against indemnity insurers sounds in damages for failure to hold the insured harmless: cf. e.g. *The Italia Express (No. 2)*, [1992] 2 Lloyd's Rep. 292. A claim for damages for breach of contract must, he submits, be essentially contractual. But the consideration to which Mr. Gruder refers has itself an artificial and peculiarly domestic flavour about it, and I find it of no assistance to the exercise of characterization in a broad internationalist spirit which has here to be undertaken.

43. In my view, there is a short answer to both characterization and resolution of the present issue as between the insurers, Five Star and RZB. It is that art. 12(2) of the Rome Convention manifests the clear intention to embrace the issue and to state the appropriate law by which it must be determined. Article 12(1) regulates the position of the assignor and assignee as between themselves. Under art. 12(2), the contract giving rise to the obligation governs not merely its assignability, but also "the

relationship between the assignee and the debtor" and "the conditions under which the assignment can be invoked as against the debtor", as well as "any question whether the debtor's obligations have been discharged". On its face, art. 12(2) treats as matters within its scope, and expressly provides for, issues both as to whether the debtor owes moneys to and must pay the assignee (their "relationship") and under what "conditions", e.g. as regards the giving of notice.

44. Mr. Layton submits that this is to read art. 12(2) too comprehensively. In his submission, the "relationship" between debtor and assignee merely refers to their relationship under the contract, *provided* there has been an effective passing of property; the reference to "conditions" under which the assignment can be invoked merely refers to any *contractual* conditions, which must be satisfied before any assignment will be recognized; it says nothing again about the general requirement that there should have been an effective *passing of property*; and that requirement must be further satisfied in each case by reference to the lex situs of the relevant property.

45. To my mind, however, these submissions by Mr. Layton postulate a most unlikely thought process on the part of the draughtsmen of the Convention, and a misleadingly drafted article. Article 12(1) concentrates on its face on the contractual relationship between assignor and assignee. In contrast, there is no hint in art. 12(2) of any intention to distinguish between contractual and proprietary aspects of assignment. The wording appears to embrace all aspects of assignment. If the draughtsmen had conceived that the basic issue, whether and under what conditions an assignee acquires the right to sue the obligor, could involve reference to a quite different law to either of the two mentioned in art. 12(1) and (2), one would have expected them to say so, if only to avoid confusion. Further, on Mr. Layton's case, it is unclear why the draughtsmen troubled to refer so explicitly in art. 12(2) to the relationship of the parties and the conditions under which the assignment could be invoked against the debtor. It seems self-evident that an assignee could not succeed to any other relationship with the debtor than that established by the contract assigned, and that he could not avoid any conditions prescribed by that contract. I note that, in an interesting article "The proprietary aspects of international assignment of debits and the Rome Convention, Article 12" (1998) L.M.C.L.Q. 345 at p. 354 by Professor Teun H.D. Struycken of Nijmegen University, the writer suggests that:

> Article 12(2) is not about the person to whom the debtor owes the debt nor about who has the right to demand payment, but only about the conditions on which the creditor — either assignor or assignee, depending on whether there has been a valid and effective transfer of ownership — may exercise the right to demand payment, whether notice to the debtor is required, and about the contractual aspects of the obligation to pay such as the terms, the place and the time of payment, and the possibilities of set-off, and the like. It is also about the conditions under which there is a valid discharge of the debtor, i.e. about bona fide payment to the wrong person.

46. On this basis, as Professor Struycken acknowledges at p. 358, it would follow that the debtor always enjoys not merely the protection of the proper law of the obligation assigned, but also "the additional benefit of the law governing the debt he owes" in other words the benefit of any "additional defence from the law governing the proprietary aspects" (which Professor Struycken suggests should be identified with the law of the assignor's place of residence). This highlights the double hurdle, which would, on Mr. Layton's case, apply and the extent to which art. 12 would then have to be regarded as presenting a partial and misleading picture.

47. The Guiliano-Lagarde report states bluntly under art. 12 that:

> The words "conditions under which the assignment can be invoked" cover the conditions of transferability of the assignment as well as the procedures required to give effect to the assignment in relation to the debtor.

48. That, in my judgment, is a compelling indication that (whatever might be the domestic legal position in any particular country) the Rome Convention now views the relevant issue — that is, what steps, by way of notice or otherwise, require to be taken in relation to the debtor for the assignment to take effect as between the assignee and debtor — not as involving any "property right", but as involving — simply — a contractual issue to be determined by the law governing the obligation assigned.

49. While there is, as yet, no international Court to which issues of construction of the Rome Convention may be mandatorily referred, we have had our attention drawn to a limited number of cases in other European jurisdictions. Of particular relevance are two decisions of the German Supreme Court. In its judgment of June 20, 1990 (VIII ZR 158/89) (1990) RIW 670, the German Supreme Court held that priority as between successive assignments fell to be determined by reference to the law governing the claim assigned. The assignments related to instalments due under a shipbuilding contract, between a wharf and a foreign state, made subject to English law. In July, 1986 the

wharf contracted to acquire the new vessel's rudders from the claimant on terms assigning the wharf's claim to the instalments due for the vessel to the claimant, as security for the price of her rudders. On or about Sept. 8, 1986, the wharf obtained a loan from the defendant again in return for an assignment of its claim to the instalments. In May, 1987 the wharf became insolvent. Notices were given of these assignments in reverse order, that is first by the defendant and later by the claimant (although the claimant contended that the defendant had known of its prior assignment, when taking its own). The Supreme Court held that assignment was governed by the so-called law of the debt. It relied both upon consistent German case-law, giving a number of references, and prevailing doctrine (including a learned article by a most distinguished comparativist, Professor Christian von Bar of Osnabrück University, Abtretung und Legalzession in neuen deutschen Internationalen Privatrecht, RabelZ 53 (1989) 462). The Court of Appeal had reached its conclusion based on the incorporation into German law of art. 12(2) of the Rome Convention as art. 33(2) of the EGBGB. It was objected that this incorporation only took effect from Sept. 1, 1986, but the Supreme Court held that the objection was unimportant, since, as Professor von Bar had maintained, art. 33(2) merely reproduced the previous German legal position. The case was remitted to the lower Court, for reconsideration, applying English law principles, of the issue regarding knowledge.

50. In a later decision of Nov. 26, 1990, concerned with an assignment prior to Sept. 1, 1986, the German Supreme Court repeated that art. 33(2) reflected the previous law. The first issue was whether the assignment by the creditor of the benefit of a loan debt subject to German law was invalidated by virtue of the fact that the claim was assigned pursuant to an agreement to contribute the claim as capital in return for shares in a Swiss company, which agreement was apparently invalid under Swiss law in the absence of any resolution to increase that company's capital. The Supreme Court held that it was not. The decision identifies the distinction made in some continental legal systems, to which both Mr. Layton before us and Professor Struycken in his article have drawn attention, between an agreement to assign and the assignment itself. But it also shows that this distinction would not lead the German Supreme Court to accept Mr. Layton's submissions that art. 12 only embraces the contractual and not the "proprietary" aspect of a voluntary assignment. In the decision of Nov. 26, 1990 the latter aspect was determined under principles which the Supreme Court said were now reflected in art. 33(2) of the German law, which in turn reflects art. 12(2) of the Rome Convention.

51. The Dutch Supreme Court has addressed the application of art. 12 in the case of *Brandsma q.q. v. Hansa Chemie A.G.*, (May 16, 1997) (RvdW 1997, 126C). This is a more problematic and evidently controversial decision, discussed both by Professor Struycken in his article and also by M. E. Koppenol-Laforce in The Property Aspects of an International Assignment and Article 12 Rome Convention (1998) NILR 129. Hansa Chemie SA was the German supplier to Brandsma q.q., a Dutch company, under a contract subject to German law which contained terms assigning, to Hansa, Brandsma's claims under Dutch law against its Dutch sub-buyers as security for the price due to Hansa. German law recognizes such an assignment as valid. Dutch law does not, even as between assignor and assignee, (a) because the claims assigned could not be and were not specified and individualized at the moment of assignment and (b) because they were only assigned by way of security (cf. Professor Struycken at p. 352). The liquidator of Brandsma therefore challenged Hansa's right to the moneys receivable from the sub-buyers. The Dutch Supreme Court held that art. 12 applied to govern the requirements necessary in order to transfer a debt, in a way having effect against third parties (as the liquidator was apparently viewed as being). But it rejected the application of art. 12(2) on the grounds that this article was in restrictive terms and that its application could require the application of a number of different legal systems (e.g., presumably, in cases of assignment of global assignments of receivables) and would deprive the assignor and assignee of full freedom of choice. In the Court's view, art. 12(1) applied. It also considered that art. 12(1) would otherwise be superfluous, having regard to arts. 3 and 4 of the Rome Convention.

52. I find it difficult to express any definite views on the reasoning or outcome of the Dutch Supreme Court's decision, not having seen a full translation. Its effect, Professor Struycken points out, was to side-step recently enacted, but much criticised, provisions of Dutch law, in the context of an assignment of a Dutch debt by a Dutch creditor. I find unconvincing the argument that art. 12(1) must have been intended to cover the issue or would be superfluous. It would seem no surprise that the first paragraph of an article dealing specifically with voluntary assignment should, for clarity, re-capitulate a result which was consistent with and could anyway flow from other provisions of the Convention (cf. also Struycken's comment to like effect on p. 351 in his article). On the face of it, the issue which arose before the Dutch Court might appear to have been one of assignability within art.

12(2). It is unclear what (if any) significance may have been attached to the fact that the issue involved a liquidator of Brandsma, and was being litigated between the liquidator and Hansa, rather than (for example) between Hansa and the Dutch sub-buyers. A liquidator may by law sometimes stand in a stronger position than the company would have had prior to its winding up (cf. Chitty on Contracts (28th ed.) vol. 1, par. 20–063, instancing ss. 395–398 of the English Companies Act 1985). The Dutch Supreme Court's decision also relates to a situation where the governing laws of the debt and the assignment differed and had different effects — so that a choice between art. 12(1) and art. 12(2) was critical. As it happens in the present case, both the insurance contract claims and their assignment by Five Star to RZB were expressly made subject to English law. The claims and their assignment, together with all aspects of the resulting relationship between the insurers, Five Star as assignor and RZB as assignee, are in my judgment clearly covered by art. 12(1) and (2). In these circumstances — even if one were to follow the Dutch Supreme Court's reasoning (which, so far as I follow it, I find myself presently unable to do) — the effect of Five Star's voluntary assignment to RZB and of the notice given of it to the insurers, would here fall to be determined by English law.

53. Mr. Layton referred to *In re Maudsley, Sons & Field*, [1900] 1 Ch. 602. In that case the English company, Maudsley, was owed money by a French firm, Delaunay & Cie. In October, 1899, receivers were appointed in respect of Maudsley's undertaking and assets in debenture-holders' actions. In November, 1899, Thomas Piggott & Co. Ltd., English creditors of the company took proceedings in France to attach the French debt. The debenture-holders sought to injunct P & Co. from, inter alia, such attachment. Mr. Justice Cozens-Hardy refused such relief, holding at pp. 609–610 that the French debt had a "locality" or "quasi-locality" and that:

> It seems to me that I must treat the debt due from Delaunay & Cie. as being situate in France, and subject to French law, and I cannot therefore prevent the claimants, at the suit of the debenture-holders, from taking any proceedings the law of France allows for recovering their debt out of this French asset.

54. He went on at p. 610 to hold, on the evidence of French law before him, that the French attachment prevailed over any title of the debenture-holders:

> The debenture-holders having according to English law a good assignment of the French debt, but having according to French law no such assignment, and the claimants having according to French law a good inchoate charge or assignment, which ought to prevail? It seems to me that I am bound to hold that that assignment which alone is recognised by the law of France ought to prevail, and that the claimants have a better title than the debenture-holders. This is the view taken by Mr. Dicey in his work on the Conflict of Laws, rule 141: "An assignment of a movable which cannot be touched, i.e. of a debt, giving a good title thereto according to the lex situs of the debt (in so far as by analogy a situs can be attributed to a debt), is valid." I am not satisfied that the authorities cited by him necessarily involve this principle; but I think it is correct, and, indeed, is a necessary consequence from the admission that a debt has a locality or quasi-locality.

Finally, he held that the appointment of English receivers made no difference to this result.

55. I do not find this case of assistance. Firstly, on the facts, the debt was both against a French debtor and subject to French law. Mr. Justice Cozens-Hardy did not have to choose between the lex situs and the proper law of the debt, or indeed to distinguish between the voluntary and involuntary aspects of the facts in the manner involved in the present case. Secondly, the decision is only a first instance decision. Thirdly, it was a decision on the common law; we are concerned with an international Convention, which must be approached on its own terms and given an appropriate international interpretation.

56. We were also referred to *In re Queensland Mercantile and Agency Co.*, [1891] 1 Ch. 536; affd. [1892] 1 Ch. 219. The Queensland company had charged to an English debenture-holder (a bank) the unpaid capital in respect of its shares. The Queensland company made calls on such capital on, inter alios, Scottish shareholders. The shareholders did not pay such calls, and had no notice of the debenture. An Australian creditor of the Queensland company obtained Scottish arrests in respect of the claims on such shareholders. The Queensland company was then ordered to be wound up both in Australia and in England. The question of priority between the debenture-holder and the creditor was argued in the English winding-up. The evidence was that the Scottish arrest had the effect of an assignment with notice and took priority over an earlier assignment without notice. This case therefore concerned an issue of priority between an earlier voluntary assignment and a later involuntary assignment by operation of law. Mr. Justice North took the simple approach that the debt was situated in Scotland, where the debtors resided. The Court of Appeal upheld his decision, after receiving further evidence of Scottish law and rejecting an argument that this should be disregarded as being in

conflict with international law. The case is of no assistance on the issue of the effect between insurers, Five Star and RZB of Five Star's voluntary assignment to RZB. It might have relevance as an authority in favour of applying the lex situs to determine any issue arising along the lines of the second issue identified earlier in this judgment — if for example there were evidence to suggest that a French attachment takes effect as an involuntary assignment and overrides a prior voluntary assignment completed by notice under the law governing the validity of such a voluntary assignment: see the citation of *Queensland* case in Cheshire and North (13th ed.) at p. 965, and the text to Dicey & Morris (13th ed.) r. 119, citing at par. 24–076 a dictum of Lord Goff in *Deutsche Schachtbau–und Tfefbohr G.m.b.H. v. Shell International Petroleum* Co. *Ltd.*, [1988] 2 Lloyd's Rep. 293 at pp. 319 col. 1; [1990] 1 A.C. 295 at p. 354B — although I would also note the vigorous attack on the appropriateness of the lex situs to govern even this type of issue by P.J. Rogerson in her article in [1990] C.L.J. 441 cited above. As I have said earlier in this judgment, no such second issue arises on the material before us, and so the *Queensland* case is of no present relevance.

57. I therefore conclude that art. 12 of the Rome Convention applies and that the effect, as between insurers, Five Star and RZB, of Five Star's assignment to RZB falls to be determined by reference to English law.

The nature and scope of the assignment

58. Under English law, an assignment may occur in a pot-pourri of three different forms, with variegated terminology. First, s.50 of the Marine Insurance Act, 1906 (re-enacting s.1 of the Policies of Marine Insurance Act, 1868) provides:

> (1) A marine insurance policy is assignable, unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.
>
> (2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.
>
> (3) A marine policy may be assigned by indorsement thereon or in other customary manner.

59. Secondly, s.136(1) of the Law of Property Act, 1925 (re-enacting s. 25(6) of the Judicature Act, 1873) provides:

> Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice– (a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same; and (c) the power to give a good discharge for the same without the concurrence of the assignor . . .

60. Thirdly, there may be an equitable assignment, which, once notified to the debtor, will have the effects of obliging the debtor to pay the assignee, of preventing further equities attaching to the debt and of protecting the assignee against subsequently notified assignments. An equitable assignment may relate either to the whole interest in a thing in action or to a partial interest: see Chitty on Contracts (28th ed.) vol. 1, pars. 20–037–040. *The Evelpidis Era* (cited below) is an example of the latter. There is a rule of practice that the assignor should be joined, but that rule will not be insisted upon where there is no need, in particular if there is no risk of a separate claim by the assignor: *Central Insurance Co. Ltd. v. Seacalf Shipping Corporation (The Aiolos)*, [1983] 2 Lloyd's Rep. 25 at pp. 33–34; *Weddell v. J.A. Pearce & Major*, [1988] Ch. 26 at pp. 40–41; and a decision of my own in *Sim Swee Joo Shipping Snd. Bhd. v. Shirlstar Container Transport Ltd.*, (Com. Ct., Feb. 17, 1994). The case for joinder will obviously be strongest, if there is an issue between assignor and assignee regarding the existence of an assignment or the equitable assignee has acquired only part of a chose in action: see e.g. Chitty, pars. 20–037 and 20–040. In the present proceedings, no problem about joinder arises, since all relevant parties are before the Court. Although at law future things in action could not be assigned, equity will give effect to the assignment of a future thing in action (or "expectancy") supported by consideration: see Chitty on Contracts (28th ed.) vol. 1, par. 20–032. I return to this aspect below.

61. RZB has asserted that Five Star's assignment took effect in each of these three ways. Mr. Justice Longmore held that any assignment took effect either under s. 50 or in equity and regarded any question of an assignment under s. 136 as beside the point.

62. Prior to the Policies of Marine Insurance Act, 1868 and the Judicature Act, 1873 (and leaving aside further presently immaterial statutory provisions relating to life insurance), choses or things in action were assignable if at all only in equity. The

statutory provisions of s. 50 and s. 136 must be seen against this background. Section 50 must also be seen in the context of ss. 15 and 51 of the Marine Insurance Act providing that an assured parting with his interest in a subject-matter insured does not thereby assign his rights under the contract of insurance, unless he expressly or impliedly agrees to do so; and further providing that any such agreement must occur before or when the assured parts with his interest and not subsequently, save in the case of assignment of a policy after loss. The operation of s. 50 depends upon there having been an assignment of "the beneficial interest in such policy", but no notice is required to the insurers. The operation of s. 136 depends upon there having been an "absolute assignment" of "a debt or other legal thing in action" and upon express notice in writing being given to (in this case) the insurers.

63. The reference in s. 50 to assignment "so as to pass the beneficial interest in such policy" has been held to require the passing of the whole beneficial interest in the policy: Arnould on Marine Insurance (16th ed.) par. 254; *Williams v. Atlantic Assurance Co. Ltd.*, (1932) 43 Ll.L.Rep. 177; [1933] 1 K.B. 81; *The First National Bank of Chicago v. The West of England Shipowners, Mutual P. & I. Association (The Evelpidis Era)*, [1981] 1 Lloyd's Rep. 54 at p. 64. In these two cases the assignment did not satisfy this requirement because, it was held, the assignors retained at least a limited interest in recoveries that might be made under the policy. In order to identify when the beneficial interest passes, it is also necessary to distinguish between situations of assignment before and after loss. Before loss, the policy is alive, and the assured cannot, in my judgment, be said to have parted with all beneficial interest in it, so long as he retains and does not part with the insurable interest in the subject-matter insured that the policy is intended to cover. The classic application of s. 50 is thus to circumstances where the assured sells the subject-matter insured (be it cargo, as happens daily, or ship) to another person with the benefit of the policy. Section 1 of the 1868 Act made this point clear, by providing:

> Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name . . .

64. In *Lloyd v. Fleming*, (1872) L.R. 7 Q.B. 299, Mr. Justice Blackburn delivering the judgment of the Court of Queen's Bench said at p. 303 that "the words relied upon [namely "entitled to the property"], in the case of an assignment before loss, express what is necessarily implied, and so are superfluous, perhaps inserted pro majore cautela". The Marine Insurance Act, 1906 was expressly a codifying measure. Sir Mackenzie Chalmers prepared it to reflect pre-existing statute and case-law, citing *Lloyd v. Fleming* both in his and Owen's pre-Act Digest of the Law relating to Marine Insurance (1st ed., 1901 and 2nd ed., 1903), under what became ss. 50 and 51, and in their post-Act work entitled The Marine Insurance Act, 1906 (now in its 10th ed). The inference is not that the change in s. 50 from the wording of s. 1 of the 1868 Act was intended to alter the effect, but that the words omitted were considered, as Mr. Justice Blackburn had said, superfluous in relation to assignment before loss — as well as inappropriate and potentially misleading (see the losing argument in *Lloyd v. Fleming* and see par. 66 below) in relation to assignment after loss. A person cannot be said to have parted with his beneficial interest in ongoing insurance cover, if he remains the person whose interest is insured, even if (for example) he has assigned the entire right to the benefit of any claims which arise in respect of his interest. As MacGillivray on Insurance Law (9th ed.) par. 20–9 points out, the assignor remains the insured in such circumstances, and only he can cancel the policy. The analysis which I have set out is expressly adopted, though without citation of authority, in Arnould on Marine Insurance at par. 253:

> A valid assignment before loss supposes the co-existence of three things at the time of assignment: (1) an insurable interest in the subject-matter of the policy in the assignor; (2) the continuance of the risk insured in the policy; (3) the assignment of an insurable interest in the subject-matter of the policy to the assignee, and its exposure to the perils during the continuance of the risk.

65. A similar proposition in an earlier edition of Arnould was approved by Lord Justice Slesser in his judgment in *Williams v. Atlantic Assurance Co.* at p. 105:

> The principle that the contract is one of indemnity implies that the beneficial interest in the policy cannot while it remains in force be severed from the interest insured: Arnould, 11th ed., s. 176.

66. After a loss, different considerations apply. The interest in a claim on insurers, the chose in action, may then be regarded as "the only property which is covered by the policy" and the words of the Act thus "literally complied with" by a simple assignment of the benefit of such a claim: per Mr. Justice Blackburn in *Lloyd v. Fleming* at p. 303. This is obviously so, when the subject-matter insured has become totally lost so as to exhaust the policy. It may also be so in the case of a partial loss,

at least once the policy has expired: see e.g. *Swan v. Maritime Insurance Co. Ltd.*, [1907] 1 K.B. 116 (a case of assignment after a partial loss and after the expiry of a time policy).

67. In Mr. Gruder's submission the assignment took effect under s.50. The assignment took place before any loss. Did Five Star assign to RZB an insurable interest in the subject-matter of the insurance? So far as the hull and machinery cover is concerned, it can be said that it did. The mortgage dated Sept. 17, 1997, which was subject to the laws of St. Vincent and the Grenadines, was expressed to —

> ... grant, convey, mortgage, pledge, assign, transfer, set over and confirm to the Mortgagees the whole of the vessel and all shares in the Vessel TO HAVE AND TO HOLD the same unto the Mortgagees for ever upon the terms set forth in this Mortgage for the enforcement of payment to the Mortgagees of the Indebtedness ...

68. *William Pickersgill & Sons Ltd. v. London and Provincial Marine and General Insurance Co. Ltd.*, [1912] 3 K.B. 614 instances the application of s. 50 to an assignment in favour of a mortgagee. However, the fact that Five Star transferred an insurable interest to RZB does not necessarily mean that it intended to or did transfer the benefit of its insurance so as to cover the assignee in respect of that interest. Whatever interest it transferred, it clearly also retained an insurable interest of its own as mortgagor and operator of the vessel. Bearing this in mind, I find it hard to see how other terms of the present mortgage (as summarized at the start of this judgment) can be reconciled sensibly with any idea that Five Star and RZB intended that the whole beneficial interest of even the hull cover should be transferred to RZB in order to protect the interest that RZB acquired as mortgagee. The thrust of cl. 5 of the mortgage is that Five Star would ensure that it continued to take out insurances in respect of *its own* insurable interests and continue (subject to the proviso in cl. 5.11) to receive any insurance payments in reimbursement of insured losses which *it* incurred. It may, however, be said that the mortgage is not the, or the only, relevant document. The deed of assignment deals directly with the assignment of the insurances. For my part, whatever policy or cosmetic considerations led to these two separate documents, I would think it appropriate to look at the overall position resulting from both. But, even if it is right to restrict one's vision to the deed dealing expressly with the assignment of insurances, it seems to me that, although its draughtsman started in cl. 5.1.1 with a valiant attempt to express an assignment in the widest and most absolute terms, the underlying reality (that the insurance was to continue to cover Five Star's insurable interest, although losses would be payable as set out in the loss payable clause) appears from the provisions of cl. 2.3.2 and 2.3.4 referring to the letters of undertaking and the loss payable clause.

69. The form of loss payable clause set out in Appendix B provided as follows:

> It is noted that by an Assignment in writing dated the day of 1997 (together "the Assignment") made in consideration of the Bank advancing a loan to us pursuant to a Loan Facility dated 1997 ("the Loan Agreement") we FIVE STAR GENERAL TRADING of PO Box 2274, Ajman, United Arab Emirates, ("the Owners") owners of the vessel "MOUNT I" (ex "MOUNT ATHOS I") ("the Vessel") assigned absolutely to RAIFFEISEN ZENTRALBANK ÖSTERREICH AKTIENGESELLSCHAFT of 36–38 Botolph Lane, London EC3R 8DE ("the Bank") this policy and all benefits thereof including all claims of whatsoever nature (including return of premiums) hereunder.
>
> Claims hereunder payable in respect of a total or constructive total or an arranged or agreed or compromised total loss or unrepaired damage and all claims which (in the opinion of the Bank) are analogous thereto shall be payable to the Bank.
>
> Subject thereto all other claims, unless and until underwriters have received notice from the Bank of a default under the Loan Agreement in which event all claims hereunder shall be payable directly to the Bank, shall be payable as follows:
>
> (i) a claim in respect of any one casualty where the aggregate claim against all insurers does not exceed ONE HUNDRED THOUSAND UNITED STATES DOLLARS (U.S.$100,000) or the equivalent in any other currency prior to adjustment for any franchise or deductible under the terms of the policy shall be paid directly to the Owners for the repair salvage or other charges involved or as a reimbursement if they have fully repaired the damage and paid all of the salvage or other charges;
>
> (ii) a claim in respect of any one casualty where the aggregate claim against all insurers exceeds ONE HUNDRED THOUSAND UNITED STATES DOLLARS (U.S.$100,000) or the equivalent in any other currency prior to adjustment for any franchise or deductible under the terms of the policy shall subject to the prior written consent of the Bank be paid to the Owners as and when the Vessel is restored to her former state and condition and the liability in respect of which the insurance loss is payable is discharged provided that the insurers may with such consent as aforesaid make payment on

account of repairs in the course of being effected.

Notwithstanding the terms of the said Loss Payable Clause and Notice of Assignment unless and until Brokers receive notice from the Bank to the contrary Brokers shall be empowered to arrange their proportion of any collision and/or salvage guarantee where the aggregate liability under all guarantees given in respect of any one casualty shall not exceed ONE HUNDRED THOUSAND UNITED STATES DOLLARS (U.S.$100,000) or the equivalent in any other currency to be given in the event of bail being required in order to prevent the arrest of the Vessel or to secure the release of the Vessel from arrest following a casualty.

All collections are to be made through . . . .

This wording seems to me to recognize, as I have said, that the insurances, despite and following any assignment, were intended to and did continue to protect Five Star's insurable interests in respect of any losses and liabilities which it incurred as mortgagor (and, in commercial terms, owner) or as operator of the vessel.

70. This conclusion is to my mind reinforced when one remembers that the present insurance provided more than mere hull and machinery cover. It included both collision cover and protection and indemnity cover. It is an essential part of RZB's case that the assignment embraced — in some sense — not merely the total loss cover on hull and machinery cover, but also the protection and indemnity cover and, above all, the collision cover. They submit that these too were assigned to RZB under s. 50. The appellants take issue with these propositions at each point. In their submission, the risks of liability insured by the protection and indemnity and collision cover remained Five Star's risks, and cannot have been transferred to RZB. Five Star continued to operate and crew the vessel. RZB as mortgagee never took possession or took over operation of the vessel. That seems to me clearly correct. Accordingly, if the assignment of the insurances to RZB embraced the protection and indemnity and collision cover at all, it cannot have done more than transfer to RZB the benefit of any claims that might subsequently accrue under such cover. The insurable interest in the subject-matter to which such cover related, namely Five Star's pecuniary interest in maintaining its patrimony free of the burden of such expenditure or liability, must then have remained with Five Star. On that basis, once again s. 50 could not apply. If, on the other hand, the assignment did not even transfer to RZB the benefit of any claims arising under the collision cover, then again s. 50 could not apply — the policy cannot be split into a series of sub-policies; if the collision cover was not assigned at all, then the whole beneficial interest in the policy was not assigned for that even broader reason.

71. For these reasons, s. 50 cannot in my judgment have applied to the present assignment.

72. We were referred to Mr. Justice Mocatta's brief treatment of the application of s. 50 in *The Evelpidis Era* (above) at p. 64, which was relied upon as pointing in the contrary direction to the conclusion which I have just expressed. An assignment to the mortgagee bank of the benefit of protection and indemnity cover was there held outside s. 50, but the sole reason given was the provisions of a letter of undertaking which provided for the club to continue to pay claims directly to the shipowners or their creditors until receipt of notice to the contrary from the bank. In Mr. Justice Mocatta's judgment the whole of the beneficial interest in the policy had not therefore been assigned. The fact that the shipowners remained the persons at risk in respect of the expenditure or liability insured (for example, on the facts of that case, the repatriation expenses: see [1981] 1 Lloyd's Rep. 54; at p. 57) does not appear to have been suggested as a further and more fundamental reason why s. 50 could not apply. Nor does Arnould raise this as a problem when referring to the case: see 16th ed., vol. 3 (1997) part 2, par. 254. Nevertheless, and despite the distinction and expertise of Counsel and the Judge in *The Evelpidis Era*, this further reason must, in my view and for reasons I have explained, prevent the application of s. 50 in such a case.

73. There is a further reason why s. 50 was in my view inapplicable in this case. Clause 2.3.4 of the deed of assignment contemplated that the loss payable clause set out above, providing inter alia for insurers to continue to pay some, though not all, claims directly to Five Star until notice to insurers of a default under the loan agreement, would be endorsed upon or attached to the insurance. There are differences between the terms of the assignment and intended loss payable clause in this case and those of the assignment and the letter of undertaking in *The Evelpidis Era*, and no loss payable clause was actually endorsed upon or attached to the present insurance. Nevertheless, the parties agreed in both the mortgage and the deed of assignment that there should be a loss payable clause, in terms defined by Appendix B of the deed and entitling Five Star, at least until further notice, to receive certain claims payments. The intention, although this does not appear to have been effected, was also that this clause should also be endorsed on the policy, so as to affect the insurers. It seems to me that these facts alone would prevent s. 50 from applying — as Mr. Justice Mocatta considered the letter of undertaking did on the facts before him.

74. I turn to s. 136 of the Law of Property Act, 1925. The requirement here is that there should have been an absolute assignment of the legal thing in action. A legal thing in action may be either the policy as a whole or a right of claim under it. Despite the different terminology, somewhat similar considerations to those relevant under s. 50 may arise here. First, in my judgment, an agreed assignment of the whole benefit of an insurance policy in conjunction with a sale or other transfer of the subject-matter insured could come within s. 136 (so that the section represents in that respect, prior to any loss, an alternative means to the same end as s. 50). As Clarke observes in The Law of Insurance Contracts pars. 6–3 and 6–4, "Under a contract of insurance the insured has present rights which are assignable even though their full value may not have matured". Compare also the examples of other contracts assignable under s. 136 given in Halsbury's Laws of England, vol. 6 (4th ed., reissue, 1991) Title Chose in action, citing *Tolhurst v. Associated Portland Cement Manufacturers, (1900) Ltd.*, [1903] A.C. 414 (assignment of the benefit of a contract to be supplied with chalk) and *Torkington v. Magee*, [1902] 2 K.B. 427 (assignment of a contract for the purchase of a reversionary interest; reversed on a different point at [1903] 1 K.B. 644). I also accept that, for the purposes of s. 136, an assignment is not prevented from being absolute by virtue of the fact that it may have been entered into for the purpose of security and may (as here) be subject to an equity of redemption, in the form of a provision for reassignment on repayment of the loan: see Chitty on Contracts (28th ed.) vol. 1, par. 20–012.

75. Nevertheless, s.136 is not, in my judgment, applicable on the facts of this case. First, for reasons which parallel those which I have given in relation to s. 50, there was here no assignment of the whole benefit of the insurance cover, and so, in the terms of s. 136, no absolute assignment of this nature. On the contrary, Five Star remained covered as mortgagor and operator of the vessel. Second, the most that the assignment may therefore have achieved, whatever the generality of the language used in cl. 2.1.1 of the deed of assignment, was to assign the benefit of any particular claims arising. There may under s. 136 be an absolute assignment of a claim or claims, but only of a *present* claim or claims. At the date of Five Star's assignment to RZB, any insurance claim(s) were merely an unwished-for future possibility dependant upon some future casualty. The distinction between present claims (which category includes rights that may mature in future under a presently existing contract) and future claims is not always easy. But future insurance claims which depend on future casualties which may never occur appear to me to fall clearly into the latter category and not to be assignable under s. 136: see the discussion in Chitty at pars. 20–028 and 20–029. Third, quite apart from the objection that what was agreed was an assignment of future, not present claims, the parties' agreement on the provisions of the loss payable clause – splitting the proceeds of such claims between them, at least until further notice – means, despite the language of cl. 2.1.1 of the deed of assignment, the assignment cannot be regarded as having been absolute.

76. It follows that the assignment cannot have taken effect under s. 50 or s. 136. But these are, as I have indicated, merely two specific statutory possibilities, which, where applicable, offer some advantages either in relation to the general requirement of notice (dispensed with under s. 50) or procedure (the general facility to sue without any need to consider joining the assignor under both sections). Where they do not apply, effect may still be given to an assignment in equity, both as between the parties to it and as against the debtor (or here the insurers) in consequence of the notice given to them. Before considering this further, however, I propose to deal with the issue raised relating to the scope of the assignment. The appellants submit that this excluded altogether the benefit of any claims that might arise under the collision cover. The submission is consistent with their likely overall objective. The mortgage contemplated insurance against both marine risks and P & I risks. It may be observed that marine risks on hulls are commonly insured (as this vessel was) on the Institute Voyage Terms — Hulls, cl. 6 of which includes collision cover. It is perhaps also worth nothing that cl. 3 of the standard wording of such terms (where not deleted, as it was in this particular case) purports to regulate assignment of "this insurance or... any moneys... payable thereunder" without suggesting any distinction between the pure hull cover and the collision cover conferred by the Institute terms. The deed of assignment, cl. 2.1 of which witnessed that Five Star "with full title guarantee assign absolutely and unconditionally and agree to assign to the Bank all their right, title and interest in and to the Insurances". "Insurances" was defined as meaning:

> ... all policies and contracts of insurance (including all entries in Protection and Indemnity or War Risks Associations) which are from time to time taken out or entered into in respect of or in connection with the Vessel or her increased value and (where the context permits) all benefits thereof including all claims of whatsoever nature and returns of premium.

Thus far the scope of the assignment seems on its face to embrace collision cover.

77. In the appellants' submission, the terms of the loss payable clause (as agreed between Five Star and RZB, although never actually endorsed on the policy) suggest that the collision cover was not being assigned. The appellants point out that, although the first paragraph of the loss payable clause refers to "this policy and all benefits thereof including all claims of whatsoever nature (including return of premiums) hereunder", the next paragraphs, dealing with total losses or unrepaired damage and "all other claims", focus on physical loss or damage. But this submission itself requires some qualification, in so far as the penultimate paragraph would have allowed the brokers to put up collision and/or salvage guarantees if required to prevent the arrest of the vessel or to secure her release from arrest following a casualty. This paragraph suggests that collision liability claims fall within the scope of the assignment, but would have allowed the limited incurring of expenditure under cl. 6.3 and/or under the sue and labour provisions in cl. 11 of the Institute Voyage Clauses — Hulls — Total Loss.

78. Mr. Layton submits that an assignment of collision liability claims is either impossible or inimical to the concept and purpose of an insurance like the present. The purpose of collision liability insurance is to cover the assured against third party liability. Assignment would, he submits, undermine this. I do not consider that this proposition is made good, even if one assumes that the collision insurance was intended to produce funds which the assured would be able to use to pay third party claimants. Even if that was its intention and effect, it does not follow that the assured was bound to use any insurance recoveries for that purpose; he would remain free to pay the third party claimants from any funds he wished (and indeed free not to pay them at all, if he wished); likewise he could dispose of any recovery made from insurers in any way he wished. In reality, however, the terms of the present collision insurance (although not as crystal-clear as those considered in *Firma C-Trade S.A. v. Newcastle P. & I. Association (The Fanti)*, [1990] 2 Lloyd's Rep. 191; [1991] 2 A.C. 1) probably mean that Five Star could not recover from the insurers in respect of collision liability except in respect of sums previously "paid", in the sense of disbursed, to the third party claimants by reason of such liability. On that basis, it is clear that, having paid the third party, the assured could dispose of any insurance recoveries in any way he wished, including by assignment.

79. It follows that I see nothing about the collision insurance cover which either makes assignment impossible or is inimical to the concept or purpose of such insurance. Indeed, the scenario presented to us — according to which, under the law of Malaysia where the fund representing the vessel is held and where the collision action is proceeding, the appellants as third party claimants may take priority over the vessel's mortgagees — indicates a good reason why it may be very prudent for a mortgagee to take from a shipowner an assignment of the benefit of collision insurance claims. Here, the assignment was in the widest terms. The context does not require any exclusion of the benefit of the collision insurance claims, and I would hold that they were duly assigned.

80. On that basis, I consider that there was an assignment of the benefit of any claims under the policy, including collision liability claims. Further, although such assignment cannot in my judgment have taken effect under either s. 50 or s. 136, there is no reason why it did not take effect in equity. Equity recognizes and gives effect to any assignment, for value, of a thing in action depending on a future contingency (an "expectancy"): see Chitty par. 20–032; and also Snell's Equity (13th ed.) par. 5–28, summarizing the position on the authorities as follows:

> The principle that equity regards as done that which ought to be done is applied, so that, once the assignor has received the valuable consideration and became possessed of the property, the beneficial interest in the property passes to the assignee immediately.

81. An assignor and assignee are thus bound from the moment of their agreement, while the debtor is (subject to notice) bound as soon as the expectancy develops into an actuality. Here, Five Star's assignment to RZB was for value — being supported (as recited in the deed of assignment) by ample consideration in the form of the loan advance. It had at least contractual effect between Five Star and RZB from Sept. 17, 1997 onwards. Once the collision occurred on Sept. 26, 1997, Five Star acquired present rights to look to the insurers pursuant to (technically, under English law, for breach of) the insurers' duty to hold them harmless or indemnify them in respect of any loss or liability falling within the policy terms and arising out of the collision. One can accept for present purposes that liability claims made against Five Star, for example by the appellants as cargo-owners, would fall to be agreed or adjudicated upon, before insurers could actually be required to disburse moneys under the policy. Even so, as from the collision, any entitlement to indemnity under the policy as against the insurers in respect of the consequences of such collision was in law no longer an expectancy; an insured loss had occurred and there was a present and assignable right to be indemnified against any loss or liability which might result. The previously agreed assignment could in equity operate accordingly and pass to RZB the beneficial interest in

relation to any insurance claims. Finally, notice of such assignment was given by or on behalf of RZB to the insurers on Oct. 7, 1997. In these circumstances, all the ingredients of a valid equitable assignment, binding not only on Five Star and RZB, as assignor and assignee, but also on the insurers, were fulfilled from Oct. 7, 1997. The insurers were from that moment onwards bound to RZB, rather than Five Star, in relation to any claim under the insurance as and when it fell to be settled. All these parties being before this Court, we are both entitled and bound to recognize and give effect to that assignment.

82. There is nothing to indicate that the loss payable clause has any relevance in relation to any such insurance claims as have arisen. There is nothing to indicate that any such claim, or any part of it, would, under sub-cl. (i) or (ii) or the penultimate paragraph of the loss payable clause, fall for payment to Five Star, rather than to RZB. I also add, for completeness, that there is nothing to indicate whether or when the insurers may have received any notice from RZB of a default under the loan agreement precluding the operation of sub-cl. (i) and (ii) or notice precluding the operation of the penultimate par.

83. Accordingly, the situation is on the face of it one in which RZB as assignee became entitled in equity as against Five Star and the insurers to the whole benefit of all claims arising from the collision. But, even if (contrary to the position so far as it appears) Five Star could be said, under the loss payable clause, to retain any interest in any part of any claim that may have arisen, RZB is still entitled in equity in relation to, and by virtue of, the assignment of the remainder of such claim. Further, all parties being before the Court, there is no obstacle to giving effect to any partial interest; since Five Star is in fact before the Court, it is unnecessary to consider whether, as a matter of procedure, the Court would, in the case of either a complete or a partial assignment in equity, have insisted upon its presence before granting RZB appropriate relief.

The appropriateness of declaratory relief

84. Having reached clear conclusions as to the legal positions of Five Star, RZB and the insurers, all of whom are before this Court, the question remains what if any relief the Court should now grant. In this Court, the appellants submit — with I think considerably greater emphasis than before Mr. Justice Longmore — that, whatever the rights and wrongs of the substantive issues argued, this is not a case where it is appropriate for the English Courts to grant any declaratory relief. Mr. Layton seeks to support this submission by four considerations: the declarations sought are intended for use in France to challenge the French attachments; the declarations relate to contracts to which the appellants were not party; they would serve no useful purpose, since there will have inevitably to be French proceedings; and great caution should always be exercised before granting any declarations. To these he added the arguments relating to collision cover, which I have already resolved against the appellants.

85. The present proceedings were begun against Five Star and the insurers, who in each case submitted to the English jurisdiction. Leave to serve the appellants out of the jurisdiction was obtained on the basis that they were necessary and proper parties to the litigation against Five Star and the insurers, and they in turn submitted to the jurisdiction. I agree that that does not preclude the appellants from raising points on the appropriateness of declaratory relief. But the fact remains that English jurisdiction has been accepted by all parties involved, in relation to the legal position of the parties to an insurance and an assignment, each of which is subject to English law. If this were, as Mr. Layton submits, a case of "naked forum shopping", one would expect that to have been raised as a jurisdictional objection. In fact, however, it is a case where the first issue, as identified earlier in this judgment, concerns the effect of the voluntary assignment of the insurance as between Five Star, RZB and the insurers. That involves identifying the appropriate law by which to consider such effect. My conclusions have been that art. 12 of the Rome Convention applies to identify the relevant law, that this is English law and that under English law there was a valid equitable assignment of the benefit of claims arising under the insurance, including any claim in respect of collision liability. It is true that the Rome Convention should mean that the same conclusions would have been, or would be, reached in France if the issue had been, or were to be, litigated there. But that is no reason at all for refusing to grant declaratory relief to record the decision here by the Courts of the country whose law governs under art. 12 — rather the contrary. The declaratory relief which this court grants may indeed (as I have noted in par. 23 of this judgment) prove the end of the whole matter. But even if, after the present judgment, there do remain further matters for argument either in England or in France, it is clearly appropriate to grant declaratory relief to confirm what has been now decided. That will then serve as a starting point for any further argument.

86. That the declarations relate to the effect of an English law insurance contract and an assignment to which the appellants were not party is no objection to declaratory relief. The appellants, by their French attachments, have themselves put in

issue the effect of the insurance and its assignment. The issue as to its effect has to be resolved somewhere. For reasons just given, England is the appropriate place to resolve it, not just because all parties have submitted to English jurisdiction on the point, but because, under art. 12, English law is the relevant law. The fact that other parties to the insurance contract and the assignment have been content to leave the English Court to decide the point, without submitting arguments of their own, is neither here nor there. They may not mind what answer is given. The present judgment and any declarations granted will still establish their position with certainty, and they will be both bound and protected by them, here and no doubt in France.

87. The case of *Meadows Indemnity Co. Ltd. v. Insurance Co. of Ireland plc*, [1989] 2 Lloyd's Rep. 298 is neither analogous nor helpful. In that case, Meadows, as reinsurers, sought to claim declarations against the original insured (International Commercial Bank — "ICB") to the effect that the original insurer (Insurance Co. of Ireland — "ICI") was entitled to avoid the original insurance and was not obliged to indemnify ICB. This Court took the view that no contested issue arose between Meadows and ICB and that there was no basis for any claim for declaratory relief. Meadows had rights in relation to ICI and no-one else. That is quite a different situation from the present, where the appellants have obtained attachments against a claim on insurers on the basis that Five Star has the right to claim. The appellants themselves, by their attachments and by the basis on which these were obtained, have raised an issue as to who had the benefit of the claim against insurers as at the date of such attachments.

88. Nor do I find in other cases cited by Mr. Layton, including *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade*, [1921] 2 A.C. 438 and *Messier-Dowty Ltd. v. Sabena S.A.*, [2000] 1 Lloyd's Rep. 428; [2000] 1 W.L.R. 2040, any principle or statements that should discourage the Court from granting declaratory relief on the issue which arises and which I have determined. These are not authorities requiring either extreme circumstances or extreme, or even great, caution before granting declaratory relief. Of course the Court will always scrutinize with care the context, utility and likely effect of any such relief. But where its grant "would help to ensure that the aims of justice are achieved" the Courts should not be reluctant to grant even negative declarations: *Messier-Dowty* per Lord Woolf M.R. at p. 434, col. 2; p. 2050H. At least as favourable a test must apply in the present context. For all the reasons I have given, I regard the grant of declaratory relief in this case as both useful and called for.

Conclusion and relief to be granted

89. In the result I would dismiss the appeal in so far as it maintains, on the basis of the evidence of French law before the Court, that the assignment to RZB was invalid, that RZB acquired no right or title by virtue thereof as against Five Star and the insurers and that RZB's claim to any insurance proceeds was bound to fail. I would also dismiss the appeal in so far as it maintains that, even if (as I have held) the appellants are wrong on these points, declaratory relief is not appropriate. It remains only to consider the detailed terms of the appropriate declaratory relief, on which the appellants took a number of further points. In the light of my conclusions as to the nature of the issue regarding entitlement under the insurance that we have at this stage to address, and as to the nature of the assignment that took place, some re-formulation of the declarations granted by Mr. Justice Longmore will be required. As suggested during argument, I would invite Counsel, after considering this judgment, to submit redrafted declarations in the forms for which they would now contend, with a view to our hearing further oral argument on this aspect when this judgment is handed down.

Mr. Justice CHARLES: 90. I agree

Lord Justice ALDOUS: 91. I also agree