

THE RIGHT TO ROME? THE LAW APPLICABLE TO DIRECT CLAIMS AGAINST INSURERS, AND ANTI-SUIT INJUNCTIONS

Under the Third Parties (Rights Against Insurers) Act 1930 (which survives notwithstanding its repeal, from a date still to be appointed, by the 2010 Act of the same name) the victim of a tort has the right, in certain circumstances, to seek an indemnity from the tortfeasor's liability insurer. That right rests upon a statutory transfer of the insured's contractual rights against the insurer (1930 Act, s. 1(1)). Many other legal systems provide for direct actions against a wrongdoer's liability insurers, adopting a variety of approaches and formulations. In *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticarat A.S. (The Yusuf Cepnioglu)*, the Court of Appeal granted an anti-suit injunction to restrain a Turkish charterer from pursuing a direct action before the Turkish courts against a Luxembourg based mutual insurance organisation. In that action, the charterer asserted rights under Turkish legislation which it claimed had arisen by reason of the fact that it had been the victim of a tort committed by the insured Turkish shipowner in connection with the sinking of a Turkish vessel off the Greek coast in 2014. The central part of the Court's reasoning was that the right asserted by the charterer in the Turkish proceedings fell to be characterised as a “contractual right”, with the consequence that the charterer, although not a party to the contract of insurance, was subject to an equitable obligation to respect the London arbitration clause in that English law governed contract. As the charterer had breached that obligation (so violating the insurer's correlative equitable right) and had acted “unconscionably” by suing in Turkey, the Court concluded that an anti-suit injunction should be granted to restrain further prosecution of the claim, in the absence of strong countervailing reasons ([2016] EWCA Civ 386, esp. at [1], [14]-[16], [20]-[21], [33], [35] (Longmore L.J.), [38] (Macfarlane L.J.), [45]-[50], [56] (Moore-Bick L.J.)).

According to Longmore L.J., “[t]he issue in the present case is whether it is appropriate for the English court to grant an anti-suit injunction; the first question is whether that issue should be determined in accordance with English law or some other law”. In his Lordship's view, that first question required the court to ascertain *either* “the nature of the right sought to be asserted namely the right not to be troubled ... by foreign proceedings” *or* “the nature of the right asserted in the foreign proceedings which is sought to be restrained” (all at [14]). The Court then chose to focus on the latter enquiry, undertaking a detailed analysis of the terms of the Turkish statute and concurring with the assessment of Teare J. below, that the right that the statute conferred was essentially contractual, being “to a large extent circumscribed by the contractual provisions” (at [20]-[21]). It appears that the distinction that the Court wished to draw was between a right of the victim to enforce against the insurer “essentially the same obligations as those that could have been enforced by the insured” (contractual right) and “a new and independent right which is not intended to mirror the insurer's liability under the contract of insurance” (independent right) (at [1], [16]).

Although the Court started in the right place, its consequential analysis of the choice of law issue appears topsy-turvy and unconvincing. It is also striking that the members of the Court did not refer to, or seek to account for, the effect of the Rome Regulations on the law applicable to contractual obligations (Regulation (EC) No. 593/2008, [2008] O.J. L177/6, Rome I) and non-contractual obligations (Regulation (EC) No. 864/2007, [2007] O.J. L199/40, Rome II) on the subject matter of the dispute before it. As the Court's approach was likely a product of the way in which the case was argued before it, the following comment should be understood not as a criticism but as a brief exploration of how future cases of this kind might be analysed in light of the Rome Regulations.

The Court's ostensible justification for focussing on the character of the right asserted by the charterer before the Turkish court, and not that relied on by the insurer to justify the grant of the anti-suit injunction, was that English private international law demanded that the issue to be characterised should

not be defined too narrowly according to particular notions or distinctions of English domestic law ([2016] EWCA Civ 386, at [15]-[16], referring to *Macmillan Ltd v Bishopsgate Investment Trust Plc (No. 3)* [1996] 1 W.L.R. 387, at 407B-C (Auld L.J.)). It is, however, one thing to adopt an enlightened approach to characterisation which looks beyond the claimant's formulation of the claim, and the labels that would be attached to that claim in a domestic context; it is another thing to approach the characterisation of the claim or issue before the English court by examining the juridical nature of a foreign rule of law which forms the basis of proceedings before a foreign court, and is not directly invoked before the English court. If, as Longmore L.J. suggested, the parties had invited the Court of Appeal to determine the law applicable to the anti-suit injunction claim then the Court should have begun its analysis of that issue by classifying the obligation in question in the English proceedings in order to decide whether and, if so, how the Rome Regulations would apply to it. If, instead, it was common ground between the parties that English law should apply to the issues arising upon the claim for an anti-suit injunction, then it would have been preferable for the Court to begin by identifying the rule(s) of English law relied on to support the grant of the injunction, before turning to consider (and, if necessary, classify) the subject matter of the Turkish proceedings insofar as this was necessary for the application of that rule.

The latter exercise would, at least directly, involve no choice of law process. If English law does apply to the charterer's obligation not to sue in Turkey, the operative rule would appear to be a rule of equitable origin according to which a person not originally a party to a contract, who seeks to enforce what is "essentially" a contractual right against a contracting party, acts unconscionably if he does so in a manner that deprives the contracting party of the benefit of a contractual right to arbitrate disputes under the contract ([2016] EWCA Civ 386, at [23]-[33] (Longmore L.J.) and [48]-[56] (Moore-Bick L.J.)), relying principally upon the Court of Appeal's decision *The Jay Bola* [1997] 2 Lloyd's Rep. 279 in preference to the later decision of that Court in *The Hari Bhum (No. 1)* [2005] EWCA Civ. 1598, [2005] 1 Lloyd's Rep. 67 to the extent of any inconsistency between the two). The contracting party (here, the insurer) has an equitable right to protection from such unconscionable conduct which it is entitled to enforce by the remedy of an anti-suit injunction. Here, although the arbitration clause would likely extend to both contractual and non-contractual obligations between the contracting parties: *Premium Nafta Products v Fili Shipping* [2007] UKHL 40, [2007] 4 All E.R. 951, the reason for distinguishing between claims that are essentially contractual and other claims for the purposes of applying this equitable rule would seem to be that, if the foreign claimant does not seek to use or take the benefit of the insurance contract to support his claim (see Longmore L.J., at [24]), he does not act unconscionably by suing otherwise than in accordance with the dispute resolution mechanism for which the contract provides. In non-legal parlance, the claimant does not seek to have his cake and eat it.

In order to decide whether there has been a breach of an equitable obligation justifying the grant of an anti-suit injunction, the substance of the claim advanced before the foreign court must be analysed. Nonetheless, this would simply be an exercise in classification of the obligation in issue before a foreign court as a factual element in applying a rule of English domestic law. It would not be an exercise in characterisation under private international law for the purposes of determining the law applicable to a claim or issue in English court proceedings. If, on the other hand, the English court were called upon to answer the question "what law should govern the claim for an anti-suit injunction?", then a process of characterisation, properly so called, would need to be undertaken. Moreover, the Rome Regulations would enter into the equation, raising as yet unconsidered questions of some complexity (Dickinson, *The Rome II Regulation* (Oxford University Press, 2008), [4.107]-[4.111]; Sim (2013) 62 I.C.L.Q. 703).

As a preliminary matter, the court may be invited to consider whether and, if so, to what extent a claim for an anti-suit injunction is a matter of evidence or procedure, excluded from the material scope of both Regulations (Rome I/Rome II, Art. 1(3). cf. *Actavis UK Ltd v Eli Lilly & Company* [2015] EWCA Civ. 555). In this connection, it may be noted that a procedural classification seems most strongly justifiable

when the basis for the grant of the injunction is the protection of the English court's jurisdiction or the jurisdiction of an arbitral tribunal, but that this was not the ostensible basis of the anti-suit injunction in *The Yusuf Cepnioglu* (see *Masri v Consolidated Contractors (No. 3)* [2008] EWCA Civ 625, [2009] Q.B. 503, esp. at [48], [55]-[58] (Lawrence Collins L.J.); *Ust -Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, esp. at [48] (Lord Mance)).

If the anti-suit claim is seen as raising a matter of substance, rather than procedure, the court would then proceed to consider whether the obligation in question should be classified as contractual (subject to Rome I) or non-contractual (subject to Rome II) or, possibly, as involving both contractual and non-contractual elements (subject to both Regulations). This characterisation process would need to be carried out according to EU rather than English law principles and, in particular, with reference to the guidance recently laid down by the European Court in *Ergo Insurance SE v If P&C Insurance AS* (Joined Cases C-359/14 etc) [2016] ECLI:EU:C:2016:40. In that case, adopting a test frequently applied under the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation (EC) No. 44/2001, [2001] O.J. L12/1, now superseded by Regulation (EU) No. 1215/2012, [2012] O.J. L351/1), the CJEU held that the concept of a "contractual obligation" designates a "legal obligation freely entered into by one person to another". Although the Brussels I regime provides separately for direct actions against insurers (Regulation 44/2001, Art. 11, now Regulation 1215/2012, Art. 13), the CJEU's general approach to the classification of a matter as contractual or non-contractual for jurisdiction purposes suggests that the fact that the content of the claimant's legal right is defined by reference to a contract will not suffice to establish the contractual nature of the matter if there is no obligation freely assumed between the claimant and the defendant (see *Jacob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA* (Case C-26/91) [1992] E.C.R. I-3967; *Kolassa v Barclays Bank plc* (Case C-375/13) [2015] ECLI:EU:C:2015:37). On that basis, following *Ergo Insurance*, there is a strong, if not irresistible, argument that the obligation of a person such as the charterer in *The Yusuf Cepnioglu* not to disregard the dispute resolution provision in the insurance contract falls within Rome II (non-contractual) rather than Rome I (contractual). The defendant (here, the charterer) did not freely assume any obligation not to sue the claimant (the insurer) otherwise than in accordance with the arbitration clause in the insurance contract; as the involuntary victim of a tort his only voluntary act consisted of asserting a Turkish statutory right by court proceedings in Turkey.

From the insurer's perspective, the case for a contractual classification appears, if only slightly, more promising. The insurer's obligation to indemnify the insured is, of course, contractual, as is any obligation owed to a named beneficiary for whose protection the insured contracts. In the case a contract of liability insurance, under which the insurer has promised to hold the insured harmless from liability incurred to the victim of a tort, it does not seem too much of a stretch to treat the insurer's obligations as being capable of being freely assumed towards the victim as well, at least if the victim is afforded a legal right by the law applicable to the contract to claim or intercept the indemnity payment and chooses to exercise that right (*Ergo Insurance*, above, at [54]-[55]). The victim's right in these circumstances could be regarded as being in the nature of a third party right which, although arising by operation of law, is sufficiently grounded in the insurer's voluntary conduct (cf. *Engler v Janus Versand GmbH* (Case C-27/02) [2005] ECR I-481, at [51]-[57]). If that proposition is accepted, any burdens imposed on the victim as a condition of enforcing the insurer's contractual obligation to indemnify might conceivably be classified as themselves engaging contractual obligations even though not regarded in national law as involving a breach of contract by the victim (cf. *Brogstetter v Fabrication de Montres Normandes EURL* (Case C-548/12) [2014] ECLI:EU:C:2014:148, at [23]-[26], albeit that it remains unclear whether this unsatisfactory reasoning would also apply to the Rome Regulations following *Ergo Insurance*).

That, however, is as good as the case for a contractual classification gets. The propositions in the last two sentences of the preceding paragraph stretch the definition of "contractual obligation" offered by the

CJEU in *Ergo Insurance*, quite possibly beyond the limits that the European Court would be willing to accept. Moreover, the further that the victim's right of direct action is removed from the insurer's freely assumed obligations towards the insured, the less likely that the claim against the insurer (and any reciprocal obligations of the victim to respect a dispute resolution clause) will be capable of being analysed involving freely assumed obligations, and the more likely that the situation will be treated as involving a non-contractual obligation imposing (vicarious) responsibility on the insurer for the tort committed by the insured (see the reasoning of Moore-Bick L.J. in *Hoteles Piñero Canarias SL v Keefe* [2015] EWCA Civ 298, [2016] 1 W.L.R. 905, at [80], albeit in a case to which Rome II did not apply; compare also Gloster L.J., at [36(viii)], and Black L.J., at [60]). This contrast between contractual (freely assumed) and non-contractual obligations is similar to the division between contractual right and independent right that the Court of Appeal acknowledged to exist in *The Yusuf Cepnioglu*, but it is not the same, as it originates in EU rather than English law.

Once the victim's putative obligation not to sue otherwise than in accordance with the dispute resolution provision in the insurance contract has been characterised as either contractual or non-contractual, a further twist occurs. The Rome I Regulation contains an exception for "arbitration agreements and agreements on the choice of court" (Art. 1(2)(e)). The Rome II Regulation does not. If, therefore, the victim's obligation to respect the dispute resolution clause is contractual under Rome I, that Regulation would not apply and the law applicable to the anti-suit claim would need to be determined by reference to common law choice of law rules (subject to the overriding effect of the Brussels I regime). If, however, the victim's obligation is non-contractual under Rome II, that Regulation (and, in particular, Art. 4 concerning the law applicable to non-contractual obligations arising out of tort/delict) would apply. It should be noted that the scope of the law applicable under Rome II extends to "the measures which a court may take to prevent or terminate injury or damage" (Art. 15(d)).

Finally, it is necessary also to consider Art. 18 of Rome II, which provides that "the person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides". That provision has been interpreted by the European Court as entitling the victim of a tort to bring a direct action by reference to one of those laws, even if such action is precluded by the other (*Prüller-Frey v Brodnig* (Case C-240/14) [2015] ECLI:EU:C:2015:567, at [44]). According to the Advocate General in that case, whose approach the Court followed, the rule "determines the law applicable to the question as to whether the injured party may bring a direct action against the insurer" by providing "a special connecting factor for a direct action brought by the injured party against the insurer, including possible limits on the exercise of that right" and is "a provision that protects the interests of the injured party, granting that party the benefit of the most favourable rules and enabling him or her to bring a claim directly against the insurer" (Opinion of Adv Gen Szpunar, at [81], [82], [85]). Although it seems unlikely that Art. 18 would apply directly in a case such as *The Yusuf Cepnioglu*, in which the direct action was brought outside the European Union, it seems strongly arguable that (even assuming English law to apply to the anti-suit claim) the court should address the question whether the foreign claimant behaved "unconscionably" in light of the circumstance that an English claimant in an identical position would have the right to invoke a direct action available under the law applicable to the tort committed against him (on the facts of *The Yusuf Cepnioglu*, almost certainly Turkish law: Rome II, Art. 4), even if the law applicable to the insurance contract would prohibit this.

In conclusion, the absence from *The Yusuf Cepnioglu* of any reference to the Rome Regulations should lead lawyers and judges in future cases to treat the outcome and reasoning with distinct caution.

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