

Case and comment

DIRECT ACTIONS AND ARBITRATION: ALL AT SEA

The Yusuf Çepnioğlu

The *Yusuf Çepnioğlu* ran aground on the rocky coast of Mykonos, casting its cargo into the Ionian Sea and becoming a total loss. The Turkish charterers, facing claims from cargo interests and blaming the Turkish owners for their predicament,¹ took advantage of a Turkish law which allowed them, as they said, to claim compensation in proceedings brought directly against the insurers of the vessel. Those insurers were a P&I Club, and the Turkish court had jurisdiction under its own law to entertain the claim against them. In *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Çepnioğlu)*,² the Court of Appeal confirmed³ an anti-suit injunction to restrain the charterers. The basis for this was that their bringing proceedings in Turkey infringed the legal rights of the insurers, and the only way to protect those rights was by injunction.⁴

If there had been no more to the story than that, the outcome would be inexplicable. The one additional fact, which the court took to make all the difference, was that the contract of insurance, which was governed by English law, provided for London arbitration. That allowed the court to conclude that the claim brought before the Turkish court was one which the arbitration clause in the insurance contract required the claimants to bring before a London tribunal. The plain point, that the claimants were not party to any contractual or consensual agreement to arbitrate, and so owed no relevant legal duty to the insurers to submit their claim to arbitration in London, was rejected. It should not have been.

The law of insurance gives rise to puzzles of a kind not usually found in simple bilateral relationships created by contract. Two points in particular challenge the application of basic theory. One is the way in which an insurer may be brought into a direct legal relationship with a non-party by taking over the rights of its insured against a person who has caused the loss. This may result in the insurer's being bound and entitled in the same way its insured was.⁵ Whether the mechanism by which this happens is by assignment

1. The charterers' claims against the owners were the subject of arbitration in London.

2. [2016] EWCA Civ 386; [2016] 1 Lloyd's Rep 641.

3. Dismissing the appeal against the decision of Teare J: [2015] EWHC 258 (Comm); [2015] 1 Lloyd's Rep 567.

4. If the premise is right, the conclusion follows, at least in the generality of cases, and unless the judicial proceedings are before the courts of another Member State. The point is not discussed here.

5. A particular factor that commonly arises in such cases, as it did here, is that a "pay to be paid" clause in the insurance contract means that the insurer's liability to indemnify is subject to the insured's having paid the person claiming against him. See *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti)* (No 2) [1990] 2 Lloyd's Rep 191; [1991] 2 AC 1.

of rights, or by subrogation, or by measures having equivalent effect, it is not hard to see that the insurer is treated, at least as a matter of private international law, as standing in the shoes of the insured: bound and entitled as the insured was. If the rights of the insured which so vest in the insurer were in a contract which contained a jurisdiction or arbitration agreement, the insurer will stand, for good or ill, in the insured's shoes in relation to that as well, for the dispute resolution provision will be part and parcel of the rights acquired by the insurer.⁶

The second point is the way in which the law of insurance may allow the victim of a tort committed by an insured to cut out the middle man and go after the insurer in a direct action. Here also there is variety in the legal analysis.⁷ There may be a transfer by operation of law of the rights of the insured from insured to victim. The Third Parties (Rights Against Insurers) Act 1930⁸ works this way, providing that the contractual rights of the insured are “transferred to and vest in”⁹ the victim, though only in the case of the insolvency or winding up of the insured. When this happens, the claimant replaces the insured in the contractual relationship with the insurer, and if the insurance contract contained a dispute resolution provision, this will be part of the created contractual relationship between insurer and third party. However, the 1930 Act was not applicable in *The Yusuf Çepnioğlu*.

For the Court of Appeal to find that the bringing of proceedings in Turkey was a breach of contract by the charterers, capable of founding the claim for an injunction, it was necessary to show that the charterers were bound by the arbitration agreement in the contract between the owners and the Club. The court concluded that they were, by taking two steps. It characterised the claim of the charterers, created by Turkish law, as contractual in nature, and deduced that the contract which provided the contractual cause of action was the contract of insurance with its provision for London arbitration; for, unless this could be made out, there was no vehicle to carry the arbitration clause to the charterers' door.

Was the claim of the charterers contractual in nature? There are several ways to answer this question. One would be to analyse the legal nature of the right or rule relied on, and to “characterise” the particular right or rule of law as essentially contractual or essentially not contractual. This is what the court seemed to do. But it is difficult. As the present case showed, it may ask questions about a foreign legal rule enacted to produce a result without concern for such abstract theory; it will also mean that every time a case comes up, particular provisions taken¹⁰ from a foreign law will have to be examined and analysed.

6. The legal mechanism for this conclusion may be debated, and may not be completely straightforward. The Court of Appeal took it as established (English) law: Longmore LJ at [24] (citing, rather surprisingly, *Halsall v Brizell* [1957] Ch 169, a case on the running of covenants touching and concerning freehold land); Moore-Bick LJ at [46].

7. As well as a variety in the circumstances in which this right is available. In English law, the Third Parties (Rights Against Insurers) Act 1930; in Turkish law, the Insurance Contract Law of 2012; in Spanish law, the Penal Code and the Insurance Contract Act 1980 (examined in *The London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige) (No 2)* [2015] EWCA Civ 333; [2015] 2 Lloyd's Rep 33).

8. The Third Parties (Rights Against Insurers) Act 2010 will replace the 1930 Act with effect from 1 August 2016 (SI 2016/550). However, it makes no material change on this point.

9. Section 1(2) of the 1930 Act.

10. And possibly outside their broader context.

It is a recipe for expensive unpredictability. Further, the usual and better technique of the common law is to characterise issues rather than rules of law. This would involve asking the more general question whether such claims, as a matter of principle, fell within the private international law domain of contract or of tort; it would pay less attention to the accident of legislative drafting.

And this is the point. However one describes the legal relationship, one cannot avoid using the unhappy term “third party”.¹¹ The victim is a third party to the insurance contract when claiming benefits which would not exist if the contract did not exist; but the insurer can equally well be seen as a third party to the tort, liable to be liable in consequence of another’s wrongdoing. Whether they realised it or not, the insurers were asking the court to adopt the first point of view, and the charterers the second.

The last time the Court of Appeal had examined this question, it had favoured an approach which characterised such claims as tortious claims, imposing non-contractual liability on a third party, Moore-Bick LJ saying:¹²

“That makes it necessary to identify the system of law by reference to which the existence of a direct right of action against a liability insurer is to be determined. In *Maher v Groupama*¹³ (in which the issue did not arise for decision) I suggested in passing that it was the proper law of the contract, but on further reflection I think that may not be correct. There will be no contractual relationship in the ordinary sense between the injured party and the insurer. The right of the injured party to recover directly from the insurer will therefore not arise under the contract of insurance (unless, perhaps, the proper law of the contract recognises some kind of third party right of a contractual nature). Nor does it depend on any breach of duty by the insurer personally. If it exists at all as a substantive right, it is likely to equate to a right to hold the insurer vicariously liable for the tort of his insured.”

The question had arisen in a complex case in which the court had needed to identify the law governing such a claim in order to answer a jurisdictional question posed by the Brussels I Regulation;¹⁴ in the end, the particular issue did not require decision. But the approach favoured by Moore-Bick LJ was to address (or characterise) the issue as one of abstract principle; the answer was that such claims were in the nature of a tort. A year later, this insight was nowhere to be seen:¹⁵ the particular cause of action was interpreted (or characterised) as contractual: “in essence the claimant became entitled under the legislation to enforce for its own benefit the contract between the insured and the Club”.¹⁶ This volte-face was not explained. It also overlooks the fact that the

11. It seems to mean “non-party”. It may be that, if this had been the language with which the law was described, the issues would seem materially different.

12. *Hoteles Piñero Canarias SL v Keefe* [2015] EWCA Civ 598; [2016] Lloyd’s Rep IR 94; [2016] 1 WLR 905, [80]. Gloster LJ, at [40–41], did not need to decide the question, and did not comment on this aspect of Moore-Bick LJ’s judgment. The Supreme Court has given permission to appeal.

13. *Maher v Groupama Grand Est* [2009] EWCA Civ 1191; [2010] Lloyd’s Rep IR 543; [2010] 1 WLR 1564.

14. Regulation (EC) No 44/2001 (Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), Art.11(1); Regulation 1215/2012 (Brussels I Regulation (Recast)), Art.13(1).

15. The earlier decision is not mentioned in the judgment; it is not known whether it was cited to the court.

16. At [45].

common law¹⁷ rules of private international law allow the victim of a tort, who is also party to a contract, to elect to pursue a claim in tort where one is available to him: according to this, even if they were third parties to a contract of insurance, the charterers were entitled to say that the insurers were third parties to a tort, made personally liable by the *lex delicti*.¹⁸ On the footing that this was Turkish law,¹⁹ that law would determine who was liable in respect of it and how far they were liable for it,²⁰ and so forth.

But it may be that to get bogged down in analysis of the nature of the action against the insurer is to focus on the wrong point. The cause of action for an injunction required the charterers to owe the insurers a duty to arbitrate, and required the insurers to suggest how this had happened. The court appears to have felt that the charterers should not have had a litigation freedom which the insured would not have had. But by what process of reasoning? It had not been brought about by the 1930 Act; and Turkish law had no relevance to a contract of insurance governed by English law. It was obviously not the result of the charterers being subrogated to the rights of the insured, or any such thing. Although the Court of Appeal purported to find support for its conclusion in *The Jay Bola*,²¹ this should not have helped. *The Jay Bola* held that an insurer, on becoming subrogated to the insured's rights against a defendant wrongdoer, was entitled and bound by the terms of the contract between the insured and the defendant. The insurer acquired or assumed the rights of the insured and, if an arbitration agreement was part and parcel of those rights, the insurer was both bound and entitled to arbitrate. *The Jay Bola* was not concerned with a direct action by victim against insurer, in which subrogation plays no part.

In *The Hari Bhum (No 1)*,²² however, a more muddled message had been given. The insurer of a victim had become subrogated to the rights of its insured, and had then brought a direct action, based on Finnish statute law, against the insurer of the wrongdoer. Moore-Bick J had restrained the claimant insurer from proceeding in Finland on the basis that it was bound by an arbitration agreement in the contract of insurance by which the defendant insurer had covered the liability of the insured wrongdoer.²³ The Court of Appeal had set aside the injunction; and, though the appeal judgment is perplexing, it

17. As the ultimate question was whether an arbitration agreement bound the charterers, it may just have been acceptable to ignore the Brussels and Rome Regulations (Rome I Regulation (EC 593/2008) on the law applicable to contractual obligations; Rome II Regulation (EC 864/2007) on the law applicable to non-contractual obligations). It was still surprising that nothing was said about the role of the Rome I and Rome II Regulations when analysing the legal nature of causes of action (contractual or non-contractual) which arose after those Regulations came into force.

18. This was not said, but must follow from the Rome II Regulation.

19. Even though the damage occurred in Greece, the parties appeared to have a common habitual residence in Turkey: see Rome II Regulation, Art.4(1),(2).

20. Rome II Regulation, Art.15.

21. *Schiffahrtsgesellschaft Detlev von Appen GmbH v Vöst Alpine Intertrading GmbH (The Jay Bola)* [1997] 2 Lloyd's Rep 279.

22. *Through Transport Mutual Insurance Association (Eurasia) Ltd v New Indian Assurance Co Ltd (The Hari Bhum) (No 1)* [2004] EWCA Civ 1598; [2005] 1 Lloyd's Rep 67; noted (2004) 75 BYBIL 549.

23. [2003] EWHC 3158 (Comm); [2004] 1 Lloyd's Rep 206. In 2004 it was still understood that an injunction might restrain proceedings before a Member State court if those proceedings breached an agreement to arbitrate. The decision in *Allianz SpA v West Tankers Inc (The Front Comor)* (Case C-185/07) [2009] ECR I-663; [2009] 1 Lloyd's Rep 413; [2009] AC 1138 would now mean that such an injunction could not be ordered.

seems that the court was not willing to restrain a claimant who was not, and had never been, a party to the contract which contained the arbitration agreement.²⁴ What made the judgment awkward was acceptance by the Court of Appeal that the claim against the defendant insurer was contractual in nature, and that the claimant was bound by the arbitration provision in it. But, if one asks where or when the claimant had agreed and bound itself to arbitrate the claim which it made in court, the answer was nowhere and never: it had neither done so for itself nor succeeded in law to the position of someone who had done so. That should have been that; and so it should also have been in *The Yusuf Çepnioğlu*.²⁵

The proper analysis of direct actions against an insurer is certainly tricky. Aspects of the question may arise: in the context of jurisdiction under the Brussels I Regulation; in the context of the common law principles of characterisation for the purpose of choice of law; and in the context of the Rome I and Rome II Regulations²⁶ for the purpose of identifying the applicable law under the uniform European rules of private international law. It seems certain that it will be back before the courts soon; and there probably is a good doctoral thesis to be written on the topic. But the question in *The Yusuf Çepnioğlu* was actually simpler: had the charterers bound themselves, or become bound, to bring a claim against the insurers only before an arbitral tribunal? The answer was equally simple: they had not done so, and nor had anyone whose rights they had taken over. Of course, an insurer may ask how a third party can be better placed, jurisdictionally speaking, than the insured who paid for the insurance in the first place.²⁷ But the answer is that, in providing a third party with a direct claim against another's insurer, the law has already exposed the insurer beyond the four corners of the contract of insurance. When that happens, there is no particular reason to suppose that the beneficiary of that statutory right is nevertheless²⁸ subject to a dispute-resolution promise which, *ex hypothesi*, the statutory beneficiary did not give or otherwise subscribe to. In the peculiar world of direct actions, instinct is not the sure guide it often is. In *The Yusuf Çepnioğlu*, an instinct for the right answer seems to have led the court onto the rocks.

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24. Which, one has to say, is a sensible instinct to follow.

25. If it is argued that, in the end, the decision to order an injunction is discretionary, and that the court is not therefore bound to follow an earlier decision of its, this is contradicted by the approach of Moore-Bick LJ in *Petter v EMC Corp Ltd* [2015] EWCA Civ 828, [31].

26. See *supra*, fn.17.

27. In the context of the Brussels I Regulation, see *FBTO Schadeverzekeringen NV v Odenbreit* (Case C-436/06) [2007] ECR I-11321; [2008] Lloyd's Rep IR 354.

28. And even though the legislation does not say so.

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