JUDGMENT : Mr. Justice Moore-Bick: Commercial Court. 21st March 2005

1. This matter comes before me on an application by the claimant under section 18 of the Arbitration Act 1996 for an order appointing an arbitrator to hear and determine certain disputes between the parties. It forms part of a long-running battle between the defendant, New India Assurance Company Ltd ("New India"), and the claimant, Through Transport Mutual Insurance Association (Eurasia) Ltd ("the Club"), arising out of the loss of a container of garments in the course of carriage from Calcutta to Moscow in the latter part of 1999. The container was carried by sea in the vessel *Hari Bhum* from Calcutta to Kotka in Finland where it was delivered to a road haulage company, Borneo Maritime Oy, for onward carriage to Moscow. The container was lost somewhere in Russia in the course of its journey to Moscow. New India insured the goods against loss or damage in transit and settled a claim by the shipper for their loss. Having done so, it is seeking to recover its loss from the Club as the liability insurer of Borneo Maritime Oy which went into liquidation and was struck off the Finnish register of companies on 26th November 2002.

2. The circumstances giving rise to the claim and the steps that have been taken by New India to recover from the Club through proceedings in Finland under section 67 of the Finnish Insurance Contracts Act 1994 which contains provisions similar to those of the Third Parties (Rights against Insurers) Act 1930 are set out in some detail in the judgment I delivered on 18th December 2003 in earlier proceedings between these two parties. On that occasion I determined the Club's application for a declaration that New India was bound to pursue its claim in arbitration in London in accordance with its Rules and for an injunction restraining New India from continuing the proceedings in Finland. That judgment ([2003] EWHC 3158 (Comm)) is now reported at [2004] 1 Lloyd's Rep. 206 and it is unnecessary for me to repeat what I said on that occasion. For the reasons given in that judgment I held that New India was bound to pursue any claim against the Club in arbitration and made a declaration to that effect. I also made a declaration that the proceedings brought against the Club by New India in Finland were in breach of the arbitration clause and I granted an injunction restraining New India from continuing those proceedings, save for opposing the Club's appeal against the decision of the District Court of Kotka that New India was not bound by the arbitration clause in the Club's Rules.

3. The question whether New India is bound by the arbitration agreement has an importance which goes far beyond that of regulating the procedure by which its claim against the Club should be determined. The Club's Rules also contained a "pay to be paid" clause and an express choice of English law. As New India recognises, the combined effect of those clauses is that any claim made in arbitration in this country under the Third Parties (Rights against Insurers) Act 1930 would be bound to fail in the light of the decision of the House of Lords in *Firma C-Trade S.A. v Newcastle Protection and Indemnity Association (The 'Fanti')* and *Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd (The 'Padre Island') (No.2)* [1990] 2 Lloyd's Rep. 191. However, it is possible (though this has yet to be finally decided) that the "pay to be paid" clause may not operate to defeat a claim in Finland under section 67 of the Insurance Contracts Act 1994.

4. When the matter was last before me the Club argued that the effect of section 67 of the Insurance Contracts Act is substantially the same as that of the Third Parties (Rights against Insurers) Act in that it enables a person who has a claim against an insolvent insured to pursue a claim directly against the insurer in order to obtain the benefit of the insurance. It submitted that since the contract of insurance contained an arbitration agreement, such a claim could only be brought in arbitration. New India, on the other hand, argued that the rights it sought to enforce in Finland were statutory rights independent of the contract of insurance and were therefore unaffected by the arbitration agreement. I held that in order to determine that question it was necessary to characterise the issue between the parties in accordance with English conflicts of laws rules. If the claim was properly to be characterised as one to enforce an English law obligation, the question whether it was one to which the arbitration clause applied was to be decided in accordance with English law as the law giving rise to the obligation. In those circumstances Finnish law and the provisions of the Insurance Contracts Act 1994 would be irrelevant. I concluded that the claim was to be characterised as one to enforce an English obligation and that it was one to which the arbitration agreement applied.

5. The applications before me on the last occasion raised a number of complex issues and I therefore gave New India permission to appeal. The Court of Appeal (Lord Woolf, L.C.J., Clarke and Rix L.JJ.) upheld my decision that New India's claim was one to which the arbitration agreement applied and upheld my order granting a declaration to that effect. However, it set aside the anti-suit injunction leaving New India free to pursue its claim in Finland. Much of the argument in the present case has been directed to ascertaining precisely what the court decided about the nature of the rights acquired by New India and the legal basis on which it is able to enforce them.

Jurisdiction

6. Section 18 of the Arbitration Act 1996 under which this application is made provides as follows:

> *"(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal. . . . .*
>
> *(2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.*
>
> *(3) Those powers are — . . . . . .*
>
> *(d) to make any necessary appointment itself."*

7. Mr. Smith submitted that the court's jurisdiction to appoint an arbitrator depends on there being an agreement between the parties to refer disputes to arbitration. In the present case, however, there is no such agreement. The Court of Appeal has held that New India is not a party to an agreement to arbitrate and it is apparent from the court's judgment that its position is not even to be equated to that of an assignee. Accordingly, the court has no jurisdiction in this case to exercise the powers given by section 18.

8. The foundation for this argument is to be found in paragraph 52 of the Court of Appeal's judgment which comes at the beginning of the section dealing with the arbitration clause. It reads as follows:

> *"52. Some of the argument in this appeal proceeded on the footing that the question is whether New India became a party to the agreement to arbitrate contained in clause D2 of the General Provisions in the Club Rules. However, we do not think that that is quite the right question and, as we read his judgment, the judge did not go so far. We accept Mr Smith's submission that New India did not become a party to an arbitration agreement. We agree that self-evidently New India was not an original party and there is no basis upon which it could be held that there was any novation or transfer to New India of the rights and obligations of the insured under the Club Rules. This is in our view important on the question whether it was appropriate to grant an anti-suit injunction discussed below."*

9. That passage certainly supports Mr. Smith's argument that New India did not become a party to an arbitration agreement, but it does not on its own go far enough to establish the full extent of his case. I say that because, notwithstanding what is said in paragraph 52, the court reached the conclusion in paragraph 60 that *"if New India wishes to pursue a claim under the Finnish Act, it is bound to do so by arbitration in England because the Club is entitled to rely upon the arbitration clause, just as it is entitled to rely upon any other clause in the contract to defend the claim."*

10. Then, having set out in paragraph 63 the declarations made by this court, the court said:

> *"64. It seems to us to follow from the conclusions which we have reached so far that the Club is entitled to the first of those declarations. For the reasons given above under the heading 'the arbitration clause', an application of English conflict of laws principles leads to the conclusion that, if New India wishes to pursue a claim under section 67 of the Finnish Act, it must do so in arbitration in London because the Club is entitled to rely upon the arbitration clause in the Club Rules, which are the very rules which New India relies upon in order to make a claim under the Act: see, in the context of the Third Parties (Rights Against Insurers) Act 1930,* ***The Padre Island (No 1)****."*

11. The first of the two declarations did not in fact refer to a claim *under section 67 of the Finnish Act* and, as Mr. Smith accepted, it is not easy to see on what basis a claim could be made under foreign legislation of that kind in an English arbitration in order to enforce a chose in action arising under an English contract. It would seem to follow, therefore, both from the court's reasoning and from the terms of the declaration contained in the resulting order (which also makes no mention of the Finnish Act), that any claim by New India to enforce the contract of insurance must be pursued in arbitration.

12. However, although the Court of Appeal did consider that New India was bound to pursue its claim in arbitration in accordance with the Club's Rules, it is clear that it did not regard New India as being a party to an arbitration agreement in the full sense and therefore under a positive obligation to arbitrate of a kind that would sound in damages in the event of a breach. Thus in paragraph 65 it said:

> *"65. It is less clear that the Club is entitled to the second declaration. In our view the Club is not entitled to such a declaration if it means, on its true construction, that New India was in breach of contract in commencing the Kotka proceedings. As indicated in paragraph 52 above, we do not think that New India was in breach of contract. So, for example, the Club could not in our view sue New India for damages for commencing the proceedings in Finland. It seems to us that the declaration could be so construed and for that reason we think it right to set aside that declaration. As we see it, the Club is sufficiently protected by the first declaration and either does not need the second or, if it is construed as just suggested, is not entitled to it."*

13. The fact that New India was not a party to an arbitration agreement in the full sense was one of the factors that ultimately led the court to the conclusion that it was not just or convenient in this case to grant an injunction restraining it from continuing the proceedings in Finland. Having considered the earlier authorities, in particular the decision of the Court of Appeal in ***Aggeliki Charis Compania Maritima S.A. v Pagnan S.p.A. (The 'Angelic Grace')*** [1995] 1 Lloyd's Rep. 87, the court said this:

> *"92. . . . . We do not accept Mr Smith's submission that the court should not grant an anti-suit injunction in a case where a party to an arbitration agreement begins proceedings in the courts of a contracting state in breach of an arbitration clause in a contract.*
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> *93 That is not, however, this case. We therefore turn finally to Mr Smith's submission that the judge should not have granted an injunction in this case, where the highest that it can be put against New India is that the only reason that it can be said in England that New India should not be permitted to proceed in Finland is that, because of English principles of conflict of laws, the claim is classified as a claim under the contract so that New India is bound to bring any claim against the Club in arbitration in London. Mr Smith submitted that in these circumstances there is no parity of reasoning between this case and the principles relied upon by the judge and set out above.*
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> *94 We accept that submission. This claim is brought in Finland under a Finnish statute conferring rights on third parties against liability insurers in circumstances in which the insured is insolvent. The statute was no doubt passed because, as a matter of public policy in Finland, it was thought that liability insurers should be directly liable to third parties who had suffered loss in respect of which the insured was liable. The public policy behind the Finnish Act was the same as or very similar to the public policy behind the Third Parties (Rights Against Insurers) Act*

1930. It appears that the only difference of importance between them is that in England the anti-avoidance provision does not defeat the pay to be paid clause, whereas it may be that section 3 of the Finnish Act will do so, although it is right to say that that is a matter yet to be determined by the Finnish courts. It may also be observed that by section 3(3) section 3(1) and (2) do not apply to "marine or transport insurance taken out by businesses". There is, as we understand it, an issue between the parties as to whether the liability insurance provided by the Club is within the exception. The court in Kotka appears to have been of the view that it was not, but was liability insurance outside the exception. However, it is not entirely clear to us whether the court has made a final decision to that effect in its decision on jurisdiction.

95. The question is whether in all the circumstances the English court should grant an injunction restraining New India from bringing its claim under the Finnish Act in Finland. It is always a strong step to take to prevent a person from commencing proceedings in the courts of a contracting state which has jurisdiction to entertain them. The ECJ has either held or in effect held that no such injunction should be granted in the case of an exclusive jurisdiction clause (Gasser) or on the ground that the proceedings are vexatious and oppressive (Turner v Grovit). New India is not in breach of contract in bringing these proceedings in Finland, so that the principles in cases like The Angelic Grace do not apply directly. In this regard we accept Mr Smith's submission that, while such cases may provide some assistance by analogy, they do not apply by parity of reasoning, as the judge thought. None of the cases to which we were referred, including Akai, was considering a case quite like this.

96. Further, this is not a case in which it can fairly be said that the proceedings in Finland are vexatious or oppressive. New India is simply proceeding in Finland under a Finnish statute which gives it the right to do so. The question is whether the English court should restrain it from doing so.

97. Given our view that the principles in the decided cases cannot be applied by parity of reasoning and given the further fact that the judge did not have the assistance of either Gasser or Turner v Grovit, both of which have made an important contribution to the jurisprudence in this area, this court is in our opinion free to form its own conclusion on the question whether to grant an anti-suit injunction on the facts of this case. We have reached the conclusion that, having regard to all the circumstances of the case, including those set out above and the reasoning underlying the approach of the ECJ in Turner v Grovit, this was not a case in which, in the language of section 37(1) of the Supreme Court Act 1981, it was or would be just and convenient to grant an injunction restraining New India from pursuing a claim under the Finnish Act in Finland. "

14. Mr. Smith submitted that, since the court confirmed that the principles relating to the granting of anti-suit injunctions in support of arbitration agreements as applied in *The Angelic Grace* and subsequent authorities still apply, it would have had no hesitation in upholding the anti-suit injunction in this case if it had been satisfied that there was an arbitration agreement of any kind between the Club and New India. Its unwillingness to do so, he submitted, therefore provides strong support for the conclusion that, whatever the precise nature of the relationship between them, it does not amount to an arbitration agreement of the kind that is required before the court can exercise its jurisdiction under section 18 of the Act. However, Mr. Smith did accept on the authority of ***Schiffahrtsgesellschaft Detlev von Appen G.m.b.H. v Voest Alpine Intertrading G.m.b.H. (The 'Jay Bola')*** [1997] 2 Lloyd's Rep. 279 that an assignee of rights under a contract which contains an arbitration clause must pursue his claim in arbitration in accordance with the terms of the contract and that the court will normally protect his right not to have proceedings brought against him in another forum by granting an anti-suit injunction. He was therefore constrained to argue that the position of New India in the present case is different from that of an assignee, or indeed of any other kind of transferee, of the obligation in question.

15. In my view the debate in the present case has suffered to some extent from a misunderstanding of the significance of what the Court of Appeal said in paragraph 52 of its judgment. As I read it, all that the court was seeking to do in that paragraph was to dispose of the suggestion that New India had become a party to a contract with the Club as a result of the transfer to it of the rights and obligations of the insured under the Club's Rules. The court clearly thought that it had not, but it is equally clear that it did not think that that was the right question. Having disposed of that point, it went on to consider the nature of the claim being made by New India and whether it was one that had to be pursued in arbitration. It is quite clear from paragraph 60 of the judgment and from the declaration contained in the order drawn up to give effect to its decision that the court considered that New India was bound to pursue its claim in arbitration in England and was not entitled to act in disregard of the arbitration clause.

16. Similarly, the fact that the Court of Appeal reached the conclusion that it was inappropriate in this case to grant an anti-suit injunction against New India provides only limited support for the conclusion that there is nothing that can be regarded as amounting to an arbitration agreement between the Club and New India for any purposes. When discussing the nature of the relationship between New India and the Club the court pointed out that New India was not acting in breach of contract in commencing proceedings in Finland, despite the fact that it was under an obligation to pursue its claim in arbitration, but that does not of itself make it inappropriate to grant relief of this kind. In *The Jay Bola* the Court of Appeal considered the position of an assignee of a claim under a charterparty containing an arbitration clause. The claimant in that case was an insurance company which had insured a cargo for carriage from Brazil to Thailand under a voyage charter made by the defendant as charterer with the claimant as time charterer and disponent owner of the vessel. The voyage charter contained an arbitration clause. The cargo was damaged as a result of a fire on board and steps taken to extinguish it. The insurers began proceedings in Brazil in their own name against the disponent owners in order to avoid the statutory provisions in England giving effect to the international convention limiting the liability of owners of seagoing ships. The disponent owners applied to the court for an anti-suit injunction. The insurers' submissions were

not dissimilar to those of New India in the present case: they contended that the disponent owners had no cause of action which would found a claim for relief. This proposition was rejected by Hobhouse L.J. in the following terms at page 286 col. 1:

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

17. Sir Richard Scott V.-C. expressed himself in similar terms at page 291 col. 1. He said:

*"Miss Bucknall argued that, because WAV were not parties to the sub-charterparty and because the subrogation which entitled WAV to sue on Voest's contractual causes of action did not constitute a novation under which WAV became a party to the sub-charterparty, WAV were not bound by the arbitration agreement. The premises on which this argument is based are correct but the conclusion drawn therefrom is not. WAV is bound by the arbitration agreement not because there is any privity of contract between WAV and DVA but because Voest's contractual rights under the sub-charterparty, to the benefit of which WAV has become entitled by subrogation, are subject to the arbitration agreement which, too, is part of the sub-charterparty. WAV cannot enforce those contractual rights without accepting the contractual burden, in the form of the arbitration agreement to which those rights are subject (c/f **Halsall v Brizell** [1957] Ch. 169 and **Tito v Waddell (No. 2)** [1977] Ch. 106 at p. 309). WAV is, through subrogation, an assignee from Voest of Voest's contractual rights against DVA. DVA is contractually entitled, whether as against Voest or any assignee from Voest, to require the enforcement of those rights to be pursued by arbitration. WAV's attempt to enforce those rights otherwise than by arbitration is a breach of DVA's contractual entitlement. I agree with Lord Justice Hobhouse that DVA's remedy is, prima facie, the grant of an injunction to restrain the attempt."*

18. Since the court in the present case held that New India was bound to pursue its claim in arbitration, I do not think that the decision to discharge the injunction can be attributed simply to the absence of direct contractual relations between the parties. Indeed, I think it is clear from paragraph 97 of the judgment that the decisions of the European Court of Justice in ***Erich Gasser GmbH v Misat Srl***, ECR C-116/02, and ***Turner v Grovit***, ECR C-159/02 [2004] All ER (EC) 485 and the developing jurisprudence governing the relationship between courts of different Convention states played an important part in persuading the court that it was not appropriate to restrain New India from continuing the proceedings in Finland. In these circumstances, although the reasoning in these paragraphs lends some support to Mr. Smith's argument, I do not think that the court's decision to discharge the anti-suit injunction takes the matter as far as he suggested.

19. The passages in the judgment of the Court of Appeal to which I have referred led Mr. Smith to concentrate his argument on the means by which New India became entitled to pursue a claim against the Club and to submit that it was in a position different from that of an assignee or transferee of any other recognised kind. However, it is more helpful in my view to ask a different question, namely, what is the nature of the right that New India seeks to enforce, whatever the precise mechanism by which it has become entitled to enforce it.

20. The most helpful discussion of this question is again contained in *The Jay Bola* in which Hobhouse L.J. explained the position of an assignee as follows at page 285 col. 2:

"But the plaintiff in the Brazilian proceedings and the relevant defendant in the present action is the insurance company. The insurance company has made no contract with the timecharterers. The insurance company is the assignee or the transferee of the rights of the voyage charterers against the timecharterers. It is submitted on behalf of the insurance company that as a result the insurance company is entitled to enforce the voyage charterers' contractual rights without any obligation to refer the dispute to arbitration. This submission is unsound and contrary to decided authority.

*The proper law which governs the voyage charterparty and the contractual rights which the insurance company is seeking to enforce in Brazil is English law. Under s.136 of the Law of Property Act 1925 rights of action are assignable subject to equities, for example, rights of equitable set-off. (**Lawrence v Hayes** [1927] 2 KB 111) Similarly under s.4 of the Arbitration Act 1950 and s.1 of the Arbitration Act 1975 the stay of an action may be ordered on the application not only of the contracting party but also "any person claiming through or under him". (The position is the same under the 1996 Act: see s.82(2).) An example of such a stay being granted against an assignee is **The Leage** [1984] 2 Lloyds 259. The assignee takes the assigned right with both the benefit and the burden of the arbitration clause. (**Aspel v Seymour** [1929] WN 152; **Shayler v Woolf** [1946] 1 Ch 320 not following the dicta in **Cottage Club Estates v Woodside Estates** [1928] 2 KB 463) In the **Padre Island (No 1)** [1984] 2 Lloyds 408, Leggatt J. held that the transferee under the Third Parties (Rights against Insurers) Act 1930 of an insolvent assured's rights against his insurer, a P & I Club, was bound by the arbitration clause:*

"The 1930 Act transfers to the plaintiffs not the claim but the contractual rights of the insured. Those contractual rights are subject to the arbitration clause ...." (p.414)

In the **Padre Island (No.2)** [1990] 2 Lloyds 191 at 200 Lord Goff said:

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

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

21. Sir Richard Scott V.-C. explained the matter in similar terms in the passage in his judgment to which I have already referred.

22. In **The Jay Bola** the insurance company is described as an assignee or transferee of the right of action under the voyage charter. Both expressions are used because the subrogation receipt expressly provided that the voyage charterers *". . . . . hereby assign and transfer to the above underwriters any and all recovery and redress rights, grounds of action and recourses of any nature whatsoever arising out of the damages and losses sustained by the above referred cargo . . . . .",* but Hobhouse L.J. did not draw any distinction between the position of an assignee and that of a transferee of some other kind. Rather, his reasoning was based on the nature of the rights acquired by the insurers and the extent to which they could be exercised independently of other terms in the contract under which they arose. In my view the decision in this case is authority for the proposition that a person who obtains by an assignment or transfer of some other kind the right to pursue a claim under a contract can only enforce that right in accordance with the terms of the contract and subject to any restrictions or limitations which those terms may impose. In other words, what he obtains is a chose in action whose precise scope is determined by the contract under which it arises and which is inherently subject to certain incidents, in this case a requirement that it be enforced by arbitration. It is interesting to note that Lord Goff in *The Padre Island (No. 2)* and Sir Richard Scott V.-C. and Hobhouse L.J. in **The Jay Bola** all speak in terms that suggest that an assignee of rights under the contract is bound by the arbitration agreement as a whole with the result that he both obtains the benefits of the agreement and is subject to its burdens.

23. In the present case, however, New India is not seeking to claim as an assignee or transferee of the chose in action in a conventional sense. It is only by virtue of the Finnish Insurance Contracts Act that it is entitled to pursue a claim against the Club in Finland. This is not so much a case, therefore, in which New India has acquired vested rights against the Club indistinguishable from those of an assignee as one in which it can take advantage of statutory provisions in another jurisdiction to pursue a claim against the Club. It was this distinction that led Mr. Smith on the previous occasion to submit that New India's right to make a claim against the Club in Finland was an independent statutory right and not simply a statutory right to enforce obligations arising under the contract, an argument that was rejected both by this court and by the Court of Appeal.

24. Although this distinction can be drawn between the position of New India in this case and the position of the insurer in *The Jay Bola*, it is not in my view one that is ultimately of any substance. In the present case the Court of Appeal has held, applying English rules of characterisation, that section 67 of the Finnish Insurance Contracts Act gives a person in the position of New India the right to enforce the obligations of the Club under the contract of insurance. Whether one describes New India as a statutory transferee or simply as the beneficiary of a statutory provision, therefore, the right it enjoys is a right to enforce a chose in action which is itself subject to certain inherent limitations. One of those is the pay to be paid clause; another is the obligation to enforce any claim by arbitration in London. In Finland those limitations may be disregarded if mandatory provisions of the relevant legislation so require, but in English law, as the Court of Appeal has held, that legislation is not recognised as capable of affecting the parties' rights and obligations.

25. For these reasons I am satisfied that, however one describes its position, New India is seeking to enforce a chose in action which is subject to certain inherent limitations, including the obligation to enforce it by arbitration in London. Section 82(2) of the Arbitration Act 1996 provides that references in Part I of the Act to a party to an

arbitration agreement include any person claiming under or through a party to the agreement. An assignee seeking to enforce the contract clearly falls within that provision because he claims under or through the assignor, as the Court of Appeal recognised in the *Jay Bola*. Accordingly, if New India were to commence arbitration against the Club, I have no doubt that it could apply to the court for relief under section 18. In the present case, however, the application for the appointment of an arbitrator is made by the Club which has sought to commence proceedings with a view to obtaining a declaration of non-liability. New India does not wish to pursue a claim in arbitration at all.

26. Mr. Smith submitted that New India is entirely free to choose whether to pursue a claim against the Club. He contended that it is not bound to do so at all, either in this country or in Finland, and that if it chooses not to pursue a claim under the Third Parties (Rights against Insurers) Act, it is not a person claiming 'under or through a party to the agreement' within the meaning of section 82(2). Until it does choose to pursue such a claim, he argued, section 18 has no application and the court has no jurisdiction to appoint an arbitrator on the application of the Club. If his submission is correct, it means that New India can initiate arbitration proceedings and invoke the assistance of the court, but the Club cannot.

27. The arbitration clause in the Club's Rules provides as follows: *"If any difference or dispute shall arise between you (or any other person) and the Association out of or in connection with any insurance provided by the Association or any application for or an offer of insurance, it shall be referred to arbitration in London."*

As one would expect, it provides not simply for any claim under the Rules to be made in arbitration, but for any differences or disputes between the insured and the Club to be referred to arbitration. The clause imposes a limitation on the chose in action represented by the insured's rights against the Club by regulating the manner in which they may be enforced. It follows, therefore, from the decision in the *Jay Bola* that any dispute between New India and the Club in relation to the enforceability of those rights is one that is capable of being referred to arbitration.

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

29. New India commenced proceedings against the Club in Finland on 16th December 2002. Those proceedings were contested by the Club on the various grounds outlined in my previous judgment and at that point, if not before, a dispute arose between the Club and New India. By a letter dated 7th May 2003 the Club through its solicitors repeated a message previously sent by fax on 29th April 2003 calling upon New India to concur in the appointment of a sole arbitrator to determine the dispute between them. New India took the view that it was not bound by the arbitration agreement and therefore declined to take any steps towards the appointment of an arbitrator. Although it had been foreshadowed in correspondence, this application was not issued until 17th December 2004 in order to allow other matters between the parties to be resolved first.

30. By virtue of sections 14(4) and 15(3) of the Arbitration Act 1996 the Club's letter of 7th May 2003 was sufficient to commence arbitration against New India if there was an arbitration agreement between them within the meaning of the Act. For the reasons I have already given I consider that New India is to be regarded as a party to an arbitration agreement with the Club for the purposes of those sections because by the time that letter was written it had made a claim against the Club under or through Borneo Maritime Oy. Since New India has failed to respond to the letter requiring it to agree the appointment of an arbitrator, the court has jurisdiction to exercise its powers under section 18.

Discretion

31. It was common ground that the court has a discretion in relation to the exercise of its powers under section 18 and Mr. Smith submitted that in this case I should decline to exercise that discretion in favour of the Club for a number of reasons.

32. The first of these can be disposed of quite shortly. He submitted that the application was premature because an appeal is still pending in Finland on the issue of jurisdiction. If the Club is successful in its appeal, those proceedings will be terminated and the claim will then be dropped altogether since New India recognises that any claim made in this country is bound to fail. He submitted that there was no point, therefore, in pursuing the present application until the outcome of the appeal is known.

33. Mr. Diwan submitted, however, that there is every reason for the Club to pursue the matter urgently because it needs to obtain an award in its favour before New India obtains a judgment on the merits of the claim in Finland. This is an aspect of the matter to which I shall return in a moment.

34. Even if New India is successful in resisting the appeal, it seems unlikely that there will be a judgment in Finland on the substantive claim in the near future since there are a number of issues of fact and law to be determined before that point is reached. Nonetheless, having regard to the history of this litigation I can understand why the Club is reluctant to defer any longer the appointment of an arbitrator. If an arbitrator is appointed it will be for him to decide how the matter should proceed taking into account all the circumstances of the case, including the nature and progress of the proceedings in Finland. There is a risk, of course, that the costs of this application will have been wasted if the Club succeeds on its appeal, but I do not think that provides sufficient grounds for declining to exercise the court's powers. It may be a matter to take into consideration when disposing of the costs of this application, but in my view that is as far as it goes.

35. In ***Atlanska Plovidba v Consignaciones Asturianas S.A. (The 'Lapad')*** [2004] EWHC 1273 (Comm); [2004] 2 Lloyd's Rep. 109 I expressed the view that the court should normally exercise its discretion in favour of constituting the parties' agreed tribunal, a view to which I firmly adhere. However, that case concerned a dispute between the original parties to the arbitration agreement, whereas in the present case, as Mr. Smith pointed out, New India is not in that position and does not wish to be forced to arbitrate in London. He submitted that in those circumstances other factors should weigh more heavily in the balance.

36. The main argument put forward by Mr. Smith is that the court should not exercise its discretion in order to assist the Club to avoid enforcement of a judgment on the merits obtained in Finland. The Club has been quite candid about its reasons for seeking to pursue arbitration proceedings in this country: it wishes to obtain an award declaring that it is not liable to New India and if successful will seek leave to enforce that award as a judgment under section 66(1) of the Arbitration Act. It will then enter judgment in the same terms under section 66(2) and will rely on it to oppose enforcement of any judgment that New India may obtain in Finland under Article 34.3 of the Jurisdiction and Judgments Regulation (Council Regulation E.C. No. 44-2001). Mr. Smith submitted that the court should not lend its support to a tactic of this kind.

37. One thing that is already clear in this case is that both parties are adamant in the pursuit of their rights as they see them. New India is determined to press ahead in Finland and if it is successful will no doubt seek to enforce its judgment in this country. Similarly, the Club intends to do all it can to ensure that the claim is determined in arbitration, as the Court of Appeal has held is its right. Apart from any desire to establish a point of principle, each side knows that the outcome of the dispute may be profoundly affected by the forum in which it is decided. In these circumstances I see no reason why the court should exercise its discretion otherwise than to give effect to the parties' rights and obligations as it understands them to be. In a case where the Club has established its right under English law to have the claim against it determined by arbitration in London I do not think that the court should be astute to deprive it of the benefit of that right. Unlike the granting of an anti-suit injunction, the appointment of an arbitrator could not in any sense be said to interfere with the jurisdiction of the Finnish courts which will remain free to pronounce on the claim in accordance with the rules of Finnish law. A judgment obtained in Finland would ordinarily be enforceable in this country under the Jurisdiction and Judgments Regulation and would no doubt be enforceable in other jurisdictions. It would be unwise to anticipate the arguments that may arise in the future out of any attempt by New India to enforce a judgment obtained in Finland, but if any such judgment turned out to be unenforceable in this country, that would only be as a result of the exercise by the Club of its rights under English law. I am unable to accept, therefore, that I should decline to exercise my discretion in favour of the Club on these grounds.

38. Secondly, Mr. Smith submitted that I should decline to appoint an arbitrator on the grounds that there is no dispute in this case capable of being referred to arbitration. If I were persuaded that that is really the case, I should decline to make an appointment, but it is clear that it is not. Mr. Smith said that it was common ground that New India's claim would be defeated by the "*pay to be paid*" clause if it were pursued in arbitration in London and he suggested that the parties could agree on a form of declaration that would reflect that fact. However, attempts to find a form of declaration satisfactory to both parties have only emphasised what has been apparent from the outset, namely, that they are irreconcilably at odds and that the dispute between them is of a fundamental nature. In substance it is simply whether New India is entitled to recover from the Club or not. The Club considers that it is entitled to a declaration in unqualified terms that it is not liable to New India; New India is willing to agree that the Club is not liable in the eyes of English law, but is unwilling to accept any form of declaration which might suggest that it is not liable in the eyes of Finnish law. If the matter goes to arbitration, it will be for the arbitrator to decide what, if any, declaration it is appropriate to make in the light of the evidence and arguments put before him, but to say that there is no dispute between the parties capable of being referred to arbitration is to shut one's eyes to the facts.

39. In these circumstances I am satisfied that I should exercise my discretion under section 18 of the Arbitration Act 1996 to appoint an arbitrator to determine the dispute between the parties.

Mr. Ricky Diwan (instructed by Birketts) for the claimant
Mr. Christopher Smith (instructed by Holmes Hardingham) for the defendant