Neutral Citation Number: [2009] EWCA Civ 175

Case No: A3/2008/2667

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, COMMERCIAL COURT
MR JUSTICE TOMLINSON
CASE NO. 2007 FOLIO 1672

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2009

Before :

LORD JUSTICE RIX
LORD JUSTICE JACOB
and
LORD JUSTICE LAWRENCE COLLINS

- -

Between :

YOUELL and others	**Respondents/** Claimants
- and -	
LA REUNION AERIENNE and others	Appellants/ Defendants

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Richard Slade (instructed by Barlow Lyde & Gilbert) for the Appellants
Mr John Kimbell (instructed by **Clyde & Co**) for the Respondents

Hearing date: March 5, 2009

- -

Judgment

Lord Justice Lawrence Collins:

I Background

1. This is an appeal, by permission of this court, from a judgment of Tomlinson J dated October 22, 2008 in which he rejected a challenge to the jurisdiction by the defendants: [2009] 1 All ER (Comm) 301. The issue on the appeal arises in this way. A claimant brings a claim in England against a person domiciled in France for a declaration of non-liability under a contract the existence of which the defendant asserts, but the claimant denies. Because the claim relates to an alleged contract, and England would be the place of performance of the obligation in question, the English court has jurisdiction under Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation"). The issue is whether in these circumstances the claim is nevertheless outside the scope of the Brussels I Regulation because the defendant asserts that the contract on which it relies contains a French arbitration clause and therefore that the claimant's claim is covered by the exclusion in Article 1(2)(d) of the Brussels I Regulation of "arbitration."

2. The background facts are set out very clearly and comprehensively by the judge, and it is only necessary to summarise them here.

The policies

3. The claimants are London market insurers ("the London market"), and the defendants are French market insurers ("the French market"). For the 1993 year of account both sets of insurers subscribed to the insurance programme of a French group of companies engaged in aeronautical engineering, one of which, Turbomeca, was concerned with the manufacture and sale of helicopter parts. 75% of the cover was provided by the French market, 25% by the London market.

4. The wording of the English policy was expressed to be "as and to follow French Warranty Company with regard to terms (excluding rate), conditions, agreements and amendments". The insured interest was "all as more fully described in and following warranty company policy". The warranty company was La Réunion Aérienne, and the warranty company policy was the French policy. Both policies were treated as being governed by French law.

5. The French policy contained an arbitration clause which (in translation) reads:

> "8.13 <u>DISPUTES - ARBITRATION CLAUSE</u>:
>
> In the event of disagreement or dispute concerning the interpretation of the present contract or its effects or

consequences, each of the parties shall appoint an arbitrator in Paris.

In the event of disagreement between the appointed arbitrators, this shall be settled by a third arbitrator appointed by the other two, or in the absence of agreement, by the President of the Court of Paris by an interim ruling.

Should either party fail to appoint an arbitrator, he will be appointed using the same procedure.

The arbitrators will decide as conciliators, exempted from formalities and procedural delays and as the last resort, the parties waiving the right to appeal against their decision, by any means whatsoever, even extraordinary."

6. There was evidence before Tomlinson J to the effect that French law would regard the arbitration clause as incorporated into the English policy, notwithstanding there were no specific words of incorporation. The French market contended that the consequence was that co-insurers were bound to submit to arbitration in Paris their disputes arising out of the insurance to which they both subscribed.

7. The French policy contains a term headed "Convention de Co-Assurance" which (in translation) provides:

"**Co-Insurance Agreement**

The present insurance is issued by companies specified elsewhere.

The cover provided by each Insurer is limited, exclusively within the settlement of claims, to a fixed share, without joint and several liability between them.

By joint agreement between the parties, it is agreed that, in respect of operations resulting from the present contract (declarations, claims, transmission of documents, payment of premiums and losses, etc.) the Insured shall contact the Leading Insurer acting for and on behalf of the Insurers.

For their part, the Co-Insurers delegate to the Leading Insurer the fullest powers to accept all declarations, claims or notifications, to acknowledge them, issue valid receipts, and settle and transact all claims, within the limits of the powers conferred upon them by the present policy, but without the Leading Insurer having any power to incur any liability on them as a result of its powers."

The US actions and the claims under the policies

8. In 1993 Mrs Roth, a nurse working on board an air ambulance helicopter, was very seriously injured, when the helicopter crashed in the State of Missouri. Two sets of proceedings were brought by Mr and Mrs Roth in the United States against various Turbomeca companies alleging that the Turbomeca manufactured engines were defective. In the first action La Reunion Aérienne instructed US lawyers to represent the interests of Turbomeca and its related companies, and the action was settled in 1995.

9. A second action was commenced in 2000 against various Turbomeca companies, all of its French insurers as well as the London market insurers and Lloyd's itself, and the lawyers who had been involved in Turbomeca's defence in the first action. The claim alleged that Mr and Mrs Roth had been induced into the settlement of the first action by the fraudulent misrepresentations of Turbomeca and its insurers and the lawyers' fraudulent or negligent misrepresentations, including in particular a statement in an answer to an interrogatory that the amount of Tubomeca's insurance coverage was fraudulently represented to be US$50 million instead of US$1 billion.

10. It was the contention of the London market that liability in respect of a fraudulent or negligent misrepresentation in an answer to an interrogatory in court proceedings is not an insured risk under either the French or the English policies. Consequently the London market declined coverage to Turbomeca and declined contribution to the legal fees incurred in defence of Turbomeca in the second action.

11. In 2007 the second action was settled. The French market contended that by virtue of the Co-Insurance Agreement and by reason of French law, the French leading underwriter, the warranty company, became invested with the irrevocable authority of the London market to conclude claims settlements on its behalf, and consequently it had settled the claim pursuant to its mandate from the London market with the result that the London market was liable for its proportionate share, US$2,450,000.

12. The London market said that the settlement was reached without any authority from it and without its knowledge or involvement, and has declined to pay. It has relied on (inter alia) the fact that, at any rate with effect from April 22, 1993, pursuant to the English policy a participating Lloyd's syndicate was designated "deemed slip leader" with the conduct and for the purposes of settlement of claims and that two other participating companies were deemed leaders for the purposes of a particular London market instrument which was applicable to the cover.

The French market agreed with Turbomeca that it would "pre-fund" or advance what was said to be the London market's share of the settlement amount. This was apparently done in order to avoid any difficulty with the Roths. Turbomeca apparently agreed that in consideration of the French market so acting it would assign to it its rights against the London market under the English policy. On June 30, 2008 Turbomeca and La

Réunion Aérienne, the warranty company, executed a "réitération de cession de créance," which is relied upon by the French market as an effective assignment by Turbomeca of its rights against the London market under the English policy.

II French arbitration and English proceedings

13. The French market commenced an arbitration in Paris against the London market. Notice was initially given in October 2007, but that notice was ineffective, and a second notice was given on March 13, 2008. The claim in the arbitration arises out of (1) the Co-Insurance Agreement clause in the French policy, which the French market claims is incorporated into the English policy; and (2) the alleged assignment to the French market from Turbomeca, evidenced by the "réitération de cession de créance."

14. The London market has appointed an arbitrator under protest. The London market contends that the arbitrators lack jurisdiction, because there is no agreement between the parties to arbitrate. Submissions have been made to the tribunal on jurisdiction, and its ruling is awaited.

15. On December 21, 2007 the English market responded by issuing these proceedings for a declaration (inter alia) that it was not liable to the French market.

16. The basis of jurisdiction relied on by the English market was Article 5(1)(a) of the Brussels I Regulation, namely that the matter related to a contract, and England was "the place of performance of the obligation in question." Before the judge, the French market contended that Article 5(1)(a) did not apply because (a) by Article 8, jurisdiction was to be determined by the special provisions for insurance in the Regulation, none of which applied; and (b) even if the case would otherwise be within Article 5(1)(a) "the contract relied on by the French market is a contract with an arbitration clause" and "Article 1(2)(d) provides that the Regulation does not apply to arbitration" (Skeleton argument before the judge, July 11, 2008, para 41.3).

17. The judge held, first, that Article 5(1)(a) applied notwithstanding that the English market was denying the existence of any contract between itself and the French market. That was because the English market could establish a good arguable case that there was a matter relating to a contract by relying on the fact that that was what the French market was contending against it in Paris: *Boss Group Ltd v Boss France SA* [1997] 1 WLR 351 (CA). Second, he held that the special provisions relating to insurance did not apply to the claim because the insurance provisions of the Regulation did not apply to actions between insurers, whether in their own right or as assignees, applying Case C-77/04 *GIE Réunion Européenne v. Zurich Espana* [2005] ECR I-4509; and Case C-89/91 *Shearson Lehman Hutton v. TVB* [1993] ECR I-139.

18. The argument on the exclusion of arbitration by Article 1(2)(d) failed because the judge held that it did not apply merely because the contract to which the claim relates contained

an arbitration clause: Case C-185/07 *Allianz SPA v. West Tankers Inc*, *per* Kokott A-G, at [62].

20. After permission to appeal was refused by the judge, this court gave permission to appeal, but limited to the arbitration exclusion point, on the basis that the stance taken by the London market might be said to offend against the principle of not approbating and reprobating.

III The appeal

The argument for the French market on this appeal can be stated shortly. It is now accepted that a contract can fall within the Brussels I Regulation, even if it contains an arbitration clause. But Article 1(2)(d) applies to a claim of a party who *relies* on an arbitration clause. An applicant for negative declaratory relief can use what is alleged against him in order to allocate jurisdiction to the English court: *Boss Group Ltd v Boss France SA* [1997] 1 WLR 351 (CA). But this must be a fair and not a distorted reflection of what is alleged against him. The whole foundation for the claims made by the French market in the Paris arbitration proceedings is that the parties have agreed to determine their differences by arbitration. The alleged consensual nature of the process is intrinsic to the Paris arbitration. The allegations made by the French market in the Paris arbitration include an allegation that there is a binding arbitration clause. It is a principal focus in the Paris arbitration and so justifies the application of the arbitration exclusion.

The opinion of Kokott AG in Case C-185/07 *Allianz SpA v. West Tankers Inc* to the effect that a legal relationship does not fall outside the Brussels I Regulation simply because the parties have agreed to arbitration is of no assistance because it did not consider the application of the principle in *Boss Group Ltd v Boss France SA* [1997] 1 WLR 351 (CA). Neither party in the *West Tankers* case was adopting the other side's case for the purposes of allocating jurisdiction, and so the *Boss Group* principle did not arise. It is no answer for an applicant for negative declaratory relief to say that the right to proceed by way of arbitration is not the "substance" or "subject-matter" of what is being alleged against him. Case C-190/89 *Marc Rich and Co AG v Società Italiana Impianti PA* [1991] ECR I-3855 and Case C-185/07 *Allianz SpA v West Tankers Inc*, February 10, 2009, were dealing with proceedings before national courts, and not arbitral proceedings, and did not address how an applicant for negative declaratory relief should fairly reflect the allegations made against him. Consequently, the judge ought to have held (or at any rate this court ought to hold) that because the existence of a binding arbitration clause was intrinsic to the dispute in the Paris arbitration, he was bound to conclude that the dispute fell outside the scope of the Regulation.

IV Conclusions

21. In the face of the English proceedings the French market had several options. The first and obvious option was to seek a stay under section 9 of the Arbitration Act 1996. The

second was to defend the case on the merits. The third was to ignore the proceedings. Each of those options presented it with tactical problems. Instead, it sought to claim that the English court had no jurisdiction.

23. The original Brussels Convention, which was concluded in 1968 and came into force in 1973, contained in Article 1(4), the same provision for exclusion of arbitration as does the Brussels I Regulation.

24. The Jenard Report on the Brussels Convention ([1979] OJ C59/13) pointed out that the reason for exclusion of arbitration was that there were already many international agreements on arbitration in force (particularly the New York Convention) or proposed. The Report also stated that the Brussels Convention did not apply to the recognition and enforcement of arbitral awards, and did not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration, for example, proceedings to set aside an arbitral award, or to the recognition of judgments given in such proceedings.

25. A committee was appointed by the Lord Chancellor and the Secretary of State for Scotland in March 1972 under the chairmanship of Lord Kilbrandon to advise on any adjustments which it might be necessary or desirable to negotiate with the Member States of the EEC with a view to enabling the United Kingdom to accede to the Brussels Convention. The committee reported that it was a matter of some importance to the United Kingdom that the exclusion of arbitration should be understood in the widest sense: *Report of the Committee on the European Judgments Convention*, October 1973, para 72.

26. Consequently, as the Schlosser Report on the Accession Convention of 1978 confirms ([1979] OJ C59/71, para 61), the United Kingdom took the position in the accession negotiations that the exclusion covered all disputes which the parties had effectively agreed should be settled by arbitration, including any secondary disputes connected with the agreed arbitration. But the original Member States took the position that the exclusion only related to proceedings before national courts as part of "arbitration" if they referred to arbitration proceedings, whether concluded, in progress or to be started.

The Schlosser Report indicated (paras 61-62) that the difference of view led to a different result in practice only in relation to one particular question, namely whether recognition and enforcement of a judgment could be refused in another State on the ground that the proceedings were brought in breach of an arbitration agreement. Because it was agreed that no amendment should be made to the text, and that the new Member States could deal with the problem of interpretation in their implementing legislation, the effect of section 32 of the Civil Jurisdiction and Judgments Act 1982 is that a foreign judgment is not to be recognised or enforced if the bringing of the proceedings in the foreign court was contrary to an agreement under which the dispute was to be settled otherwise than by proceedings in the courts of that country. But it is

specifically provided that this was not to apply to a judgment which was required to be recognised or enforced under the 1968 Convention: Section 32(4) (subsequently amended to include also the Lugano Convention and the Brussels I Regulation).

The Evrigenis-Kerameus Report on the Greek Accession Convention drew a distinction between proceedings which were directly concerned with arbitration and proceedings which only incidentally raised the arbitration agreement. Proceedings which were directly concerned with arbitration as the principal issue, e.g. the establishment of the tribunal, annulment or the recognition of the validity or defectiveness of an award, were outside the Brussels Convention. But the verification, as an incidental question, of the validity of an arbitration agreement which was relied on by a litigant in order to contest the jurisdiction of the court before which he was being sued pursuant to the Brussels Convention, fell within the scope of the Convention: [1986] OJ C298/1, at para 35.

In Case C-190/89 *Marc Rich and Co AG v Società Italiana Impianti PA* [1991] ECR I-3855 the European Court ruled that by excluding arbitration from the scope of the Brussels Convention on the ground that it was already covered by international conventions, the contracting parties intended to exclude arbitration in its entirety, including proceedings brought before national courts, in particular proceedings relating to the appointment of an arbitrator: para 18. In order to determine whether a dispute fell within the scope of the Convention, reference had to be made solely to the subject matter of the dispute, and, if by virtue of its subject matter, such as the appointment of an arbitrator, a dispute fell outside the scope of the Convention, the existence of a preliminary issue (such as the existence or validity of an arbitration agreement) could not justify application of the Convention: para 26. In Case C-391/95 *Van Uden Maritime BV v Firma Deco-Line* [1998] ECR I-17091, [1999] QB 1225, at para 33, the European Court said that the critical question was the nature of the rights which the proceedings sought to protect.

It is of course well known that the principal question in Case C-185/07 *Allianz SpA v West Tankers Inc*, February 10, 2009 was whether it was compatible with the Brussels I Regulation for an English court to grant an injunction restraining a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement. It is equally well known that the European Court answered the question in the negative. The European Court confirmed its rulings in *Marc Rich* and *Van Uden* that it must be borne in mind that, in order to determine whether a dispute falls within the scope of the Brussels I Regulation, reference must be made solely to the subject matter of the proceedings, and that, more specifically, its place in the scope of the Brussels I Regulation is determined by the nature of the rights which the proceedings in question serve to protect (para 22). As Kokott A-G said in her opinion (para 52) the effect of the case-law of the Court was that whether or not proceedings fell within the scope of the Brussels Convention or the Brussels I Regulation was to be determined from the substantive subject-matter of the proceedings.

The European Court then went on to accept the view of Kokott A-G (in paras 53 and 54 of her opinion) that if the subject matter of the dispute, such as a claim for damages, comes within the scope of the Brussels I Regulation, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. The European Court said that this was supported by the passage in the Evrigenis-Kerameus Report referred to earlier in this judgment (at [29]). The effect was to reject the view expressed by Lord Hoffmann and Lord Mance on the making of the reference that the proceedings in that case for an injunction were entirely to protect the contractual right to have the dispute determined by arbitration, and accordingly fell outside the Brussels I Regulation: *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA (The "Front Comor")* [2007] UKHL 4, [2007] 1 Lloyd's Rep 391.

The European Court implicitly accepted the view of Kokott A-G (para 62 of her opinion) that a "legal relationship does not fall outside the scope of Regulation 44/2001 simply because the parties have entered into an arbitration agreement. Rather, the Regulation becomes applicable if the substantive subject-matter is covered by it".

The effect is that (contrary to the position originally espoused by the United Kingdom in the accession negotiations) the mere fact that a claim is the subject of an arbitration agreement does not deprive a court, which could otherwise determine the substance of the claim, of its jurisdiction under the Brussels I Regulation. The remedy for the party which claims that the proceedings are brought in breach of the arbitration agreement is to seek a stay under the Arbitration Act 1996, section 9 (or, in other countries, the appropriate remedy under the New York Convention or legislation implementing it).

It is the nature of the claim which is critical. What is the claim here? The claim form stated that the French market alleged that the London market was liable to pay US$2.45 million by way of contribution to the settlement of the claim for fraud and misrepresentation brought by Mr and Mrs Roth in the second US action, and that the London market denied that it was liable to pay the contribution claimed or any contribution to the French market arising out of the settlement, and that the London market was entitled to and sought a declaration of non-liability to the French market. The claims made in the second US action did not arise from, and were not risks covered by, the policy. The settlement of the second action was not agreed by the London market and was not binding on the London market. The French market had no authority to bind the Underwriters to that settlement.

There can be no doubt that these claims are claims which are not covered by the arbitration exclusion. The mere fact that they are the mirror image of claims which are being asserted by the French market in a French arbitration to which the London market says it has not agreed to does not make them claims to which the exclusion applies.

The French market argues that the "whole foundation" of its claims is that the parties have

agreed to determine their differences in arbitration, and that the effect of the decision of this court in *Boss Group Ltd v Boss France SA* [1997] 1 WLR 351 (CA) is that the claim in England should be treated as the mirror image of that claim and therefore within the arbitration exclusion. In *Boss Group* it was held that for the purposes of Article 5(1) of the Brussels Convention (and the same applies in relation to the Brussels I Regulation), it does not matter whether the claimant is denying or asserting the existence of a contractual claim; and a claimant who seeks a negative declaration is entitled to point to what is being said by the defendant (whether in proceedings in another jurisdiction or otherwise) about his substantive damages or debt claim against the claimant in order to make out a good arguable case that one or more of the special jurisdictions in Article 5 applies. Saville LJ (with whom Otton and Russell LJJ agreed) said (at 357) that it was entirely illogical and wrong for that party to assert that there was a contract and that the plaintiffs had broken it (which is what the defendants had done in France, where they had themselves relied on Article 5(1)) whilst simultaneously contending the contrary in England in order to avoid the application of Article 5(1). The plaintiffs established a good arguable case that there was a matter relating to a contract by relying on the fact that that was what the defendants were contending against them. The defendants could not challenge the jurisdiction on the basis that they should not be sued in England because there was (contrary to those contentions) no contract. Once the self-contradictory stance taken up by the defendants was removed, it was self-evident that there were matters "relating to a contract" between the parties. The jurisdictional issue in the case was whether it could be said that Article 5(1) could be relied on at all by a claimant who was asserting that there was no contract: *Royal & Sun Alliance Insurance Plc v MK Digital Fze (Cyprus) Ltd* [2006] EWCA Civ 629, [2006] 2 Lloyd's Rep 110, at [101], *per* Rix LJ.

The decision in *Boss Group* was mentioned with apparent approval by Lord Hope of Craighead (dissenting) in *Agnew v Länsforsäkringsbolagens AB* [2001] 1 AC 223, at 251 (a decision in which the *Boss Group* principle did not arise for decision). *Cf* Lord Clyde in *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153, 192, cited by Lord Woolf MR in *Agnew v Länsforsäkringsbolagens AB* [2001] 1 AC at 243. But it has not escaped criticism. Lord Millett (also dissenting) considered that the decision that Article 5(1) gave the court jurisdiction to determine a claim for a negative declaration that no contract was ever concluded was doubtful: [2001] 1 AC at 264. See also Dicey, Morris & Collins, *Conflict of Laws*, 14th ed. 2006, para 11-288. But the decision in *Boss Group* is binding on this court.

But there is no basis for the application of the *Boss Group* principle here. The French market mis-states the nature of the relevant claims. The principal claim by the French market is a debt claim based on an indemnity arising from an alleged mandate given by the London market to the French market. The subsidiary claim is a claim for damages arising from an alleged breach of the policy issued by the London market to Turbomeca, which is said to have been orally assigned by Turbomeca to the French market in August 2007. These could not possibly be regarded as claims covered by the arbitration exclusion.

Contrary to the French market's contention, the London market does not distort the nature of

the French market's claim. All that the London market is saying is that the French market is wrongly asserting the existence of an obligation to pay under a contract between the French market and the London market (and also in the subsidiary claim, an obligation to Turbomeca which has, allegedly, been assigned to the French market). The English market is not guilty of a distortion simply because it does not rely on an arbitration agreement, the existence of which it also denies. At best the French market's reliance on the arbitration agreement is merely incidentally raised in the English proceedings (because the French market has raised it, and the English market has disputed its relevance), but I do not consider that the French market has even shown that it is incidentally raised.

The subject-matter or the substance of the English market's claim is the claim that it is not liable under the alleged contract. The rights which the English market seeks to protect are its rights not to be sued on a claim which it denies. It does not matter that the French market pursues that claim in an arbitration.

It is true that in the claim form the London market had originally sought a declaration that the notice of arbitration was ineffective and/or a nullity; that no arbitration agreement existed (or had ever existed) between the London market and the French market; and that the proper jurisdiction for the French market's claim was the English court. Section 72 of the Arbitration Act 1996 permits a party who is alleged to be a party to an arbitration agreement to seek a declaration from the court that there is no valid arbitration agreement, but this section does not apply where the seat of the arbitration is outside England and Wales or Northern Ireland: section 2(1). The judge referred to section 67 (challenging the award) but this was no doubt a slip. The London market ultimately accepted that the English court had no jurisdiction to make such a declaration, and applied to amend the claim form to delete those claims. Counsel for the French market was not able to resist the amendment. The fact that this claim was once made does not now mean that what is left in the proceedings could be said to be an arbitration claim.

As I have said, permission to appeal on the ground relating to the exclusion of arbitration was given by this court on the basis that it was arguable that the London market was impermissibly approbating and reprobating: see *Lissenden v CAV Bosch, Ltd* [1940] AC 412, 417-418, 420 (*per* Viscount Maugham). But to the extent that the Scottish principle that a person cannot approbate and reprobate under the same instrument applies in England in some form (such as election or estoppel: see at pp 429 (*per* Lord Atkin), 435 (*per* Lord Wright)), I am unable to see any scope on the facts for the application of the principle, and counsel for the French market does not suggest that the London market has taken inconsistent positions. Instead he says that the London market has been impermissibly picking and choosing between the French market's assertion of a contract, on which the London market relies to found jurisdiction, and the French market's assertion of an arbitration agreement, which the London market ignores because it would otherwise be making an arbitration claim which would take the case outside the Brussels I Regulation. In my judgment there is nothing in this point, which is in reality putting the *Boss Group* point in a slightly different way, and which fails for the reasons I have already given.

I would therefore dismiss the appeal.

Lord Justice Jacob:

I agree.

Lord Justice Rix:

I also agree.