JUDGMENT : Mr Justice Tomlinson : Commercial Court. 22nd October 2008

1. This application raises issues under Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, usually referred to as the *"Judgments Regulation"* and to which I shall refer hereafter as simply *"the Regulation"*. The French domiciled Defendants have been served with, or at any rate have acknowledged service of, an English Claim Form which contains a declaration in standard form that this court has power under the Regulation to hear the claim. The underlying dispute is between insurers participating in a liability insurance cover. The cover was placed partially in the French market and partially in the English market. The leading French insurer concluded a claim settlement which it says binds the English following market and it has funded what it says is the English insurers' due proportion of the settlement. The English domiciled Claimant insurers say that they are under no liability to the French domiciled Defendant insurers, and seek in this court negative declaratory relief to that effect. The French insurers contend that this court has no jurisdiction to entertain the action. By this application they seek an order to that effect and the setting aside of the Claim Form and/or service thereof.

2. The Claimants are London market insurers to whom I shall refer hereafter as "*the London market*". The Defendants are French market insurers to whom I shall refer hereafter as "*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. Under the rubric "*Aeronautical General Third Party Liability"* Turbomeca enjoyed worldwide cover of up to 5,000 million French Francs. 75% of the cover was provided by the French market, 25% by the London market.

3. Both the London and the French markets gave cover on the basis of one primary and one excess policy, although the layers of cover did not coincide as between the French and the English markets. For ease of reference, although it is an over-simplification, I shall simply refer to the French policy and to the English policy respectively.

4. The wording of the English policy is expressed to be "*as and to follow French Warranty Company with regard to terms (excluding rate), conditions, agreements and amendments"*. The insured interest is "*all as more fully described in and following warranty company policy"*. The conditions of the English policy contain copious reference to "*following the warranty company*". The warranty company is La Reunion Aerienne, and the warranty company policy is the French policy.

5. The French policy contains an arbitration clause which in translation reads:

   "8.13 DISPUTES – ARBITRATION CLAUSE:

   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. The insured group of companies is French. The warranty company is French. The French policy is written in the French language and contains a Paris arbitration clause. The English policy follows and very largely adopts the wording of the French policy. It is common ground that for the purposes of this application I should approach the matter on the basis that the proper law of the English policy is French law.

7. There is evidence before the court to the effect that French law would regard the arbitration clause as incorporated into the English policy, notwithstanding there are no specific words of incorporation. This might not be the conclusion which would be reached by the application of English law – c.f. ***Federal Bulk Carriers Inc v. C. Itoh Limited, 'The Federal Bulker'*** [1989] 1 Lloyds Rep 103. The London market does not accept that the arbitration clause is incorporated into the English policy, but it has not, for the purposes of this hearing, sought to controvert the evidence as to French law on the point. It says that it is irrelevant for present purposes whether the arbitration clause is incorporated or not. I agree that it is unnecessary to decide whether the arbitration clause is incorporated into the English policy. Even if it is incorporated, that brings in its wake a second question whether it is also sufficiently arguable that there is thus constituted not simply an arbitration agreement between the insured and the London market but also an agreement between the French market and the London market to submit to arbitration disputes between them as to the extent and effect of an alleged mandate granted to the French market by the London market to which I next turn. As I understand it, it is the contention of the French market that the application of French law to this question would yield an arbitration agreement binding co-insurers to submit to arbitration in Paris their disputes arising out of the insurance to which they both subscribed.

8. The French policy contains a term headed "C*onvention de Co-Assurance*" which is translated as follows:

   "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."

9. The French market contends that by virtue of this clause 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. The London market denies that this is so, pointing amongst other things to the fact that, at any rate with effect from 22 April 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 indeed two other participating companies were deemed leaders for the purposes of a particular London market instrument which was applicable to the cover.

10. The French market contends that in 2007 pursuant to its mandate from the London market it concluded a settlement of a third party claim against Turbomeca. The London market has at all times denied that the settlement was concluded with its authority and has declined to pay what would, if the French market is correct, be its proportionate share, US$2,450,000.[1] Possibly in anticipation of this stance but in any event, I think, without reference to the London market, 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 third party claimant. 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. There was an attempt to confirm the assignment in writing in 2007 by means of the execution or partial execution of an "*Acte de Cession de Creance*" but this was apparently ineffective. On 30 June 2008 there was executed between Turbomeca and the French market, or more accurately between Turbomeca and La Reunion Aerienne, the warranty company, a "*Reiteratif de Cession de Creance*". This latter document is now relied upon by the French market as an effective assignment by Turbomeca of its rights against the London market under the English policy.

11. On 22 October 2007 the French market indicated that it intended to bring arbitration proceedings in Paris against the London market with a view to recovering what was said to be the London market's contribution to the settlement amount. It did so by means of notice of appointment of its own arbitrator and called upon the English market to make a corresponding appointment. This notice is in fact no longer relied upon as effective to commence arbitration. However on 21 December 2007 the English market responded by issuing these proceedings. The Claim Form contained the following "*Brief details of claim*":

"The Claimants are underwriters at Lloyds. The First Defendant is 'Groupment d'Interet Economique' ('GIE') under French Law. The Second to Fourteenth Defendants are French insurers and are or were members of the GIE. In 1993, the Defendants insured, inter alia, Societe Labinal and Turbomeca S.A. (being companies involved in the manufacture and sale of helicopters) under policy 93/14313 for a variety of aviation liability related risks. The Claimants insured the same entities in London for the same categories of risks over the same period under policy AW589293. In 1995, claims brought by a Mr and Mrs Roth in proceedings issued in 1993 in the Jackson County Circuit Court in Missouri ('Roth I'), arising out of a helicopter crash covered by the said policies, were settled on terms agreed by both the Claimants and the Defendants. That settlement has been fully performed and has not been rescinded or otherwise set aside.

The Defendants allege that the Claimants are liable to pay US$2.45 million by way of contribution to the settlement of a claim for fraud and misrepresentation brought by Mr and Mrs Roth in Jackson County in 2000 ('Roth II'). The Claimants deny they are liable to pay the contribution claimed or any contribution to the Defendants arising out of the settlement of Roth II. The Claimants are entitled to and seek a declaration of non-liability to the Defendants. The claims made in Roth II did not arise from, and were not risks covered by, Policy AW589293 or policy 93/14313. The Defendants' settlement of Roth II was not agreed by the Claimants. The Defendants' settlement of Roth II is not binding on the Claimants. The Defendants had no authority to bind the Underwriters to that settlement.

By a notice dated 22 October 2007, the Defendants have purported to commence an arbitration against the Claimants as a means of pursuing their contribution claim. The Claimants are entitled to and seek a declarations [sic] that (i) the said notice is ineffective and/or a nullity; and (ii) No arbitration agreement exists (or has ever existed) between the Claimants and the Defendants; and (iii) The proper jurisdiction for the Defendants' claim is the High Court of Justice in England.

I state that the High Court of England and Wales has power under Council Regulation (EC) No. 44/2001 of 22 December 2000 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) to hear this claim and that no proceedings are pending between the parties in Scotland, Northern Ireland or any other Regulation State as defined by section 1(3) of the Civil Jurisdiction and Judgments Act 1982."

12. It is unnecessary for present purposes that I say a great deal more about the facts underlying the claims therein described as "*Roth I*" and "*Roth II*". Mrs Roth is a nurse. On 27 May 1993 she was working on board an air ambulance helicopter. The helicopter crashed in Missouri, United States. The pilot and the patient being transported were both killed. Mrs Roth was very seriously injured, being rendered paraplegic. Proceedings were brought by Mr and Mrs Roth (Roth I) against various Turbomeca companies alleging that the Turbomeca manufactured engines were defective. La Reunion Aerienne instructed US lawyers Messrs Mendes & Mount LLP to represent the interests of Turbomeca and its related companies in this litigation. Roth I was settled in April 1995. The Roth II claim was filed in the Circuit Court of Jackson County, Missouri on 24 April 2000. It named as

[1] I leave out of account that in July 2008 one company participating in the English cover agreed to pay to the French market its proportionate share of this amount, which was US$147,000.

defendants Turbomeca, Turbomeca's US subsidiary, TEC, all of Turbomeca's French insurers, including La Reunion Aerienne as well as the London market insurers and Lloyd's itself. It also named Mendes & Mount LLP, and two of the attorneys individually who had been involved in Turbomeca's defence in Roth I. The Petition alleged that Mr and Mrs Roth had been induced into the settlement of their Roth I claims by the fraudulent misrepresentations of Turbomeca and its insurers and the attorneys' fraudulent or negligent misrepresentations. Specifically, Mr and Mrs Roth alleged that in sworn statements made by Turbomeca in response to an interrogatory filed and served in 1994 in the course of Roth I the amount of Tubomeca's insurance coverage was fraudulently under-represented to be US$50 million instead of US$1 billion. It is certainly the contention of the London market and it may be common ground that the London market had no input into the response to the interrogatory. Because of the nature of the claim being advanced in Roth II the London market declined coverage to Turbomeca and declined contribution to the legal fees incurred in defence of Turbomeca in Roth II. It is the contention of the London market, at first sight plausible, 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. A standstill agreement was agreed in the Roth II proceedings so far as concerned the claim against the London market directly. As I understand it the claim as against Mendes & Mount and as against the two individual attorneys was dismissed on the basis that an attorney is in general not liable to a third party for acts done in the course of legal representation of another. Although the standstill agreement lapsed Mr and Mrs Roth did nothing to prosecute their direct claims against the London market. In 2006 La Reunion Aerienne and Turbomeca filed a Third Party Petition and a separate Petition against Mendes & Mount seeking damages for the negligent representation of Turbomeca in Roth I. The London market was I believe unaware of this development. The London market and counsel for Mr and Mrs Roth were in discussions concerning a dismissal by consent of the action insofar as brought directly against the London market when on 20 July 2007 the London market learned that in June 2007 the Roth II claim had been settled. The confidential settlement agreement is not in evidence before me and I do not know who precisely was party to it or how it was structured. The inference which I derive from the terms of the assignment is that probably the settlement agreement with the Roths was concluded by Turbomeca, who alone therefore undertook liability to pay to the Roths the agreed further amount of compensation. The London market say that the settlement, which included an associated release by the Roths which encompassed some, although not all, of the English insurers, was reached without any authority from them and without their knowledge or involvement. Under a separate and subsequent agreement Mendes & Mount undertook to contribute to the agreed further compensation. Because the London market regarded the purported release of it contained within the settlement agreement and release as executed and filed with the court as not binding on it, and because in any event not all of the English insurers were included in it, the London market negotiated a separate release with counsel for the Roths. On 14 December 2007 the Roths agreed a voluntary dismissal of their action against the London market, without prejudice to their ability to re-litigate against the London market within the applicable statute of limitations. The fact that Mr and Mrs Roth filed a separate dismissal and did so in a manner that would allow them to re-litigate against the London market may be indicative that Mr and Mrs Roth did not intend to release the London market in the settlement agreement and release negotiated and executed by counsel for La Reunion Aerienne and Turbomeca.

13. The notice of commencement of arbitration dated 22 October 2007 is no longer relied upon by the French market. It now relies upon a notice dated 13 March 2008 as the commencement of the Paris arbitration. The London market has appointed an arbitrator under protest. The London market contends that the arbitrators lack jurisdiction, there being no agreement to arbitrate. The French market has served its Statement of Claim, in which document it sets out its submissions both on liability and on the question of jurisdiction. I am told that in the first instance the London market will respond only on the question of jurisdiction and that the arbitrators intend to hold a hearing on 9 December 2008 in order to determine their own competence.

14. On 15 May 2008 the French market issued the application which I have now to decide. That is an application for an order that this court has no jurisdiction to determine the Claimants' claim. The French market contends that this court does not have power under the Regulation to hear this dispute, and that by reason of section 2(1) of the Arbitration Act 1996 the Claimants' claim does not fall within the scope of section 67 of that Act.

15. It is plain that the London market cannot and does not invoke section 67 of the Arbitration Act. Furthermore, at the hearing before me the London market abandoned reliance upon the third paragraph of its "Brief details of claim" set out in the Claim Form. Mr Slade for the French market realistically accepted that he could not resist the amendment of the Claim Form so as to delete this paragraph.

16. What is left therefore is the London market's claim for negative declaratory relief to the effect that it is under no liability to the French market. Since the French market contends that that question falls to be determined in Paris arbitration, one would ordinarily expect the French market simply to apply for a stay of these proceedings pursuant to section 9 of the Arbitration Act 1996. Whilst reserving the right to make such an application, the French market has not yet done so. The French market contends that this court simply has no jurisdiction to entertain the claim.

17. The jurisdiction of this court over the French market must be sought in the Regulation. There is no other available source. The English market says that Article 5.1(a) allocates jurisdiction. That Article provides:

"A person domiciled in a Member State may, in another Member State, be sued:

1(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question."

True it is that the English market denies the existence of any contract between itself and the French market. But the decision of the Court of Appeal in *Boss Group Limited v. Boss France S.A.* [1997] 1 WLR 351 shows that the English market establishes a good arguable case that there is a matter relating to a contract by relying on the fact that that is what the French market is contending against it in Paris. In its Statement of Claim in the Paris arbitration the French market says this:

"The aforementioned co-insurance agreement gave authority to the leading insurance company (LRA) to settle any loss.

Consequently, the settlement made by LRA was legitimately in an official capacity as representative of the London market.

LRA has good grounds to principally claim reimbursement on the basis of the power of representation of the London market which it had at its disposal under the terms of the insurance policy.

In order to avoid any difficulty, LRA was also granted by Turbomeca an assignment of its rights against the insurers of the London market.

This assignment of an obligation was concluded by a 'reiterative assignment of debt' deed dated 30 June 2008.

Owing to the refusal of the London market to execute its contractual obligations, LRA was forced to initiate this arbitration procedure."

Thus both the principal direct claim and the alternative derivative claim by assignment from Turbomeca are said to be contractual claims. It is accepted that I should approach the matter upon the basis that the English policy is governed by French law. If there exists a contract of mandate pursuant to which the French market had the power to represent and to bind the London market to the Roth II settlement, there must equally be a good arguable case that that contract is governed by French law. It is common ground that in French law, absent contrary agreement, the place of performance of contractual obligations involving the payment of money is the place of domicile of the debtor. In French law, unlike English law, a creditor must seek out his debtor. As it happens this basic rule is also reflected in that part of the French policy which deals with claims against Turbomeca arising out of death or injury – see Article 7(c). The requirements of Article 5.1(a) of the Regulation are thus satisfied since the place of performance of the London market's alleged obligation to pay is England.

18. The French market however denies the applicability of Article 5.1(a) of the Regulation. First, it says that the subject matter of its claim against the English market relates to insurance. Whereas Article 5 is to be found in Section 2 of the Regulation, "*Special jurisdiction*", Section 3 of the Regulation deals with "*Jurisdiction in matters relating to insurance*". Article 8 of the Regulation provides:

"In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5."

Thus since there is no saving for Article 5.1, in contradistinction to that for Article 5.5, Article 5.1(a) is unavailable as a source of jurisdiction. It is common ground that there is no provision of Section 3 of the Regulation which would justify the court in assuming jurisdiction in respect of this claim for negative declaratory relief. Secondly, if that be wrong, the French market says that if this is to be regarded as a dispute relating to a contract, and thus as prima facie falling with Article 5.1(a), nonetheless the contract relied upon by the French market, or more accurately as I would think the two contracts relied upon by the French market, is or are a contract or contracts containing an arbitration clause. Article 1.2(d) of the Regulation provides that the Regulation shall not apply to arbitration.

19. I reject the first argument. Sections 3 and 4 of the Regulation have a common aim and a similar if not identical structure. They both have as their primary objective the protection of a party perceived to be the weaker party economically. This has been authoritatively determined by a series of cases in the European Court of Justice and in the House of Lords dealing with the Brussels Judgments Convention which forms the basis of the Regulation. Thus in ***UGIC v. Group Josi Reinsurance Company*** [2001] QB 68, at page 75 Advocate General Fennelly, in a passage subsequently accepted by the ECJ at paragraph 64 of the judgment, said: *"The rules on insurance should be viewed as being inspired by the same philosophy as that underlying the rules concerning consumer contracts in Section 4 of Title II..."*

The social policy of protecting the weaker party has been recognised as providing a compelling context which requires the words in Section 3 to be given a restrictive interpretation – see per Lord Millett in ***Agnew v. Lansforsakrings Bolagens A.B.*** [2001] 1 AC 223 at 260. Thus in the *Group Josi* case the ECJ determined that the special rules of Section 3 are not to be extended to those for whom protection is not justified. The ECJ said this, at pages 85 and 86 of the report cited above:

*"64. First, according to settled case law, it is apparent from a consideration of the provisions of section 3 of Title II of the Convention in the light of the documents leading to their enactment that, in affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer, they reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically: **Gerling Konzern Speziale Kreditversicherungs-AG v. Amministrazione del Tesoro dello Stato (Case 201/82)** [1983] ECR 2503, 2516, paragraph 17.*

*65. The role of protecting the party deemed to be ecomonically weaker and less experienced in legal matters than the other party to the contract which is fulfilled by those provisions implies, however, that the application of the rules of special jurisdiction laid down to that end by the Convention should not be extended to persons for whom that protection is not justified (see, by analogy, in respect of Articles 13 et seq of the Convention in relation to jurisdiction over consumer contracts, **Shearson Lehman Hutton v. TVB (Case C-89/91)** [1993] ECR I-139, 188, paragraph 19).*

66. No particular protection is justified as regards the relationship between a reinsured and his reinsurer. Both parties to the reinsurance contract are professionals in the insurance sector, neither of whom can be presumed to be in a weak position compared with the other party to the contract.

67. It is thus in accordance with both the letter and the spirit and purpose of the provisions in question to conclude that they do not apply to the relationship between a reinsured and his reinsurer in connection with a reinsurance contract.

68. That interpretation is confirmed by the system of rules of jurisdiction established by the Convention."

The same conclusion had earlier been reached by the House of Lords in the *Agnew* case to which I have referred above.

20. Subsequently, the ECJ has extended this reasoning to claims as between insurers. ***Groupement d'Intérêt économique (GIE) Réunion Européenne and others v. Zurich Espana* Case C-77/04**, [2005] ECR I-4509, was concerned with a claim by one insurer against another. Unsold motor vehicles belonging to General Motors Spain and insured by a Spanish insurer, Zurich, were damaged whilst stored in a French car park. The French owners of the car park were insured against their liability for damage to the vehicles by the French insurers, Réunion and others. The French car park owners compromised proceedings brought against them by General Motors, agreeing to pay ESP120 million in damages. The French car park owners sought to recover this amount from their insurers by an action in the French court. The French insurers sought to join the Spanish insurers to the French proceedings seeking a contribution pursuant to an article of the French Insurance Code. That article provides that in cases of multiple insurance the amount of indemnification to be paid to the insured is to be divided proportionately between the various insurers. The French insurers contended that Article 6.2 of the Convention, which relates to third party proceedings, gave to the French court jurisdiction to consider their claim for contribution against the Spanish insurers. The Spanish insurers sought to rely upon Section 3 of the Convention as providing the exclusive code in matters relating to insurance, and contended that they must therefore be sued in the courts of their domicile, Spain. The ECJ, in agreement with the Opinion of Advocate General Jacobs, held Section 3 inapplicable to this claim between multiple insurers for contribution. The court observed, at paragraph 20 of its judgment, that *"no special protection is justified since the parties concerned are professionals in the insurance sector, none of whom may be presumed to be in a weaker position than the others"*. This echoes the view of the Advocate General:

"16. It seems to me that, despite the broad wording of Article 7, the rules in that section are not designed to apply to proceedings between insurers.

17. There is support for that view in all the substantive provisions of the section, and in particular in Articles 8, 10 and 12, which clearly contemplate proceedings brought by a policy holder, insured or injured party, and Article 11, which refers to proceedings brought against a policy-holder, insured or beneficiary.

18. It is further buttressed by the Court's case-law to the effect that this section, like many of the other special rules in the Convention, is intended to protect the weaker party…".

21. The instant case is not of course on all fours with the ***GIE Réunion* case**. This is not a claim for contribution between multiple insurers of the same, or essentially the same risk, rather it is a claim, effectively, by a leading underwriter to be reimbursed by following underwriters in respect of a settlement allegedly both agreed and paid on the latters' behalf. Nonetheless, the cases are in my view for present purposes indistinguishable, and the reasoning in the *GIE Reunion* case compels the conclusion that Section 3 of the Convention and now the Regulation is of no application to the French market's direct claim against the English market. Proceedings between insurers are outwith the scheme established thereby.

22. The same reasoning in my judgment compels the same result in relation to the French market's derivative claim which it pursues as assignee of Turbomeca. ***Shearson Lehman Hutton v. TVB* Case C-89/91** was concerned with what was in origin a consumer claim vested in a natural person which had however been transferred by assignment to a company and was pursued by that company against the alleged contract breaker and tortfeasor. It was held that the assignee company could not rely upon or benefit from the special rules governing jurisdiction laid down by the Brussels Convention in the precursor to Section 4 of the Regulation. At paragraphs 18 and 19 of its judgment the ECJ said:

"18. Secondly, the special system established by Article 13 et seq of the Convention is inspired by the concern to protect the consumer as the party deemed to be the economically weaker and less experienced in legal matters than the other party to the contract, and the consumer must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting state in which the other party to the contract is domiciled.

19. The protective role fulfilled by those provisions implies that the application of the rules of special jurisdiction laid down to that end by the Convention should not be extended to persons for whom that protection is not justified."

23. A leading German commentary on the interpretation of the Judgments Regulation is *EU-Zivilprozessrecht* by Professor Peter Schlosser, Munich 2003. In his commentary on Article 8 he writes, at page 102: *"Articles 12.1, 13.2 … refer to as possible parties to proceedings alongside the insurer, the policyholder, the insured, the beneficiary and the injured party. In addition to these possible parties are all persons who derive rights or obligations from the contract of insurance. As in consumer law, the legal assignees of protected persons are not protected."*

Professor Robert Merkin would appear to subscribe to the same view – see paragraph D-0710/1 of Colinvaux and Merkin's *Insurance Contract Law*. In that paragraph he notes the distinction between a claim by an assignee and a claim by right of subrogation in the name of the insured. It may be open to question whether the ECJ would assimilate a claim brought by right of subrogation, not generally recognised in continental legal systems, to a claim brought by way of assignment. Furthermore Mr Slade points out that Article 9 of the Regulation does not define who may sue an insurer whereas Article 16 is concerned with claims by a consumer, so that the structure of the two

sections is not identical. Nonetheless, it is in my judgment clear that the European Court of Justice is most unlikely to regard as falling within Section 3 a claim by one co-insurer against another brought by the former as assignee of the insured's rights against the latter. Professor Merkin writes, in the paragraph to which I have referred above: *"An action by one insurer against another is not a matter relating to insurance."*

Then, having set out the decision in the *GIE Réunion* case, he continues: *"Jurisdiction in such an action was held by the Court to be determined by the general jurisdiction rules of Regulation 44/2001. As far as English law is concerned, it is unlikely that the same principle would apply in a subrogation action where, for example, a property insurer having indemnified its assured was to commence direct proceedings against liability insurers in circumstances where a direct action was permissible (for example, under the Third Parties (Rights Against Insurers) Act 1930 where the assured whose liability was in issue had become insolvent, or in respect of a motor claim). In these circumstances, the action is in the name of the assured under the property policy and not in the name of the insurers, so the claim remains one relating to insurance."*

It might be thought at first sight anomalous that the question whether a matter relates to insurance should depend on by whom the claim is brought. But the words are not to be construed in a vacuum. They are contained within a community instrument and in my judgment the guidance given by the European Court of Justice as to the proper approach is clear.

24. I turn then to the second argument. In my judgment this too fails. Article 1.2(d) does not in my judgment oust the jurisdiction of a court under Article 5.1 merely because the contract to which the claim relates contains an arbitration clause. The point is neatly encapsulated in the Opinion of Advocate General Kokott in ***Allianz SPA and others v. West Tankers Inc, "The Front Comor", Case C-185/07***, c.f. [2007] 1 Lloyd's Rep 391. At paragraph 62 of her Opinion delivered on 4 September 2008 the Advocate General said this: *"Finally it should be emphasised 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 Front Comor is concerned with a different question from that raised by the present case, which, translated into the present context, is the ability of the French court to issue an injunction restraining the English market from proceeding with this, English, action. Advocate General Kokott's conclusion on the issue for decision in that case was, contrary to that reached by Colman J and the House of Lords (see [2005] 2 Lloyd's Rep 257 and [2007] 1 Lloyd's Rep 391) that the Regulation precludes a court of a Member State from making an order restraining a person from commencing or continuing proceedings before the courts of another Member State because, in the opinion of the court, such proceedings are in breach of an arbitration agreement. That conclusion is of itself of course inconsistent with any notion that the Regulation is without more inapplicable to disputes concerning contracts containing arbitration clauses. According to Advocate General Kokott, an anti-suit injunction designed to restrain a party from proceeding with an action brought in the court of a Member State, inconsistently with an arbitration agreement, but in accordance with the allocation of jurisdiction prescribed by the Regulation, constitutes an impermissible interference with that action which itself falls within the scope of the Regulation as being permitted thereby. However that may be, and whether or not that conclusion is endorsed by the ECJ, I have with respect little doubt that the Advocate General is correct in her more limited conclusion that a legal relationship does not fall outside the scope of the Regulation simply because the parties have entered into an arbitration agreement. It would be absurd to regard the arbitration exclusion as extending to an action which does not have as its subject matter arbitration. The subject matter of these proceedings, at any rate as now constituted, is not arbitration.

25. For all these reasons I conclude that the court has jurisdiction to entertain the claim of the London market for a declaration of non-liability to the French market. It is open to the French market to apply for a stay of the proceedings pursuant to section 9 of the Arbitration Act 1996, which application may or may not succeed. It is of course unfortunate that there should be concurrent proceedings in arbitration in Paris and in this court. However the remedy for that ill lies in the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, to which all the Member States of the European Community are party, and which relevantly finds expression in English domestic law in section 9 of the 1996 Act. There is of course the possibility that divergent conclusions might be reached by the English court and by the arbitrators or by the French court, as the relevant supervisory court. As the English court would in relation to an arbitration having its seat in England and Wales, section 67 of the 1996 Act, so the French court has jurisdiction to determine whether arbitrators sitting in France have reached a correct conclusion as to their own jurisdiction. However as Advocate General Kokott points out in her Opinion in ***The Front Comor***, such a possibility only arises where there is doubt as to the existence of an agreement to arbitrate. In such rare cases, on anyone's approach the exclusion of arbitration from the scheme of the Regulation renders inevitable the possibility of irreconcilable decisions in two member states, which it is one of the purposes of the Regulation to prevent. This is unsurprising. The New York Convention is not a Community instrument and does not create a system for the allocation of jurisdiction comparable with the Regulation – see per Lord Hoffmann in ***The Front Comor*** at page 394 of the report cited above. The present application is in any event not concerned with the question whether the London market has agreed not to invoke the English jurisdiction. The present application is merely a challenge to the existence of that jurisdiction.

26. For all these reasons I decline to set aside the Claim Form or service thereof. In my judgment the court has jurisdiction to entertain the claim. The Defendants' application is dismissed.

John Kimbell (instructed by Messrs Clyde & Co) for the Claimant
Richard Slade (instructed by Messrs Barlow, Lyde & Gilbert) for the Defendants