JUDGMENT : Mr Justice Langley: Commercial Court. 27th November 1998

INTRODUCTION

1. By a Writ dated 12th December 1997 the two Respondent companies, to whom I shall refer as *Ingosstrakh* and *The Association,* as First and Second Plaintiffs, claimed against the Applicant company, to whom I shall refer as *LSC,* monies alleged to have been received by LSC by way of "roll-back relief" in respect of a pollution incident in 1987 at Porvoo in Finland involving LSC's vessel "Antonio Gramsci".

2. Ingosstrakh was at the time of the incident a Soviet state-owned insurance enterprise with its place of business in Moscow. It is now a privately owned joint stock company based in Moscow. LSC was a ship-owning company and also at that time a Soviet state-owned enterprise based in Riga, Latvia. It is now a joint stock company, soon to be privatised, and still based in Riga in Latvia.

3. LSC was insured against P & I risks by Ingosstrakh under the terms of a Policy No. 022873 agreed in February 1986. The Association is and was a mutual insurer which reinsured Ingosstrakh for 75% of its liabilities to LSC under that Policy by a quota share reinsurance treaty which is not before the court.

4. Put shortly, but sufficiently for the purposes of the issues before court, Ingosstrakh and the Association met claims arising from the pollution incident by payments both to third parties and to LSC. "*Roll-back-relief*" is monies provided under the terms of a voluntary agreement between oil cargo interests (CRISTAL) by way of partial reimbursement to ship owners and/or their insurers who have paid claims by third party victims of pollution. It is Ingosstrakh's and The Association's case that although LSC (and third parties) have been indemnified in full in respect of the pollution incident. LSC has also subsequently received US $ 864,692 by way of roll-back relief which LSC is obliged to pay, but has not paid, over to them. That obligation is said to arise either in contract under the Policy and/or by a separate agreement with the Association or as a matter of the law of "unjust enrichment".

5. No substantive defence has been put forward to date to the claim (which has been the subject of intermittent correspondence prior to the commencement of proceedings) although questions have been raised whether the roll-back relief was received by LSC and possible time-bar issues have been adverted to.

THE APPLICATION AND ISSUES

6. LSC, by an Application dated 7th August 1998, seeks:
   (a) a stay of the action under Section 9 of the Arbitration Act, 1996; alternatively
   (b) under R.S.C. Order 12 rule 8 a declaration that the English court has no jurisdiction, or that it is not appropriate for it to exercise its jurisdiction;
   (c) orders also under RSC Order 12 rule 8 setting aside service on LSC of the Writ and Points of Claim; alternatively
   (d) a stay on the grounds of forum non conveniens as regards the claim by Ingosstrakh.

7. For reasons which it is not necessary to state in this judgment the application so far as it relates to the Association has been the subject of an agreement the effect of which is that the claim by the Association will be stayed in favour of the dispute-resolution procedures provided for by Rule 40 of the Association's Rules without prejudice to LSC's right to contend in the arbitration provided for by that Rule that there is in fact no contract or arbitration agreement between LSC and the Association.

8. Further, as a result of concessions made in the course of the hearing before me, the real issue between the parties has become one of whether or not (in effect) Ingosstrakh should be granted leave to issue the proceedings out of this jurisdiction on LSC. That is because LSC does not seek to contend that the claim is subject to any arbitration agreement which would entitle it to a stay on that basis and Ingosstrakh no longer pursues the argument that service of the proceedings was accepted by LSC's solicitors on terms other than a reservation of LSC's right to argue the Order 11 issues, in accordance with the principle which was endorsed by the Court of Appeal in ***Sphere Drake v. Gunes Sigorta*** [1988] 1 LL. Rep. 139. Nor is it now submitted by LSC that if there are proper grounds for service out of the jurisdiction there is no serious issue to be tried on the merits of Ingosstrakh's claim.

9. It follows that it is for Ingosstrakh to establish a good arguable case for service out of the jurisdiction under one or both of the two grounds on which it relies, namely that the proper law of contract between it and LSC is English law within R.S.C. Order 11 Rule 1(1)(d)(iii) and/or that the claim is brought for money had and received or for an account and LSC's alleged liability arises from acts committed, whether by LSC or otherwise, within the jurisdiction :R.S.C. Order 11 rule 1(1)(t).

10. There are also issues concerning the proper exercise of discretion and forum non conveniens. As to the latter, in the light of the concessions made it is for Ingosstrakh to show that the United Kingdom is clearly the appropriate forum for the resolution of its dispute with LSC : ***Spiliada v. Cansulex*** [1987] AC 460.

PROPER LAW

11. Policy No. 022873 was issued before April 1, 1991 and the Contracts (Applicable Law) Act 1990 therefore does not apply to it. The first question at common law is whether the contract contains any express or implied choice of proper law. Both Ingosstrakh and LSC contend that it does, but Ingosstrakh contends it is English law and LSC the law of Russia. What is not in issue is that at least the insuring clauses of the Policy fall to be construed in accordance with English law.

12. To understand the context in which the Policy came to be agreed in the terms it was, it should be noted that LSC has been entered as a Member of the Association since 1982. Between 1982 and 1984 LSC was directly subject to all the terms of the Rules of the Association including Rules 40 and 42 which contained an express choice of English law and provision for London arbitration. For the 1984/5 year LSC requested that Ingosstrakh (which had previously reinsured part of the Association's risk) should be directly involved in the insurance of LSC's fleet, hence the agreement and reversal of roles whereby Ingosstrakh insured LSC and were in turn reinsured on a quota share basis by the Association.

13. It is this background which explains how Policy No. 022873 comes to refer to both Ingosstrakh's "Rules" and the "Rules of the Association". It does so in the following terms :

This insurance is effected in accordance with Ingosstrakh's ... Rules, extended ... by the terms and conditions of the [Rules of the Association] *providing the latter has priority.*

Scope of the liabilities is in accordance with the following sections of [the Rules of the Association } ....

14. The sections which are then referred to specifically are some only of the provisions of the Rules of the Association stating the scope of cover it offers. Ingosstrakh's own Rules are in very general terms as regards the scope of cover and otherwise provide for what may be termed procedural matters such as proposals and claims but also provisions referring to choice of forum.

15. It is LSC's submission that the effect of the foregoing provision of the Policy is to incorporate all Ingosstrakh's rules but the Rules of the Association only insofar as those Rules are directly germane to the scope of the cover provided for in the Rules to which specific reference is made.

16. I do not think it is possible (nor necessarily surprising where short-hand techniques are used to incorporate provisions in contracts) to make complete or wholly satisfying sense of the terms of the contract which resulted from this provision, but in my judgment the use of the word "*extended*" would normally carry with it an expansion and not a contraction of (in this case) Ingosstrakh's Rules and had the intention been only to incorporate the chosen insuring clauses of the Rules of the Association then that could have been achieved more simply. In the course of argument I was concerned whether even the chosen Rules of the Association could be incorporated in a contract between LSC and Ingosstrakh without re-writing them but I think Mr Priday is right in his submission that against the background of the relationship of the parties those Rules are to be read just as they are written and insofar as they provide, for example, for certain discretions to be exercised by the Association, there is nothing surprising in LSC and Ingosstrakh agreeing that the Association should be the arbiter of such matters, thus making the scope of the insurance and reinsurance truly "back-to-back". That conclusion, however, as will appear, cannot in my judgment be extended to apply to the arbitration clause (Rule 40) of the Rules of the Association.

17. I should now set out the provisions of both Ingosstrakh's Rules and the rules of the Association so far as relevant to the proper law of the Policy.

18. The relevant Rule is Rule 4.

4.1 The right to make a claim on Ingosstrakh for the payment of the insurance compensation is valid within three years from the day of the insured event if it is not stated otherwise by the law of the USSR.

4.2 Within the same period Ingosstrakh has the right to demand from the Insured or any other person who received the insurance compensation to return the sums paid if reasons for this arise or are discovered, which are stipulated by the law of the USSR or the present Rules.

4.3 All disputes in relation to claims against Ingosstrakh are settled in court or Arbitrage in Moscow. Disputes in connection with the demands of Ingosstrakh against the Insured or any other person who received the insurance compensation are settled in the same way at the place of business or residence of the respondent.

19. Mr Dunning submits Rule 4.3 is a "choice of forum" clause and if not an express choice of law clause a very strong indication in favour of Russian law. Mr Priday submits the Rule is limited in its terms to claims for the return of insurance monies paid by Ingosstrakh and thus not applicable to this claim, and, in any event, that the Rules of the Association have "priority". The relevant Rules of the Association are:

Rule 40 A If any difference or dispute shall arise between an Owner and the Association (my emphasis) *out of or in connection with these Rules or any contract between them or as to the rights or obligations of the Association or the Owner thereunder or in connection therewith, such difference or dispute shall in the first instance be referred to and adjudicated upon by the Directors* (of the Association).

Rule 40B If the Owner concerned ... does not accept the decision of the Directors it shall be referred to the Arbitration in London of two Arbitrators (one to be appointed by the Association and the other by such Owner) ....

Rule 42. These Rules and any contracts of insurance between the Association and an Owner shall be governed by and construed in accordance with English law.

20. In my judgment, neither Ingosstrakh's Rules nor the Rules of the Association have express application to the present claim.

21. I accept Mr Priday's submission that Ingosstrakh's Rules are addressing only a claim to recover insurance monies paid by Ingosstrakh to LSC. That submission is supported by the language of Clause 4 (and indeed Clause 3.15). I appreciate this is a narrow construction but it seems to me to be what the Rule says. Whilst in a sense the present claim could be characterised as one to recover insurance monies I do not think it is correct to do so. I can see (and Mr Dunning suggested none) no legal basis on which Ingosstrakh could claim the return of monies paid by it to LSC

and indeed on the evidence the bulk of those monies appears to have been paid direct to third parties to compensate them for damage caused by pollution. Mr Priday also submitted that Clause 4.3 was *an agreement to agree* and so unenforceable in any event. I do not agree. I see no violence to the language in reading the reference to C*ourt or Arbitrage* as meaning to arbitration if we agree but otherwise to the courts.

22. As to the Rules of the Association, Rule 40 cannot be made to apply to a contract between Ingosstrakh and LSC without being re-written (by reading references to the Association as references to Ingosstrakh) in a manner I do not consider to be permissible : see ***Pine Top v. Unione Italiana*** [1987] 1 LL Rep. 476 per Gatehouse J at page 479 and ***The Miramar*** [1984] AC 676. Rule 42 can apply to the extent of providing the proper law against which the Rules are to be construed but not as regards any contract of insurance for the same reason as for Rule 40.

23. It follows that in my judgment the Policy does not contain an express choice of law clause and the question becomes whether Ingosstrakh has shown a good arguable case that an implied choice was made for English law or that English law is the system of law with which the Policy has its closest and most real connection. In my judgment Ingosstrakh has shown such a case. The factors that drive me to that conclusion are:

(i) There is (and can be) no dispute that the selected insuring clauses, which define the scope of the cover provided for by the Policy, are to be construed in accordance with English law. That is because of the pivotal role of the Association in the cover. The Policy was also written in English.

(ii) It is true that the Ingosstrakh Rules expressly purport to refer certain disputes to the courts and law of the USSR and the Policy was, when made, a contract between two Soviet state entities. Nonetheless in the circumstances in which the insurance arrangements arose I do not consider either of these factors outweigh (i). Once it is recognised that in whatever forum a dispute as to the scope of cover might come to be argued that forum would be obliged to recognise the agreement that the scope of cover was to be construed in accordance with English law the force of these points is to my mind considerably diminished. The very fact that the Policy provides that the Rules of the Association are to have "priority" over the Ingosstrakh Rules (however either be construed) reinforces this conclusion.

(iii) I also think it of some significance in this context that the Policy provision for the calculation of the premiums payable by LSC to Ingosstrakh referred expressly to *mutual rates* to be paid in US Dollars. That also serves to demonstrate the fundamental importance of the role of the Association in the cover agreed between LSC and Ingosstrakh. The risks involved were also, of course, international risks.

ORDER 11 RULE 1(1)(t)

24. Mr Dunning accepts that Ingosstrakh has shown a good arguable case that its claim satisfies this rule. That is because CRISTAL paid the roll-back relief to LSC's London agents who received it into their bank account in London with a U.K. Bank. His submissions were directed to the question of discretion and in particular if I were to decide (as I have not) that there was no ground on which the claim in contract could be served out of the jurisdiction, then it would be wrong to permit this claim to be pursued alone unless, at least, the claim in contract was not to be pursued in another jurisdiction.

DISCRETION

25. As there is no dispute that Ingosstrakh's claim gives rise to a serious question to be tried the only remaining question is whether I should exercise my discretion (in effect) not to grant leave under Order 11 and thus set aside the service of the proceedings on LSC.

26. The one further point which arises in this context is whether or not the parties have agreed a forum for their disputes. Mr Dunning submits they have and that forum is in Riga, Latvia in accordance with Rule 4.3 of the Ingosstrakh Rules. For the same reasons as are set out above in addressing the question of proper law I do not think Rule 4.3 does apply to the present claim. Moreover in the particular circumstances of this case, as a matter of discretion, I think there are sufficient and sufficiently strong connections between the claim and the United Kingdom to make the courts of this country the appropriate forum for the matter to be litigated here. As I have already held, the relevant obligations are ones of which English law is the proper law and they arise out of international risks and compensation arrangements. Nor do I think I should ignore the fact that by definition Ingosstrakh seeks to advance its claim in this jurisdiction and, as events have happened, LSC is no longer resident in the USSR. Insofar as Ingosstrakh's Rules contemplated a choice of forum the choice was (at the time) the USSR not Latvia, and insofar as they contemplated a choice of law it was Soviet law not Latvian law. Yet Rule 4.3, if it applied, would now have the consequence that Ingosstrakh would be required to pursue its claim in Latvia.

CONCLUSION

27. I am satisfied that this is a proper case in which Ingosstrakh's claim should proceed in this jurisdiction. The proceedings satisfy the provisions of Order 11 both as to grounds for service out of the jurisdiction and as a matter of discretion. It follows that LSC's applications must be dismissed.

28. I will hear the parties further on questions of the form of any order and costs unless they are able to agree those matters in the light of this judgment.

Mr Graham DUNNING (instructed by Lawrence Graham for the Applicant)
Mr Charles PRIDAY (instructed by Richards Butler for the Respondents)