V.-C.). But the more significant difference is that pension trusts do not operate in a narrow setting where the trustees' exclusive concern is to promote the members' best interests. The view of Sir Robert Megarry V.-C. in *Cowan* v. *Scargill* [1985] Ch. 270, 288–89 that pension trustees, like traditional donative trustees, must aim to promote their beneficiaries' best financial interests might have been true for their investment powers but it is not necessarily true for all powers of pension trustees. The members are one section of a larger network of relevant participants in the pension scheme. So the trustees must also have regard to the employer's interest in operating the scheme (*Edge* v. *Pensions Ombudsman* [2000] Ch. 602, 627 *per* Chadwick L.J., confirming [1998] Ch. 512, 537 *per* Scott V.-C.). This is entirely appropriate. The scheme is an adjunct to the employer's business. The employer carries the immediate risk of moral hazard arising from the trustees' decisions since it is liable to pay the balance of cost of funding the scheme if it falls into deficit. *Hope* confirms that the PPF is also a significant participant in the operation of a pension scheme. It ultimately bears the risk of any deficiency in the scheme investments if the employer becomes insolvent. Inevitably, pension trustees will have regard to the PPF when they exercise their powers but not, after *Hope*, in ways that improperly exploit its insurance functions.

Hope offers little comfort for the many scheme members who have lost their full pension benefits owing to the insolvency of their sponsoring employer. But perhaps it is a mistake to expect that it should. The legal standards of governance in UK pension schemes are higher now than ever before, and the legal regimes for spreading the investment risks on pension scheme assets are more sophisticated now than at any time in the past. But regulation by statute or case-law cannot save sponsoring employers from insolvency or ensure that pension investments stay in surplus. The law cannot defy the economic conditions that are the real reasons why pension schemes fail.

In the long term, however, the decision in *Hope* is good news for employers and pension scheme members since it supports the PPF's insurance role. It prevents the PPF from being undermined by pension trustees' short-term exploitation of moral hazard.

D.M. Fox

ARBITRATION AGREEMENTS IN EUROPE

In *National Navigation Co* v. *Endesa Generacion SA* [2009] EWCA Civ 1397, [2009] 1 Lloyd's Rep. 666 the Court of Appeal addressed a question of considerable practical importance. Is an English court

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precluded from determining whether an English arbitration clause is incorporated in a contract if a court in another EU state has already decided the matter?

When the vessel *Wadi Sudr* failed to discharge its cargo of coal as stipulated in the bill of lading, the Spanish cargo owners (Endesa) claimed damages in a Spanish court. The Egyptian shipowners (NNC) sought a stay of the Spanish proceedings on the basis that a London arbitration clause, derived from the voyage charterparty, was incorporated in the bill of lading. Applying Spanish law, the Spanish court ruled that no such clause was incorporated. NNC then sought a declaration from the Commercial Court in London that the clause was incorporated under English law. Whether the English court could reconsider the status of the clause depended on whether it was bound to recognise the Spanish court's ruling as a Regulation judgment pursuant to Article 33(1) of Regulation 44/2001 (the Brussels I Regulation). If so, Article 33 would oust section 32(3) of the Civil Jurisdiction and Judgments Act 1982, which frees an English court to ignore a foreign decision concerning the status of an arbitration agreement in cases outside the Regulation, and in doing so suspends the principle of issue estoppel.

In holding that Article 33 applied, the Court of Appeal considered three questions. First, was the Spanish ruling within the arbitration exception to the Regulation, thereby disengaging Article 33, arbitration being excluded from the Regulation by Article 1(2)(d)? Secondly, if the ruling was a Regulation judgment, could the English court nonetheless disregard it on the basis that the English proceedings in which recognition was sought were themselves outside the Regulation's scope, being concerned solely with arbitration? Thirdly, was the Spanish ruling "manifestly contrary to public policy" pursuant to Article 34(1) of the Regulation, because it was obtained in breach of an arbitration agreement which was effective under English law?

The Court of Appeal held that, although the Spanish court's ruling concerned an arbitration clause, it was ancillary to proceedings the substance of which (NNC's liability) was within the Regulation. Applying *Allianz SpA* v. *West Tankers Inc* (C-185/07, [2009] 1 A.C. 1138, noted [2009] 68 C.L.J. 278), the test is whether the "essential nature of the substantive dispute" is within the Regulation, not the particular decision for which recognition is sought. It was irrelevant that the English proceedings concerned solely the status of the arbitration clause. Nor was it legitimate to challenge the ruling's status on public policy grounds.

These conclusions are unsurprising. It cannot infringe public policy to ask a foreign court a question if an English court is obliged to recognise its answer. Although conceptually the issues are distinct,

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consistency also requires that whether recognition of a judgment is subject to the Regulation depends on whether the Regulation governs the proceedings in which it was obtained. Certainly, *Endesa* reflects the assumption that the courts of the country named in a jurisdiction or arbitration agreement have no unique claim to assess its status (an assumption famously exemplified in C-116/02 *Erich Gasser Srl* v. *MISAT* [2003] ECR I-14693). It also promotes the Regulation's overarching objective by avoiding inconsistent judgments in different Member States, here concerning the status of an arbitration clause. But *Endesa* is at odds with two assumptions widely shared in the arbitration community. One is that arbitration is properly a matter for national law, which is more likely than the Regulation to respect party autonomy and the de-regulated resolution of disputes, the twin lodestars of arbitration. The other is that the courts at the alleged seat may always police the arbitration agreement, the assumption underlying section 32 of the 1982 Act.

Endesa also highlights the difficulties inherent in the *West Tankers* approach, difficulties which the Court of Appeal recognised but felt helpless to avert. The courts at the seat of arbitration are deprived of any role in determining the status of an arbitration clause if pre-empted by the decision of another court that the agreement is ineffective. Conversely, a court in which substantive proceedings have begun may disregard any decision by the courts at the seat of arbitration upholding the agreement. Compounding the problem, this depends (however irrationally) on the context in which the foreign ruling is made. In *Endesa* the ruling was ancillary to a substantive dispute in Spain concerning the shipowner's liability, and so subject to the Regulation. But, had the Spanish proceedings concerned merely whether the arbitration clause was incorporated, the entire proceedings would have concerned arbitration, thus avoiding the Regulation, and allowing the English court to ignore the Spanish court's decision.

Endesa is likely to generate unnecessary, tactical proceedings in the courts of Member States. In addition to initiating arbitral proceedings, parties wishing to arbitrate may feel compelled to preserve their position by seeking a pre-emptive declaration that the agreement is valid from the courts at the arbitral seat – in English law pursuant to section 32 of the Arbitration Act 1996. Again, those seeking to evade such agreements will doubtless seek in future to have the agreement's ineffectiveness confirmed elsewhere, being careful to append such relief to a substantive claim, to ensure compliance with the *West Tankers* test. Such manoeuvres will only increase the parties' costs, defeat the objective of private, autonomous dispute-resolution that arbitration is intended to serve, and diminish the attractiveness of arbitration in Member States.

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Endesa illustrates a recurring theme in cases subject to the Regulation. Inconsistent judgments are successfully avoided, but at the cost of promoting tactical litigation, and confounding legitimate expectations. Encouragingly, however, the decision may not survive the current review of the Regulation (initiated by the Commission's Report and Green Paper of April 2009), a result which the Court of Appeal would doubtless applaud. The European Parliament's rapporteur has expressed the bold – but possibly fragile – preliminary view that judgments concerning the status of arbitration agreements should be excluded from the Regulation (Zwiefka, Working Document, 2.12.2009, 4), with the effect that their recognition in other courts is no longer required, and the consequences of *Endesa* are avoided.

RICHARD FENTIMAN

CONFLICT OF LAWS – FOREIGN COPYRIGHT JURISDICTION

A VARIETY of issues were canvassed in *Lucasfilm Ltd* v. *Ainsworth* [2009] EWCA Civ 1328 but this note only deals with those of jurisdiction. Was the alleged infringement of US copyright in Star Wars action figures justiciable in England? If so, was there any discretion to refuse to hear the case following *Owusu* v. *Jackson* (C-281/02 [2005] ECR-I 1383)? The defendant had acted from England but had advertised the figures via a website and sold them to buyers resident in the US.

Jacob L.J. postulated an extremely narrow view of the justiciability of foreign intellectual property actions. He followed the immovable property cases (*e.g. British South Africa* v. *Companhia de Moçambique* [1893] A.C. 602) to hold that these US copyright infringements were not justiciable in the English court, despite that court's personal jurisdiction over the defendant. He regarded intellectual property of all kinds as essentially local and difficult to decide by another court. However, other than the validity of a patent, intellectual property is not so closely analogous to immovable property. Patents are registered rights and the validity question might raise issues of purely local sovereignty, for example, the accuracy of public registers. Under the Brussels 1 Regulation this is reflected in Article 22. However, matters of infringement or alienation of the patent and the validity, infringement and alienation of unregistered intellectual property (such as copyright, in issue here) are all outwith Article 22. These cases may raise difficult questions of the foreign law and special issues of peculiarly foreign policy for an English court to determine. Nevertheless, they must be adjudicated in England even though the intellectual

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