CONFISCATION LAWS AND INSURANCE RIGHTS

Union Insurance Company, Ltd. v. *Pasha*[1]

This recent decision of the Israel Supreme Court again brings into focus the question of the effectiveness of foreign confiscation and nationalisation laws on insurance rights. The facts of the case were as follows: The appellant, an insurance company whose head office is in Paris, with branches both in Iraq and in Israel, issued in 1932 a life insurance policy to the respondent who was then resident in Iraq. According to the terms of the policy the insurance money, when due, would be payable in sterling pounds by cheque on London. It was a condition of the policy that all disputes between the parties had to be referred for settlement to the competent courts in Baghdad, to whose exclusive jurisdiction the parties submitted themselves. The respondent, who was a Jew, left Iraq for Israel in 1951 where he became a resident and citizen. In the meanwhile legislation was enacted in Iraq which in effect confiscated the property (and property rights) of Jews who had emigrated to Israel. The legislation created a custodian who became vested with this property. In 1956 the respondent sued the insurance company for the money due under the policy in the District Court of Tel-Aviv. The insurance company pleaded that the Israel Court had no jurisdiction to entertain the claim in view of the choice of tribunal clause which, it furthermore contended, made the Iraqi law the governing law of the contract. And, as under Iraqi law the rights of the respondent had become vested in the custodian, he could not recover even were the court to assume jurisdiction.

The District Court heard evidence that the respondent, as a Jew and Israeli, had no access to the Baghdad courts, and that the Iraqi law was in effect intended to confiscate the property of Iraqi Jews who emigrated to Israel. It therefore held that in the circumstances, the agreement of the parties could not deprive it of jurisdiction to hear the claim, (such jurisdiction being based on the fact that the defendant insurance company had an office which was carrying on business in Israel) and refused to force the insured to sue in Iraq even if he could, which in fact he clearly could not, since he would run the risk of being arrested as an "enemy". And it further held that the Iraqi legislation afforded no defence in the Israel courts even if the law of Iraq was the proper law of the contract, which question the District Court did not specifically decide, since the legislation in question was in its view both penal and discriminatory, and, consequently, unenforceable in Israel.

This of course is fully in accordance with long established principles of English private international law which is still part of the law of Israel by virtue of Article 46 of the Palestine Order in Council, 1922, and Article 11 of the Law and Administration Ordinance 5708-1948.[2]

16. *Chhoteylal's* case [1944] I.L.R. Allahabad 674 at p. 677; *Chammanlal's* case [1953] Allahabad Law Journal 689; Ratanlal & Thakore, *The Law of Crimes* (Bombay, 1961), at p. 799; Stephen, *History of Criminal Law,* (London, 1883), Vol. III, at p. 10.

1. C.A. 165/60 (1963) 17 Piskey Din 646.

2. See, *e.g., Ellinger* v. *Guiness, Motion & Co., Frankfurter Bank, A.G. and Metal Gesellschaft A G.* [1939] 4 All E.R. 16; *The Fehmarn* [1958] 1 W.L.R. 159; *Owners of Cargo ex "Athenee"* v. *Athenee* (1922) 11 Ll.L.R. 6 with respect to the nonenforcement of a choice of tribunal clause, and *Frankfurther* v. *Exner* [1947] Ch. 629 with respect to the nonenforcement of foreign penal and

The insurance company appealed from this decision to the Israel Supreme Court which dismissed the appeal and affirmed the judgment of the lower Court but on different grounds.

The Supreme Court held that the clause giving exclusive jurisdiction to the courts of Iraq was not conclusive proof as to the proper law of the contract or to the intention of the parties that the municipal law of Iraq should govern it. In other words the Supreme Court held that the proper law of the contract was not Iraqi, and that the Iraqi legislation was therefore irrelevant and for this reason alone could not afford a defence to the company.

In arriving at this conclusion the court refused to follow the maxim of *qui eligit judicem eligit jus* which is still maintained by some to be absolutely binding in England,[3] and preferred the statement of the law as given in Martin Wolff's book[4] where he says:

> The old phrase qui eligit judicem eligit jus still has some value though the inference from such clauses is not conclusive ... it may be justifiable to construe the clause to the effect that the foreign court should apply its own conflict rules in order to find the proper law of the contract.

Approving this proposition which incidently is supported by Dicey[5] also, the Supreme Court said:

> All that one may conclude from a clause of this nature [restricting disputes to the jurisdiction of a particular country] is that the courts of the country specified should apply their own law in order to determine what law is applicable to the contract, and that once having established the law of the contract and decided that it is not the municipal law of their country, they are obliged to apply the law of the contract and not their own law.

The Supreme Court then held that since Baghdad was neither the *locus contractus* nor the *locus solutionis* (the policy was in French, issued by a French company in Paris, and the insurance money and the premiums were not in Iraqi currency nor the risks covered restricted to Iraq), the proper law of the contract must be presumed to be French, it being immaterial and completely irrelevant to the issue that the courts of Iraq would, in all probability, have turned a blind eye to this intention and applied their own law instead of French law.

It is interesting to note that while this question was being argued before the Israeli courts the very same problem was being considered in England where the High Court in London reached a similar conclusion. The decision in question is *Rossano* v. *Manufacturers Life Insurance* Co.[6] the facts of which were as follows: The plaintiff was an Egyptian national by birth who, in 1940, whilst resident in Egypt, negotiated three twenty year endowment assurance policies with the Egyptian branch of the defendant, a company that was incorporated in Canada with its head

discriminatory legislation. *Elliger* v. *Guiness etc.,* and *Frankfurther* v. *Exner* both relate to the position of Jews in Nazi Germany and are therefore factually the closest to the case under consideration. In the first of these cases the English High Court refused to enforce an agreement to submit disputes to the exclusive jurisdiction of the German Courts because of the high probability of a miscarriage of justice by a Nazi tribunal to a Jewish plaintiff, while in the second the same court refused to give effect to a Nazi law which was meant to confiscate the property (and property rights) of Jews in Austria. With respect to the question of jurisdiction see also *Oppenheimer* v. *Louis Rosenthal & Co., A.G.* [1937] 1 All E.R. 23 where the Court of Appeal refused to set aside the service of a writ on a German company in an action for wrongful dismissal, although the contract of employment was made in Germany between German nationals and its proper law was German because "... the plaintiff [as a Jew] is ... unlikely to have in the foreign court the rights of advocacy which according to English notions of justice, everyone ought to have . . . he would run the risk of being arrested and put in a concentration camp . . . the matter is one of principle, *forum conveniens* being a matter of principle not a matter of discretion."

3. See, *e.g.,* Cheshire, *Private International Law,* (6th ed., 1961), at p. 222; *Halsbury's Laws of England,* Vol. 7, (3rd ed.), at p. 75; Rabel, *The Conflict of Laws; A Comparative Study,* (2nd ed., 1960), vol. II, at p. 387, and the authorities therein cited.

4. *Private International Law,* (2nd ed., 1950), at p. 437.

5. See *Conflict of Laws,* (7th ed., 1952), at pp. 731, 732 where it is stated that the maxim *qui eligit judicem eligit jus* operates only as a presumption of the intention of the parties to be discarded where the circumstances give ground to a different inference.

6. [1962] 2 All E.R. 214.

office in the Province of Ontario. Two of these policies were in sterling and the third in U.S. dollars, to be paid in bankers demand drafts on London and New York respectively. In form the policies were in all essentials based on the standard form of life assurance policy employed by the defendants, and were drawn in accordance with the Canadian practice and the terms of the relevant Ontario statute relating to life assurance policies. Although the policies did not include a specific choice-of-tribunal clause, provisions were inserted to the effect that the parties waived the necessity for *mise en demeure* by *huissier* which clearly indicated that they had in mind, in the event of a dispute, that resort would be made to the mixed court in Egypt. In accordance with an Egyptian Law, applying to companies transacting life insurance in Egypt, the policies were registered and backed by deposits in that country. In 1956 the plaintiff, fearing that he would be subject to growing discrimination on account of his Jewish faith, left Egypt and assumed Italian nationality. In 1961 the policies were brought to England where he claimed the amounts due under them. If the proper law of the policies were Egyptian, or the *situs* of the debts or the place of performance was in Egypt, payment outside Egypt in Sterling or Dollars, if made without the permission of the Egyptian exchange control authorities, would have been contrary to Egyptian law. Furthermore, the Egyptian revenue authorities served garnishee orders on the defendant's Egyptian branch attaching the amounts due to the plaintiff under the policies on account of tax liabilities alleged to have been incurred by him.

Giving judgment for the plaintiff, and rejecting the defendant's contention that the proper law of the contract was the municipal law of Egypt, McNair J., *inter alia,* stated:

> ... it seems to me that, where a resident in a territory seeks life insurance from a foreign insurance company through its local agent in that territory, it is manifest that, normally, he chooses the foreign company because he has faith not only in that company but in the system of law under which it operates.[7]

It will be noticed that McNair J. found it advisable to limit his observations to contracts of life insurance. That the courts feel that a distinction should be drawn between life and other forms of insurance, and in particular property insurance, and are more inclined to enable the insured to claim amounts due on life insurance outside the country where the policy was issued (if the laws of that country purport to restrict the assured from enjoying the benefits of his policy or to deprive him of them altogether) should not come as a surprise. Life insurance contracts are in effect forms of investment,[8] and in the absence of a specific provision fixing the *situs* of the debt in a particular country (whether by an express choice of law clause[9] or otherwise[10]) can more easily be made to follow the assured to any one of the several countries in which the insurer-debtor maintains branch offices where payment may be enforced. In fact life insurance policies are often effected for the very purpose of transferring capital abroad as was clearly recognised in *Pick* v. *Manufacturers Life Insurance Co.*[11] the facts of which were as follows: The plaintiff was a German Jewish national who left Germany for Palestine in 1933 because of the Nazi regime. In 1944 the plaintiff took out two endowment policies with the defendants. The first — which was not the subject matter of this action — was in Palestine currency, whereas the second was in sterling. The plaintiff later left Palestine (which became Israel) and attempted to realise the second policy in London. The defendants refused to pay on the grounds that the debt was due in Israel which had in the meantime introduced exchange control legislation prohibiting the payment outside Israel in foreign currency without special permission, which was not obtained. Diplock J. found for the plaintiff on the ground that the proper law of the contract was not Israeli but Canadian. In so deciding he attached importance to the fact that the insurance and premiums were not expressed in Israeli currency, and that at the time the insurance was issued the plaintiff had "at the back of his mind that he might eventually return to Germany if circumstances

7. *Ibid.,* at p. 224.

8. See *Gould* v. *Curtis* [1912] 1 K.B. 631 at p. 640.

9. See, *e.g., Perry* v. *Equitable Life Assurance Society of the U.S.* (1929) 45 T.L.R. 468.

10. E.g., *New York Life Insurance Co.* v. *Public Trustee* [1924] 2 Ch. 101.

11. [1958] 2 Lloyd's Rep. 93.

made that country again a congenial place of residence for him", and furthermore that he distinctly requested assurance "that the policy would be payable outside Palestine".

In the case of property insurance the courts appear to be less inclined to dissociate the governing law of the, obligation from the law of the *situs* of the subject matter of the insurance which is normally the law of the country where the insurance was issued. Thus, *e.g.,* in *Fouad Bishara Jabbour* v. *Custodian of Absentee Property of the State of Israel*[12] the court refused to allow the plaintiff to recover in England money due under a policy covering loss or damage to his property which was situated in Haifa in view of the Israeli Absentees Property Law which vested the rights of the plaintiff in the Custodian of Absentee Property of the State of Israel. The case concerned a claim for indemnity for damage caused by fire or riot under a policy issued by the Haifa agent of the Yorkshire Insurance Company. The property was damaged as a result of the Arab-Israel war, and the company admitted liability under the policy. But the company claimed that, as the plaintiff was a person who had become an absentee within the meaning of the relevant Israel legislation, the sum due under the policy had become vested with the Israel Custodian. The company therefore paid the amount due into the Court. By interpleader order the Court then summoned the assured and the Custodian to argue their respective claims before it and decided the case in favour of the Custodian on the grounds that the governing law was the law of Israel, and that, as that law was not confiscatory in nature, it must be recognised by the English Courts. Pearson J., it is submitted correctly, refrained from drawing any theoretical difference between property insurance on the one hand and life insurance on the other. For in both cases the disputed subject matter is in effect a debt or a *chose in action* for which the insurer must answer and to which the same legal principles ought, at least in principle, to apply. A competition between the *lex situs* and the proper law (in either case) can therefore only relate to the question of whether the debt should be regarded as a movable property to be determined (in cases of involuntary transfer such as confiscation) by the *lex situs* or as an unperformed obligation under a contract to be determined according to the proper law. In his words:[13]

> A legislative provision that a debt or chose in action owing to A shall be discharged by payment to B could be regarded either as involving a transfer of the ownership of the property from A to B or as an alteration of the contractual obligation by substituting B for A as the obligee.

Nevertheless Pearson J. was careful to add that in the case of a hypothetical conflict between the *lex situs* and the proper law (the one having legislation which vests the debt or *chose in action* in A and the other having legislation which vests the debt or *chose in action* in B) the *lex situs* will generally prevail. In this case however there does not appear to have been any such conflict. On either approach the law of Israel — which he found was confined within the proper territorial limits of Israel and did not attempt to apply universally to property outside its borders — governed. The practical difference between this case and the previous ones relating to life insurance therefore lies in the decision to regard the obligation as situated in Israel. And it is submitted that it is in this respect that the courts are perhaps more inclined to apply the law of the *situs* of the property, (particularly if it is, as it usually will be, identical with the law of the place where the assured resides at the time of the contract and where the insurance was effected), to the policy in question than they are in the case of life insurance. Up to now however this tendency has not found any formal expression in England[14] and it therefore still remains to be seen whether its existence will be acknowledged in the future.

12. [1954] 1 All E.R. 145.

13. *Ibid.,* at p. 154.

14. The only acknowledged distinction relates to the difference between contractual obligations and property rights but there is no clear indication as to which concept prevails in any particular case. Any attempt to classify the cases on the basis of the issues (discharge of an obligation to be determined by the proper law on the one hand as against the transfer of the obligation to be determined by the *lex situs* on the other) is, it is submitted, not very helpful. Where the problem is treated as a transfer of title to a movable the question of where the insurance money is primarily payable will probably be material for the purpose of determining the *situs* of the "property". See Diplock J.'s comments on *Fouad Bishara Jabbour* v. *Custodian of Absentee Property for the State of Israel* [1954] 1 All E.R. 145 in *Pick* v. *Manufacturers Life Insurance Co.* [1958] 2 Lloyd's Rep. 93 at p. 98, following Wynn-Parry J. in *In re United Railways of the Havana and the Regla Warehouse, Ltd.* [1958] 2 W.L.R. 229 at p. 244 *et seq.*

In conclusion it may be said that the problem of confiscation laws and insurance rights requires a consideration of two separate and distinct issues. The first relates to the question of whether or not the confiscatory legislation is to be construed as governing the contract in question. If the answer to this question is in the negative then this alone disposes of the problem, and payment by the insurer may then be enforced. In this context the question whether the court regards the issue as a contractual obligation or as a question of title to a movable is of major importance because in the latter case account must be taken of the *lex situs* of the "property" which will generally require the ascertainment of where the amount due under the policy was *primarily* payable. The reported decisions seem to indicate that in the case of life insurance the courts are more inclined to treat the matter separately from the proprietory angle than in the case of property insurance. And it is submitted that this is not merely the result of confusing the question of which law governs the discharge of a contractual obligation with the quite different question of determining which law governs the transfer of an obligation as a movable or *chose in action.* For, although this confusion may persist, the reported decisions reveal a certain pattern which transcends it. An adequate solution which would normally equate the *lex situs* with the proper law (as between the parties to the contract at least) would be to hold the debt situated at the principle place of business of the insurance corporation: but this would require a departure from the prevailing decisions. If, however, the confiscatory legislation is held to govern the contract, the extraterritorial enforcement of the confiscatory legislation will have to be determined. On this the courts in different countries are likely to take different views as is clearly illustrated by the conflicting opinions of the German and Dutch Courts over the question of whether or not they should recognise the nationalisation by Indonesia of Dutch property.[15] The different views in this case may relate either to the moral or immoral character of the legislation in question (its being discriminatory or penal, or whether provision was made for the payment of compensation [16]) or to the question of its proper jurisdictional limits [17].

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15. See Domke, "Indonesian Nationalisation Measures Before Foreign Courts", The American Journal Of International Law, Vol. 54 at p. 305 *et seq.,* where this problem is discussed in detail.

16. The case of *Perry* v. *Equitable Life Assurance Society of the U.S.* (1929) 45 T.L.R. 468, cannot be taken as authority for the proposition that the English courts will always give effect to legislation which does not provide for compensation. The case concerned a claim on a policy for life insurance which the defendants issued in Czarist Russia. The policy incorporated an imperial decree, that all disputes should be settled in accordance with Russian law before Russian courts. In 1919 the Soviet Government annuled all life insurance contracts. The assured brought his action in London where the court held that as the proper law of the contract was Russian effect had to be given to the Soviet legislation. It should however be noted that, in the words of Pearson J. in *Found Bishara Jabbour* v. *Custodian of Absentees Property of the State of Israel* [1954] 1 All E.R. 145 at p. 155, "That (case) is a clear decision that a contract can be annulled, and the contractual nexus between the parties can be dissolved by legislation of the country whose law is the proper law of the contract. It is to be observed however, that as no payment would have become due under the policy before 1923, and the contract was annulled in 1919, if not earlier, no chose in action had arisen ..." Furthermore the question of whether the Soviet legislation should be disregarded because of its confiscatory character does not even appear to have been raised before the court.

17. Thus, *e.g.,* U.S. Courts have declared life insurance policies contracted with persons who later became Cuban refugees as enforceable in the U.S. notwithstanding the expropriation of the companies' assets in Cuba. See *Blanco et al* v. *Pan American Insurance Co. et al* 221 F. Supp. 219 (1963).