Neutral Citation Number: **[2021] EWCA Civ 1589**

Case Nos: A4/2020/1456, A4/2020/1468, A4/2020/1560 & A4/2020/1676

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTYCOURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Mr Justice Henshaw and Mr Justice Butcher
[2020] EWHC 1582 (Comm) and [2020] EWHC 1920 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2021

Before:

LORD JUSTICE MALES
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE PHILLIPS

- -

Between:

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED	**Claimant**
- and -	
THE KINGDOM OF SPAIN	**Defendant**

And between:

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED	**Claimant**
- and –	
THE FRENCH STATE	**Defendant**

M/T "PRESTIGE" (Nos. 3 and 4)

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Christopher Hancock QC & Alexander Thompson (instructed by **Ince Gordon Dadds LLP**) for the **Claimant**
Timothy Young QC & Jamie Hamblen (instructed by **Squire Patton Boggs (UK) LLP**) for the **Kingdom of Spain**
Anna Dilnot QC (instructed by **K & L Gates LLP**) for the **French State**

Hearing dates: 11, 12, 13, 14 and 15 October 2021

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Approved Judgment

Lord Justice Males, Lord Justice Popplewell and Lord Justice Phillips:

(1) Introduction

1. On 19 November 2002 the "Prestige", a tanker carrying 70,000 mt of fuel oil, broke in two and sank off Cape Finisterre. Its cargo escaped from the vessel and polluted the Atlantic coastline of northern Spain and southern France. This was a catastrophe for the regions affected and for the people who lived there, including those whose livelihoods were dependent on the marine environment. It led to civil and criminal proceedings in Spain which reached the Spanish Supreme Court and to litigation and arbitration in this country which has already involved a previous visit to this court. The present appeals are the latest (but not the last) round in the battle arising out of this casualty between the Kingdom of Spain ("Spain") and the French State ("France") (together "the States") on the one hand and the shipowner's liability insurer, the London Steam-Ship Owners' Mutual Insurance Association Ltd ("the Club"), on the other.

2. It will be necessary to explain in some detail the nature of the claims with which we are presently concerned and the course of proceedings so far, but in the briefest outline the States seek compensation for the losses caused by the pollution of their coastlines and have obtained from the Spanish courts what is now a final judgment against the Club in the sum of €855,493,575.65, broadly speaking the limit of Club cover. Spain has obtained also an order for the registration of that judgment pursuant to the provisions of the Brussels I Regulation (Council Regulation (EC) No. 44/2001)[1] with a view to its enforcement against the Club's assets here. That order is being challenged by the Club and an appeal is due to be heard by this court later this year.

3. The Club, however, contends that the pursuit by the States of the proceedings in Spain was contrary to an obligation binding on the States to pursue their claims by arbitration in London. It has obtained awards from Mr Alistair Schaff QC, an arbitrator appointed by the Commercial Court (Mr Justice Christopher Clarke), supporting that contention. Mr Schaff has made declaratory awards ("the Awards") which declare that (1) the States are bound by the arbitration clause contained in the Club's Rules and their claims must be referred to arbitration in London and (2) pursuant to the "pay to be paid" clause in the Club's Rules, the Club is not liable to the States in respect of such claims in the absence of any prior payment. The States challenged those Awards pursuant to sections 67 and 72 of the Arbitration Act 1996 on the ground that Mr Schaff had no jurisdiction to make them, but that challenge was unsuccessful (see *The Prestige (No. 2)* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep 309 and [2015] EWCA Civ 333, [2015] 2 Lloyd's Rep 33). At the same time, the Club obtained permission to enforce the Awards pursuant to section 66(1) of the same Act and entered judgment in terms of the Awards pursuant to section 66(2).[2]

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[1] The Brussels I Regulation applies to recognition and enforcement of the Spanish proceedings because those proceedings were commenced before 10 January 2015. However, the Brussels Recast Regulation applies, or potentially applies, to the English proceedings with which this appeal is concerned.

[2] The parties often referred to these two different forms of relief indiscriminately as the relevant judgment. When we refer to "the section 66 Judgment(s)" we are referring to the judgment(s) in the terms of the Award(s) made pursuant to section 66(2) contained in two separate orders, one against Spain and one against France.

4. The Club has now issued further proceedings against the States and it is those proceedings which are the subject of the present appeals. They can be grouped under three headings, as follows.

The Arbitration Claims

(1) The Club has commenced a new arbitration against each of the States by service of notices of arbitration, in which it claims, in outline, (a) declarations that by continuing to pursue its claims in Spain and seeking to enforce the Spanish judgment, the State is in breach of its obligation not to pursue those claims otherwise than by London arbitration, (b) equitable compensation and/or damages for breach of that obligation in the amount of any liability and costs incurred arising from the pursuit of those claims, (c) contractual damages for breach of a contractual obligation to arbitrate those claims, said to arise from the States' participation in the section 66 proceedings, and (d) an anti-suit injunction to restrain the further pursuit of those claims and enforcement of the Spanish judgment.

The Award Claims

(2) The Club has issued proceedings against each of the States in the Commercial Court, seeking damages or equitable compensation for any liability under the Spanish judgment, including the costs of prior arbitral and court proceedings. The claims are described as being "for breach of the Defendant's obligation to honour an arbitration award" (i.e. Mr Schaff's award) declaring the State bound to pursue its claims in London arbitration.

The Judgment Claims

(3) The Club has also issued further proceedings against each of the States in the Commercial Court, seeking damages or equitable compensation for any liability under the Spanish judgment, including the costs of prior arbitral and court proceedings. The claims are described as being "for breach of the Defendant's obligation to abide by" the judgment of Mr Justice Hamblen, upheld by this court, declaring the State bound to pursue its claims in London arbitration (i.e. the section 66 Judgment entered in the terms of Mr Schaff's award).

5. Thus in each case the monetary relief which the Club seeks is the same, effectively to nullify any liability resulting from the Spanish judgment and to recover its costs of the Spanish proceedings, with an additional claim for an anti-suit injunction made in the arbitrations, although not the court proceedings. However, the obligations on which the claims are founded are different. While the obligation on which the Club relies for its new Arbitration Claims is the original obligation to arbitrate contained in its Rules to which (as held in *The Prestige (No. 2)* [2015] EWCA Civ 333, [2015] 2 Lloyd's Rep 33) the States have become subject pursuant to a "conditional benefit" analysis (see below), the Award and Judgment Claims are founded on what are said to be new obligations arising from the Awards ("to honour the award") and section 66 Judgments ("to abide by the judgment") respectively.

6. Orders were made without notice for service of the claim forms initiating the Award and Judgment Claims, while in the case of the Arbitration Claims orders were made for service of an arbitration claim form seeking the appointment of an arbitrator pursuant

to section 18 of the Arbitration Act 1996. There is now no dispute that in each case service has been validly effected.

7. However, the States contend that they are entitled to state immunity in respect of the Award and Judgment Claims and dispute the territorial jurisdiction of the English court over them. They do so, depending on which regime applies, whether the court's jurisdiction falls to be determined by reference to the Brussels Recast Regulation (Council Regulation (EU) No. 2015/2012) or the English domestic rules for service of proceedings out of the jurisdiction. Spain likewise claims state immunity in respect of the Club's application for the appointment of an arbitrator to determine the Arbitration Claim against it ("the section 18 Application") and disputes the territorial jurisdiction of the English court over it.[3]

8. In a judgment handed down on 18 June 2020 Mr Justice Henshaw held that Spain was not entitled to state immunity in respect of the Club's claim for the appointment of an arbitrator and appointed Sir Peter Gross as arbitrator, save in respect of the Club's claim for damages for breach of contract. As to that latter way of putting the Club's case, Mr Justice Henshaw was not persuaded that the parties had entered into any fresh contractual relationship by reason of Spain's opposition to the section 66 proceedings. The Club has not appealed from that decision.[4]

9. In a judgment handed down on 24 July 2020 Mr Justice Butcher held that the States were not entitled to immunity in respect of the Award or Judgment Claims. He held that the Award Claims fell within the "arbitration" exception in Article 1.2(d) of the Brussels Recast Regulation, so that the domestic rules for service out of the jurisdiction applied, and that there was a "serious issue to be tried" on the merits. Accordingly he held that the English court had jurisdiction over the Award Claims. He held that the Judgment Claims were not within the "arbitration" exception, so that the applicable regime for determining jurisdiction was the Regulation; that the claims fell within Section 3 of Chapter II of the Regulation ("Jurisdiction in matters relating to insurance"); and that, pursuant to Article 14 of the Regulation, the Club could only bring its proceedings in the courts of the state in which the defendant was domiciled. Accordingly the English court did not have jurisdiction over the Judgment Claims.

10. The States now appeal to this court, contending that the courts below were wrong to reject its claims to state immunity from the Award and Judgment Claims and (in the case of Spain only) the section 18 Application and to accept jurisdiction over them. The Club also appeals, contending that Mr Justice Butcher was wrong to hold that the court did not have jurisdiction over the Judgment Claims.

(2) The background

[3] France did not challenge the jurisdiction of the English court in the section 18 proceedings against it. On 14 February 2020 Mr Justice Foxton appointed Dame Elizabeth Gloster as sole arbitrator in the arbitration between the Club and France after a hearing of which France had notice but at which it did not appear ([2020] EWHC 378 (Comm)). We were told that France has participated in the arbitration, where it has challenged the arbitrator's jurisdiction, that a hearing took place in July 2021, and that an award is awaited.

[4] We were told that in the light of Mr Justice Henshaw's decision, the Club has not pursued this contractual claim in its arbitration against France.

11. In this section of the judgment we summarise the facts and the course of proceedings so far, as to which there is no material dispute for the purpose of this appeal.

12. Following the casualty in November 2002 both States began criminal proceedings in Spain against the master of the vessel. At the conclusion of the investigative stage in 2010, civil claims were brought within the criminal proceedings as follows:

    (1) The master was accused of the crimes of serious negligence against the environment and serious disobedience and resistance to authority under the Spanish Penal Code.

    (2) The shipowner was also sued on the ground that it was vicariously liable for the master's conduct.

    (3) The Club was sued pursuant to Article 117 of the Spanish Penal Code as the shipowner's liability insurer under a contract of marine insurance.

    (4) The Club was also sued, in the same proceedings, pursuant to the Civil Liability Convention 1992 ("the CLC"). In 2003 the Club deposited a fund of approximately €22 million in respect of the Club's and the shipowner's liability under the CLC with the Spanish court. The claims under the CLC are not relevant to the present dispute. Where we refer to the claims in the Spanish proceedings, we are referring to those brought pursuant to Article 117 of the Spanish Penal Code ("the Art 117 Claims").

13. Spain and France were each claimants in these proceedings, in the case of Spain both on its own behalf and on the basis that it was subrogated to the claims of other claimants having compensated them for losses caused by the pollution from the vessel under a compensation scheme established under Royal Decree Law 4/2003 as developed and implemented by Royal Decree Law 1053/2003. Under this scheme Spain made payments to those affected which its evidence described as "an act of the State taking extraordinary special measures to reduce the social, economic and environmental impact of the oil spill on the communities affected".

14. The Club in turn commenced separate arbitrations against Spain and France, seeking declarations that (1) they were each obliged to pursue their claims in London arbitration, (2) the Club was under no liability to the States by virtue of the inclusion in the insurance contracts contained in its Rules of a "pay to be paid" clause, relying on *The Fanti and The Padre Island* [1991] 2 AC 1, and (3) in the case of Spain, that in any event its liability was subject to the global limit of US $1 billion specified in the insurance contract. No other relief was claimed.

15. Mr Schaff was appointed by the Commercial Court as sole arbitrator in each of the arbitrations. The States did not participate in them. The Club made clear that its objective in seeking these declarations was to convert them into judgments pursuant to section 66 of the Arbitration Act 1996 which (it would contend) would provide it with a defence pursuant to Article 34.3 of the Brussels I Regulation (equivalent to Article 45.1(c) of the Recast Regulation) to any application for recognition and enforcement of any future Spanish judgment against it. In due course Mr Schaff produced the Awards containing these declarations.

16. The Club then sought to enforce the Awards as judgments and to enter judgment in terms of the Awards pursuant to section 66. The States defended that application and issued their own proceedings under sections 67 and 72 of the Arbitration Act 1996 for a declaration that the arbitrator had had no jurisdiction to make the Awards. These applications came before Mr Justice Hamblen in *The Prestige (No. 2)*. He held that the States' claims against the Club pursuant to a right of direct action under Spanish law were properly characterised as contractual claims in civil proceedings, even though brought under a criminal statute, so that the States were bound to arbitrate them in accordance with the terms of the contract of insurance contained in the Club's Rules. Accordingly the Club was entitled to seek the declarations which it had sought in the arbitrations. Further, the States had lost the right to state immunity pursuant to section 9(1) of the State Immunity Act 1978 ("the 1978 Act") because they had agreed in writing to submit the relevant dispute to arbitration.

17. Mr Timothy Young QC for the States placed some weight upon the fact that in establishing a statutory compensation scheme Spain was carrying out public functions characteristic of sovereign activity and that the proceedings in Spain had their origin in the investigation of criminal offences allegedly committed by the master. It is clear, however, that these matters were taken into account by Mr Justice Hamblen and that they do not detract from his conclusion that the civil claims against the Club were contractual in nature. It is, moreover, Spain's own case in its proceedings to enforce the Spanish judgment (which the Club does not dispute) that the judgment was given in civil proceedings to which the Brussels I Regulation applies.

18. On appeal by the States, this court affirmed Mr Justice Hamblen's decision. Lord Justice Moore-Bick (with whom Lord Justices Patten and Tomlinson agreed) confirmed that the States' claims were contractual in nature so that, if the States wished to pursue them, they had to do so in arbitration in accordance with the terms of the contract. Further, by making their applications under sections 67 and 72 of the Arbitration Act 1996, the States had submitted to the jurisdiction of the English court pursuant to section 2(3)(b) of the 1978 Act; in addition, by commencing proceedings in Spain, the States had asserted claims which were subject to arbitration agreements and had thereby adopted those agreements, which satisfied the requirement for an agreement in writing pursuant to section 9(1) of the Act.

19. Following the decision of Mr Justice Hamblen, but before the decision of the Court of Appeal, the Provincial Court of La Coruña gave judgment in the Spanish proceedings on 13 November 2013. The master was acquitted of the crime of serious negligence against the environment. He was convicted of the crime of disobeying orders of the Spanish maritime authorities to accept a tow of the vessel, but this was held not to have had a causative effect. The shipowner was held not liable, as was the Club.

20. However, the case then came before the Spanish Supreme Court on an appeal by the States. The Spanish Supreme Court reversed the decision of the Provincial Court, holding that the master was liable for the crime of serious negligence against the environment, although it quashed his conviction for the crime of disobeying orders. It went on to hold that the shipowner was vicariously liable for the master's conduct and that the Club was directly liable to the claimants, including Spain and France. It found that the Club's liability was subject to the limit of US $1 billion in the insurance contract.

21. The Spanish Supreme Court remitted the question of quantum to the Provincial Court. The Club participated in the quantum proceedings under protest. The Provincial Court entered judgment on quantum, which (with some corrections) was upheld by the Spanish Supreme Court on appeal. In January 2019 the States applied to the Provincial Court for enforcement of the Spanish quantum judgments against the shipowner and the Club. On 1 March 2019 the Provincial Court ordered that Spain is entitled to seek enforcement in the sum of about €2.355 billion, with the equivalent for France being about €117 million, but subject in the case of the Club to the limit of €855,493,575.65 (the Euro equivalent of the US $1 billion limit, less the value of the CLC fund deposited by the Club in 2003) ("the Spanish Judgment").

22. Spain then brought proceedings in England to have the Spanish Judgment enforced against the Club. The Spanish Judgment was registered by Spain on a without notice application on 28 May 2019, by order of Master Cook. The Club applied to set aside that order for registration pursuant to Article 34 of the Brussels I Regulation on the grounds that recognition would be "manifestly contrary to public policy" and that the Spanish judgment is irreconcilable with the prior section 66 Judgments recognising and enforcing Mr Schaff's awards. The current position is that Mr Justice Butcher has made a reference to the Court of Justice of the European Union on the issue (in short) whether Article 34.3 of the Regulation applies to the section 66 Judgment against Spain (*The Prestige (No. 5)* [2020] EWHC 3540 (Comm)). An appeal from his decision is due to be heard later this year. He has dismissed the Club's public policy arguments (*The Prestige (No. 6*) [2021] EWHC 1247 (Comm)) alleging violation of fundamental rights and has given permission to appeal from that decision, but has extended the time for doing so until after the final determination of the issues which he has referred to Luxembourg.

23. It is in these circumstances (or in the case of the application for registration of the Spanish judgment, in anticipation of these circumstances) that the Club has commenced the new proceedings with which we are now concerned, that is to say, the Arbitration Claims and the Award and Judgment Claims.

(3) Jurisdiction of the Court of Appeal over the section 18 Application appeal

24. A preliminary question is whether the Court of Appeal has jurisdiction to entertain an appeal from the order of Mr Justice Henshaw in the section 18 Application. Section 18(5) of the Arbitration Act 1996 provides that "The leave of the court is required for any appeal from a decision under this section". It is clear that "the court" in question is the court of first instance and not the Court of Appeal: see section 105(1) of the same Act and *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 1WLR 3555 at [20].

25. It is also well established that a decision which the judge had no jurisdiction to make is not a decision "under the section", with the consequence that section 18(5) does not bar the Court of Appeal from entertaining an appeal challenging the jurisdiction of the first instance court: see *Cetelem* at [28].

26. In the present case Spain issued an application under CPR Part 11, including challenges to the jurisdiction of the court in respect of the section 18 Application on the grounds of state immunity and territorial jurisdiction, the latter ground being that the Club could not demonstrate that there was a serious issue to be tried (for the purposes of obtaining

permission to serve out of the jurisdiction) as to whether it had a good arguable case (the standard for granting section 18 relief – see further at [58] below) that there was a binding arbitration agreement in respect of the disputes sought to be referred to arbitration.

27. Mr Justice Henshaw heard the Part 11 application and the substantive section 18 application together, first determining, substantively, that Spain was not entitled to immunity in respect of the Club's claims, in particular finding that Spain had agreed to arbitrate those claims (save for the claim for damages for breach of contract) within section 9 of the 1978 Act. Having so found, Mr Justice Henshaw further (and necessarily) held that the jurisdiction challenges by way of the Part 11 application failed.

28. Mr Justice Henshaw's order duly recorded that the jurisdiction challenge was dismissed before proceeding to appoint an arbitrator. The order further recorded that Spain's application for permission to appeal was refused, but that a further application might be made to the Court of Appeal, save in relation to the appointment of an arbitrator, apparently by way of recognition of the distinction between issues as to the jurisdiction of the court on the one hand and the substantive determination of the section 18 application on the other.

29. In the event, Spain's Notice of Appeal and accompanying Grounds were directed solely at the dismissal of the Part 11 application, not directly seeking to impugn the substantive order under section 18. On 25 January 2021 Lord Justice Males granted permission to appeal, directing that any question as to the jurisdiction of the Court of Appeal be determined as part of the appeal.

30. We see no difficulty whatsoever in this Court entertaining the appeal against the dismissal of the jurisdictional issues raised by the Part 11 application, as indeed was recognised by the terms of Mr Justice Henshaw's order. The Club did not contend otherwise.

31. In our judgment, for the reasons set out above, there would also have been no obstacle to the Court entertaining an appeal against the substantive order under section 18, to the extent that it was based upon contentions as to the jurisdiction of the court to make the order, being the very same issues as arise on the appeal against the dismissal of the Part 11 application. A procedural difficulty might have arisen from the fact that Spain has not appealed the substantive section 18 order, but if we were to hold that the Court had no jurisdiction to entertain the section 18 application, the appointment of Sir Peter Gross as arbitrator would necessarily fall away. However, that difficulty does not arise given our decision on the appeal as it stands, as set out below.

(4) State immunity

32. The 1978 Act provides by section 1 that a State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of the Act. The Club relies on four of the exceptions which are set out in the sections which follow, namely:

    (1) section 3(1)(a): proceedings relating to a commercial transaction entered into by a State;

(2) section 3(1)(b): proceedings relating to an obligation of a State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom;

(3) section 9: proceedings relating to the arbitration of a dispute which a State has agreed in writing to submit to arbitration;

(4) section 2 (in the case of Spain only): proceedings in respect of which a State has submitted to the jurisdiction of the courts of the United Kingdom.

Section 3(1)(a)

33. Section 3 of the 1978 Act provides in relevant part:

> **3 Commercial transactions and contracts to be performed in United Kingdom.**
>
> (1) A State is not immune as respects proceedings relating to—
>
> (a) a commercial transaction entered into by the State; or
>
> (b) ….
>
> (2) ….
>
> (3) In this section "commercial transaction" means—
>
> (a) any contract for the supply of goods or services;
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;
>
> but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.

34. The Club submits that the States' commencement and pursuit of the Art 117 Claims in the Spanish proceedings, and the steps taken by Spain to seek to enforce the Spanish Judgment in this jurisdiction, constitute a commercial transaction within the meaning of subsection (1)(a), being activity of a commercial or other similar character otherwise than in the exercise of sovereign authority within the definition in subsection (3)(c); and that each of the Award Claims, Judgment Claims and section 18 Application are proceedings which "relate to" that commercial activity. The States accept that the activity complained of was not undertaken in the exercise of sovereign authority. They say, however, that the exception is not engaged because the activity does not fall within the scope of the subsection (3)(c) definition; alternatively because the proceedings do not "relate to" that activity. The Club responds that if a construction of the Act would

otherwise lead to either of these conclusions, the result would be contrary to customary public international law and the application of section 3 of the Human Rights Act 1998 and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") would require the section to be construed and applied in the way for which it contends in accordance with the principles explained by the Supreme Court in *Benkharbouche v Embassy of The Republic of Sudan* [2017] UKSC 62, [2019] AC 777.

Is the activity within the definition in subsection (3)(c)?

35. Mr Justice Butcher held at [61] that the commencement and pursuit of the Spanish proceedings was a commercial transaction or activity of a commercial or similar character. Mr Justice Henshaw concluded at [99] that it was an activity of a commercial or financial or similar character. There was no challenge to these aspects of their decisions in the Grounds of Appeal and the States did not advance any argument to the contrary in their joint written skeleton argument, in which they took no issue with the Club's statement that this was now conceded. However in oral argument before this Court Mr Young sought to argue that because the activity in question comprised claims advanced before judicial authorities, it was properly characterised as "judicial" activity and was not within the four categories of activity identified in the subsection, namely commercial, industrial, financial or professional; and that the operation of the section was confined to activity of a character defined by reference to those four categories. Ms Anna Dilnot QC for France adopted those submissions. On behalf of the Club Mr Hancock objected to the argument as being advanced too late. However he had no difficulty in being able to address it, and we think it right to determine it since it goes to a question of immunity, which is concerned with whether one state is entitled to sit in judgment upon another state, and bearing in mind s. 1(2) of the 1978 Act which requires the court to give effect to immunity even where the state does not appear in the proceedings.

36. We have little hesitation in rejecting the argument. The activity in question comprised the pursuit of civil claims which constituted an attempt to enforce the terms of the insurance contract under a direct action right conferred by Spanish law. As Mr Justice Hamblen and the Court of Appeal held in *The Prestige (No. 2)*, the Art 117 Claims were contractual in nature, and the contract in question was a commercial contract of insurance by which a P and I club granted cover to a shipowner against the consequences of commercial maritime casualties, including that which occurred to the Prestige in performing a commercial venture. Activity seeking monetary compensation by virtue of a commercial contract against the consequences of a commercial misadventure is plainly commercial in character. The fact that it involves a claim advanced in judicial proceedings does not make it less so. A litigant does not engage in "judicial activity" by bringing a claim in court. The fact that claims are being heard by a judicial authority does not make the claims judicial in character.

37. We do not need to rest our conclusion on the dicta which have repeatedly stressed the width of the wording in the definition in subsection (3)(c). In *Benkharbouche* at [10] Lord Sumption JSC described commercial activity as "widely defined"; Lord Mance JSC in *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 2 AC 495 said at [86] that the drafters of the Act took extreme care to define the concept of commercial transactions in section 3 "in the widest terms". In *Kuwait Airways Corporation v Iraqi Airways* [1995] 1 WLR 1147 Lord Goff of Chieveley described it

at p. 1159 as a "very broad definition". In our view no process of construction of the subsection, however restrictive, could justify a conclusion that the activity in question in this case was anything other than commercial in character.

38. In the light of this conclusion it is unnecessary to decide whether commercial activity is confined to activity within the four categories identified in the subsection (or activity of a similar character). We should merely record that we were not attracted by Mr Young's argument that a restrictive interpretation should be put on the scope of the definition within subsection (3)(c) because the structure of the Act was one which provided immunity in section 1 and section 3(1)(a) was an exception, thereby giving rise to a strict interpretation of the exceptions if it was to be removed. We do not accept that the structure of the Act provides any basis for such a restrictive approach to construction of the exception sections, for the reasons articulated by Lord Sumption JSC in *Benkharbouche* at [39].

Do the proceedings relate to that commercial activity?

39. We start with some observations on the relationship between the 1978 Act and public international law. The provisions of the Act fall to be construed against the background of the principles of customary international law, which at the time it was enacted, as now, drew a distinction between claims arising out of those activities which a state undertakes *jure imperii*, i.e. in the exercise of sovereign authority, and those arising out of activities which it undertakes *jure gestionis*, i.e. transactions of a kind which might appropriately be undertaken by private individuals instead of sovereign states, in particular what is done in the course of commercial or trading activities. The former enjoyed immunity; the latter did not. This came to be known as the restrictive theory of immunity, which had by then been adopted by the common law in this country. See *Alcom Ltd. v Republic of Colombia* [1984] AC 580 at pp. 597-599, *Playa Larga and Marble Island (Owners of Cargo Lately Laden on Board) v I Congreso del Partido* [1983] 1 AC 244 at pp. 261-262, and *Benkharbouche* at [8]. The Act did not, however, merely seek to frame immunity in terms of this binary distinction, choosing instead to formulate the exceptions to immunity in a series of detailed sections, such that the existence of immunity under public international law is not conclusive as to whether immunity has been removed by the 1978 Act. As Lord Diplock observed in *Alcom* at p. 600, the fact that the bank account of the Colombian diplomatic mission which the respondents in that case sought to make the subject of garnishee proceedings would have been entitled to immunity from attachment under public international law, at the date of the passing of the 1978 Act, was not sufficient to establish that it enjoyed immunity under the Act; it made it highly unlikely that Parliament intended to require United Kingdom courts to act contrary to international law unless the clear language of the statute compelled such a conclusion; but it did not do more than this.

40. In the converse situation, however, in which there would be no immunity under customary international law, there is a more direct correlation between immunity under customary international law and the 1978 Act as a result of the enactment of sections 3 and 4 the Human Rights Act 1998 and the application of article 6 ECHR, together with Article 47 of the Charter of Fundamental Rights of the European Union. As explained in *Benkharbouche*, any immunity granted to a State is necessarily incompatible with Article 6 as disproportionate if and to the extent that it grants to a state an immunity which would not be afforded in accordance with customary international law. Section 3 of the Human Rights Act requires that so far as it is possible to do so, legislation must

be given effect in a way which is compatible with the Convention rights. This is an interpretative obligation of strong and far reaching effect which may require the court to depart from the legislative intention of Parliament, in accordance with the principles articulated in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 and *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264. The alternative remedy of a declaration of incompatibility under section 4 is a remedy of last resort (*Ghaidan* at [46], *Sheldrake* at [28]).

41. On behalf of the States it is argued that the Award Claims "relate to" the Awards, not the underlying activity which gave rise to the Awards. The juridical basis of those claims is an action on the award, deriving from a promise to adhere to the Awards, and the source of the obligation sued on is the Award itself. Similarly, in the case of the Judgment Claims, it is the fact of the Judgment itself which is said to give rise to the claim, in the two ways identified hereafter, not the underlying activity which gave rise to the Judgment. It is contended that a dictum of Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 at p. 1588, the decision of this court in *Svenska Petroleum AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA Civ 1529, [2007] QB 886 endorsing the reasoning of Mrs Justice Gloster [2005] EWHC 2437 (Comm), [2006] 1 All E.R. (Comm) 731, and the decision of the Supreme Court in *NML v Argentina*, all support, indeed dictate, this conclusion.

42. In the case of the section 18 Application, Spain's argument is different. The subject of the Club's Arbitration Claim, in support of which it sought the appointment of an arbitrator, is said not to be the commercial activity (if such it be) of Spain's assertion of its direct action rights against the Club, but rather the Club's "equitable right to arbitrate" the disputes sought to be referred, that is to say the issue whether the disputes are arbitrable disputes.

s. 3(1)(a) applied to the Award and Judgment Claims

43. Mr Justice Butcher rejected the States' argument at [62], without resort to the *Benkharbouche* principles, in these terms:

> "Once it is accepted that the continued pursuit of the civil claims by Spain and France constituted the relevant 'commercial transaction', then it is impossible, in my judgment, to resist the conclusion that the present proceedings (both the Awards Claims and Judgment Claims) 'relate to' that commercial transaction. It is, in a real sense, what the actions are all about. That is the breach alleged, and that is what it is said has caused the Club's loss and entitles it to the relief claimed."

44. We agree. The fundamental flaw in the States' argument on this point is their focus solely on the part of the claim which is concerned with the existence of the obligation relied on. It is true that the source of that obligation is an essential ingredient of the cause of action sued upon, but it is only one ingredient. The other essential ingredients are the activity which is alleged to amount to a breach of the obligation, and the monetary losses which are said to have been caused, or be in prospect of being caused, as a consequence of that activity. The commercial activity in pursuing the civil claim

in Spain, and in Spain's case registering the Spanish Judgment, is an essential part of the Award and Judgment Claims and central to the causes of action sued on in those claims. It would be an abuse of language to say that the claims do not relate to activity which comprises such a large and essential part of the ingredients of the cause of action.

45. The reasoning of the House of Lords in *I Congreso del Partido* is supportive of this approach. The relevant claim was by Chilean purchasers of a cargo of sugar from a Cuban state enterprise, loaded on board the Playa Larga, a vessel owned by another Cuban state enterprise. Following the 1973 revolution in Chile, the Republic of Cuba resolved to have no further dealings with Chile and ordered the vessel to return to sea, part laden, giving rise to a claim under the bill of lading (as well as in tort) for non-delivery of part of the cargo. In relation to whether immunity attached to the actions of the Cuban state entity, Lord Wilberforce identified the necessary relationship between the proceedings and the act characterised as sovereign in customary international law as being the answer to the question what is the relevant act which forms the basis of the claim **(**at p. 262 F) or upon which the claim is based (p. 267B-C). At pp. 262G-263D he rejected the plaintiff's argument that because the claim arose from the bill of lading contract and the use of a trading vessel governed by normal commercial transport arrangements, which were non-sovereign acts, the claim was for that reason alone based on non-sovereign acts and could not attract immunity. Lord Wilberforce explained that what was required was a focus on the act of sending the vessel to sea part laden, which in that case constituted the alleged breach of contract and duty. That could be a sovereign act notwithstanding that it was in relation to a commercial contract. So in this case, it is important to focus on the acts which constitute the conduct said to amount to breach of the obligation in question, not merely the source of the obligation. The acts which form the basis of the claim, and to which the proceedings relate, are not merely the fact of the Awards or the Judgment which create obligations: they are the commercial and non-sovereign activity which is alleged to be a breach of those obligations.

46. The authorities relied upon by the States do nothing to undermine this conclusion. *Holland v Lampen-Wolfe* concerned a claim in defamation by a teacher at a US military base against the author of a memorandum who was the education services officer at the base. The plaintiff was employed pursuant to a contract for services between the US Government and the university for which she worked, which was a commercial contract. The case was determined by the application of s. 16(2) of the 1978 Act, which took the claim outside the scope of the Act and required immunity to be determined in accordance with the common law. Only Lord Millett addressed, obiter, the potential application of s. 3(1)(a). It is unclear to what extent Lord Cooke of Thorndon and Lord Hobhouse of Woodborough intended to associate themselves with these obiter remarks by agreeing that the appeal should be dismissed "in substance" and "substantially", respectively, with the reasons given by Lord Millett. The passage in Lord Millett's speech which is relied on by the States at p. 1587F-G is in the following terms:

> "In my opinion, section 3(1)(a) is not satisfied because, although the contract between the university and the United States Government is a contract for the supply of services and therefore a commercial contract within the meaning of the section by virtue of section 3(3)(c), the present proceedings do not relate to that contract. They are not about the contract, but about the

> memorandum. The fact that the memorandum complains of the quality of the services supplied under the contract means that the memorandum relates to the contract (which is why section 16(2) is satisfied). But it does not follow that the proceedings relate to the contract, which is what section 3(1)(a) requires. In my opinion the words "proceedings relating to" a transaction refer to claims arising out of the transaction, usually contractual claims, and not tortious claims arising independently of the transaction but in the course of its performance."

47. The States rely upon the passage to criticise Mr Justice Butcher for applying a test of what the actions are "all about", rather than whether the claims "arise out of" the transaction in question. In our view the passage is, if anything, more supportive of the Club's case. It is true that Lord Millett in the later part of this passage uses the expression "arising out of" as a characterisation of the relevant connecting factor; but in the earlier part he rejects the argument that the proceedings relate to the contract between the US Government and the university because they are not "about" the contract but "about" the memorandum. He clearly saw no relevant distinction between a test of whether the proceedings were about a transaction or arose out of a transaction for the purposes of answering the question whether they relate to the transaction within the meaning of s. 3(1)(a). More significant, in our view, is his conclusion that the defamation claim did not relate to the contract because it arose independently of the contract and merely in the course of its performance. The defamation claim did not depend for any part of its validity on the existence or terms of the contract itself, and was in that sense truly independent. By contrast, in this case the claims by the Club in the Award and Judgment Claims cannot be said to arise independently of the commercial transaction (activity) in question; on the contrary they are necessarily based on and arise from that activity as the entirety of the conduct of which complaint is made.

48. *Svenska* was concerned with a claim which originated in a joint venture agreement for the exploration and extraction of oil, giving rise to an arbitration award against Lithuania for some $12.5m as damages for breach of the agreement. The application was to enforce the award under s. 101 of the Arbitration Act 1996 and the question arose as to whether the proceedings related to the underlying agreement for the purposes of s. 3(1)(a) of the 1978 Act. Mrs Justice Gloster held not at [50], in reasoning approved by this court on appeal at [137], where she said:

> "In my judgment, I should follow the decision of Stanley Burnton J in *AIC Ltd v. The Federal Government of Nigeria* largely for the reasons which he gives. Although the view expressed by Lord Millett in the House of Lords in *Holland v Lampen−Wolfe* [2000] 1 WLR 1573, at 1588, that:
>
> "In my opinion the words "proceedings relating to" a transaction refer to claims arising out of the transaction, usually contractual claims, and not tortious claims arising independently of the transaction but in the course of its performance"
>
> was strictly obiter, it shows that the phrase "proceedings relating to the transaction", in the context of Section 3 of the 1978 Act, should indeed be given a narrow construction; that is to say, they

> should be limited to claims that arise out of the contract or transaction itself, and not extended to those arising out of some subsequent act, albeit that that act itself might loosely "relate to" the contract or transaction. A claim to enforce an arbitration award necessarily "arises out of" the award. As Mr Bools realistically accepted, there is a clear analogy between proceedings to register judgments and proceedings to enforce arbitration awards. The decision in *AIC Ltd v. The Federal Government of Nigeria* has been cited with some approval by Dame Hazel Fox QC in the introduction to her work *The Law of State Immunity*, Oxford University Press (2002) at page xxvii, although she questioned the judge's reasoning by reference to the utility of section 9 of the Act, stating that his reading "may neglect the prime purpose of section 9 which was to construe consent to arbitration as submission to the English Court's jurisdiction". Be that as it may, and even accepting, as Mr. Bools submits, that there well may be situations where there is no overlap between a section 3 case and a section 9 case, I conclude that these enforcement proceedings under section 101 of the 1996 Act do not relate to the underlying commercial transactions of the JVA, but rather to the arbitration and the Final Award."

49. The reasoning is inapplicable to the current case. There the sole basis for the s. 101 application was the existence of the award. The entirety of the application, based on the award, could be said to relate to the award itself, not the activity which had given rise to it (although we say nothing as to whether such process of reasoning is consistent with customary international law and whether the decision itself would merit reconsideration by application of section 3 of the Human Rights Act and the principles in *Benkharbouche*, which was not an issue raised or addressed in that case). By contrast, in this case the Awards are not the sole basis for the Award Claims. On the contrary all the commercial activity in question post-dates them, and it is that activity after the Awards were published which gives rise to the claims.

50. The same distinction is to be drawn with the facts of *NML v Argentina*, in which the majority of the Supreme Court reached a similar conclusion to that in *Svenska* where the action was to enforce a New York judgment rather than an arbitration award. The underlying claims which gave rise to the judgment against Argentina arose on a series of bonds in respect of which Argentina had expressly waived immunity. The majority concluded that the proceedings related to the foreign judgment, not the commercial activity upon which the judgment adjudicated. Lord Collins of Mapesbury JSC, with whom Lord Walker of Gestingthorpe JSC agreed, recognised at [111] that "relate" in section 3(1)(a) could be given either a wider or narrower interpretation. His adoption of the narrower interpretation is reflected in his conclusion at [116] that "The proceedings in England relate to the New York judgment and not to the debt obligations on which the New York proceedings were based." Lord Mance JSC, in reaching the same conclusion, said at [84]-[86]:

> "84 …. I do not consider that the drafters of that Act or Parliament contemplated that section 3(1)(a) of the 1978 Act had in mind that it would or should apply to a foreign judgment

> against a foreign state. I understand Lord Phillips PSC effectively to accept that (para 42), but, nonetheless, he and Lord Clarke of Stone-cum-Ebony JSC treat the words as wide enough to cover such a judgment. I do not consider this to be justified.
>
> 85 The pursuit of a cause of action without the benefit of a foreign judgment is one thing; a suit based on a foreign judgment given in respect of a cause of action is another. In the present case, the only issue arising happens to be the issue of state immunity with which the Supreme Court is concerned. But a claim on a cause of action commonly gives rise to quite different issues from those which arise from a claim based on a judgment given in respect of a cause of action. A claim on a cause of action normally involves establishing the facts constituting the cause of action. A suit based on a foreign judgment normally precludes re-investigation of the facts and law thereby decided. But it not infrequently directs attention to quite different matters, such as the foreign court's competence in English eyes to give the judgment, public policy, fraud or the observance of natural justice in the obtaining of the judgment. These are matters discussed in rules 42 to 45 of *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed (2006), vol 1. A recent example of their potential relevance is, in a Privy Council context, *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] 1 CLC 205, paras 48, 109-121."

51. Lord Phillips of Worth Matravers JSC and Lord Clarke of Stone-cum-Ebony JSC gave powerful dissenting judgments on this issue at [26]-[41] and [139]-[153] respectively.

52. Again we say nothing as to whether the decision of the majority is consistent with customary international law and would merit reconsideration by application of section 3 of the Human Rights Act and the principles in *Benkharbouche*, which was not an issue raised or addressed in that case. It is sufficient to say that the reasoning of the majority is inapplicable to the current case, which is distinguishable on its facts. The proceedings in that case were an action to enforce a judgment which did not require any consideration of the facts giving rise to the judgment, and in particular of the commercial activity which gave rise to the cause of action which resulted in the judgment. The commercial activity in question preceded the judgment, and the judgment finally adjudicated upon the cause of action to which the commercial activity gave rise. The enforcement proceedings were merely to convert the foreign judgment into an English judgment in the same terms. By contrast in the present case the Judgment Claims are proceedings involving an action on a domestic judgment seeking a judgment in different terms for different relief based on commercial activity of the state since the judgment as giving rise to a cause of action which was not asserted or adjudicated upon in the judgment. Unlike the Club's Judgment Claims, the sole basis for the relief sought in the enforcement action in *NML* was the fact of the judgment itself. It was this critical feature which underpinned Lord Mance's reasoning at [85] in drawing a distinction between issues which arise from the pursuit of an original cause of action and the issues which arise from a claim on a judgment based on that cause of action.

53. Mr Young advanced a further argument, which was that the Club could not rely upon the continued pursuit of the civil claims as a breach of obligation in order to come within the section because the allegation of breach necessarily presupposed that the claims were good on the merits, whereas they were bound to fail for the reasons advanced under other heads, including that there can be no breach of a declaratory award or judgment and/or that the doctrine of merger precluded the claims. We address those merits arguments in the context of the jurisdiction issues below, but will assume for present purposes that they are sound, and that the Club cannot succeed in establishing the obligation relied on in each of the Award and Judgment Claims, of which the commercial activity in question is said to be a breach. Mr Young submitted that for immunity purposes the merits of the claim had to be adjudicated upon on a final, not merely interlocutory or arguable basis, and that this was what the court decided in *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 1 Ch 72 (*The Tin Council case*). He relied in particular on the judgment of Lord Justice Kerr at p. 194A-G and that of Lord Justice Ralph Gibson at p. 252B-G.

54. We cannot accept this submission, which in our view misunderstands what was said in that case. It was there decided that where a state makes a claim to immunity, it is necessary for the court to determine, on a final and not merely interlocutory basis, whether the ground for immunity/loss of immunity exists. In that case the ground on which it was said that the States had lost immunity under section 3 was that they were parties to the tin contracts being sued on. It was only if they were parties that the immunity was lost, because otherwise they had not engaged in any commercial activity, and it was not enough to assert that they were merely alleged to be parties or that there was a good arguable case to that effect. It was necessary to decide that question in order to determine whether they had lost immunity by reason of engaging in commercial activity.

55. By contrast, in this case there are no relevant disputed facts concerning the States' pursuit of the civil claims against the Club and we have determined that as a matter of law that conduct involved commercial activity within the meaning of section 3. The sole remaining issue is whether the proceedings relate to that activity. The answer to that question depends upon a characterisation of the proceedings, which examines the nature of the claim being advanced, not whether it will succeed on its merits. If it lacks merit, that will be a ground on which it will be defeated, but is not itself a ground of immunity. Sometimes, as in the *Tin Council case*, the issue which arises in order to determine immunity is co-extensive with an issue which will arise on the merits, such that a decision that there is no immunity necessarily amounts to a finding that the claim is bad on the merits. It is the former which leads to the latter, not vice-versa. So where the issue is not co-extensive, as in this case, it is impermissible to argue that because a claim is bad on the merits a state has immunity. It is a non-sequitur which derives no support from the *Tin Council case*. All that is required in this case for the purposes of determining whether immunity has been lost is an answer to the question whether the causes of action asserted in the Award Claims and Judgment Claims are such that those proceedings are to be characterised as related to the relevant commercial activity. For those purposes what is required is identification of the basis of the claims giving rise to the proceedings, not whether they will or will not succeed on their merits. It is therefore irrelevant to the immunity question that we conclude below that the Award Claims raise no serious issue to be tried.

Section 3(1)(a) applied to the section 18 Application

56. Mr Justice Henshaw held that the application to appoint an arbitrator to determine a claim for breaches of the obligation to arbitrate, where those alleged breaches comprise the commercial activity of pursuit of the Spanish proceedings, was a proceeding which was related to that commercial activity (at [101], [105]) without the need to resort to the principles of construction dictated by section 3 of the Human Rights Act and the principles articulated in *Benkharbouche*. He distinguished *Svenska* and *NML* on the grounds that the Arbitration Claims did not depend upon the existence of the Awards or the Judgments, and unlike in those cases, there was no intervening award or judgment to which the proceedings could be said to relate to the exclusion of the underlying causes of action.

57. We agree. The Arbitration Claims themselves are clearly related to the commercial activity of pursuit of the Art 117 Claims by the State, those Arbitration Claims being proceedings in which the Club seeks compensation for the consequences of that activity. The application to appoint an arbitrator to determine those Arbitration Claims is similarly related to the commercial activity on which they are based. *Svenska* and *NML* can be of no relevance to that question: the claims do not seek to rely on the fact of the Awards or the Judgment at all as an ingredient of the cause of action: neither is said to be the origin of the obligation of which there has been a breach: the obligation is said to be found in the arbitration clause in the Club Rules.

58. Spain's principal argument before this court was that the section 18 Application relates to the arbitrability question, that is to say the issue whether Spain had indeed become bound by the arbitration agreement in respect of the Arbitration Claims. Mr Justice Henshaw rejected this argument (at [117]) and so do we. It is true that the section 18 Application raised an issue whether the Club met the relatively low threshold of establishing that there was a good arguable case that the tribunal had jurisdiction to determine the disputes referred, which is part of its gateway function in determining applications to appoint an arbitrator under section 18: see *Noble Denton Middle East v Noble Denton International* [2010] EWHC 2574 (Comm), [2011] 1 Lloyd's Rep 387 at [8]-[10]; *Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd* [2017] EWHC 44 (Comm), [2017] 1 All ER (Comm) 791 154 at [26]-[27]; and *Crowther v Rayment* [2015] EWHC 427 (Ch), [2015] Bus LR 690 at [26]. However, the essential feature of a section 18 application which is relevant for present purposes is that it invites the exercise of the court's powers, as the curial court, to support the arbitration, and the important question of characterisation for the purposes of s. 3(1)(a) of the 1978 Act is determined by what the arbitration is about; if the claims which the applicant is seeking to have arbitrated are related to commercial activity, an application to the curial court to enable the arbitration of those claims to take place is a proceeding relating to the same commercial activity. The invocation of a curial court's powers in relation to arbitration proceedings for the purposes of enabling them to take place is to be treated for these purposes as part and parcel of the arbitration process itself.

Sections 2, 3(1)(b) and 9

59. Our conclusion that the States do not have immunity by reason of the exception in s. 3(1)(a) of the 1978 Act renders it unnecessary to consider the other exceptions relied on, and we do not propose to do so, save in one respect. In their written skeleton arguments each side urged us to decide whether section 9 applied to the section 18

Application, because it involves a determination of whether the States are bound to arbitrate the Arbitration Claims. In the course of oral argument, the Club took a more neutral stand, but the States still urged us to decide the point one way or the other. Although it is not an issue which falls to be conclusively determined in relation to the jurisdiction dispute, where the issue is whether there is a serious issue to be tried that there is a good arguable case to that effect, Mr Justice Henshaw chose to reach a final conclusion on the point, both by reference to section 9 immunity and jurisdiction. It is an issue which will determine the jurisdiction of the arbitrator in each of the Arbitration Claims references, and although the Court will not always determine jurisdiction questions in advance, leaving it in the first place to the arbitrator to determine on the basis of the Kompetenz-Kompetenz principle, it may do so in an appropriate case. Having heard full argument and reached a clear view, we propose to decide the issue, which will avoid any application challenging the arbitrators' jurisdiction under s. 67 of the Arbitration Act 1996.

Section 9 applied to the section 18 Application

60. Section 9 of the 1978 Act provides.

> **9 Arbitrations**
>
> (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.
>
> (2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States."

61. The issue is whether Spain has agreed in writing to submit to arbitration the dispute in respect of the Arbitration Claim.

62. The juridical basis for the States being bound by the arbitration agreement is to be found in a series of cases which include *The Fanti and Padre Island (No 2)* [1991] 2 AC 1, *Schiffahrtsgesellschaft Detlev von Appen G.m.b.H v Voest Alpine Intertrading G.m.b.H (The "Jay Bola")* [1997] 2 Lloyd's Rep 279, *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Association Co Ltd ("The Hari Bhum")* [2004] EWCA Civ 1598, [2005] 1 All ER 715 (*"Through Transport (No. 1)")* and *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Association Co Ltd ("The Hari Bhum") (No. 2)* [2005] EWHC 455 (Comm), [2005] 1 CLC 376 *("Through Transport (No. 2)"*, which were decided prior to *The Prestige No 2*; and the subsequent decisions of the Court of Appeal and Supreme Court respectively in *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglou")* [2016] EWCA Civ 386, [2016] 2 All ER (Comm) 851 and *Aspen Underwriting Ltd v Credit Europe Bank NV (The "Atlantik Confidence")* [2020] UKSC 11, [2021] AC 439. It is not necessary to refer extensively to those authorities. In summary, a third party to a contract containing an arbitration clause, who claims a right under such contract, whether by assignment or statutory entitlement, takes that right subject to the arbitration clause which regulates the means by which the transferred

right is to be enforced: see *The Fanti and Padre Island (No 2)* at p. 33 C. The obligation to arbitrate the dispute relating to the asserted claim is an equitable obligation imposed by the conditional benefit principle, namely that although an assignment does not make the assignee a party to the contract, an assignee of a right to which a burden attaches can only take the benefit of that right on the condition that he observes the burden which attaches to it; he may not assert his right under the contract inconsistently with the terms of the contract: see in particular *The Jay Bola* at pp. 286, 291 and *The Atlantik Confidence* at [26]-[27]. Arbitration agreements apply to disputes, not claims as such, with the result that if the third party asserts a claim, which the contractual party against whom it is made disputes, that other party is entitled to refer that matter to arbitration seeking a declaration of non-liability: the obligation of the third party to arbitrate that dispute has arisen by virtue of assertion of the right: see *Through Transport (No. 2)* at [28].

63. Applying those principles in *The Prestige (No 2)* Mr Justice Hamblen (at [136]-158]) and the Court of Appeal (at [55]-[71]) held that section 9 of the 1978 Act removed the States' immunity from the proceedings before those courts, namely the Club's s. 66 proceedings to enforce the Awards. The States had agreed to arbitration of the dispute which the Club had referred to Mr Schaff, namely whether they were bound to arbitrate the Art 117 Claims and the effect of the "pay to be paid" clause on liability for such a claim. The remaining question was whether such agreement was "an agreement in writing" within the meaning of the section in the absence of the States being party to the agreement, which was resolved in favour of the Club: it was sufficient that the arbitration agreement itself, by which the States were bound, was a written agreement in the Club Rules.

64. Against that background the issue which now arises in relation to the application of s. 9 to the section 18 Application can be resolved quite shortly. It depends simply on whether the dispute raised by the new Arbitration Claim falls within the scope of the disputes which Spain agreed to arbitrate by asserting the Art 117 Claim in the Spanish proceedings and the registration of the Spanish Judgment. Given that it has been already been determined that by asserting the Art 117 Claim in the Spanish proceedings, and refusing to arbitrate, the States agreed in writing to arbitrate the Club's disputed claim for a declaration that the States were bound to arbitrate the Art 117 Claim, did Spain thereby also agree to arbitrate the Club's disputed claim for coercive relief in the form of an injunction to support the right to have the Art 117 Claim arbitrated and monetary compensation for failure to do so? We consider that the answer is obviously yes. The only distinction between the two disputes lies in the form of relief: that which was referred to Mr Schaff concerned the existence of rights and obligations; that which is to be referred to Sir Peter Gross is for injunctive relief to enforce the same rights, and for monetary compensation for breach of the same obligations, whose existence Mr Schaff had jurisdiction to determine because under the conditional benefit principle Spain agreed he should do so. To draw a distinction in this respect between a claim for a declaration and a claim for coercive relief, which in each case relies upon identical rights and obligations would involve absurd hair-splitting, as Mr Justice Foxton said at [24] of his judgment on the application to appoint an arbitrator to hear the Arbitration Claim against France ([2020] EWHC 378 (Comm)). The reasoning of the Court in *The Prestige (No. 2)* would apply with equal force had the Club included a claim for coercive relief in their reference to Mr Schaff instead of confining the claim to one for declaratory relief. By asserting the Art 117 Claim the States had become bound to

arbitrate the dispute as to whether they were bound to arbitrate those claims. The scope of that agreement extends to a dispute about the consequences of not doing so if they were so bound, as Mr Schaff held they were. The fact that the claim before Mr Schaff was for declaratory relief and that before Sir Peter Gross is for coercive relief is for this purpose a distinction without a difference.

65. In addressing this aspect of the case, Spain's written reply skeleton argued that "the conditional benefit principle, as applied to arbitration agreements, binds the third party discretely to arbitrate only those disputes concerning the enforcement of that party's conditional right." We would readily accept that the assertion of a claim by a third party under a contract containing an arbitration clause does not involve an agreement to arbitrate *any* dispute of whatever nature brought by the other party merely on the grounds that it falls within the scope of the arbitration clause. There must be a sufficient connection between the dispute and the claim which the third party has asserted. If the connection required is formulated in the way suggested by Spain, it is satisfied in this case. The dispute to which the Arbitration Claim gives rise does "concern" the enforcement of Spain's conditional right, which is the pursuit of the Spanish proceedings and the registration of the Spanish Judgment: it involves a claim for coercive relief as a result of that very conduct, based on the existence of rights and obligations whose existence the States had agreed to arbitrate by reason of the same conduct in asserting the claim.

66. There were three further aspects to Spain's argument on this point. The first depended upon a distinction as to who was advancing a claim. It was submitted that by asserting *its* claim *against the Club*, Spain could not have agreed to arbitrate *the Club's* claim *against it.* This is to repeat the argument correctly rejected by Mr Justice Moore-Bick in *Through Transport (No 2)* at [28]. It mistakenly treats arbitration agreements as biting on claims rather than disputes. Once a claim has been disputed, and the dispute falls within the scope of an arbitration agreement, any party to the arbitration agreement is entitled to require the dispute to be arbitrated and anyone bound by the arbitration agreement is bound to arbitrate the dispute. That is why the States were bound to arbitrate the dispute referred to Mr Schaff, as this court held in *The Prestige (No 2)*, notwithstanding that it arose from a claim by the Club. The Club has asserted its Arbitration Claim. That claim has been disputed by Spain. That dispute falls within the scope of what the States have agreed to arbitrate under the conditional benefit principle by asserting the Art 117 Claims. It matters not that the dispute is a disputed claim by the Club rather than a disputed claim by Spain. That distinction is not determinative of whether the dispute is one which under the conditional benefit principle Spain is bound to arbitrate.

67. Secondly, it was submitted that the proposed arbitration does not relate to the conditional right asserted by Spain, namely Spain's right to compensation, but rather to distinct rights arising out of obligations said to be owed to the Club, namely the equitable obligation to arbitrate. However this distinction too is misplaced, once it is recognised that this court has already determined in the *Prestige (No 2)* that by asserting its Art 117 Claim, Spain did come under the equitable obligation to arbitrate the Club's claim for a declaration that Spain's Art 117 Claim was arbitrable. Spain's argument before us elided the concept of the substantive issue determined by Mr Schaff, namely whether there was an obligation to arbitrate the Art 117 Claim, with the different jurisdictional issue which arose in the section 9 and section 67/72 argument in the

Prestige (No 2), going to Mr Schaff's jurisdiction, namely whether that substantive issue was itself arbitrable as within the scope of what Spain had agreed to submit to arbitration under the conditional benefit principle. The court's determination of the jurisdictional issue in favour of the Club means that it cannot be disputed that the assertion of Spain's claim gave rise to an agreement to arbitrate at least some disputes based on the equitable obligation to arbitrate arising from Spain asserting its Art 117 Claim. The only issue is whether the Arbitration Claim gives rise to such a dispute, which for the reasons set out above we conclude it does.

68. Thirdly, Spain suggested that if the conditional benefit principle functions in the way suggested, it would not comply with Article 6 ECHR which requires an unequivocal waiver of the right to a public hearing, relying on *Hakansson and Sturesson v Sweden* 13 EHRR 1. However, we see no difficulty in the necessary waiver being found in the application of the conditional benefit principle, which involves a choice by the third party to take a benefit which necessarily involves the third party subjecting itself to the attached requirement to arbitrate as a condition. The waiver is made by the voluntary assertion of a claim which requires arbitration of all disputes which are sufficiently connected with it. That involves providing consent to arbitrate those disputes, in the language used by Lord Justice Moore-Bick in *The Prestige (No 2)* at [65]-[66] (in which this point was not taken).

69. For these reasons, which are similar to those articulated by Mr Justice Henshaw, Spain has no immunity from the section 18 Application by reason of the operation of section 9, as well as section 3(1)(a) of the 1978 Act. It is now established that there may be an overlap between section 3(1)(a) and section 9 *(NML v Argentina)* and this case provides an example of such overlap.

(5) Jurisdiction – which regime?

70. We deal next with the question whether the English court has jurisdiction over the States, pursuant to either the Brussels Recast Regulation or the English domestic rules for service of proceedings out of the jurisdiction contained in CPR 6.36 and 6.37 and paragraph 3.1 of Practice Direction 6B (or, in the case of the Arbitration Claims, CPR 62.5). Which regime applies depends in each case on whether the proceedings fall within the "arbitration" exception in Article 1.2(d) of the Recast Regulation.

The "arbitration" exception

71. The test for whether proceedings fall within this exception is now well established. It was first considered by the ECJ in *The Atlantic Emperor* [1991] I.L.Pr 524, where the court held that the exception is "intended to exclude arbitration in its entirety, including proceedings brought before national courts", and specifically that proceedings for the appointment of an arbitrator are "part of the process of setting arbitration proceedings in motion" which, as such, fall "within the sphere of arbitration" so as to be excluded from (what was then) the Brussels Convention. *The Atlantic Emperor* was then considered in a series of first instance decisions, mainly concerned with the grant of anti-suit injunctions, which culminated in a detailed analysis by Mr Justice Aikens in *The Ivan Zagubanski* [2002] 1 Lloyd's Rep 106. This analysis was then approved by this court in *Through Transport (No. 1)*.

72. It is sufficient to cite what was said by Lord Justice Clarke giving the judgment of the court, which also included Lord Woolf CJ and Lord Justice Rix:

> "47. In the result Aikens J, in our opinion correctly, held that the question in each case is whether the (or a) principal focus of the proceedings is arbitration. That test seems to us to be consistent, not only with *The Atlantic Emperor*, but also with the first instance decisions to which he referred and we agree with him that the reasoning in those decisions is to be preferred to that in *Partenreederei M/S Heidberg v Grosvenor Grain and Feed Co Ltd, The Heidberg* [1994] 2 Lloyd's Rep 287. Another way of putting the same point there is to ask the question posed by Rix J in *Qingdao Ocean Shipping Co v Grace Shipping Establishment, The Xing Su Hai* [1995] 2 Lloyd's Rep 15, namely whether the essential subject matter of the claim concerns arbitration. We do not think that that is any different from the test which seemed to Clarke J to be correct in *Union de Remorquage et de Sauvetage SA v Lake Avery Inc, The Lake Avery* [1997] 1 Lloyd's Rep 540, namely whether the relief sought in the action can be said to be ancillary to, or perhaps an integral part of, the arbitration process."

73. We should refer also to the decision of the CJEU in *West Tankers Inc v Allianz SpA* (Case C-185/07) [2009] 1 AC 1138, where the court said, referring to the claim in England for an anti-suit injunction, that:

> "15. … it is clear from the judgment in *Marc Rich & Co AG v Societá Italiana Impianti PA* (Case C-190/89) [1991] ECR I-3855 that the exclusion in article 1(2)(d) of Regulation No 44/2001 applies not only to arbitration proceedings as such, but also to legal proceedings the subject matter of which is arbitration. The judgment in *Van Uden Maritime BV (trading as Van Uden Africa Line) v Kommanditgesellschaft in Firma Deco-Line* (Case C-391/95) [1999] QB 1225 stated that arbitration is the subject matter of proceedings where they serve to protect the right to determine the dispute by arbitration, which is the case in the main proceedings."

74. Accordingly the question is whether a principal focus of the proceedings is arbitration, the essential subject matter of the claim concerns arbitration, or the relief sought can be said to be ancillary to the arbitration process, these being alternative ways of expressing the same idea. That being the test, we take the three sets of proceedings in turn.

The section 18 Application

75. There is no doubt, and it was not disputed, that the proceedings for appointment of an arbitrator against Spain fall within the "arbitration" exception. As already noted, this was the decision in *The Atlantic Emperor*. Accordingly the domestic rules for service apply.

The Award Claims

76. Before the judge it was common ground that the Award Claims fell within the "arbitration" exception so that the domestic rules for service apply. On appeal, however, the States have withdrawn that concession, contending that the exception does not apply. As explained by Ms Dilnot, who conducted this part of the argument on behalf of both States, they do so on a very narrow basis, relying by analogy on the decision of the CJEU in *Assens Havn v Navigators Management (UK) Ltd* (Case C-368/16) [2018] QB 463. Ms Dilnot accepted that, if this analogy is unsound, the exception applies.

77. *Assens Havn* concerned a claim by the owner of a quay which had been damaged by a tug. The quay owner brought an action in Denmark, where the damage had occurred and the claimant was domiciled, against the liability insurer of the company which had chartered the tug. It relied on Section 3 of the Brussels I Regulation ("Jurisdiction in matters relating to insurance") which, by Article 11, allows an injured party to sue a liability insurer in the courts of the injured party's domicile where such a direct action is permitted under national law. The insurer challenged the jurisdiction of the Danish court, relying on a clause in the insurance policy which provided for the exclusive jurisdiction of the High Court in London. On a reference by the Danish court, the CJEU held that the injured party (i.e. the quay owner), which was not a party to the contract of insurance, was not bound by the exclusive jurisdiction clause. That was because prorogation of jurisdiction under Section 3 was "strictly circumscribed by the aim of protecting the economically weaker party", which requires a strict interpretation of the jurisdictional rules in matters relating to insurance:

> "40. The view must therefore be taken that an agreement on jurisdiction made between an insurer and an insured party cannot be invoked against a victim of insured damage who wishes to bring an action directly against the insurer before the courts for the place where the harmful event occurred, as recalled in paragraph 31 above, or before the courts for the place where the victim is domiciled, a possibility accepted by the court in *FBTO Schadeverzekeringen NV v Odenbreit* (Case C-463/06) [2007] ECR I-11321; [2008] 2 All ER (Comm) 733, para 31."

78. Ms Dilnot submitted that this reasoning, which applies to an exclusive jurisdiction clause contained in a liability insurance policy, is equally applicable to an arbitration clause. She prayed in aid a passage in *Arnould's Law of Marine Insurance & Average*, 20th Edition (2021), para 4.14 which, although unreasoned, is to this effect. She submitted that Article 15 of the Brussels Recast Regulation (which is in the same terms as Article 13 of the Brussels I Regulation) provides for the only circumstances in which the provisions of Section 3 can be departed from by an agreement, none of which apply in the present case. Moreover, so far as the Regulation's objective of protecting the weaker party is concerned, there is no material difference between an exclusive jurisdiction clause and an arbitration clause.

79. For this purpose we are prepared to assume that, if the Regulation applies to the Award Claims, they would constitute a matter relating to insurance so as to fall within Section 3[5]. We would accept that, where the Recast Regulation applies, Article 15 sets out the only circumstances in which parties may contract out of Section 3. That is clear from

[5] We shall have to consider Section 3 in more detail in relation to the Judgment Claims and, for that reason, its provisions are set out at paragraph 128 below and are not duplicated here.

the Article's opening words, "The provisions of this Section may be departed from only by an agreement" which satisfies one of the five conditions which then follow. We accept also that *Assens Havn* means that an exclusive jurisdiction obligation applicable under the conditional benefit analysis in English law cannot be invoked by a liability insurer facing a claim by an injured party bringing a direct action when that is permitted under the national law of the court concerned.

80. However, before any question as to the effect of Section 3 can arise, a necessary prior question is whether the Regulation applies at all. As arbitration in its entirety is excluded from the Regulation, there can be no question of Section 3 having any effect in a case to which the "arbitration" exception in Article 1.2(d) applies. Section 3 can only apply to matters within the scope of the Regulation and does not apply to arbitration which is excluded from the Regulation by the exception. Whereas exclusive jurisdiction clauses are within the scope of the Regulation, arbitration clauses are not.

81. We would add that so far as the Recast Regulation (although not the Brussels I Regulation) is concerned, this conclusion is supported by the terms of Recital (12). This provides that:

> "This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law. …"

82. The Recital goes on to provide that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 takes precedence over the Regulation.

83. If *Assens Havn* meant that an injured party making a direct claim against a liability insurer was not bound by an arbitration clause in the contract of insurance, the effect would be that no stay of such a claim could be made in accordance with a state's national law under the New York Convention. This would be contrary to the second sentence of Recital (12), which provides that "Nothing in this Regulation" (which must include Section 3) should prevent the courts of member states from giving effect to an arbitration agreement in accordance with their national law.

84. For these reasons we hold that the reasoning in *Assens Havn* cannot apply to an arbitration clause. We note that this is also the view of Professor Briggs (*Civil Jurisdiction and Judgments*, 7th Ed (2021), para 9.05). Accordingly the "arbitration" exception applies to the Award Claims and jurisdiction must be determined in accordance with domestic law principles.

The Judgment Claims

85. In contrast to the Award Claims, Mr Justice Butcher held that the Judgment Claims did not fall within the "arbitration" exception. He held that they were too far removed from the arbitrations to fall within the exception:

> "104. Various verbal formulae have been used to describe the width of the arbitration exception. An action of the type involved in the Judgment Claims can be said to fit more readily into some than others. In my judgment, however, and considering the purpose of the exception, and its authoritative interpretation, the Judgment Claims do not fall within it. Essentially this is because I consider that these claims are too far removed from the arbitrations to fall within the exception. They depend quite specifically on there being separate causes of action arising as a result of the States' not giving effect to the **judgments** which are distinct from those arising as a result of the States' failure to honour the **awards**. The alleged obligation to respect those judgments is said to derive from the fact(s) that the States were party to the English judgments and/or submitted to the English court proceedings and/or agreed to be bound by the English judgments. The obligation is thus said to have arisen in the course of and as an aspect of the judicial proceedings, not in the course of the arbitral reference or as an aspect of it." (The judge's emphasis).

86. Mr Christopher Hancock QC for the Club challenged this reasoning and conclusion, submitting that the judgments were entered in proceedings under section 66 of the Arbitration Act 1996 for the enforcement of the Awards and that the purpose of the Judgment Claims, which raise important questions of arbitration law, is to support the obligation to arbitrate declared in the section 66 Judgments. He submitted that "the sphere of arbitration" (the phrase used in *The Atlantic Emperor*) should be interpreted broadly and emphasised the statement in *West Tankers* that arbitration is the subject matter of proceedings where they serve to protect the right to determine the dispute by arbitration, together with statements in the *Schlosser Report* (paragraph 65) and case law (e.g. *Arab Business Consortium International Finance & Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485) that proceedings to enforce judgments on awards fall within the exception.

87. In order to determine whether the Judgment Claims fall within the "arbitration" exception, it is necessary to consider more closely the legal basis for those claims. Mr Hancock submitted that the obligation to abide by the judgments on which those claims are founded is derived from two sources. First, he submitted that, as a matter of law, there is an implied contract to abide by a judgment. This was said to be established by a dictum of Lord Justice Leggatt in *E D & F Man (Sugar) Ltd v Haryanto* (Court of Appeal, unreported, 17 July 1996):

> "The applicant accepts that, as it is put in the written submissions of counsel, an action in debt can be founded on an existing judgment. The juridical basis of the claim seems to be that of an implied contract to pay on the part of the party against whom judgment has been obtained. That that is the attitude of the Court has been clear for more than 150 years: see *Williams v Jones* (1845) 13 M & W 628."

88. For our part, we doubt whether this authority, which was an extempore judgment only concerned with whether permission to appeal should be given, and where no permission

was given for the judgment to be cited, stands for any proposition of law which can be applied to the circumstances of the present case.

89. Second, Mr Hancock relied on the decision of the Supreme Court in *JSC BTA Bank v Ablyazov (No. 14)* [2018] UKSC 19, [2020] AC 727 that contempt of court can constitute unlawful means for the purpose of the tort of conspiracy to injure, including the comment of Lord Sumption and Lord Lloyd-Jones at [22] that the last word has not necessarily been said on the question whether contempt of court gives rise to a civil action for damages.

90. Although we are not concerned with the merits of the Judgment Claims, it seems to us that they face considerable difficulties. We find it hard to see how in reality any contract to abide by a section 66 judgment can be implied from the fact that a defendant resists the entry of the judgment by making an unsuccessful challenge to the jurisdiction of the arbitral tribunal. Such conduct is not consistent only with an agreement on the part of the defendant to accept the court's decision (cf. *The Aramis* [1989] 1 Lloyd's Rep 213) and any implied contract would be highly artificial. Moreover, whatever may be the consequences of disobedience to a court order giving rise to liability for contempt, a merely declaratory judgment does not order the defendant to do anything and is not capable of giving rise to a contempt of court. As Lord Justice Judge explained in *St George's Healthcare NHS Trust v S* [1999] Fam 26 at 60:

> "Non-compliance with a declaration cannot be punished as a contempt of court, nor can a declaration be enforced by any normal form of execution, although exceptionally a writ of sequestration might be appropriate: see *Webster v Southwark London Borough Council* [1983] QB 698."

91. The decision of the Supreme Court in *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38, [2015] 1 WLR 2961 also suggests that a declaratory judgment does not entitle the claimant to any consequential relief: see in particular Lord Mance at [18] to [20]. Rather, any such relief must depend upon the underlying obligation which is the subject of the declaration.

92. Be that as it may, however, it is apparent that neither the claims themselves nor the legal sources from which they are derived have anything to do with arbitration. Mr Hancock acknowledged that the obligations which are said to arise from the judgments do not depend upon the fact that they happen to be judgments entered under section 66 of the Arbitration Act 1996 to enforce the awards. While the arbitrations and the proceedings under sections 66 and 67/72 of the Act form part of the background to the Judgment Claims, their essential subject matter (or principal focus) is an obligation alleged to arise out of any English judgment, whatever its subject matter. The fact that the judgments in the present case gave effect to arbitration awards does not appear to be critical or even relevant to whether such an obligation exists. We do not understand the CJEU in *West Tankers* to be propounding a new test for when arbitration is the subject matter of proceedings by reference to the purpose of those proceedings. Rather, the test remains dependent on the character of the proceedings in question.

93. In the circumstances we agree with Mr Justice Butcher, for the reasons which he gave, that the Judgment Claims are not within the "arbitration" exception and that jurisdiction over them is therefore governed by the Recast Regulation. We would add that the test

of "essential subject matter" or "principal focus" is in any event not hard-edged. It calls essentially for an evaluation of the nature of the claim by the first instance judge. In the circumstances of the present case where the judge made no error of principle in applying the test, we would be reluctant to disagree with his conclusion except in a clear case.

(6) Jurisdiction over the section 18 Application under domestic principles

94. Once it is concluded, as set out above, that this court has jurisdiction to entertain an appeal on the issue of jurisdiction, that Spain is not entitled to state immunity, and that Mr Justice Henshaw was right to decide that Spain is bound to arbitrate the Arbitration Claims under a conditional benefit analysis, no further issue as to jurisdiction arises. Accordingly the judge was right to decide that the court has jurisdiction to appoint an arbitrator.

(7) Jurisdiction over the Award Claims under domestic principles

The principles

95. The applicable principles are not in dispute. As explained in *Altimo Holdings & Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [71], a claimant must satisfy three requirements. First, there must be a serious issue to be tried on the merits of the claim. This is equated to the test for summary judgment, whether there is a real as opposed to fanciful prospect of success. Second, there must be a good arguable case that the claim falls within one or more of the jurisdictional gateways in paragraph 3.1 of Practice Direction 6B. Third, the English court must be clearly or distinctly the appropriate forum for the trial of the dispute so that, in all the circumstances, the court should exercise its discretion to permit service of the proceedings out of the jurisdiction. In the present case there is no issue as to the second or third of these requirements. The issue is whether there is a serious issue to be tried on the merits.

Serious issue to be tried – the approach

96. Mr Justice Butcher recognised at [83] to [87] that "serious issue to be tried" represents a relatively low hurdle for a claimant and that the appellate courts have repeatedly deprecated "prolonged debate and consideration of the merits of the plaintiffs' claim" (*Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 at 455G; *Altimo Holdings* at [84] and [85]). More recently, the Supreme Court has emphasised that an appellate court should be slow to interfere with a decision of an experienced first instance judge that a serious issue does (or does not) exist (*Lungowe v Vedanta Resources Plc* [2019] UKSC 20, [2019] 2 WLR 1051 at [9] to [13]). We fully endorse these principles.

97. Nevertheless, even if it is a low one, the hurdle remains one which the claimant must surmount. In the present case the issue is one of law and there is no material dispute of fact. The issue has been fully argued, although not at great length (it is a short point which was merely one point among many in this appeal) and we consider that we should decide it rather than putting the parties to the expense of what we were told would be an eight-day trial in which numerous issues of Spanish law going to quantum (but not liability) would be raised, which would no doubt be followed by a further appeal in

which the identical legal arguments would be repeated. That approach was endorsed, in an appropriate case, by the Privy Council in *Altimo Holdings*:

> "81. A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case: *E F Hutton & Co (London) Ltd v Mofarrij* [1989] 1 WLR 488, 495; *Chellaram v Chellaram (No. 2)* [2002] 3 All ER 17, para 136."

The issue

98. The issue is whether a declaratory award (i.e. an award which merely declares what the parties' rights and obligations are) creates any obligation to "honour" the award, breach of which gives rise to a cause of action for damages or equitable compensation. Mr Hancock submitted that it does. He submitted that the Award Claims are claims at common law to enforce the Awards which are founded on a well-recognised principle that an agreement to arbitrate (or perhaps the submission of a dispute to arbitration) carries with it an obligation to honour the arbitral tribunal's award; that this principle applies even in the case of a declaratory award; and that in an action to enforce an award at common law, the court has flexibility to fashion an appropriate remedy, which may include a claim for damages or equitable compensation.

Declaratory awards

99. We begin consideration of this question by confirming that the Awards in this case are merely declaratory of the parties' existing rights and obligations. The Awards against Spain and France are in materially identical terms. We can therefore take the Award against Spain as representative. It recites the circumstances in which the casualty occurs and the relevant provisions of the Club Rules including the arbitration clause, as well as the proceedings in Spain which had so far occurred. It records that the Club's Claim Submissions sought declaratory relief (with no mention of any other kind of relief) and sets out the procedural steps in the arbitration. It continues:

> "NOW I, the said Alistair Schaff QC, having taken on the burden of this reference and having carefully and conscientiously considered all the evidence and submissions made to me, DO HEREBY MAKE, ISSUE AND PUBLISH this my FINAL AWARD:
>
> A. I AWARD AND DECLARE that, as regards all claims arising out of the loss of the M/T PRESTIGE and the resulting loss and damage which are currently brought in Spain by the Respondent against the Claimant by way of alleged direct public liability under the Spanish Penal Code:
>
> 1) the Respondent is bound by the arbitration clause contained in Rule 43.2 of the Club Rules and such claims must be referred to arbitration in London;

> 2) (i) actual payment to the Respondent of the full amount of any insured liability by the Owners and/or Managers (out of monies belonging to them absolutely and not by way of loan or otherwise) is a condition precedent to any direct liability of the Claimant to the Respondent in consequence of the 'pay as may be paid clause' contained in Rule 3.1; and accordingly
>
> (ii) pursuant to the 'pay as may be paid clause', and in the absence of any such prior payment, the Claimant is not liable to the Respondent in respect of such claims.
>
> 3) The Claimant's liability to the Respondent in respect of such claims shall, in any event, not exceed the amount of US $1,000,000,000 (US Dollars One Billion)."

100. Finally, Spain was ordered to pay the costs of the reference.

101. Thus, with the exception of costs, the Award did not order Spain to do or to refrain from doing anything, or to pay money. It merely declared what Spain's obligations (and the Club's rights) were under the Club Rules.

102. Mr Schaff's Reasons make clear, if that were needed, that the only relief sought was a declaration of rights and that, according to the Club, "the declaratory relief sought from this Tribunal was sought for defensive purposes, namely to give rise to an award which could be registered as a Regulation judgment and which could then be used to insulate the Club's assets from any inconsistent judgment which may subsequently emanate from the Spanish Courts".

103. To be clear, and viewing the Awards in context, they did not determine that the States were under any positive obligation to pursue their claims in London arbitration or indeed at all. It was always open to them to abandon their claims. Rather, the Awards determined that if the States were going to pursue their claims, their obligation was to do so in London arbitration – or putting the point by reference to the negative obligation explained by the Supreme Court in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889, their obligation was not to pursue their claims in any other forum (including the Spanish courts). *A fortiori* the Awards did not order the States to arbitrate their claims. If the arbitrator had intended to make such an order, he would no doubt have considered whether it was open to him to do so in view of section 13(2) of the State Immunity Act 1978 which provides that relief shall not be given against a State by way of injunction or order for specific performance.[6]

The effect of a declaratory award

[6] We understand that there is an issue in the current arbitrations before Dame Elizabeth Gloster and Sir Peter Gross whether this prohibition applies in an arbitration. We say nothing about the merits of the issue, but we have no doubt that if the Club had sought any kind of coercive order from Mr Schaff, this section would have been drawn to his attention and he would have addressed it in his Awards.

104. We consider next the nature and effect of a declaratory award or judgment, which is stated in *Zamir & Woolf, The Declaratory Judgment*, 4th Edition (2011), para 1.02 as follows:

> "A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the claimant's rights; if the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus the court may, for example, declare that the claimant is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position."

105. The effect of a declaratory judgment was considered further in *Zavarco Plc v Nasir* [2021] EWCA Civ 1217, decided after the judgment of Mr Justice Butcher in this case. In previous litigation the court had made declarations that the claimant was entitled to forfeit shares held by the defendant which had failed to pay for them. The claimant then exercised its right to forfeit the shares and brought proceedings to recover the sum due. The defendant contended that the claim for payment had merged in the declaratory judgment granted in the previous litigation. The concept of merger was explained by Lady Justice Arden in *Clarke v In Focus Asset Management & Tax Solutions Ltd* [2014] EWCA Civ 118, [2014] 1 WLR 2502:

> "24. … Merger explains what happens to a cause of action when a court or tribunal gives judgment. If a court or tribunal gives judgment on a cause of action, it is extinguished. The claimant, if successful, is then able to enforce the judgment, but only the judgment. The effect of merger is that a claimant cannot bring a second set of proceedings to enforce his cause of action even if the first tribunal awarded him less than he was entitled to (see, for example *Wright v London General Omnibus Co* [1877] 2 QBD 271 and *Republic of India v Indian Steamship Company Ltd (The Indian Grace)* [1998] AC 878). As Mummery LJ held in *Fraser v HMLAD* [2006] EWCA Civ 738 at [29], a single cause of action cannot be split into two causes of action."

106. This court held in *Zavarco* that a cause of action does not merge in a declaratory judgment, which confirms the existing cause of action while leaving it intact, neither adding to it nor extinguishing it. Sir David Richards (with whom Lord Justices Henderson and Warby agreed) said:

> "37. A declaration is a quite different remedy from judgment for a debt or damages. It makes sense to speak of a merger of a claim for debt or damages into a judgment for the payment of a specified sum as debt or damages, so creating 'an obligation of a higher nature'. The lesser right is merged into the higher. The same simply cannot be said of a purely declaratory judgment, which itself imposes no obligation but only confirms the obligation which already exists. As Birss J aptly put it, 'I do not see how a declaration which declares to exist the right which the claimant already had before judgment was given, could be said to extinguish that pre-existing right. It does the opposite'."

The implied promise to "honour" an award

107. Finally, we consider the cases which have discussed the implied promise to "honour" an award.

108. It has long been recognised in English law that proceedings to enforce an arbitration award are founded upon a mutual promise by the parties, creating a contractual obligation, to abide by and perform the award. This analysis originated in the time when the only means of enforcement was by an action to enforce the award, although that procedure has in modern times been largely superseded by the more summary methods contained in section 66 and (for New York Convention awards) sections 100 to 103 of the Arbitration Act 1996 and their statutory predecessors. There has been some debate whether the promise is contained in the arbitration agreement in the parties' underlying contract or in a separate contract which comes into being when a dispute is submitted to arbitration. In our judgment it must be the former. That makes better sense of the common situation where, as in this case, a respondent plays no part in submitting a dispute to arbitration and even denies the arbitrability of the claim. In such circumstances to say that a respondent makes a new promise to perform the award is artificial. The better view is that such an obligation already exists because the parties have agreed to arbitration in the first place (or, when a conditional benefit analysis applies, when a party becomes bound by the arbitration clause by virtue of making a contractual claim). But in either event, it is clear that the action on an award is founded on an implied contractual promise.

109. An early case was *Purslow v Bailey* (1704) 2 Ld Raym 1039, where Chief Justice Holt said that:

> "as the law is now, the party might have an action upon the case for the breach of his promise in non-performance of the award. For the submission is an actual mutual promise to perform the award of the arbitrators; …"

110. That was a case where the arbitrators had awarded that the defendant should provide the plaintiff with a couple of pullets to be eaten at the defendant's house in satisfaction of a trespass. In the end, the court decided not to give judgment, but (in robust terms which foreshadowed modern judicial attempts at mediation by some three centuries) "exhorted the parties to eat the pullets together, which they would have done at first, if they had had any brains".

111. We draw attention to the reference to "non-performance" of the award, which necessarily implies that the award is one which can be performed.

112. In modern times the leading case is *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753. A charterparty made in London provided for disputes to be submitted to arbitration in Hamburg where an award was made against the defendant. The claimant sought to enforce the award by action and obtained permission to issue and serve a writ on the defendant out of the jurisdiction. The issue was whether the action based on the award was for the enforcement of a contract made within the jurisdiction. The Court of Appeal held that it was. The action was to enforce the implied promise to abide by and carry out the award which was contained in the charterparty made in London rather than being an action on the award itself which had been made in Hamburg. Lord Justice Slesser cited with approval a passage from *Leake on Contracts*, 8th Edition:

> "A submission by consent … implies an agreement to perform the award; upon which an action will lie for non-performance. The action may be in the form of a claim for debt or damages, or for specific performance."

113. The explanation that an agreement to submit disputes to arbitration carries with it a promise by both parties to abide by and perform the award has been followed in later cases (see e.g. *F. J. Bloemen Pty Ltd v Council of the City of Gold Coast* [1973] AC 115 at 126C-F; *Agromet Motoimport v Maulden Engineering Co (Beds) Ltd* [1985] 1 WLR 762, at 770; *The Bumbesti* [2000] QB 559 at [9] to [12]; *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 WLR 1041 at [9]; *Gater Assets Ltd v Nak Naftogaz Ukrainiy (No. 3)* [2008] EWHC 1108 (Comm), [2009] Bus LR 396 at [23]; and *The Amazon Reefer* [2009] EWCA Civ 1330, [2010] Bus LR 1058).

114. In the *Associated Electric* case, which may be the origin of the Club's reference to "honouring" the award, Lord Hobhouse described the position in these terms (our emphasis):

> "9. The essential purpose of arbitration is to determine disputes between the parties to the arbitration. Historically this was what the function of arbitrators was -- to say who was right. The decision of the arbitrators could, as a result of the authority given to the arbitrator by the parties' agreed submission to arbitration, declare what were the rights and liabilities of the parties and bind the parties by that declaration. Enforcement lay with the courts. Common law remedies were available besides statutory ones. *It is possible to sue on the award or for damages for failing to honour the award*; or to rely upon the award as having conferred a right or determined a fact. … Statutes and International Conventions have since facilitated the direct enforcement of awards with a minimum of formality but still ultimately requiring the assistance of the judicial system. But the situation remains that the foundation of arbitration is the determination of the parties' rights by the agreed arbitrators pursuant to the authority given to them by the parties. As section 58 of the United Kingdom Arbitration Act 1996 says, 'an award made by

> the tribunal pursuant to an arbitration agreement is final and binding … on the parties'. *It is an implied term of an arbitration agreement that the parties agreed to perform the award*."

115. It is apparent that, in referring to a cause of action for damages for failing to "honour" an award, Lord Hobhouse had in mind an award which could be "performed", that is to say a coercive award which required the defendant either to perform an act (including to pay money) or to refrain from doing so. Hence his characterisation of the implied term in the final sentence which we have emphasised. He drew no distinction between "honouring" and "performing" an award. While he acknowledged that a declaratory award would create an issue estoppel, and in that sense could be "enforced", there is nothing in his judgment to suggest that he contemplated a cause of action for damages for failing to honour a purely declaratory award.

116. In *The Amazon Reefer* Lord Justice Thomas explained at [5] to [7] how the summary procedure for enforcement of an award under section 66 of the 1996 Act has in practice replaced the common law action on the award, but he went on to make clear that the statutory procedures are also founded on the parties' promise to perform the award:

> "14. … In the first place there is a clear distinction between an arbitration award and a judgment. An arbitration agreement [sc. award] is in essence enforceable because of the implied contractual promise to pay an arbitration award contained in the arbitration agreement; all measures of enforcement essentially rest upon the contract. The provisions of section 26 of the 1950 Act and section 66 of the 1996 Act must be seen in that context. They are simply procedural provisions enabling the award made in consensual arbitral proceedings to be enforced. This is quite different to the pronouncement of a judgment by a court where the state through its courts has adjudged money to be due."

117. Although a declaratory award can be "enforced" for the purpose of section 66 of the 1996 Act in the sense that judgment can be entered in terms of the award, that is because the term "enforce" in section 66 is not confined to enforcement by one of the normal forms of execution of a judgment which are provided under the CPR, but extends to other means of giving judicial force to the award by recognising it as creating an issue estoppel or as providing a shield against enforcement of an inconsistent foreign judgment. It was so held by this court in *West Tankers Inc v Allianz SpA* [2012] EWCA Civ 27, [2012] Bus LR 1701. But there is nothing in that case to detract from what is said above as to the nature and effect of a declaratory judgment or award.

The Xiamen case

118. Mr Hancock relied in particular on a recent decision of the Court of Final Appeal in Hong Kong, *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd* [2020] HKCFA 32, (2020) 23 HKCFAR 348. This was an action at common law in Hong Kong to enforce a CIETAC arbitration award made in the People's Republic of China. Importantly, the award ordered the defendant to continue to perform the parties' contract, a remedy available under Chinese law. It was, therefore, a coercive award. The fact that specific performance of the contract would not have been available as a remedy under Hong Kong law does not detract from this characterisation of the award. When performance

became impossible because the defendant was no longer able to transfer the shares which it was required to transfer to the claimant under the contract, the claimant claimed damages for the defendant's failure to perform the award. The Court of Final Appeal held that, in a common law action to enforce an award, the court was not limited (as it is in the statutory enforcement procedures) to granting relief which simply mirrors the terms of the award, but was able to fashion an appropriate remedy to give effect to the award. This was a remedy available in court as part of the enforcement process which was not itself arbitrable. The fresh dispute arising from the defendant's non-performance of the award gave rise to a fresh cause of action "stemming from breach of the implied promise to comply with the Award":

> "102. It is clear that as a matter of law, the implied promise to honour the Award exists as a contractual obligation separate and distinct from the obligations created by the underlying contract. …
>
> 120. … Once the final award is made, the arbitrators' mandate is exhausted and, if the award is not complied with, a fresh cause of action arises for breach of the implied promise to honour the award. That cause of action lies within the enforcing court's jurisdiction and is not within the power of the tribunal. …
>
> 122. At the enforcement stage, in an action on the implied promise, the enforcing court may grant relief appropriate to the award. If it is a monetary award for payment within the jurisdiction, it may simply be a judgment enforcing the award as a debt. If it is a non-monetary award which has not been complied with, the court may fashion an apt remedy chosen from the full range of remedies available in an ordinary common law action. Thus, in *Agromet Motoimport v Maulden Engineering Co (Beds) Ltd* [1985] 1 WLR 762, Otton J approved the approach of *Mustill and Boyd* who stated:
>
> > 'Parties to an arbitration agreement impliedly promise to perform a valid award. If the award is not performed the successful claimant can proceed by action in the ordinary courts for breach of this implied promise and obtain a judgment giving effect to the award. The court may give judgment for the amount of the award, or damages for failure to perform the award. It may also in appropriate cases, decree specific performance of the award, grant an injunction preventing the losing party from disobeying the award, or make a declaration that the award is valid, or as to its construction and effect'."

119. So far, we respectfully agree. The decision represents an orthodox application of established principles, albeit perhaps in unusual circumstances. But it is important that all of this discussion was in the context of a coercive award. That was the position in the *Xiamen* case in view of the arbitral tribunal's order to the defendant to continue performing the contract.

120. Mr Hancock submits, however, that the Court of Final Appeal then went further because of what it went on to say about two English cases:

> "123. The cases involving non-monetary awards granting declarations of rights or specific performance illustrate the remedial flexibility of the enforcing court. Thus, in *Selby v Whitbread*, when the defendant company demolished a building, withdrawing support from the plaintiff's adjoining building and rendering it dangerous, surveyors appointed under an applicable statute made an award which required the defendant to erect a substantial pier to give support to the plaintiff's structure and to do certain minor works. The defendant refused to comply and the plaintiff brought the action to enforce that award. McCardie J held that while '… a decree of specific performance can in some cases appropriately be granted in order to carry out the terms if an award', in the instant case, such a decree should not be made because of difficulties of enforcement and because damages were an adequate remedy. So by way of relief, his Lordship granted the plaintiff a declaration that the award was valid and binding and awarded damages in respect of the erection of the pier and other works.
>
> 124. In *Birtley and District Cooperative Society Ltd v Windy Nook and District Industrial Cooperative Society Ltd (No 2)* an arbitration held pursuant to certain co-operative union rules resulted in an award declaring that the defendant co-operative trading society should not trade in certain geographical areas where the plaintiff was exclusively to provide services. When the defendant refused to be bound by the award, the plaintiff successfully brought an action for a declaration that the award was binding on the defendant, an injunction restraining them from trading contrary to the terms of the award and also an inquiry as to damages."

121. Evidently the Court of Final Appeal did not regard the award in *Selby v Whitbread* [1917] 1 KB 736 as a purely declaratory award. It described the award as one which "required" the defendant to erect a substantial pier. On that basis, the decision goes no further than those already considered. The position in *Birtley & District Cooperative Society Ltd v Windy Nook & District Industrial Cooperative Society Ltd (No. 2)* [1960] 2 QB 1 is less clear, but we are not confident that the award there was purely declaratory as distinct from coercive. Its full terms are not set out in the law report. Moreover, if it was purely declaratory, there is no discussion in the judgment (or indeed in the judgment of the Hong Kong Court of Final Appeal) of the significance of this fact. In these circumstances these cases, and what is said about them in the *Xiamen* case which was in any event unnecessary for the decision, carry no real weight on the issue before us. What is more important is what the Court of Final Appeal went on to say, reiterating that the award before it was indeed a coercive award:

> "126. In the present case, the tribunal made a non-monetary award requiring the continued performance of the Agreement. When it was discovered that the possibility of compelling such

> performance by requiring transfer of the shares had been frustrated as a result of the restructuring, the enforcing Court granted relief in the form of an award of damages. The fact that there is very likely to be a significant overlap between such damages and whatever damages might have been awarded by the tribunal for breach of the Agreement, does not mean that the Court's order 'usurps' the function of the tribunal. It is an order made at the enforcement phase, exercising the Court's jurisdiction with a view to fashioning an appropriate remedy to give effect to the award, distinct from any remedy that might have been claimed in the arbitration.

Conclusions

122. Drawing these threads together, there is in our judgment no support in any of the authorities to which we have been referred for the proposition that a purely declaratory award (such as exists in this case) is capable of creating any obligation breach of which gives rise to a cause of action for damages or equitable compensation. Rather, the cases are concerned with the remedies which may be available for failure to perform an obligation arising from a coercive award. They demonstrate the flexible approach of the common law in such cases. But to hold that such an obligation arises from a purely declaratory award would be a further step which would in our view subvert well established principles.

123. First, it does not make sense to speak of failing to "honour" or to "perform" an award (it is clear that these terms mean the same thing in the cases we have discussed) which does not order the defendant to do anything. There is nothing to "honour" or "perform". Just as there can be no "breach" of a declaration amounting to a contempt of court, so there can be no breach of a declaration which merely declares the parties' rights.

124. Second, as *Zavarco* underlines, a declaratory award or judgment does not create new obligations or extinguish existing obligations, but merely declares what those existing obligations are. To hold otherwise would be inconsistent with the nature of a declaration and, in the case of a State defendant, could amount to an injunction by the back door, contrary to section 13(2) of the State Immunity Act 1978.

125. Third, there is no need to imply any such obligation (which might itself be thought fatal to any obligation founded upon an implied promise). The existing obligations are not merged in the award. They continue to exist and can be enforced, if necessary by a claim for damages. That is, after all, precisely what the Club seeks to do by its Arbitration Claims. Subject to any argument which may be available to the States that the Arbitration Claims amount to an abuse of process because they ought to have been included in the arbitrations before Mr Schaff, an argument which at first sight seems difficult as the Arbitration Claims are concerned with alleged breaches of the agreement to arbitrate which occurred after publication of Mr Schaff's Awards but which, if made, would be a matter for the arbitrators, there is no reason why those claims should not be

pursued in the new arbitrations which the Club has commenced, with the benefit of whatever issue estoppel arises from the Awards.[7]

126. For these reasons we conclude that the Award Claims are bad in law. There is, therefore, no serious issue to be tried and the English court has no jurisdiction over them.

(8) Jurisdiction over the Judgment Claims under the Brussels Recast Regulation

Matters relating to insurance

127. In determining whether the court has jurisdiction over the Judgment Claims under the Brussels Recast Regulation, the first question which arises is whether these claims are "matters relating to insurance" so as to fall within Section 3 of Chapter II of the Regulation. With only limited exceptions, that Section provides an exclusive regime for cases which fall within it which is intended to protect "the weaker party" and to limit the party autonomy which is otherwise a general feature of the Regulation. Its rationale is set out in Recitals (15), (18) and (19) to the Regulation:

> "(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
>
> (18) In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.
>
> (19) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation."

128. The Section itself provides as follows:

> "SECTION 3
>
> **Jurisdiction in matters relating to insurance**
>
> *Article 10*

[7] We leave out of account whatever issues may arise as to the viability of the Club's claims if it is held that the States are entitled to enforce the Spanish judgment here under the Brussels I Regulation. Those issues, whatever they may be, were only lightly canvassed in argument but seem likely to apply equally to the Award and the Arbitration Claims if it is so held.

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.

Article 11

An insurer domiciled in a Member State may be sued:

(a) In the courts of the Member State in which he is domiciled;

(b) In another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled; or

(c) If he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 12

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if moveable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 13

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 14

1. Without prejudice to Article 13(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this section, the original claim is pending.

Article 15

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen;

(2) which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section; (3) which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that Member State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that Member State;

(4) which is concluded with a policy holder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State; or

(5) which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 16.

Article 16

The following are the risks referred to in point 5 of Article 15:

(1) any loss of or damage to:

(a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

(2) any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

(a) arising out of the use or operation of ships, installations or aircraft s referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

> (b) for loss or damage caused by goods in transit as described in point 1(b);
>
> (3) any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;
>
> (4) any risk or interest connected with any of those referred to in points 1 to 3;
>
> (5) notwithstanding points 1 to 4, all 'large risks' as defined in Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance (Solvency II)."

129. Section 3 was considered at all levels in *The Atlantik Confidence*, which provides recent and authoritative guidance as to the approach to be taken to the question whether a claim is a "matter relating to insurance". The facts were concisely set out by Mr Justice Butcher:

> "118. There a vessel was lost at sea. Hull underwriters had paid out under settlement agreements made with the shipowners and their managers, and payments were made in favour of the bank to which the ship had been mortgaged as loss payee and assignee under the hull and machinery policy. The underwriters then sought to recover those sums on the basis that the ship had been scuttled and the underwriters defrauded. Claims were brought against the owners and managers and the bank vicariously in tort and unjust enrichment seeking rescission of the settlement agreements, restitution or damages."

130. It was held that the bank's claims were "matters relating to insurance" within Section 3. In the Commercial Court ([2017] EWHC 1904 (Comm), [2018] 1 All ER (Comm) 228), Mr Justice Teare dealt with the issue as follows:

> "65. The claim in the present case does not seek the rescission or avoidance of the policy of insurance. The claim can, to that extent, be distinguished from the counterclaim in *Jordan v Baltic*. Mr MacDonald Eggers submitted that the claim does not concern the enforcement of a right under the Policy nor a dispute about rights and liabilities under the Policy. Rather, it concerns a payment made under or pursuant to the Settlement Agreement. It is that agreement of which rescission is sought. That is strictly true but the principal allegation made by the Hull Underwriters is that there was a misrepresentation that the loss of the Vessel was caused by a peril insured against under the Policy. Moreover, the sum agreed to be paid pursuant to the Settlement Agreement was the agreed sum under the Policy. Further, damages are sought because had the misrepresentations not been made the Hull Underwriters would not have been liable under the Policy because they were not liable for loss attributable to

the wilful misconduct of the Owners pursuant to section 55(2)(a) of the Marine Insurance Act 1906.

66. The present case is therefore not merely one where there is a factual connection between the claim and the Policy but is one where the outcome of the claim very much depends upon whether the Hull Underwriters were in fact liable under the Policy. Mr MacDonald Eggers said that this was not enough. The case is not about the Policy but about the Settlement Agreement which has 'intervened' or been 'interposed'. The claim concerns rights and obligations created by the Settlement Agreement which are not rights and obligations created under the Policy. The mere fact that the Policy forms part of the 'pathology' of the claim is not enough.

67. I accept that the Settlement Agreement has been interposed. Indeed, its aim is to resolve all claims under the Policy (see recital (D)) and the Settlement Sum is accepted in full and final settlement of such claims (see clause 1.3). It is for that reason that the Hull Underwriters need to be able to rescind or avoid the Settlement Agreement. The question for the court is whether that strict, legal analysis of the position is sufficient to show that the claim is not within the phrase 'matters relating to insurance'.

68. I consider that there is a risk that if the court concentrates on the strict legal analysis of the position in English law the court will adopt an understanding of the phrase 'matters relating to insurance' which depends too much on the English law analysis of the claim. The phrase is no doubt intended to have an autonomous meaning which is applicable in all member States. The articles relating to insurance are an example of 'the few well-defined situations in which the subject-matter of the dispute' determines which courts have jurisdiction (see recital 15 to the Regulation). That suggests, in my judgment, that in determining whether a matter 'relates to insurance' the court must in a broad and common sense manner consider whether the subject-matter of the dispute relates to insurance.

69. I accept that the mere fact that an insurance policy features in the history or pathology of the claim may not be enough to cause the subject-matter of the dispute to relate to insurance. But in my judgment the Policy on the Vessel is much more than a feature of the history or pathology of the claim brought by the Hull Underwriters against the Bank. The representations which form the basis of the claim expressly concern the question whether the Vessel was lost by reason of a peril insured against under the Policy. The Hull Underwriters expressly allege that the Vessel did not become a total loss by reason of a peril insured against under the Policy. That is the reason why the representations were misrepresentations and why the Hull Underwriters claim to be entitled to avoid or rescind the

> Settlement Agreement. The Hull Underwriters, when explaining their claim for damages, expressly allege that they are not liable for loss caused by the wilful misconduct of the Owners pursuant to the section 55(2)(a) of the Marine Insurance Act 1906. Of course, the claim raises considerations in addition to the question whether the Hull Underwriters were liable under the Policy, for example, whether the Bank made any misrepresentations and if so whether they were made negligently. But such issues concern the manner in which the claim under the Policy was presented.
>
> 70. It is wise in these matters to stand back from the detail of the claim and its precise legal analysis in terms of English law. In my judgment the nature of the claim made by the Hull Underwriters against the Bank is so closely connected with the question of the Hull Underwriters' liability to indemnify in respect of the loss of the Vessel pursuant to the Policy that it can fairly and sensibly be said that the subject-matter of the claim relates to insurance and so is governed by Article 14."

131. In this court ([2018] EWCA Civ 2590, [2019] 1 Lloyd's Rep 221) Lord Justice Gross (with whom Lord Justices Moylan and Coulson agreed) said this:

> "77. …I find myself in full agreement with the Judge. It is correct that the Settlement Agreement was here interposed and, as the Judge observed (at [67]) its aim was to resolve all claims under the Policy. Moreover, as moneys had been paid by Underwriters to Owners (via Willis) pursuant to the Settlement Agreement, it is inevitable that Underwriters' claims needed to 'tackle' the Settlement Agreement – and, as seen from the summary set out above, they do so, seeking its avoidance and/or rescission, restitution of sums paid thereunder and damages for misrepresentation.
>
> 78. However, as a matter of reality and substance, the foundation of Underwriters' claims lies in the Policy. Central to Underwriters' claims, as the Judge explained (at [69] – [70], set out above), was the question of Underwriters' liability or non-liability to indemnify Owners under the Policy. The crucial (if not the only) question is whether the Vessel was lost by reason of a peril insured against under the Policy or whether the loss arose by reason of wilful misconduct on the part of Owners. On this footing, there is the most material nexus between Underwriters' claims and the Policy. Further still, a consideration of the Policy is indispensable to the determination of the claim. As a matter of common sense, having regard to the autonomous meaning to be given to Section 3 and fortified by *Brogsitter* [*Brogsitter v Fabrication de Montres Normandes EURL* (Case C-548/12) [2014 QB 753] and *Arcadia* [*Arcadia Petroleum Ltd v Bosworth* [2016] EWCA Civ 818], notwithstanding the interposition of the Settlement Agreement,

> Underwriters' claims come squarely within the heading 'matters relating to insurance'."

132. In the Supreme Court ([2020] UKSC 11, [2021] AC 493) Lord Hodge, with whom the other members of the Court agreed, said that Mr Justice Teare and the Court of Appeal had not erred in their approach to this issue. His reasons were as follows:

> "35. First, it is to my mind important to note that the title to section 3 'Jurisdiction in matters relating to insurance' is broader than the words of article 7(1) 'matters relating to *a contract*' (emphasis added). Similarly, it is wider than the titles of section 4 'Jurisdiction over consumer contracts' and section 5 'Jurisdiction over individual contracts of employment'. The difference in wording is significant as it would require to be glossed if it were to be read as 'Matters relating to an insurance contract'. Such a gloss would not be consistent with the requirement of a high level of predictability of which recital (15) speaks.
>
> 36. Secondly, the scheme of section 3 is concerned with the rights not only of parties to an insurance contract, who are the insurer and the policyholder, but also beneficiaries of insurance and, in the context of liability insurance, the injured party, who will generally not be parties to the insurance contract.
>
> 37. Thirdly, the recitals on which the Insurers found do not carry their case any distance. Recital (18), to which I will return below, sets out a policy of protecting the weaker party to certain contracts including insurance contracts. Recital (19) which calls for respect for the autonomy of parties to certain contracts to select the jurisdiction in which to settle their claims does not assist. Neither does article 15(5), which provides that in contracts of insurance which cover the risks set out in article 16 (such as damage to sea-going ships and aircraft) the parties may agree to contract out of section 3. The references to 'the policyholder', 'the insured', and 'the beneficiary of the insurance contract' in the other recitals to which the court was referred cast no light on the meaning of the title to section 3.
>
> 38. Fourthly, as I will show below (para 57) the CJEU has often held that articles, such as article 7(1), which derogate from the general rule of jurisdiction under article 4 should be interpreted strictly. Article 14 by contrast reinforces article 4.
>
> 39. *The Ikarian Reefer (No 2)* [2000] 1 WLR 603 also does not assist the Insurers. The dispute in that case involved an action by the owners of the vessel against her hull and machinery underwriters which were represented by Prudential, and the Court of Appeal held that the vessel had been deliberately run aground and deliberately set on fire on the authority of her owners. Prudential recovered much of their costs from the

> owners and then applied under section 51 of the Supreme Court Act 1981 to recover the balance of their costs from a non-party, Mr Comninos, who was the principal behind the owners, and who it was said had directed and financed the litigation. The Court of Appeal held that, if the claim for costs constituted proceedings, those proceedings were not proceedings relating to insurance matters. If the claims were ancillary to the action by the owners against the underwriters that action related to insurance matters and had properly been raised in England. The underwriters were not seeking to raise claims relating to insurance matters against Mr Comninos. Rather they were seeking to recover unpaid costs incurred in a litigation relating to insurance matters in which they had been successful.
>
> 40. Fifthly, and in any event, as Mr Berry submits, if 'the *Brogsitter* test' is as Mr MacDonald Eggers characterises it and is applicable in relation to section 3, that test is met in the circumstances of this case. The Insurers' claim is that there has been an insurance fraud by the Owners and the Managers for which the Bank is vicariously liable. Such a fraud would inevitably entail a breach of the insurance contract as the obligation of utmost good faith applies not only in the making of the contract but in the course of its performance: *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG ("The DC Merwestone")* [2016] UKSC 45, [2017] AC 1, para 8 per Lord Sumption. It is therefore not necessary for this Court to analyse the proper application of the jurisprudence in *Brogsitter*."

133. From these judgments Mr Justice Butcher distilled the following principles at [122] as summarising the approach to be adopted when deciding whether the Judgment Claims involve a "matter relating to insurance":

> "(1) Section 3 is not to be restrictively construed.
>
> (2) 'Matters relating to insurance' are not confined to 'matters relating to insurance contracts'.
>
> (3) 'Matters relating to insurance' can extend to determinations of rights of persons who were not parties to an insurance contract, including beneficiaries and, in the context of liability insurance, injured parties.
>
> (4) The question of whether particular proceedings are or involve a 'matter relating to insurance' calls for an evaluative judgment. It will not generally be enough that insurance forms part of the history or 'pathology' of a claim for it to be a 'matter relating to insurance'. On the other hand, a claim is not prevented from being a 'matter relating to insurance' by the intervention of some other legal connexion between the parties (such as the settlement agreements in *The Atlantik Confidence*).

> (5) In making the evaluation, the court is concerned to see whether, as a matter of 'substance and reality', and applying common sense, the proceedings can be said 'fairly and sensibly' to be matters relating to insurance."

134. We endorse this summary which, with one qualification, Mr Hancock accepted as summarising the correct approach. His qualification was that the basis for ascertaining what is a "matter relating to insurance" is "title based", requiring a focus on the nature of the cause of action asserted by the claimant. This submission was derived from the Opinion of Advocate General Bobek in *Landeskrankenanstalten-Betriebgesellschaft – KABEG v Mutuelles du Mans Assurance – MMA IARD SA* (Case C-340/16) [2017] I.L.Pr 31 at [26]:

> "I do not think that it would be either necessary or wise to attempt to provide a general and exhaustive definition of what is a 'matter relating to insurance' and, hence, what is 'insurance'. That can be left in the hands of legal scholarship. There is, however, one element that emerges from the reviewed case law, naturally tied to the logic of the Brussels Convention/Regulation system: for the purpose of international jurisdiction, the basis for ascertaining what is a 'matter relating to insurance' is essentially 'title-based'. Is the title for which action is launched against a specific defendant (in other words, the cause of that action) the ascertaining of rights and duties arising out of the insurance relationship? If yes, then the case can be deemed as a matter relating to insurance."

135. This test was not adopted by the Court, which did not address what the Advocate General clearly regarded as a lack of clarity in the previous case law. We would accept that the nature of the cause of action is an important factor in considering whether a claim is a matter relating to insurance, but this cannot detract from the need for an evaluative judgment looking at the substance and reality of the matter overall and applying common sense.

136. Adopting this approach, Mr Justice Butcher concluded at [123] that the Judgment Claims are "matters relating to insurance", recognising that the section 66 Judgments were "interposed" between the insurance policy and the claims, but holding that nevertheless the essential purpose of the claims is to seek to ensure compliance with, or redress for non-compliance with, obligations derived from an insurance policy, including its "pay to be paid" provision.

137. We agree with the judge's evaluation. The States' claims in the Spanish proceedings were undoubtedly "matters relating to insurance", as Mr Hancock accepted. They were claims brought against liability insurers exercising a right to bring such a claim by direct action under Spanish law. The States were "injured parties" within the meaning of the Regulation, at least (in the case of Spain) so far as its non-subrogated claims were concerned. Accordingly the States, or at any rate Spain, were entitled (subject to the arbitration agreements to which they were subject by operation of the English law conditional benefit principle) to bring their claims in the Spanish courts pursuant to Article 13.2 of the Regulation, which extends the provisions of Article 11 (claimant's

domicile) and Article 12 (place where the harmful event occurred) to injured parties.[8] The arbitration agreements do not affect the character of the Spanish claims as "matters relating to insurance", although they might have enabled the Club to obtain a stay of those claims pursuant to the New York Convention.

138. While the Judgment Claims are in one sense claims to enforce and give effect to English judgments (their "title", as Mr Hancock would say), in substance they are claims to nullify or undo the consequences of the Spanish Judgment. Although they arise as a result of the complex procedural history which we have set out, standing back from the detail the simple reality is that the Spanish courts have held that the Club is liable as an insurer to compensate the States for the pollution damage suffered as a result of the casualty, while the English section 66 Judgments which the Club seeks to enforce by its Judgment Claims have held that the Club is under no such liability. The Judgment Claims are claims for damages or equitable compensation for the pursuit by the States of insurance claims in the courts to which jurisdiction for such claims was allocated by the Regulation. Their connection with the issue of liability under the contract of insurance is close and obvious. To treat these claims as anything other than "matters relating to insurance" would elevate form over substance.

Section 3 an exclusive code

139. As Article 10 of the Regulation makes clear, with only limited exceptions Section 3 sets out the only basis on which a court may exercise jurisdiction in a matter relating to insurance. The named exceptions, Article 6 (defendant not domiciled in a member state) and Article 7.5 (branch, agency or other establishment) have no application in this case. Further, Article 15 makes clear that the provisions of Section 3 may only be departed from by an agreement which satisfies one of the conditions then set out. It is common ground that there is no such agreement in the present case.

140. In the case of claims by insurers, Article 14.1 is quite clear. Such claims may "only" be brought in the courts of the member state in which the defendant is domiciled. The Article goes on to say that this is so "irrespective of whether he is the policyholder, the insured or a beneficiary". This does not mean that the Article only applies if the defendant is the policyholder, the insured or a beneficiary, but does not apply to claims by insurers against other defendants (including injured parties). Rather, as Mr Justice Butcher held, the Article applies to any claim (always provided that it is a "matter relating to insurance") made by an insurer:

> "131. … By Article 10, if the matter is one which relates to insurance, as I have held it is, then jurisdiction is to be determined in accordance with the Section 3 provisions. Those provisions include Article 14, under which an insurer may bring proceedings only in the courts of the Member State in which *the defendant* is domiciled. It does not provide that the insurer may bring proceedings only in the courts of the Member State in which the policyholder, insured, beneficiary or injured party is

[8] The position may be different in the case of France. It is not obvious that the Spanish courts would have jurisdiction over a claim by France in respect of pollution damage sustained in France. However, no point on this was taken in this appeal, where on this issue no distinction has been drawn between the position of Spain and France.

> domiciled. In other words, the jurisdictional allocation depends on whether the party concerned is or is not a defendant, and is not tied to the capacity in which it is sued." (The judge's emphasis).

141. Mr Hancock challenged this analysis, pointing out that injured parties are not mentioned in Article 14.1, which is not one of the Articles mentioned in Article 13.2 which extends (some of) the provisions of Section 3 to injured parties, and submitting that so far as its subrogated claims are concerned, Spain is not even an injured party but a claimant pursuing the claims of injured parties by subrogation. In our judgment, however, the analysis is unanswerable. Indeed, if Article 14.1 does not apply to an action by an insurer against an injured party or a defendant standing in the shoes of an injured party, there is simply no provision in Section 3 for such an action. Article 26.2, which is new in the Recast Regulation, provides among other things that in a matter relating to insurance where an injured party is a defendant, the court must ensure that he is informed of his right to contest the jurisdiction of the court. This confirms that in proceedings where the injured party is a defendant, the Section 3 regime applies.

142. Mr Hancock accepted that Article 14.1 would apply to an action by an insurer against an injured party sued in that capacity, for example a claim for a declaration of non-liability, but submitted that the Judgment Claims were not such an action. We find it difficult to conceive of an action by an insurer against a defendant which is a matter relating to insurance so as to fall within Section 3, but in which nevertheless the defendant (whether an injured party or a defendant standing in the shoes of an injured party) is sued in some other capacity. But in any event, once it is determined that the claim is a matter relating to insurance, we reject the submission that it is necessary to enquire into the capacity in which the defendant is sued by the insurers. There is no basis for that submission in the Regulation. In any event, however, we find it hard to see why the States are not sued on the Judgment Claims in their capacity as injured parties. Mr Hancock submitted that the gravamen of the claim against them is that by proceeding in Spain they have made a claim in the wrong forum, but the claim which is said to be wrongfully brought is their claim in their capacity as injured parties.

143. Subject only to Article 14.2, Article 14.1 therefore requires the Judgment Claims to be brought in Spain and France respectively.

Counterclaim

144. Accordingly the only basis on which the Judgment Claims could be brought in England is if they qualify as a counterclaim for the purpose of Article 14.2. This permits a counterclaim to be brought "in the court in which, in accordance with this Section, the original claim is pending". Mr Hancock submitted that the Judgment Claim against Spain is a counterclaim to the proceedings which Spain has brought in England for the recognition and enforcement of the Spanish Judgment. Mr Justice Butcher dealt with this issue shortly:

> "140. In my judgment, Article 14(2) is plainly not applicable. Article 14(2) contemplates counterclaims in actions which are pending in the courts of a Member State **in accordance with this section** (viz. Section 3 of Chapter II). The type of claims which may be pending in accordance with Section 3 are actions to

> establish the rights of the parties, not proceedings to enforce judgments. Actions to enforce judgments are the subject matter of Chapter III. Given the structure of the Recast Regulation it appears to me clear that Article 14(2) does not contemplate or allow for a counterclaim where the 'original claim' is a procedure for recognition or enforcement of a judgment under Chapter III. My view is strengthened by the fact that rights to counterclaim are a derogation from the basic rules as to jurisdiction contained in Article 4 (and, in the context of Section 3, Article 14(1)) and are therefore to be restrictively construed." (The judge's emphasis).

145. We agree. The "original claim" referred to in Article 14.2 is the original claim (i.e. in the present case, the claim in the Spanish courts) and not a claim to enforce a judgment obtained on the original claim. The enforcement proceedings are not pending in England "in accordance with this Section", but rather in accordance with Chapter III of the Regulation. Article 14.2 does not assist the Club.

146. It follows from what we have said so far that the English court has no jurisdiction over the Judgment Claims.

Weaker party

147. This means that it is unnecessary for us to deal with further arguments whether the States are to be regarded as "the weaker party" so as to benefit from the provisions of Section 3. Mr Justice Butcher held that the States were not "beneficiaries" within the meaning of Section 3, but that they were "injured parties"; but that in the case of Spain it was not an injured party in relation to its subrogated claims (amounting to just under half of its total claim by value) and (applying *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG* (Case C-347/08) [2010] 1 All ER Comm 603) that it was not a weaker party. Nevertheless, he held that because Spain was an injured party in respect of its own losses, notwithstanding that it was not in respect of its subrogated claims, it must be regarded for the purpose of Section 3 as an injured party for the entirety of its claims, at any rate where the subrogated claims were a minority of the total claims.

148. As these issues do not arise on our interpretation of Article 14, we think it preferable not to address them.

Articles 7 and 8

149. In the event that the Judgment Claims are not "matters relating to insurance", the Club contends that the English court has jurisdiction by virtue of Article 7.1 (matters relating to a contract), Article 7.2 (matters relating to tort) and Article 8.3 (counterclaim). Mr Justice Butcher did not address these issues and it is unnecessary for us to do so.

Disposal

150. For the reasons which we have explained:

(1) the States are not entitled to immunity in respect of any of the Club's claims considered on this appeal;

(2) the court had jurisdiction to appoint an arbitrator to determine the Club's Arbitration Claim against Spain;

(3) the jurisdiction of the court to determine the Club's Award Claims against the States has to be decided applying domestic law principles;

(4) the court does not have jurisdiction to determine those claims because there is no serious issue to be tried;

(5) the jurisdiction of the court to determine the Club's Judgment Claims against the States has to be decided applying the Brussels Recast Regulation;

(6) the court does not have jurisdiction to determine those claims because they are matters relating to insurance within Section 3 of Chapter II of the Regulation which requires them to be brought in the courts of the defendants' domicile.

151. Accordingly:

(1) Spain's appeal from the decision of Mr Justice Henshaw on the section 18 application is dismissed.

(2) The States' appeal in respect of the Award Claims from the decision of Mr Justice Butcher is allowed.

(3) The Club's appeal in respect of the Judgment Claims from the decision of Mr Justice Butcher is dismissed.