Case No: 2013-368
2013-920

Neutral Citation Number: [2013] EWHC 3188 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC2A 1NL

Date: 22/10/2013

Before:

MR JUSTICE HAMBLEN

- -

Between:

	The London Steam-Ship Owners' Mutual Insurance Association Ltd	**Claimant**
	- and -	
	(1) The Kingdom of Spain **(2) The French State**	**Defendants**

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Mr Christopher Hancock QC and Ms Charlotte Tan and Mr Thomas Corby (instructed by **Ince & Co LLP**) for the **Claimants**
Mr Joe Smouha QC and Ms Anna Dilnot (instructed by **K&L Gates LLP**) for the **Defendants**

Hearing dates: 3,4,7,8,9,10 and 14 October 2013

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Judgment**Mr Justice Hamblen :**

Introduction

1. In November 2002 M/T "PRESTIGE" ("the vessel") was on a voyage from St Petersburg to the Far East carrying 70,000 tonnes of fuel oil.

2. On 13 November 2002 the vessel suffered damage from a storm surge 28 miles from Cape Finisterre and began to list significantly. A distress call was sent to the Spanish authorities but salvage attempts over the following days were unsuccessful. On 19 November 2002 the vessel broke in two and sank.

3. The resulting oil spillage was an ecological disaster severely polluting the Atlantic coasts of Cantabria and Galicia. Its effects spread as far as France where thirteen administrative departments from the western coastal area were affected. Cleaning up after the spill required extensive resources and took years.

4. In late 2002 criminal proceedings were instituted in Spain against the Master, Chief Officer and Chief Engineer and Mr Lopez-Sors, the Spanish official who had ordered the vessel to sail away from the coast ("the Spanish proceedings").

5. In or about June 2010, at the conclusion of the investigatory stage of the criminal proceedings, civil claims were brought against the owners of the vessel, Mare Shipping Inc ("the Owners"), on the grounds of its vicarious liability, and also against the Owners' protection and indemnity ("P&I") insurers, the London Steamship Owners Mutual Insurance Association Limited ("the Club"). These claims were brought under Article 117 of the Spanish Penal Code 1995 ("the Penal Code") (which provides an injured party with a direct right of action against an insurer in certain circumstances) and the Convention on Civil Liability ("CLC") in respect of the damage caused by the loss of the vessel. Claims were brought by several separate legal entities, including the State Administration of Spain ("Spain"), the Spanish Public Prosecutor and two autonomous Spanish territorial entities, Galicia and (although there was a dispute about this) Arteixo. The claims brought in June 2010 by the Spanish entities were for just under €1 billion. However, that amount has now increased to approximately €4.3 billion. At about the same time, the Republic of France ("France") and a number of local French government entities and organisations joined the Spanish criminal proceedings claiming that the Club was civilly liable under the CLC and Article 117 of the Penal Code. France's claim is for approximately €67.5 million.

6. The Club acknowledges its CLC liability. The CLC broadly imposes strict liability (subject to certain limited exceptions) on the owners of ships to compensate persons who suffer oil pollution damage, as defined. To ensure that a ship owner is in a position to meet his obligations under the CLC he is obliged to arrange insurance up to his CLC limit (in this case SDR 18,884,400). In this case, the Club was the Owners' CLC insurer. The CLC provides for direct action against the CLC insurer, but only up to the amount of the CLC Fund: Article VII.8 of the CLC. The amount of the CLC Fund for this incident, which was constituted in Spain on 28 May 2003 (at the then exchange rate), is €22,777,986.

7. In relation to the non-CLC claims the Club's position is that the civil claimants are bound by the terms of the contract of insurance contained in the Club Rules to bring those claims in arbitration and by the English law clause in those Rules. Further, they are bound by any contractual defences available to the Club, including the "pay to be paid" clause (Rule 3.1) and that upon the proper application of the "pay to be paid" clause, the Club has no liability.

8. The Club has accordingly played no part in the Spanish proceedings. It did, however, commence London arbitration proceedings seeking negative declaratory relief in respect of any non-CLC liability to Spain and France. The references against each respondent proceeded separately but the same Tribunal (constituted of Mr Alistair Schaff QC) was appointed in each case. Neither Spain nor France participated in the arbitrations.

9. In awards dated 13 February 2013 (Spain) and 3 July 2013 (France), the Tribunal upheld most of the Club's claims for negative declaratory relief in respect of any non-CLC liability. Declarations were granted that Spain/France were bound by the arbitration clause in the Club's Rules to refer the civil claims being brought in Spain to arbitration; that actual payment of the insured liability by the insured member is a condition precedent to the Club's liability pursuant to the "pay to be paid" clause in the Club Rules; that in the absence of such prior payment the Club is not liable to France/Spain in respect of the claims, and that the Club's liability shall, in any event, not exceed the amount of US$1,000,000,000 (U.S. Dollars One Billion).

10. The Club now seeks permission pursuant to s.66 of the Arbitration Act 1996 ("the Act") to enforce the two arbitration awards as judgments and/or to have judgments entered in their terms.

11. France and Spain (together "the Defendants") resist the s.66 application as a matter of jurisdiction, on the grounds that they have state immunity, and as a matter of discretion.

12. They have also brought their own applications challenging the substantive jurisdiction of the Tribunal pursuant to s.67 and/or s.72 of the Act on the grounds that they are not bound by the arbitration agreement as their direct action rights are in essence independent rights under Spanish law rather than contractual rights, non-arbitrability and (in relation to France only) waiver.

13. The trial of the Spanish proceedings took place between 16 October 2012 and 10 July 2013. Judgment is expected in November 2013 and the present applications have been brought on before the court on an expedited basis, at the Club's behest.

14. The hearing of the applications took 7 days. I heard oral evidence from Spanish law experts, Professor Andrés Betancor for the Defendants and Dr Ruiz Soroa and Mr Fajardo for the Club; French law experts, Mr Grelon for France and Mr Gautier for the Club; and factual witnesses Mr Irurzun Montoro for the Defendants and Dr Ruiz Soroa for the Club.

15. Both parties made extensive written submissions and I have drawn on those submissions, with adaptations and amendments, in preparing this judgment, particularly in relation to matters of common ground and in setting out the parties' arguments.

The factual background

The insurance contract

16. In the year commencing 20 February 2002, the vessel was entered with the Club in respect of P&I and FD&D cover. The P&I contract of insurance ("the contract") was evidenced by a Certificate of Entry by which the Club agreed to provide P&I cover for the Owners and Managers (Universe Maritime Ltd) of the vessel in respect of, inter alia pollution liabilities up to a maximum aggregate amount of US$1 billion.

17. The contract was subject to the Club's Rules of Class 5 – Protecting and Indemnity ("the Rules"). The Rules included the usual P&I "pay to be paid" clause and incorporated the Marine Insurance Act 1906.

18. The most material provisions of the Rules are as follows:

"RULE 1 INTRODUCTORY

1.2 All insurance afforded by the Association within this Class is by way of indemnity and all contracts relating thereto shall be deemed to incorporate the provisions of these Rules, save insofar as those provisions are varied by any special terms which have been agreed pursuant to these Rules…; all such contracts and these Rules shall be governed by English law and shall be subject to the provisions of the Marine Insurance Act 1906 and any statutory modifications thereof.

1.3 …whatever insurance is afforded by the Association within this Class shall always be subject to the provisos, warranties, conditions, exceptions, limitations and other terms set out in the remainder of these Rules.

RULE 3 RIGHT TO RECOVER

3.1 If any Member shall incur liabilities, costs or expenses for which he is insured, he shall be entitled to recovery from the Association out of the funds of this Class,
PROVIDED that:

3.1.1 actual payment (out of monies belonging to him absolutely and not by way of loan or otherwise) by the Member of the full amount of such liabilities, costs and expenses shall be a condition precedent to his right of recovery; [hereinafter "the pay to be paid clause"]

RULE 9 RISKS COVERED

9.1 Subject to any special terms which may be agreed in writing, a Member is insured in respect of each ship entered by him in this Class against the risks set out in Rule 9.2 – 9.28,

PROVIDED that such risks arise:

9.1.1 in respect of the Member's interest in such ship; and

9.1.2 in connection with the operation of such ship by or on behalf of the Member; and

9.1.3 out of events occurring during the period of entry of such ship.

9.15 Pollution:

9.15.1 Liabilities, costs and expenses set out in Rule 9.15.1.1 – 9.15.1.4 to the extent that they are the result of the discharge or escape from an entered ship of oil or any other polluting substance, or the threat of such discharge or escape, namely:

9.15.1.1 Liability for loss, damage or contamination…

9.15.1.3 The costs of measures reasonably taken (or taken in compliance with any order or direction given by any government or authority) for the purposes of avoiding the threat of or minimising pollution, and liability incurred as a result of such measures

RULE 11 LIMITATIONS OF COVER

11.3 Recovery shall be limited to a maximum of US$1,000,000,000 (U.S. Dollars One Billion) any one occurrence in respect of any one entered ship in respect of oil pollution liability including fines, costs and expenses and clean-up and damages payable to any other person as may arise in respect of oil pollution liability whether under Rule 9.15 (Pollution)…or any other sections of Rule 9 or any other Rule or combination thereof.

RULE 43 JURISDICTION AND LAW

43.2 Save for matters referred to in Rule 43.1 [relating to security] and subject to Rule 33.4 [relating to Overspill Claims], if any difference or dispute shall arise between a Member and the Association out of or in connection with these Rules, or out of any contract between the Member and the Association, or as to the rights or obligations of the Association or the Member there under, or in connection therewith, or as to any other matter whatsoever, such difference or dispute shall be referred to Arbitration in London before a sole legal Arbitrator and the submission to Arbitration and all the proceedings there under shall be subject to the provisions of the Arbitration Acts 1950, 1979 and 1996 and any Statutory modification or re-enactment thereof, and to English law. In any such Arbitration, any matter decided or stated in any Judgment or Arbitration Award (or in any Reasons given by an Arbitrator or Umpire for making the Award) relating to proceedings between the Member and any third party shall be admissible in evidence. No Member may bring or maintain any action, suit or other legal proceedings against the Association in connection with any such difference or

dispute unless he has first obtained an Arbitration Award in accordance with this Rule. ["the arbitration clause]"

The casualty

19. In May 2002, the vessel was chartered from Owners to Crown Resources AG for a period time charter of 160/240 days. On 31 October 2002, she sailed from St Petersburg with a cargo of fuel oil bound for the Far East via Gibraltar.

20. On or around 13 November 2002, the Vessel began to experience serious difficulties, suffered some damage and began to list significantly. A distress call was sent to the Spanish authorities, seeking assistance.

21. Salvage attempts were unsuccessful. On 19 November 2002 at about 08:00hrs local time, the Vessel broke into two. Later that day, she sank and was declared and accepted as a total loss with effect from 20 November 2002.

22. As a result of the casualty extensive oil pollution was caused, requiring substantial clean up operations and resulting in widespread and significant damage to both Spanish and French coastlines.

The criminal proceedings

23. In late 2002 criminal proceedings were instigated in Spain against, amongst others, the Master, Chief Officer and Chief Engineer of the vessel.

24. On 28 May 2003 the Club constituted a compensation fund of €22,777,986 pursuant to its obligations as liability insurer of the Owners and Managers under the CLC Convention.

25. In November 2005, France initiated proceedings in the Bordeaux District Court against the Owners, the IOPC Fund and the Club seeking damages of €67,499,153.92 as a result of the pollution damage caused to France.

26. In November 2006, France initiated proceedings before an investigating magistrate in the Brest Criminal Court. Those proceedings were against persons unknown i.e. against anybody likely to have committed any relevant offence.

27. On 5 May 2010, the Criminal Court of Corcubión formally declared the investigative stage of the proceedings closed and ordered any claimants to serve

accusation pleadings. Following that order, Spain, the Public Prosecutor, and each other claimant in the case filed separate accusation pleadings.

28. On 30 July 2010, the Magistrates' Court No.1 of Corcubión ordered the commencement of the oral proceedings stage, with trial to take place in the Provincial Court of La Coruña. By order dated 28 November 2011, the proceedings were formally transferred to the Coruña Court.

29. The oral trial took place between 16 October 2012 and 10 July 2013. Judgment on criminal and civil liability is expected in November 2013.

30. In broad terms, it is alleged in the Spanish proceedings that the loss was suffered because the vessel was unseaworthy; the Master, Chief Officer and Chief Engineer were deliberately obstructive and uncooperative with the Spanish authorities; the vessel was overloaded, and the Master was negligent in counter-flooding the wing tanks of the vessel in an attempt to correct the list. The Master and Owners deny these allegations. They further say that all but a fraction of the loss was caused by the decision of the Spanish authorities to start the vessel's engines and send her out to sea, rather than sending her to a port of refuge. If the vessel had not been sent out to sea, they say, the pollution damage would have been minimal (if there had been any at all).

The civil claims made in the criminal proceedings

31. Various civil claims have been brought in the Spanish proceedings. In Spain, a party who is criminally liable will also be civilly liable for harm done by the criminal act, in accordance with the general (civil) principle that a party who does harm to another by a wrongful act is liable to compensate that other.

32. Claims are brought by the Spanish State Lawyer and by the Public Prosecutor on behalf of Spain. By the end of the trial the quantum of claims brought on behalf of Spain was €4,328,130,000.

33. Claims are also brought by France. Those claims are for €67,500,905.92. The civil claims brought in Bordeaux have been stayed pending determination of these claims in the Spanish proceedings.

34. Other parties have also claimed that they suffered loss by reason of the casualty. These can be divided into four main categories:

i) Those persons who entered into subrogation agreements with Spain whereby the

State paid out the alleged claim and pursued the claim in its own name. By the end of 2009, Spain was subrogated to all the damages suffered by any Spanish public entity (with one or possibly two exceptions).

ii) Those persons who have maintained civil claims separately to Spain and France. Included in this category is the Xunta de Galicia (claiming €1,275,458 in respect of a future disbursement). Spain says that the Ayuntamiento de Arteixo ("Arteixo") falls into this category but the Club disputes this.

iii) Those persons who have made allegations of criminal liability, but no allegations or claims of civil liability against the Club in their favour. It is common ground that the Ayuntamiento de O Grove falls into this category. The Club maintains that Arteixo also falls into this category but Spain disputes this.

iv) Those persons, who initially made civil liability claims against the Club but, by reason of their non-representation at the trial, are taken to have waived their claims. These claimants include the Comunidad Autonoma del Pais Vasco, the Diputacion Foral de Gipuzkoa, the Diputacion Foral de Bizcaya, the Ayuntamiento de Donostia/ San Sebastian, the Diputacion Provincial de A Coruña (though, in any event, these parties have been compensated by the State and the State has been subrogated to their claims).

The arbitration proceedings

35. The Club commenced arbitration against the "Kingdom of Spain" by Notice of Arbitration dated 16 January 2012 and against France by Notice of Arbitration dated 16 January 2012. Although Spain does not accept that the "Kingdom of Spain" was the correct respondent it accepts, for the purpose of these proceedings only, that it will not assert that by failing to name Spain as a party to the arbitration the Club has failed to obtain an award against it.

36. Neither Spain nor France agreed to the appointment of an arbitrator. Accordingly, the Club applied for and obtained orders from the Court pursuant to s.18 of the Act, constituting the respective Tribunals.

37. The references proceeded (separately but with the same Tribunal appointed in each case).

38. In each reference, the Club contended that the respondent was bound by the terms of the Club Rules, including the arbitration clause and the contractual defences available to the Club and sought declarations accordingly.

39. These included a declaration that the Club was not liable to the respondent by reason of

the "pay to be paid" clause in the P&I Rules. As a matter of English law it is well established that this clause operates as a complete defence to a claim if the liability in question has not been discharged by the insured member, since such discharge is a condition precedent to the insured member being indemnified by the Club – see *The "Fanti" and "Padre Island"* [1990] 2 Lloyd's Rep. 191.

40. The Tribunal invited Spain and France to participate in the proceedings. However, neither respondent took part and the matter proceeded unopposed (though all documents were served upon the respondents at every stage).

41. Separate hearings took place in January 2013 (the Spain reference) and June 2013 (the France reference). In each case, the respondents were given a final opportunity to participate following the close of the hearing but they declined.

42. The Tribunal upheld the majority of the Club's claims in both references. The award in respect of the claim against the Spain is dated 13 February 2013. The award in respect of the claim against the French State is dated 3 July 2013.

43. The relief granted in each case was substantially identical. The following relief was granted:

> "A) …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's 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 to be paid clause" contained in Rule 3.1; and accordingly
>
> (ii) Pursuant to the "pay to 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;

44. In addition, in the award against Spain the following further declaration was made in the light of the quantum of the asserted claims;

> 3) the Claimant's liability to the Respondent shall, in any event, not exceed the amount of US$1,000,000,000 (U.S. Dollars One Billion).

B) …the Respondent shall bear and pay the Claimant's costs of this reference and the Tribunal's costs of this reference and this Award, and shall reimburse the Claimant for the Tribunal's costs if they have been borne in the first instance by the Claimant."

The Issues

45. The main issues which arise for determination are as follows:

In relation to the Defendants' applications under ss.67 and 72 of the Act:

i) What is the proper characterisation of the claims?

ii) Are the claims arbitrable?

iii) Has there been a waiver of the right to arbitrate France's claims?

In relation to the applications under s.66 of the Act:

iv) Does the Court have no jurisdiction on the grounds of state immunity?

v) If it has jurisdiction, should the Court grant the applications as a matter of discretion?

46. The Defendants contended that the issue of state immunity should logically be determined first since if the Court has no jurisdiction then that is the end of the matter. However, the state immunity issue is closely bound up with the question of characterisation and it is convenient to consider that first. I accordingly propose to address the issues in the order set out above.

(1) What is the proper characterisation of the claims?

English law

47. The leading modern authority is the decision of the Court of Appeal, upholding (in the relevant part) the decision of Moore-Bick J, in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Insurance Co (The Hari Bhum) (No 1)* [2004] 1 Lloyd's Rep. 206 (Moore-Bick J) and [2005] 1 Lloyd's Rep. 67

(CA).

48. In that case the Court considered the characterisation, according to English conflicts of laws principles, of a claim brought by New India Assurance, as an injured third party, against an insolvent insured's insurer pursuant to the Finnish Insurance Contracts Act 1994 ("the Finnish Act") which gave such a third party the right to proceed directly against the insurer.

49. According to the Court of Appeal (and Moore-Bick J at first instance), there were two possible characterisations available:

i) The third party was seeking to enforce a contractual obligation derived from the contract of insurance; or

ii) The third party was advancing an independent right of recovery under the relevant statute.

50. The proper approach was set out by Moore-Bick J in his judgment at [16] in a passage with which the Court of Appeal expressed their entire agreement at [57]:

> "16 The issue in the present case is whether New India is bound by the arbitration clause which in turn depends on whether it is seeking to enforce a contractual obligation derived from the contract of insurance or an independent right of recovery arising under the Insurance Contracts Act. If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterised as one of statutory entitlement to which there may be no direct equivalent in English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterised as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law: see Adams v National Bank of Greece."

51. As explained in paragraph 58 of the Court of Appeal judgment, the question is what is the substance of the claim. Is it in substance a claim to enforce the contract, or is it in substance a claim to enforce an independent right of recovery?

52. This involves a consideration of the nature of the right as a matter of the relevant foreign law, but the question of characterisation is a question for the English court applying English conflicts of laws principles – see Moore-Bick J's judgment in

Through Transport at [11]; *Briggs, The Conflict of Laws* (2nd Ed.; 2008) at p9; *Cheshire and North* (14th Ed; 2008) at p43.

53. In the *Through Transport* case both Moore-Bick J and the Court of Appeal held that the direct right of action conferred under the Finnish Act was in substance a right to enforce the contract.

Spanish law

The experts

54. The expert for Spain/France was Professor Betancor, a public law professor at Pompeu Fabra University in Barcelona with a particular expertise in environmental law.

55. The expert for the Club was Dr ruiz Soroa, a practising lawyer with particular expertise in maritime law and marine insurance.

56. Dr Ruiz Soroa acts for the Master and the Owners in the Spanish proceedings, whose defence is funded by the Club under their FD&D cover. The Club can therefore be regarded as his ultimate client and to that extent he was not an independent witness.

57. I accept that this means that his evidence has to be approached with caution and I also accept that some criticism can be made of the selective nature of parts of his reports, or at least of his failure to make clear the selectivity involved. However, having carefully considered his evidence, on which he was extensively cross examined, I am satisfied it reflects his genuinely held opinions and was not influenced by his role in the Spanish proceedings and his relationship with the Club. He was throughout able to explain why he held the opinions that he did. There was in fact much common ground between the experts, but to the extent that there was disagreement I consider that those differences must be resolved by reference to the quality and cogency of the evidence they gave rather than their relative independence.

The sources of Spanish law

58. The experts agreed that only multiple consistent decisions of the Supreme Court constitute binding case law. However, although multiple judgments by lower courts do not have binding value, they do have informative and instructive value with

regard to the contents of Spanish law.

The relevant statutory provisions

59. The statutory regime relevant to marine insurance contracts may be summarised as follows:

i) The 1885 Commercial Code governs, amongst other contracts, contracts of marine insurance.

ii) The 1980 Insurance Contract Act ("the 1980 Act") governs various types of contract, being those not covered by other specific legislation. Such contracts are governed mandatorily by the 1980 Act by reason of s.2 of that Act.

iii) Marine insurance contracts, as a category of contract covered by a specific statute (i.e. the Commercial Code), are not governed mandatorily by the 1980 Act, save for rules of public order. The fact that the 1980 Act applies in a "subsidiary" manner to marine insurance is reinforced by s.44 of the 1980 Act, which provides that large risks, including marine insurance contracts, are not subject to Article 2.

60. As the experts agreed, Spanish law recognises the application of the principle of contractual freedom to marine insurance, and P&I insurance is a form of marine insurance.

61. The key provisions addressing the liability of insurers to compensate injured third parties under the 1980 Act are Articles 73 and, in particular, Article 76 which provide that:

"Article 73 [Object of civil liability insurance. Limits]

By means of civil liability insurance the insurer undertakes within the limits determined by the Law and the contract to cover the risk of emergence for the insured of an obligation to compensate a third party for damages and losses caused by an event covered by the contract when the insured has civil liability for the consequences of the same, according to law……

Article 76 [Direct action against civil liability insurer and the insurer's right to action for recovery]

The injured or aggrieved party or their heirs shall be entitled to a direct action against the insurer to demand of him the fulfilment of the obligation to

compensate, without prejudice to the insurer's right to recover from the insured in the event that the damage or injury to the third-party was caused by the wilful misconduct of the insured. Direct action shall be exempt from the defences that the insurer may have had in respect of the insured. The insurer may, however, allege that the injured party is exclusively liable and may also raise the personal defences he may have in respect of the injured party. For the purposes of bringing direct action, the insured shall be obliged to inform the injured third party or their heirs of the existence of an insurance contract and the content of the same".

62. Civil claims can also be brought in criminal proceedings and there is a specific section of the Penal Code (Chapter II) headed "On persons liable under Civil Law". The most relevant provisions are as follows:

"Article 109

1. Perpetration of an act defined as a felony or misdemeanour by Law shall entail, pursuant to the provisions contained in the laws, repairing the damages and losses caused thereby.
2. In all cases, the party damaged may opt to sue for civil liability before the Civil Jurisdiction.

….

Article 116

1. All persons held criminally accountable for a felony or misdemeanour shall also be held liable under Civil Law if the fact gives rise to damages or losses. If two or more persons are responsible for a felony or misdemeanour, the Judges or Courts of Law shall set the proportion for which each one must be held accountable…..

Article 117

Insurers that have underwritten the risk of monetary liabilities arising from use or exploitation of any asset, company, industry or activity when as a consequence of a fact foreseen in this code, an event takes place covered by the risk insured, shall have direct civil liability up to the limit of the legally established or contractually agreed compensation, without prejudice to the right to bring an action for recovery against who such may be appropriate.

….

Article 120

The following persons shall be held civilly liable, failing those held criminally accountable:

4. Natural or legal persons dedicated to any kind of industry or commerce, for felonies or misdemeanours their employees or assistants, representatives or managers may have committed in the carrying out of their obligations or services…"

63. It was common ground between the experts that the direct action contemplated in Article 117 of the Penal Code has the same nature and regime as that contemplated in Article 76 of the 1980 Act. As explained by Dr Ruiz Soroa in evidence, the nature of the Article 117 right is treated as a manifestation in the criminal sphere of the right given by Article 76. They are both civil liability rules, as Professor Betancor confirmed in evidence.

The legal nature of the direct action in Spanish law

64. The experts were agreed that the Judgment of the Provincial Court of Madrid dated 16.10.2012 ("the Madrid Judgment") is a correct exposition of Spanish law on this point, and I so find.

65. The Madrid Judgment included the following:

> "I. Civil liability insurance which is regulated by Insurance Contract Law (LA LEY 1957/1980) within the area of insurance against damage in articles 73 to 76 can be defined as the insurance by which the insurer is obligated to cover the risk of having an encumbrance placed on the assets of the insured party due to the creation of an obligation to indemnify derived from its civil liability. This civil liability could arise from the non-malicious, malicious, or negligent (civil or criminal behaviour of the insured party (or the people for whom it is civilly liable).
>
> …the direct action of a wronged third party against the insurer, for it to indemnify the damage caused, within the coverage of an insurance policy, was consistently recognized by case law… The exercise of this action even became allowed to be admitted by the wronged party against the insurer in criminal procedures in which an act is being tried that has the nature of a criminal infraction which the insured party causes and from which civil liability is derived that is covered by the insurance policy…At a legislative level the cited direct action of the wronged third party against the insurer was … generally established in Article 76 of Law 50/1980 dated October 8 (LA LEY 482 regarding insurance policies (B.O.E number 250 dated October 17 1980; "The wronged third party or its inheritors will be able to take direct action against the insurer to demand that they comply with the obligation to indemnify"). It should be emphasised that this direct action of the wronged third party against the insurer can be exercised both within civil and criminal jurisdictions (if the accident covered by the insurance has a criminal nature and the insured party is criminally liable).
>
> II. In principle, for the direct action of the wronged third party against the insurer to be successful, it is essential that if it was exercised by the insured party against the insurer, that it was also successful. However this general rule has two clear exceptions in Article 76 of the Insurance Contract Law (LA LEY 1957/1980), in which, despite the fact that the insurer is not obligated to indemnify the insured

party for the accident that occurred, nevertheless, it is obligated to indemnify a wronged third party when the direct action is exercised by them. Of course, in these two cases, the insurer is granted the right to a recovery action against the insured party in order to recover the amount of money with which the wronged third party was indemnified.

The first of these two exceptions is when the damage caused to the wronged third party is due to the malicious behaviour of the insured party….

The second of these two exceptions is when the insurer is obligated to pay the indemnity to the wronged third party because it is prevented from bringing up to challenge them, in their exercise of this direct action, any exception that it would have otherwise been able to bring up to challenge the insured party…

So, when faced with a wronged third party who exercises such direct action, the insurer can oppose all the "defences" that it deems convenient, and specifically, those referring to the lack of facts constituting the third party's right (which should be operative even when they have not been alleged by the insurer, if the Judge believes that these facts constituting the right of the claimant have not been proven, then the action that is being exercised would not have been brought about, and would be inexistent). These "defences" or exceptions in a broad sense are the following:

a) Inexistence of a civil liability insurance policy between the insurer and the insured party or the extinguishing of this contractual legal relationship.
b) The absence of the right of the wronged third party to compensation, due to the absence of one or more of the requirements necessary for the civil liability of the insured party to be relevant with respect to the wronged third party.
c) The right of the third party is outside the coverage of the insurance policy: the objective limits to the insurance policy's coverage will determine the substantial contents of the insurer's obligation, such that the right of the wronged third party will have been produced with respect to the insured party, but this is exclusively covered by the insurer against the creation of the obligation to indemnify for acts established in the policy the results of which are civilly liable; This is deduced from the formation of Article 76 of Law 50/1980, dated October 8, regarding Insurance Contracts (LA LEY 1957/1980) which follows precisely from the precept that said that the wronged party will have the ability to take "direct action against the insurer in order to demand from it compliance with the obligation to indemnify, within the limits established by applicable regulations, in the case of obligatory insurance, or due to the contract, in the case of voluntary insurance" (article 108 of the Draft Bill of 1969), a paragraph that was eliminated in the subsequent Draft Bill (Article 76 of the Draft Bill of 1970) because its contents were considered obvious, and therefore its declaration unnecessary. It is also deduced from the need for it to be related to the first sentence of Article 76, which grants the wronged third party or its inheritors the action to demand

from the insurer compliance with its obligation to indemnify, with Article 1, which reduces the obligation to indemnify on the part of the insurer up to the "limits agreed upon", and which Article 73, which also adheres to this obligation, on the part of the insurer, to indemnify up to the "limits established in the Law and in the policy".

The insurance coverage comes to be contractually defined by the clauses delimiting the insured risk and by the limiting clauses of the right of the insured party to charge the indemnity produced by the accident, where both the former (those that delimit risk) and the latter (those limiting the rights of the insured party) can be challenged by the insurer, when faced by a wronged third party who exercised direct action.

Lastly, there are the exceptions in a strict sense that are unchallengeable by the insurer when a wronged third party exercises direct action, and which are none other than those that refer to acts, or more specifically omissions, of the insured party that are legally tied to the release of the obligation of the insurer to indemnify the insured party when an accident occurs or a reduction of the amount of indemnification. They are exceptions based on the behaviour of the insured party, since the subjective valuation of the behaviour of the insured party is irrelevant for the purposes of the direct action of the wronged third party against the insurer. Only these exceptions are unchallengeable by the insurer with respect to the wronged third party. And, even without making an exhaustive list of them, the following can be identified:

a) Failure to comply with the duty of the declaration of risk by the party who took out the insurance policy, both before the conclusion of the policy (Article 10 of Law 50/1980 dated October 8, for Insurance Contracts (LA LEY 1957/1980) and while the legal relationship is in force (Articles 11 LA LEY1957/1980) and 12 of Law 50/1980, dated October 8, regarding Insurance Contracts (LA LEY 1957/1980))
b) Suspension of coverage of the insurance due to failure to pay the premiums (Article 15 of Law 50/1980, dated October 8, regarding Insurance Contracts (LA LEY 1957/1980))
c) Failure to comply with the duty of informing the insurer of the accident (Article 16 of Law 50/1980), dated October 8, regarding Insurance Contracts (LA LEY 1957/1980))
d) Failure to comply with salvaging duties (Article 17 of Law 50/1980, dated October 8 regarding Insurance Contracts (LA LEY 1957/1980))
e) Failure to notify regarding the existence of different insurance policies (Article 32 of Law 50/1980, dated October 8, regarding Insurance Contracts (LA LEY 12957/1980))".

66. The Madrid Judgment makes clear that the general rule and starting point is that the third party can only claim against the insurer if and to the extent that the assured would also have been able to claim against the insurer, subject to the specific

exceptions laid down in Article 76 itself.

67. As the Madrid Judgment states, "the objective limits of the insurance policy's coverage will determine the substantial contents of the insurer's obligation". The Madrid Judgment explains that this is to be inferred from the legislative history of Article 76 which had originally provided that the direct action would be subject to the limits established by the contract, in case of voluntary insurance, but that those words had been deleted as being unnecessary as this was already obvious. As is explained, this limitation is made manifest by Article 73 which provides that the insurer's obligation to compensate is subject to the limits imposed by law (in the case of compulsory insurance) and to the limits imposed by contract (in the case of voluntary insurance).

68. In relation to the exceptions laid down in Article 76 the Madrid Judgment explains that the "defences" referred to are limited to those which are "personal" to the insured party in that they are based on his conduct, the principal examples of which are then listed. All other contractual defences or exceptions may be relied upon by the insurer (save for, as recent cases have shown, a wilful misconduct exclusion).

69. The wilful misconduct exception is also explained and contrasted with Article 19 of the 1980 Act. Recent decisions of the 2nd Division (Criminal) Supreme Court have held that clauses excluding liability for losses which are otherwise within the insurance where such losses are caused by wilful misconduct cannot be relied on as against the injured third party by the insurer, bearing in mind the character of this insurance as intended to protect third parties.

70. In summary, the direct action rights which may be enforced against the insurer are the insured's contractual rights, save that the insurer may not rely as against the third party on "personal" defences or a defence or exclusion based on wilful misconduct.

71. The experts agreed that the source of the third party's direct action right is the law and that it is a right which arises from the law rather than the contract. There was disagreement between them as to whether this meant that the right would be regarded as "independent" as a matter of Spanish law.

72. Dr Ruiz Soroa's view was that although the direct action right is "genetically" independent from the contract, it was not "functionally" independent. Although it does not "flow from" the contract, is does not exist outside the contract and its content is inextricably linked to and determined by the contract, save for the exceptions provided for in Article 76. As he explained:

> "…in order for the injured party to be able to take action against the civil liability

insurer, it is necessary that: a) there is a valid insurance contract between the insured and the insurer, and b) the damage caused to the injured party must be within the limits established in the contract with regards to cause, time, place and nature of the insured risk. Therefore, the direct action of the injured party is functionally dependent on the existence and content of the insurance contract; if the contract does not cover the specific, particular damage caused to the injured third party, then no direct action exists. The direct action is not, in this sense, independent and autonomous from the contract, but rather its existence and content is shaped by the insurance contract".

73. Dr Ruiz Soroa stressed, as I have found, that the general rule is that the third party can only claim against the insurer if and to the extent that the assured would have been able to do so. His evidence was that in considering the nature of the direct action one should look to the general rule, not its exceptions. As he explained in oral evidence:

"The law states a general rule. The contents of the direct action of the third party are moulded by the contract. You must go to the contract and examine if the contract cover or not this kind of claim -- damage. But the law makes an exception. You are trying to deduct the nature of the third party victim from the exception, not for the general principle. …. You cannot deduct -- you didn't find the nature of the direct action pointing only to the exception….The principal rule is that the third party is in the same position than the assured. This is the general rule. You must consider that in order to deduct which is the exact nature of the direct action. The third party is put, by article 76 and article 117, in the same position of the assured. If the assured, according to the contract, have not right against the insurer, the third party has not. …"

74. Dr Ruiz Soroa accepted that, as a matter of logic, functional dependency should mean that the insurer would be entitled to rely on a wilful misconduct exclusion, contrary to the recent jurisprudence of the Supreme Court, Criminal Division. However, I accept his evidence that the essential basis of those decisions is the Article 76 wilful misconduct exception, and that its reasoning does not apply to contractual exclusions generally, and, therefore, does not undermine the general point he makes about functional dependency.

75. Dr Ruiz Soroa was also able to point to a number of Supreme Court decisions that supported his view of functional dependency. For example:

"…despite the fact that the civil liability insurance contract is a contract of special nature, in favour of a third party, which creates a situation of joint and several liability between the insured and the insurer, to the victim who is then able to bring direct action against the insurance company, it is evident that the entire relation brought about by this situation and this capacity, is both based and limited on and by the same contract, and while the content of which, on the one hand, serves as the basis of the rights of the insured and the third party with respect to the insurer,

this also allows this latter to enforce between the two former the restrictions which, in the present case clearly apply …": Judgment 26.10.1984 Supreme Court 1st Division

"account must be taken - with regard to the latter [sc voluntary insurance] and even with full knowledge of the applicability of the method of the injured party's direct action against the insurer – of the fact that this direct action is based on and limited by the very contract from which this action arises because the content thereof, although it is the source of the right of the insured and of the victim against the insurer, on the other hand allows the latter to assert this restrictive content against both of them and so, since the contract is the law between the contracting parties, … it is clear that the correct interpretation is that the victim cannot be placed in a better position than the contracting party – the insured – to whose legal position he is subrogated, so that he would obtain greater benefits than him…": Judgment 4.5.1989 Supreme Court 1st Division

"it is also true that the doctrine of this Division has established that the direct action derived from Article 76 of the Law of 8 October 1980 is based on and limited by the very contract from which this action arises because the content thereof, although it is the source of the right of the insured and of the victim against the insurer, on the other hand, allows the latter to assert this restrictive content against both of them…" Judgment 26.5.1989, Supreme Court 1st Division

"the extent of the victim's rights and those of his successors cannot exceed those of the contracting insured or insurance taker because it is not plausible or logical for the contractual terms agreed between the insurer and the insured to be expanded and extended when it is the beneficiary or beneficiaries of the contract who bring the direct action against the insurer…The scope of an insurance contract is not different for the insured and for the third-party victim or victims… and cannot constitute a dead letter when it was agreed freely and subject to the provisions of the law and the agreement made extends to these victims, who cannot claim to have wider rights than those resulting from the provisions agreed between the insurer and the contracting insured party": Judgment 4.4.1990 Supreme Court 1st Division

"Given that the insurance company accepted the obligation, under the aforesaid voluntary civil liability, to cover the risk and the consequent obligation of compensating the third party, only within the limits established under the act and in the contract, as established in article 73 which the appellant deems was

inappropriately not applied, then clearly the entire issue and the decision that this court must take with regard to the grounds for cassation appeals, has to be based on reviewing the contract clauses entered into under the insurance contract.": Judgment 8.2.1991 Supreme Court 2nd Division

"with regards to this type of insurance [ie voluntary insurance], the general rule is that the insurers' obligation to the aggrieved third-party is determined by the cover of the insured…": Judgment 29.3.1995 Supreme Court 1st Division

76. Professor Betancor suggested that these decisions were old and that to an extent they had been overtaken by the recent decisions of the Supreme Court, Criminal Division. But, as already found, those recent decisions relate specifically to the issue of wilful misconduct and do not detract from the general point being made in the above cases, which was summarised as the "general rule" in the Madrid Judgment, with which Professor Betancor agreed. Professor Betancor also stated that it was wrong to say that the third party's right was "based on" the contract given that its source was the law rather than the contract. However, although the law is the source of the right there is no right without a valid insurance contract. In any event, I consider that the Supreme Court is essentially referring to the basis of the content of the right, rather than its basis of origin –" the content of (the contract) …serves as the basis of the rights of the insured" - Judgment 26.10.1984.

77. In support of his view as to the independence of the third party's right Professor Betancor relied on the fact that the applicable limitation period to the direct action claim has been held to be the civil liability limitation period rather than the insurance contract limitation period and the judgment of the Supreme Court dated 27.09.2007 to this effect. Dr Ruiz Soroa's opinion was that this was the understandable result of the fact the direct action claim arises from the law rather than the contract.

78. Professor Betancor also placed particular reliance on the fact that it is the law which not only creates the right of direct action but which also delimits it. I shall address this issue further below.

79. A point of difference between the experts was whether the "obligation to compensate" referred to in Article 76 refers to the insurer's obligation to indemnify under the insurance policy or the obligation to compensate the third party. I find that it is referring to the insured's obligation to compensate the third party as set out in Article 73. Under Article 76 the third party has the right to demand that the insurer fulfils that obligation, subject to the limits determined by the insurance contract, as Article 73 and the Madrid Judgment make clear.

80. There was also an issue between the experts as to whether Spanish law involves the

third party stepping into the shoes of the insured *vis a vis* the insurer, or the insurer stepping into the shoes of the insured *vis a vis* the third party. Both experts could point to passages in Supreme Court judgments which supported their position. In so far as it matters, I find that Article 76 does entitle the third party to require the insurer to fulfil the insured party's obligation to compensate the third party, but subject to the limits and terms of the insurance contract. In other words there is only an obligation to compensate in so far as the contract imposes an obligation to indemnify. Subject to the Article 76 exceptions, the third party is in the same contractual position as the insured *vis a vis* the insurer, whether or not he is in his shoes.

81. Another point of difference between the experts was the extent to which one could contract out of Article 76 and whether or not it is a rule of public order. I do not consider it necessary to seek to resolve this issue as it is of marginal relevance to the issue between the parties as to the nature of the direct action right.

82. In so far as it is necessary to make any findings as to whether the direct action right is an independent right as a matter of Spanish law, I find that it is independent in origin but not in content. It derives from the law rather than the contract, but it does not exist separately from the contract and its content reflects the contract, save for the Article 76 exceptions. If it is necessary to choose whether or not that means that it is an independent right I find that it is not, for the reasons given by Dr Ruiz Soroa, as outlined above.

Conclusion on characterisation

83. In the light of my findings as to the nature of the direct action under Spanish law I turn to consider the proper characterisation of the right as a matter of English law.

84. The Defendants' case was that the crux of the answer to this question lies in the admitted fact that the right arises from the law and not the contract. The juridical basis of this right of action is non-contractual and therefore independent.

85. Further, the law not only creates the right of action, it also defines its contents and limits. Even though the contents of the right may be referable to the contract it is the law which permits that. It is also the law which sets out the limits to those contractual rights through the Article 76 exceptions. These have the effect of creating a different and greater right for the third party than that possessed by the insured.

86. The Defendants also stressed that the legal mechanism by which the third party acquires his direct action rights is not assignment of or subrogation to the insured's

rights, but the imposition of an obligation to compensate the third party subject to prescribed limits.

87. In all these cases both the law creating the right of direct action and the existence and validity of the contract made subject to the direct action will be essential pre-requisites of the third party's right. Both are necessary to the existence of that right. In my judgment, in deciding whether or not the direct action right is "in substance" a claim to enforce the contract or a claim to enforce an independent right of recovery, what is likely to matter most is the content of the right rather than the derivation of that content. It is the content of the right which will be the most telling guide to what "in substance" that right is.

88. The essential content of the right is provided by the contract. Save for the Article 76 exceptions, the third party's right is as set out in and defined by the contract. It is the contract that must be looked to in order to determine whether there is any right to recover from the insurer and, if so, on what basis and with what limitations. In many cases the contract is all that will need to be considered. In the present case, for example, there is no suggestion of wilful misconduct by the assured or of "personal" defences arising. In those circumstances the third party's rights will be determined solely by reference to and by the contract.

89. Whilst it is correct that the source of the right is the law rather than the contract that will always be the case where there is a right of direct action. By definition the third party is not a party to the contract so that his right will have to arise elsewhere, almost invariably under a direct action statute. Because the right is one which is created by law/statute it will also be the law/statute which defines the content of the right even if, as here, it does so by reference to the contract. The law/statute will usually also set out anti-avoidance provisions or other limitations on the insurer's contractual rights. The key features which are relied upon by the Defendants are therefore features that are likely to be present in most direct action cases. In *Through Transport*, for example, the direct action right was created by the Finnish Act; it was the Finnish Act which determined that the right was to be one to claim compensation in accordance with the contract, and it was the Finnish Act which rendered void any contractual provisions which derogated from the protection provided under it. It was nevertheless held to be in substance a right to enforce the contract.

90. Where the present case does differ from *Through Transport* is in the extent of the exceptions provided by Article 76. These clearly go beyond the anti-avoidance provisions of the Finnish Act and indeed create a liability for an event which would not normally be insurable (damage caused by wilful misconduct). I agree with the Club (and the arbitrator) that the question is whether the extent of the exceptions is such as to change the essential nature of the right created so that it can no longer be regarded as being in substance a contractual right. Like the arbitrator, I do not

consider that the exceptions go this far. Indeed, as already pointed out, in many cases they will be of no relevance and it is the contract alone which will matter. As the arbitrator observed, "the kernel of contractual obligation, as defined by the terms of the contract, remains at the heart of the claim". Indeed, if anything, it is far more than just the kernel.

91. The Defendants submitted that this reasoning is fallacious and amounts to no more than saying that there is an insurance contract and, therefore, the claim must be contractual. However, what matters is not merely the existence of the contract but the contents of the contract and the fact that the direct action right has essentially the same content. The third party's rights depend, primarily and substantially, on the terms of the contract, as reflected in the "general rule".

92. It is fair to observe that most direct action statutes are likely to confer rights which to an extent follow the contract and therefore are liable to be found to be in substance contractual. However, one can have rights created which depend on little more than the fact of the existence of liability insurance, of which the CLC could be said to be an example. The third party's rights against the insurer under the CLC arise from the mere fact of being an insurer, and the terms of the insurance contract are of no relevance.

93. Nor do I consider that the legal mechanism by which the rights are created is a critical factor. A direct action statute which creates a statutory assignment or subrogation of the insured's rights provides a clear contractual link, but it could then contain provisions that deprived the rights conferred thereby of any real contractual substance. Conversely, one could have a statute which stated in terms that it was creating an independent right of action, but if it then stated that the rights thereby created were the same as those of the insured under his contract it would in substance be a contractual right. What matters is the substance rather than the form of the right, and substance is closely linked to content.

94. This is supported by Aikens J's decision in *Youell and others v Kara Mara* [2000] 2 Lloyd's Rep. 102 in which he held that a Louisiana direct action statute created a right which was contractual in nature. The statute in that case conferred "a statutory right to make a claim on a contract to which [the third party] was not originally party". Aikens J expressly held that the third party had not become a party to the policies by a mechanism of statutory novation or assignment (as would be the case under the English Third Party (Rights Against Insurers) Act 1930) but that the rights granted under the direct action statute were nevertheless contractual in nature.

95. For all these reasons I conclude that the direct action right conferred by Spanish law against liability insurers is in substance a right to enforce the contract rather than an independent right of recovery. This ground of challenge to the jurisdiction of the

Tribunal accordingly fails.

(2) Are the claims arbitrable?

96. The Defendants contended that the claims are not arbitrable because they are brought under a criminal statute and are bound up with issues of criminal liability and/or because they involve Spain, France and the Public Prosecutor fulfilling a constitutional, public policy function, namely the protection of the environment.

97. Section 81 of the Act preserves the common law position as to the arbitrability or otherwise of certain types of dispute. It provides that:

> "(1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to – (a) matters which are not capable of settlement by arbitration …"

98. In *Mustill & Boyd, Commercial Arbitration* (2nd ed) (1989), the common law position is summarised as follows at pp 149–150:

> "English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. The general principle is, we submit, that any dispute or claim concerning legal rights which can be the subject of an enforceable award, is capable of being settled by arbitration. This principle must be understood, however, subject to certain reservations. First, certain types of dispute are resolved by methods which are not properly called arbitration. These are discussed in Chapter 2, ante. Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding up order or a decision that an agreement is exempt from the competition rules of the EEC under article 85(3) of the Treaty of Rome . It would be wrong, however, to draw from this any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration: indeed, examples of each of these types of dispute being referred to arbitration are to be found in the reported cases."

99. The issue of arbitrability was considered in the Court of Appeal decision in *Fulham Football Club (1987) Ltd v Richards and another* [2012] Ch 333. In that case Patten LJ stated at [40] that "it is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an attempt to delegate to arbitrators a matter of public interest which could not be determined within the limitations of a private contractual process". Longmore LJ at [94]

identified the key consideration as being whether reference of such matters to arbitration is prohibited as a matter of statute or English public policy.

100. In the present case the Defendants relied on various statements made to the effect that criminal matters are not arbitrable. For example:

> "Certain disputes may involve such sensitive public policy issues that it is felt that they should only be dealt with by the judicial authority of state courts. An obvious example is criminal law which is generally the domain of the national courts." - *Lew, Mistelis and Kröll, Comparative International Commercial Arbitration* (Kluwer Law International, 2003), Chapter 9 at 9.2.

> "More generally, criminal matters… are usually considered as not arbitrable."- *Redfern and Hunter on International Arbitration* (5th edn, 2009) at p125.

101. As pointed out by *Mustill & Boyd*, however, a distinction needs to be drawn between determinations of criminal liability and the imposition of criminal sanctions, and determinations of issues which may involve criminal liability. The latter are commonly the subject matter of arbitration, as, for example, in cases involving allegations of fraud.

102. The Defendants also relied on statements as to the significance of matters which uniquely involve government authority or the enforcement of obligations through the state's own mechanisms. For example:

> "The types of disputes which are non-arbitrable… almost always arise from a common set of considerations. The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely government authority, that agreements to resolve such disputes by 'private' arbitration should not be given effect." - *Born, International Commercial Arbitration*, at p.768:

> "There is no body of authority which suggests how and where the line should be drawn. We can offer only the following tentative suggestions... Another possible category would include disputes exclusively concerned with obligations which the state, acting in the public interest, enforces through its own mechanisms. We express the matter in this way to distinguish the cases, already mentioned, where matters touching public law and policy arise incidentally in the course of the enforcement of private contractual rights." - *Mustill and Boyd, Commercial Arbitration: 2001 Companion Volume to the Second Edition* (2001) at p. 75

103. The Defendants were unable, however, to point to any English statute or English rule

of public policy which is engaged in this case.

104. The Defendants submitted that in relation to the Spanish proceedings, the following matters are of particular relevance and are subject to adjudication in that jurisdiction:

i) Criminal responsibility of the Master and Chief Engineer of the vessel pursuant to Articles 325 and 326 of the Penal Code (sought by the Public Prosecutor).

ii) Whether damage has been caused by the commission of any criminal offence and whether there is an obligation on the part of those criminally responsible to pay compensation in that respect arising from Article 109 and following of the Penal Code (pursued by the Public Prosecutor). Thus civil liability is predicated directly upon criminal liability. Similarly, whether there is civil liability on their part under Article 1902 of the Spanish Civil Code.

iii) Whether the Owners are vicariously liable for the wrongs committed by the Master and Chief Engineer.

iv) The entitlement of Spain, the Public Prosecutor and France to claim damages from the Master, Chief Engineer, and/or the Owners (i.e. those who are principally or vicariously liable) in respect of damage caused to the environment as a result of the criminal activity. In so doing, Spain and the Public Prosecutor are acting in the public interest and pursuant to Article 45 of the Spanish Constitution. Further, Spain is proceeding in its capacity as a guardian of Spain's natural environment and resources. That role is not confined to seeking redress for property damage. It extends to affording protection based on the intrinsic value of the natural environment, including wildlife. Further, there is international (particularly European) consensus on the need to protect the environment, particularly with regard to the discharge of oil into the sea, which has resulted in an increased level of criminalisation and the creation of remedies which reflect the particular public disapproval of the consequences of disasters such as the loss of the vessel.

v) Whether, by reason of the procedural pathway provided by Article 117 of the Penal Code, the Club is liable to any of Spain, the Public Prosecutor and France in respect of the liability referred to above - i.e. and to use the words of Article 117, whether the Club has direct civil liability in respect of the relevant conduct.

105. The Defendants accordingly submitted that the subject matter of the Spanish and French Awards is inextricably linked with the alleged underlying criminal conduct and the role being fulfilled by Spain, the Public Prosecutor and France in pursuing redress for the damage caused to the natural environment of France and Spain and, as such, is not arbitrable.

106. I am unable to accept these submissions for the reasons given by the Club and in particular:

i) The Defendants' arguments fall to be considered in the context that it has already been decided that the claims are in substance claims to enforce a contract.

ii) The Defendants' claims are all monetary claims, for damages (whether allegedly suffered by the State itself or other third parties that the State has paid and to whose rights it is subrogated).

iii) The Club's alleged liability is fundamentally civil in nature (a liability to pay in accordance with the terms of the insurance) and arises at several steps removed from the criminality, namely as civil liability insurers of Owners who are, themselves, only vicariously liable (for the acts of its employees) and against whom no criminal allegations are made.

iv) Although the direct claims are brought under the part of a criminal statute which deals with civil liability (including Articles 109 and 117), the relevant provisions are civil in nature and are construed according to civil principles of law. The alleged liability is a civil liability and the forum in which it is asserted cannot alter that fact.

v) The fact that the civil liabilities arise out of damage to the environment does not alter the fact that the claims are still, in substance, to recover monetary loss.

vi) Even if the Defendants are fulfilling constitutional or domestic public functions of protecting the environment (or recovering civil damages flowing from criminal offences), the claims pursued are, fundamentally, civil claims which are no different from the claims brought by private parties in respect of the same acts (indeed some of Spain's claims are in respect of losses suffered by private parties, which claims the State has been subrogated to). Further, although the Public Prosecutor has the right to bring claims (or request payment) on behalf of third parties, the claim remains that of the third party, so that any judgment would be rendered in favour of the third party.

vii) Arbitrating such claims is not contrary to any identified English statute or English rule of public policy.

107. The main point stressed by the Defendants in oral argument was the fact that liability under Article 117 is predicated on a finding of criminal liability which is not a proper matter for arbitration. However, whether the claim is brought under Article 76 or Article 117, the right to recover from the insurer depends on proof of an insured liability under the insurance contract and does not require a finding of

criminal liability. Even if it did, it would not be a finding involving criminal responsibility or criminal penal consequences. It would simply be a step towards establishment of a civil law monetary claim. Further, it would be remarkable if civil claims advanced in criminal proceedings were inarbitrable, whereas if the same claims had been advanced in civil proceedings they would not have been, so that arbitrability would effectively be at the option of the claimant.

108. For all these reasons I am not satisfied that it has been shown that the dispute referred represents an attempt to delegate to arbitrators a matter of public interest which could not be determined within the limitations of a private contractual process or that such a reference engages, still less is prohibited by, English statute or English public policy or is otherwise inarbitrable. This ground of challenge to the jurisdiction of the Tribunal accordingly fails.

(3) Has there been a waiver of the right to arbitrate France's claims?

109. France's case was that in the civil proceedings in France before the Civil Court in Bordeaux which France commenced against the Club, the Owners, Managers and the IOPC Fund in November 2005 the Club has submitted to the jurisdiction of the French courts and it is no longer open to it to rely on any arbitration agreement contained in the Rules.

110. This involves a consideration of whether there has been a waiver of the right to arbitrate as a matter of French law and, if so, whether that amounts to a waiver as a matter of English law, being the proper law of the arbitration agreement and/or the lex fori, which precludes the Club from relying on the right to arbitrate France's claim subsequently brought in Spain under Spanish legislation permitting direct action.

111. On 8 November 2005 France served its writ against the Owners, the IOPC Fund and the Club claiming compensation for pollution damage in the amount of €67,499,153.92 in the Civil Court of Bordeaux. The writ was served at the address of the Club's counsel in France (Mr Gautier of Ince & Co, Paris) which, in line with the circular letter it had provided, the Club had chosen as its service address for any CLC proceedings.

112. In relation to the claim against Owners, two possible bases of liability are mentioned in the writ:

i) First, the body of the writ and the *dispositif* (the final, concluding section of the writ in which the relief is set out) refer to the CLC. Mention is made that the ship owner is entitled to limit its liability up to the amount of a limitation fund,

if he has set up one, unless the event was caused as a result of the ship owners' personal act or omission, committed with the intention of causing such damage or committed recklessly and knowing that such damage would probably result. Mention is also made of the fact that the Club has set up a limitation fund on account of the Owners, and that damage suffered by France exceeds the amount of the limitation fund. The body of the writ contains no reference to any particular fault on the part of the Owners.

ii) Secondly, in the *dispositif* only, France refers to Article 1382 of French Civil Code. Article 1382 of the French Civil Code states that where one person causes damage to another through fault, that first person is obliged to compensate the other.

113. In relation to the claim against the Club reference is made in the body of the writ to it being the Owners' insurer and to it having established the CLC fund and to France acting by way of a direct action. In the *dispositif* the Court is asked to order the Owners and the Club to jointly pay the sum of €67,499,153.92, a sum in excess of the CLC fund.

114. The first issue between the French law experts is whether France has brought a claim against the Club under the CLC only, or whether it has also brought a direct action claim on the basis of Owners' liability under Article 1382.

115. France's position, as reflected in the evidence of Mr Grelon, is that the reference in the *dispositif* to a claim against the Owners and the Club to be made jointly liable for an amount in excess of the CLC limit and to Article 1382 is sufficient to make a claim against the Owners under Article 1382 and against the Club as the Owners' liability insurer. Further, in the body of the writ reference is made to the provisions of the CLC disapplying the limit of liability in the event of fault of the ship owner.

116. The Club's position, as reflected in the evidence of Mr Gautier, is that it is not sufficient to refer to a claim in the *dispositif*. The factual basis for making a claim has to be set out in the body of the writ for a claim to be made. In this case there is no factual basis set out for a claim against the Owners under Article 1382. If so, there is no basis for a non-CLC claim against the Club. In any event neither the factual nor legal basis for a non-CLC right of direct action against the Club is set out.

117. I prefer the evidence of Mr Gautier on this issue. He was very firm in his evidence that it is essential to lay factual grounds in the body of the writ for any relief claimed in the *dispositif*. No facts relating to or alleging fault are set out. The descriptive reference to the CLC provision dealing with the loss of the right to limit does not

involve any averment of fault. Nor is any legal or factual basis for the non-CLC direct action liability of the Club identified. I accordingly find that the only claim made against the Club in the French proceedings is a CLC claim and that therefore the issue of waiver of the right to arbitrate non-CLC claims does not arise.

118. Even if that be wrong and as a matter of French law such claims are to be considered to have been made, I consider that it is far from clear that that is so and that as a matter of English law there was no clear choice to be made for the purpose of the doctrine of waiver by election. It was not objectively clear that the Club was being presented with two alternative and inconsistent options at the time of the alleged election. If so, there can be no waiver as a matter of English law.

119. In these circumstances it is not necessary to decide the further French law issue which arises as to whether the Club did in fact raise a procedural exception in January 2007 by requesting a stay of proceedings, as opposed to simply joining in the request made by others for such a stay.

120. This ground of challenge to the jurisdiction of the Tribunal accordingly also fails.

(4) Does the Court have no jurisdiction on the grounds of state immunity?

121. By s.1(1) of the State Immunity Act 1978 ("the SIA"), a State is immune from the jurisdiction of the courts of the United Kingdom except as provided for in the subsequent provisions of the SIA.

122. By s.14(1) of the SIA, the immunities and privileges conferred by the SIA apply to any foreign or commonwealth State other than the UK, and references to a State include references to the sovereign or other head of that State in his public capacity (s.14(1)(a)), the Government of that State (s.14(1)(b)) and any department of that Government (s.14(1)(c)).

123. Thus Spain and France are prima facie immune from the jurisdiction of the English Court. That immunity will only be lost to the extent that they fall within one of the exceptions set out in the SIA.

124. The Club contended that the immunity has been lost on the following grounds:

i) Pursuant to s.9(1) of the SIA the Defendants have agreed in writing to submit the relevant dispute to arbitration; and

ii) These are proceedings relating to an obligation of the Defendants which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the UK (see s.3(1)(b) of the SIA). The Club says that the relevant contractual obligation to which these proceedings relate is the obligation to arbitrate and to do so in London; and

iii) The Defendants have submitted to the jurisdiction of the English courts for the purposes of s.66 application. By virtue of s.2 of the SIA, the Defendants are therefore not immune in respect of the s.66 proceedings.

125. The Club further contended that any plea of immunity is unsustainable in respect of the Defendants' own ss.67/72 applications. In respect of those applications, the Defendants have "instituted the proceedings" and are therefore taken to have submitted to the jurisdiction of the courts of England pursuant to section 2(3)(a) SIA.

Section 9 of the SIA

126.S.9(1) of the SIA provides that:

> "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."

127. The Defendants submitted that even if they were bound by the arbitration clause by reason of the *Through Transport* analysis they were not party to any agreement to arbitrate, as the Court of Appeal decision makes clear. Even if they were, that was not sufficient for the purposes of s.9(1) which requires some written manifestation of express consent on the part of the State. Tacit consent does not suffice.

128. The Court of Appeal in *Through Transport* held that New India was bound by the arbitration clause (and granted a declaration to that effect). However, it also held that in commencing proceedings in Finland New India was not in breach of contract and could not have been sued in damages for so doing, and it set aside both the declaration that there had been a breach of contract and the anti-suit injunction which had been granted. The relevant passages from Clarke LJ's judgment are as follows:

> "52 Some of the argument in this appeal proceeded on the footing that the question is whether New India became a party to the agreement to arbitrate contained in clause D2 of the General Provisions in the Club Rules. However, we do not think that that is quite the right question and, as we read his judgment, the judge did not go so far. We accept Mr Smith's submission that New India did not

become a party to an arbitration agreement. We agree that self-evidently New India was not an original party and there is no basis upon which it could be held that there was any novation or transfer to New India of the rights and obligations of the insured under the Club Rules. This is in our view important on the question whether it was appropriate to grant an anti-suit injunction discussed below.

…..

64 It seems to us to follow from the conclusions which we have reached so far that the Club is entitled to the first of those declarations. For the reasons given above under the heading 'the arbitration clause', an application of English conflict of laws principles leads to the conclusion that, if New India wishes to pursue a claim under the section 67 of the Finnish Act, it must do so in arbitration in London because the Club is entitled to rely upon the arbitration clause in the Club Rules, which are the very rules which New India relies upon in order to make a claim under the Act: see, in the context of the Third Parties (Rights Against Insurers) Act 1930, The Padre Island (No. 1).

65 It is less clear that the Club is entitled to the second declaration. In our view the Club is not entitled to such a declaration if it means, on its true construction, that New India was in breach of contract in commencing the Kotka proceedings. As indicated in para 52 above, we do not think that New India was in breach of contract. So, for example, the Club could not in our view sue New India for damages for commencing the proceedings in Finland. It seems to us that the declaration could be so construed and for that reason we think it right to set aside that declaration….

129. The Defendants also relied on Waller LJ's summary of the *Through Transport* decision in *The "Wadi Sudr"* [2010] 1 Lloyd's Rep 193 at [50]:

"50 What the Finnish court had decided was that the Finnish statute provided the basis for the claim in Finland and thus the arbitration clause had no application. So far as the English court was concerned, the issue was whether that was a correct characterisation of New India's claim. The Court of Appeal (in agreement with Moore-Bick J (as he then was)) confirmed that, under English conflict of laws, issues of characterisation are to be resolved by applying principles of English law (see paragraph 55) and that Moore-Bick J had been correct in his characterisation and in holding New India bound by the arbitration clause but only in the sense of the club being entitled to raise the same as a defence. The court found that New India was not a party to the contract containing the arbitration clause and was thus not in breach of contract in commencing proceedings in Finland (see paragraph 65). It thus held that since New India were pursuing a claim which, under Finnish statute, it was entitled to do, it was not a case where an injunction should be granted (see paragraph 96)."

130. The most detailed consideration of the nature of the right/obligation arising under the *Through Transport* analysis is to be found in Moore-Bick J's judgment in *Through Transport No 2* [2005] 2 Lloyd's Rep 378. Following the Court of Appeal decision the P&I Club involved in that case applied to the Court for an appointment

of an arbitrator pursuant to s.18 of the Act. New India argued that the Court had no jurisdiction to do so as the Court of Appeal had held that it was not party to an agreement to arbitrate. Moore-Bick J rejected New India's argument and granted the application.

131. Moore-Bick J considered paragraph 52 of the Court of Appeal's judgment and explained it as follows:

> "15 In my view the debate in the present case has suffered to some extent from a misunderstanding of the significance of what the Court of Appeal said in paragraph 52 of its judgment. As I read it, all that the court was seeking to do in that paragraph was to dispose of the suggestion that New India had become a party to a contract with the Club as a result of the transfer to it of the rights and obligations of the insured under the Club's Rules. The court clearly thought that it had not, but it is equally clear that it did not think that that was the right question. Having disposed of that point, it went on to consider the nature of the claim being made by New India and whether it was one that had to be pursued in arbitration. It is quite clear from paragraph 60 of the judgment and from the declaration contained in the order drawn up to give effect to its decision that the court considered that New India was bound to pursue its claim in arbitration in England and was not entitled to act in disregard of the arbitration clause.
>
> 16 Similarly, the fact that the Court of Appeal reached the conclusion that it was inappropriate in this case to grant an anti-suit injunction against New India provides only limited support for the conclusion that there is nothing that can be regarded as amounting to an arbitration agreement between the Club and New India for any purposes. When discussing the nature of the relationship between New India and the Club the court pointed out that New India was not acting in breach of contract in commencing proceedings in Finland, despite the fact that it was under an obligation to pursue its claim in arbitration, but that does not of itself make it inappropriate to grant relief of this kind…"

132. Moore-Bick J then considered the analysis of the Court of Appeal in *The "Jay Bola"* [1997] 2 Lloyd's Rep 279 as to why and how an assignee of a contract is bound by an arbitration clause contained therein, as set out in particular in the judgment of Hobhouse LJ. Moore-Bick J concluded that the case was authority for the following:

> "22….In my view the decision in this case is authority for the proposition that a person who obtains by an assignment or transfer of some other kind the right to pursue a claim under a contract can only enforce that right in accordance with the terms of the contract and subject to any restrictions or limitations which those terms may impose. In other words, what he obtains is a chose in action whose precise scope is determined by the contract under which it arises and which is inherently subject to certain incidents, in this case a requirement that it be enforced

by arbitration."

133. Moore-Bick J then addressed the application of that principle to the *Through Transport* case and stated as follows:

> "24 Although this distinction can be drawn between the position of New India in this case and the position of the insurer in The Jay Bola , it is not in my view one that is ultimately of any substance. In the present case the Court of Appeal has held, applying English rules of characterisation, that section 67 of the Finnish Insurance Contracts Act gives a person in the position of New India the right to enforce the obligations of the Club under the contract of insurance. Whether one describes New India as a statutory transferee or simply as the beneficiary of a statutory provision, therefore, the right it enjoys is a right to enforce a chose in action which is itself subject to certain inherent limitations. One of those is the pay to be paid clause; another is the obligation to enforce any claim by arbitration in London. In Finland those limitations may be disregarded if mandatory provisions of the relevant legislation so require, but in English law, as the Court of Appeal has held, that legislation is not recognised as capable of affecting the parties' rights and obligations.
>
> 25 For these reasons I am satisfied that, however one describes its position, New India is seeking to enforce a chose in action which is subject to certain inherent limitations, including the obligation to enforce it by arbitration in London. Section 82(2) of the Arbitration Act 1996 provides that references in Part I of the Act to a party to an arbitration agreement include any person claiming under or through a party to the agreement. An assignee seeking to enforce the contract clearly falls within that provision because he claims under or through the assignor, as the Court of Appeal recognised in The Jay Bola . Accordingly, if New India were to commence arbitration against the Club, I have no doubt that it could apply to the court for relief under section 18…"

134. Moore-Bick J went on to consider whether it made any difference that it was the P&I Club who was making the s.18 application and that New India did not wish to arbitrate and concluded that it did not. In this connection he referred to and relied upon s.82(2) of the Act which provides that:

> "(2) References in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement"

135. Moore-Bick J concluded as follows:

> "28 For the reasons given earlier I accept that New India's position is not quite the same as that of a simple assignee and I also accept that it has a right to choose whether to seek to enforce the rights of the insured against the Club. However, as soon as a third party in the position of New India makes a demand on the insurer

there is the potential for a dispute to arise, as indeed happened in this case, and once a dispute has arisen in relation to the third party's right to recover from the insurer it is one which must be determined by arbitration in accordance with the contract. Clearly the third party can invoke the contractual arbitration machinery and as soon as he does so he becomes a person who claims under or through a party to the agreement within the meaning of section 82(2) of the Arbitration Act . However, I am unable to accept that once a dispute has arisen the insurer is powerless to act until the claimant chooses to take a formal step of that kind. The arbitration clause in the present case contemplates that either party may refer disputes to arbitration and that necessarily allows for the possibility that the Club itself may commence proceedings. In my view it was not necessary for New India to commence proceedings in order to bring itself within the scope of section 82 (2) ; it became a person claiming under or through a party to the arbitration agreement within the meaning of that subsection as soon as it sought an indemnity from the Club in the right of Borneo Maritime Oy. Having rejected the claim, the Club was entitled to refer the resulting dispute to arbitration and to invoke section 18 of the Act against New India as a party to the arbitration agreement contained in the Club's Rules."

136. I accept and adopt Moore-Bick J's helpful analysis of the legal position arising under the *Through Transport* analysis. When the third party makes a claim under an insurance policy containing an arbitration clause he becomes a person claiming under or through a party to the arbitration agreement and thereby a party to the arbitration agreement for the purposes of the Act. When that claim is disputed he becomes bound to refer the dispute to arbitration in accordance with that arbitration agreement. He is not an original party to the arbitration agreement, nor does he become a party to that agreement by reason of a novation or other legal transfer of the rights and obligations of the agreement. He is not therefore a party to the agreement "in the full sense". But he is bound by it and he is a party to the agreement for the purposes of the Act.

137. The question which then arises is whether a State which becomes a party to an arbitration agreement in this sense "has agreed in writing" to submit a dispute to arbitration within the meaning of s.9(1) of the SIA.

138. There is undoubtedly an agreement in writing. The State is bound by it by reason of the *Through Transport* analysis. The State is a party to that agreement for the purposes of the Act. Is that sufficient? I am satisfied that it is for a number of reasons.

139. First, it would be surprising if the test for whether there was an agreement in writing in the SIA was different to that under the Act, and there is no language in s.9 to suggest that there is some further or added requirement. The SIA is an English statute. S.9 is addressing matters relating to arbitration. The English law of

arbitration is as set out in the Act.

140. Secondly, this is borne out by the purpose of s.9 which is, I accept, to ensure that where a State is bound to arbitrate it is also bound to submit to the supervisory jurisdiction of the courts, to ensure that the arbitration is effective. As explained by Moore-Bick LJ in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2008] QB 886 at [17]:

> "the principle underlying section 9 is that, if a state has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective".

141. For the achievement of that purpose one would expect the "agreement in writing" for the purposes of that provision to be no different from the "agreement in writing" for the purposes of the Act.

142. Thirdly, there is nothing in the language of the Act to suggest that a State is to be put in a different position to a private party and that the State is not to be treated as having made an agreement in writing in circumstances where a private party would be so treated.

143. Fourthly, some support for the Club's case is to be found in the two main authorities on s.9, although they are both factually distinguishable.

144. The first case is *Ministry of Trade of the Republic of Iraq and Anor v Tsavliris Salvage (International) Ltd ("the Altair")* [2008] 2 Lloyd's Rep 90. In that case shipowners entered into a salvage agreement with Tsavliris on a Lloyds Standard Form of Salvage Agreement ("the LOF"), containing a London arbitration agreement. The cargo was owned by the Grain Board of Iraq ("the GBI"). Tsavliris commenced arbitration against the GBI under the LOF. The Tribunal held that the GBI was bound by the LOF. The GBI challenged the award, arguing that there was no binding arbitration agreement and that the GBI was part of the Ministry of Trade of Iraq and therefore immune from the arbitration proceedings.

145. Gross J held that the GBI was bound by the LOF (including the arbitration agreement) by reason of article 6.2 of the International Convention on Salvage 1989 (which Iraq had not ratified). In essence, that provision grants the master or owner of a vessel authority to conclude contracts for salvage operations on behalf of the owner of the property on board the vessel. Thus, the GBI was not a signatory to the LOFs themselves, though they were held bound by reason of a statutory provision. The GBI were held bound, not by reason of any particular manifestation of intention to arbitrate on their part, but by reason of the operation of an International

Convention. The only relevant positive conduct on their part was shipping their goods on board the vessel.

146. Gross J considered whether s.9 of the SIA imposed some additional requirement for an agreement in writing to that which would be generally applicable and concluded that it did not. He stated that:

> "56…
>
> v. It would be curious if the GBI was bound to the LOF and hence a party to the arbitration and yet somehow was held not to have "agreed in writing" to submit a dispute to arbitration for the purposes of section 9(1). I do not think there could be a halfway house of this nature, in particular under English law, given its broad and permissive view of the requirement that an arbitration agreement should be in writing.
>
> ….
>
> 58. For my part, I can see neither any basis for, nor any attraction in, reading into section 9(1) some additional requirement for a relevant agreement in writing; for instance, a requirement that for section 9(1) to "bite", the agreement must be signed by the parties themselves (whatever that would entail) or that an agreement for the purposes of section 9(1) cannot be entered into by an authorised agent on behalf of a party in question. But that is where Mr Hoyle's argument would seek to drive section 9(1). With respect, I cannot agree."

147. Gross J's approach provides some support for the Club's contention that to answer the question of whether there is an "agreement in writing" for the purposes of the SIA, one looks at whether there is an agreement in writing for the purposes of the Act which binds the State in question and that in this respect private parties and States are in the same position.

148. The second case is *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2006] 1 Lloyd's Rep 181 (Gloster J); [2008] QB 886 (CA). That case concerned a joint venture agreement made with a Lithuanian state-owned oil company which contained an arbitration clause governed by Lithuanian law. The Lithuanian government was not a party to the joint venture agreement but had signed an acknowledgment that it approved the agreement and acknowledged itself to be legally and contractually bound as if it were a signatory to the agreement. The arbitration tribunal found that it had jurisdiction over a claim made against the government and awarded the claimant damages and the claimant then obtained permission to enforce the award as a judgment. The government applied to set aside

that order and claimed immunity under s.9 of the SIA. Their application and claim was dismissed at first instance and on appeal.

149. The Court of Appeal recognised that the arbitration agreement did not contain an express agreement on the part of the government to arbitrate, but rejected the argument that "as a matter of law the government cannot be treated as having intended to arbitrate in the absence of an express assurance to that effect" – at [81]. In the light of the finding made that as a matter of Lithuanian law the government was bound by the arbitration agreement the Court concluded that the government had made an agreement to arbitrate within the meaning of s.9 of the SIA. As they stated at [116]:

> "The arbitrators, of course, did not have to decide whether the government had agreed in writing to refer the dispute to arbitration within the meaning of section 9 of the State Immunity Act, but they did have to decide whether, and if so how, the government was bound by an agreement to arbitrate. They held that it was a party to the agreement and in our view the government cannot go behind that decision. The first award therefore establishes that the government agreed in writing to refer disputes to arbitration and is therefore sufficient to bring the case within section 9."

150. The Court of Appeal therefore treated the requirements for a s.9 "agreement in writing" as being the same as whatever requirements applied under the law of the arbitration agreement. This therefore provides some support for the position that the English court looks to the law governing the arbitration agreement (in this case English law, specifically the Act). If there is an agreement under the relevant arbitration law, that is sufficient to bring the case within s.9.

151. In this connection it is to be noted that , in considering the Svenska case in *The Law of State Immunity, Fox,* 3rd Ed. (2013) fn. 193 it is stated that:

> "If on the overall construction of a transaction a State is held to be bound by a written arbitration agreement that will be sufficient to find that the State as a party had agreed in writing to refer the dispute to arbitration within the meaning of section 9 of the State Immunity Act"

152. The Defendants submitted that s.9 requires some written manifestation of express consent to arbitrate by the State on three main grounds:

i) The provisions of the 2004 UN Convention on State Immunity ("UNSCI") and "the state of the modern law on immunity";

ii) S.2 of the SIA; and

iii) The *Svenska* case.

153. As to i), it was pointed out that Article 7 of the UNCSI lays down a requirement of "express consent" by a State to the exercise of jurisdiction over it and that a tacit submission does not suffice. However, I can derive little assistance from a differently worded provision in a Convention made 26 years after the SIA, which has not yet been ratified. It might be different if there was evidence that it reflected customary international law at the time of the SIA, but there is no such evidence.

154. As to ii), s.2 of the SIA provides that:

> "(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
>
> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.
>
> …
>
> (7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract."

155. The Defendants submitted that what is envisaged by s.2 is express written consent by the State emanating from a person with authority to commit the State to that course of action and that the same must apply to s.9(1). However, as the Club submitted, the language of s.2(2) ("prior written agreement") is different to s.9(1) ("agreed in writing"). If anything, the use of different language in different parts of the Act indicates that a different approach is required. In any event, s.2(2) does not state that a State must have given its express written consent to submit to the jurisdiction of the English courts. Further, the emphasis on s.2(7) is misplaced: that provision is permissive (stating for clarity two particular persons who are deemed to have the requisite authority to bind a State) and is not in any way limiting.

156. As to iii), the Defendants emphasised the importance attached in the *Svenska* case to the signed acknowledgment given by the government in considering whether it was bound by the arbitration agreement. They submitted that this showed that the Court of Appeal was looking for and found express written consent. However, I do not

agree that the Court was looking for such consent. The Court held that the government could not go behind the arbitrators' decision that they were bound by the arbitration agreement and that that was sufficient for the purposes of s.9(1) of the SIA. What mattered was that it was bound by the arbitration agreement.

157. The Defendants also made the general point that it would be surprising and unsatisfactory if a state was to lose its immunity by means of making a claim which it is entitled to do under its own law and in its own state. However, that is the consequence of the *Through Transport* analysis. You cannot seek to take the benefit of the insurance contract without accepting its incidents and limitations.

158. For all these reasons I conclude that the Defendants have lost their immunity by reason of s.9(1) of the SIA.

Section 3(1)(b)

159.Section 3(1)(b) provides:

> "(1) A State is not immune as respects proceedings relating to—
>
> …
>
> (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom."

160.There are therefore four requirements:

i) "An obligation of the State"

ii) which "by virtue of a contract (whether a commercial transaction or not)"

iii) " falls to be performed wholly or partly in the United Kingdom" and

iv) the relevant proceedings must be "proceedings relating to" the obligation.

161. The Club submitted that all these requirements are satisfied.

162. As to i), the relevant "obligation of the State" is the agreement to arbitrate. The Defendants are bound to arbitrate by reason of the *Through Transport* analysis.

163. As to ii), the obligation to arbitrate arises "by virtue of a contract", namely the insurance contract between the Club and the insured and that that is the very nature

and effect of the *Through Transport* analysis.

164. As to iii), the obligation to arbitrate falls to be performed wholly or partly in the United Kingdom.

165. As to iv), the s.66 application is a proceeding "relating to" the obligation to arbitrate. The application to enforce an arbitration award is "about" or "arising out of" the obligation to arbitrate in that it is an application seeking to honour and give effect to the arbitration agreement.

166. The Defendants disputed that there was here any or any sufficient "obligation" to arbitrate on the grounds of the limited nature of any such obligation, as made clear by the Court of Appeal decision in *Through Transport.*

167. The Defendants further submitted that the SIA deals with arbitration specifically in s.9. It cannot have been intended that a State could lose its immunity under s.3 even though the requirements of s.9 were not met. Further, there is no good reason for treating an arbitration which happens to have its seat here differently to any other arbitration agreement. Section 9 is clearly intended to be of general application.

168. In the light of my ruling on s.9 it is not necessary to decide this issue, although I consider that there is force in the Defendants' contention that it is s.9 alone which governs loss of immunity under the SIA in matters relating to arbitration.

Section 2 of the SIA

169. Section 2 provides:

> "(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
> …
> (3) A State is deemed to have submitted—
>
> (a) if it has instituted the proceedings; or
>
> (b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
>
> (4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of—

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it."

170. The Club submitted that the question of what amounts to a "step in the proceedings" must be answered in light of English procedural law as to the proper steps to be taken in relation to proceedings commenced in the English courts. English court procedural law is governed by the CPR.

171. Pursuant to CPR Part 11:

"11.1

(1) A defendant who wishes to –

(a) dispute the court's jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4)An application under this rule must –

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim."

172. The Club submitted that the Defendants had taken a step in the proceedings pursuant to s.2(3)(b) i.e. a step which impliedly affirms the correctness of the proceedings and the willingness of the Defendants to go along with a determination by the courts - see *Kuwait Airways v Iraqi Airways* [1995] 1 Lloyd's Rep 25. Such a step involves an election – i.e. an unequivocal act done with knowledge of the material circumstances – see *Eagle Star Insurance Co Ltd v Yuval Insurance Co*

Ltd [1978] 1 Lloyd's Rep 357 per Lord Denning at [361].

173. The Club submitted that Spain had taken a step in the proceedings by reason of the following:

i) In its acknowledgment of service it did not tick the box indicating "I intend to dispute the court's jurisdiction".

ii) It failed to make an application to challenge the Court's jurisdiction within 14 days of acknowledgment of service and accordingly it is to be treated as having accepted the court's jurisdiction pursuant to CPR Part 11.1(5)(b) – see *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] 1 Lloyd's Rep 475.

iii) On 28 June 2013 it applied for an extension of time to submit evidence in response to the s.66 application. Neither the arbitration claim form nor the application notice referred to any challenge to the court's jurisdiction to hear the s.66 application, although the supporting witness statement sought to reserve the right to do so.

iv) No mention of immunity was made in the skeleton for the hearing or the hearing itself.

v) When the s.67/72 applications were issued no application was made to challenge the Court's jurisdiction to hear the s.66 application and the only mention of immunity was in the supporting witness statement.

vi) To date no application to dispute the Court's jurisdiction has been made.

174. In relation to point ii), whilst that may be the position as a matter of English procedural law, that does not mean that a step in proceedings has been taken for the purpose of the SIA. To do so requires an election – i.e. an act rather than a mere omission.

175. As to the other points, I am satisfied that Spain's position throughout has been that it was disputing the jurisdiction of both the Court and the arbitrator.

176. Thus in the acknowledgment of service it stated that it was "reserving all rights of any description, whether jurisdictional or otherwise" and specifically stated that it "will rely on grounds of challenge available under the…Sovereign Immunity Act

1978".

177. The assertion of immunity was repeated in its solicitors' letter of 21 June 2013 which was the first time Spain had set out its substantive position on the s.66 application. It was repeated in Mr Meredith's witness statements of 27 June 2013 and 5 August 2013.

178. The other applications made must be seen in the context of these general reservations and the practical desirability of dealing with all the applications together. Its continuing objection to the Court's jurisdiction was maintained and it was reasonably clear that this was to be raised in answer to the Club's own s.66 application. There was therefore no need for a separate application to be issued. Looking at Spain's conduct as a whole I am satisfied that it never affirmed the correctness of the proceedings and its willingness to go along with a determination by the courts.

179. France's position is similar to that of Spain, although the CPR Part 11.1(5)(b) point does not arise in its case. I find that the position is otherwise the same as in relation to Spain. Neither of the Defendants have taken a step in the proceedings within the meaning of s.2 of the SIA.

180. In summary, I hold that immunity has been lost by reason of s.9(1) of the SIA. In those circumstances it is not necessary to consider the position separately in relation to the Defendants' own applications. I accordingly conclude that the Court has jurisdiction over the Defendants.

(5) Should the Court grant the applications as a matter of discretion?

181. Section 66 of the Act provides:

> "(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
>
> (2) Where leave is so given, judgment may be entered in terms of the award.
>
> (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.
>
> The right to raise such an objection may have been lost (see section 73).
>
> (4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the

> Arbitration Act 1950 (enforcement of awards under the Geneva convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award."

182. On an application under s.66, the Court has a discretion whether or not to enforce the award – it "may" do so.

183. In many cases the discretionary issue will relate to the validity of the award and it will be for the respondent to "show" that the tribunal lacked jurisdiction. However, I accept that the discretion is a wide one to be exercised in the interests of justice and that it will embrace issues such as the utility of a declaratory judgment, as is illustrated by *West Tankers Inc v Allianz SpA* [2012] 1 Lloyd's Rep 398.

184. In *West Tankers* Toulson LJ, with whom Lloyd and Carnwath LLJ agreed, stated that:

> "37. … I cannot see why in an appropriate case the court may not give leave for an arbitral award to be enforced in the same manner as might be achieved by an action on the award and so give leave for judgment to be entered in the terms of the award.
>
> 38. I use the words "in an appropriate case" because the language of the section is permissive. It does not involve an administrative rubber stamping exercise. The court has to make a judicial determination whether it is appropriate to enter a judgment in the terms of the award. There might be some serious question raised as to the validity of the award or for some other reason the court might not be persuaded that the interests of justice favoured the order being made, for example because it thought it unnecessary…"

185. The *West Tankers* case concerned whether the Court had jurisdiction to give leave to enforce a declaratory award as a judgment under s.66 of the Act and, if so, whether the Court should do so as a matter of discretion. The jurisdictional argument was that there was no power to enforce such an award since a declaratory judgment does not involve enforcement. This argument was rejected by Field J and the Court of Appeal. Field J's exercise of his discretion to make an order under s. 66 was not challenged on appeal.

186. The Club relied upon Field J's discretionary decision in *West Tankers* and submitted that it was on all fours with the present case. The Club's stated objective in these proceedings is to obtain an English judgment which, by virtue of Article 34 (3) of the Judgments Regulation, would take primacy over any inconsistent Spanish judgment which might be rendered in November. A similar issue arose in *West Tankers*. Field J decided that the declaratory award would be enforced because

there was utility in so doing. He stated that:

> "28. The purpose of s66(1) and (2) is to provide a means by which the victorious party in an arbitration can obtain the material benefit of the award in his favour other than by suing on it. Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. In short, in such a case, the grant of leave will not facilitate the realisation of the benefit of the award. Where, however, as here, the victorious party's objective in obtaining an order under s66(1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award.
>
> ….
>
> 30 On an application under s. 66 or to set aside a s. 66 order, it is enough, in my view, in a case such as this, for the party seeking to enforce the award to show that he has a real prospect of establishing the primacy of the award over an inconsistent judgment. It is not necessary, nor is it appropriate, for the court finally to decide this hypothetical question–hypothetical because the unsuccessful party to the arbitration will not have obtained an inconsistent judgment in a member state at the time the court is dealing with the s. 66 application."

187. Similarly there is here a real prospect of establishing the primacy of the award over any inconsistent judgment which may be rendered in Spain and therefore a clear utility in granting leave to enforce. The prospect of so establishing primacy is borne out by cases in which it has been stated - *The Wadi Sudr* [2010] 1 Lloyd's Rep. 193 at [63] (per Waller LJ) - or assumed – *West Tankers* per Field J at [25-26] - that an award under s.66 is a "judgment" under s.34(3), and the decision to that effect of Beatson J in *African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2452 (Comm) at [27-28].

188. In the *African Fertilizers* case Beatson J followed and applied Waller LJ's obiter statement in *The Wadi Sudr* that Article 34(3) could be relied upon. As he stated at [28]:

> "(b) Mr Happé's submissions on this issue are inconsistent with the obiter statement of Waller LJ in National Navigation Co v Endesa Generacion SA (The Wadi Sudr) [2009] 2 CLC 1004 at [63]. Waller LJ stated that, where the English court had granted a declaration that an arbitration clause was incorporated into a contract (in that case a bill of lading) and a court in another member state subsequently refused to stay proceedings in that state, '… the claimant in England

could proceed with the arbitration in England; if that were inconsistent with the judgment obtained in the member state then that would provide an answer on its own [see article 34(3)]'."

189. The Defendants challenged the correctness of Beatson J's decision, but I agree with Field J that it would not be appropriate to decide that issue in circumstances where any inconsistency is still hypothetical and that it is sufficient for there to be a real prospect of establishing primacy, as there clearly is on the current authorities.

190. The Defendants submitted that there are two possibilities. The first is that the s.66 judgment is not a Regulation Judgment and therefore there is no utility in it. The second is that it is a Regulation Judgment, in which case it would be an inappropriate exercise of the Court's discretion to grant leave for such a judgment to be entered. The same applies to the exercise of that discretion on the basis that there is a real prospect of it being a Regulation Judgment.

191. The Defendants submitted that it would be an inappropriate exercise of the Court's discretion because it would serve to subvert the Regulation jurisdictional regime because:

i) The subject matter of the proceedings in Spain mean that they fall within the scope of the Regulation (Article 1) and any resulting judgment will be a Regulation Judgment;

ii) The subject matter of the enforcement proceedings in England is arbitration and thus outside the scope of the Regulation (Article 1(2)(d));

iii) The Spanish court was the court first seised for the purposes of Article 27(1) of the Regulation and were it not for the fact that s.66 proceedings fall outside of the Regulation the English Court would be obliged to stay its proceedings until such time as the jurisdiction of the court first seised was established;

iv) Thus if the English Court were to grant a Regulation Judgment in non-Regulation proceedings in the present case, it would be declining to respect the lis pendens provision in Article 27 and the direct action provision in Article 11, which it would be obliged to respect if these proceedings fell within the Regulation and by so doing, allocating itself primacy for the purposes of Article 34 over the judgment of the Spanish court as that which was first seised.

192. In short, the non-Regulation nature of the s.66 proceedings allows the Court to ignore the mandatory stay imposed by the Regulation and yet it would assert the

status of having issued a Regulation judgment in order to trump the judgment of the Court first seised. The Defendants submitted that such a result is not countenanced by the Regulation and that the Court should not exercise its discretion so as to encourage such a result.

193. This argument assumes that the Court should treat the present application as if it was regulated by the Regulation. However, this is an arbitration application and arbitration falls outside the Regulation. Potentially inconsistent decisions and lack of co-ordination are recognised consequences of the arbitration exclusion. As the Club put it, why should the Court refuse to grant a party the full benefit of an award which it has because to do so would run counter to the scheme of a Regulation that does not apply to arbitration?

194. In my judgment, as in the *West Tankers* case, there is a clear utility in granting judgment and the Regulation regime is not a good or sufficient reason for preventing the Club from seeking to realise the full benefit of their awards.

195. The Defendants raised a number of other matters which they submitted should persuade the Court not to exercise its discretion. These included the effect of declaratory relief on parties not before the Court; the risk of inconsistent judgments involving third parties; the fact that the Public Prosecutor is not party to these proceedings; and the potential effect of any judgment on criminal and civil proceedings which are all but concluded in which the Public Prosecutor is pursuing claims under the Spanish Penal Code in respect of matters of substantial public interest and importance in Spain and in France concerning the natural resources and heritage of those countries.

196. As to the effect on third parties, the awards do not bind any third parties and therefore do not affect their rights. Nor is there a risk of inconsistent judgments since the judgments will involve different parties. Although the Public Prosecutor is not party to these proceedings, the evidence is that any judgment obtained in Spain in respect of the civil claims brought by him on behalf of other parties (including Spain) will be in the name of the relevant party. There will therefore be no civil judgment for the Public Prosecutor.

197. As to the points made about the importance of and the public interest in the Spanish proceedings, I recognise the significance of the issues raised and the claims made in those proceedings, but there cannot be one rule for publicly important cases and another for less important cases. I also recognise that, if no English law advice was taken prior to bringing the direct claims against the Club, the Defendants might be surprised to learn that they are bound to bring those claims in arbitration. However, the Club entered into an English law insurance contract on agreed terms and priced the cover provided accordingly. Those terms involve no liability in the events which

have happened over and above the CLC liability, an international convention limit of liability which has been fully met. This Court has always upheld the principle of freedom of contract and supported the enforcement of contractual bargains freely entered into. The Club is doing no more than seeking to enforce its contractual rights in respect of a claim which is in substance a claim under the contract that it made.

198. For all these reasons I conclude that there is utility in granting the declarations sought, that no good reason has been shown why the Court should refuse to allow the Club to seek to realise the full benefit of the awards it has obtained, and that in the exercise of my discretion and in the interests of justice I should grant the s.66 application.

Conclusion

199. I answer the Issues raised as follows:

i) The proper characterisation of the claims is contractual.

ii) The claims are arbitrable.

iii) There has been no waiver of the right to arbitrate France's claims.

iv) The Court has jurisdiction because any state immunity has been lost pursuant to s.9(1) of the SIA.

v) In the exercise of its discretion the Court should grant the s.66 applications.

200. In the light of my conclusion on issues i) to iii) I refuse the Defendants' applications under ss.67/72.

201. In the light of my conclusions on issues iv) and v) I grant the Club's applications under s.66.

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