Neutral Citation Number: [2020] EWHC 1920 (Comm)

Case Nos: CL-2019-000097
CL-2019-000424
CL-2019-000578
CL–2019-000649

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24/07/20

Before :

Mr Justice Butcher

- -

Claim Nos. CL-2019-000097
CL-2019-000578

Between :

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED

Claimant

-and-

THE KINGDOM OF SPAIN

Defendant

Claim Nos. CL-2019-000424
CL-2019-000649

And Between :

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED

Claimant

-and-

THE FRENCH STATE

Defendant

M/T 'PRESTIGE'

- -

- -

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

Hearing dates: 18, 19 May, 19, 22 and 24 June 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE BUTCHER

Mr Justice Butcher:

Introduction

1. There are for determination four related Part 11 applications, arising in four sets of court proceedings.

2. Those court proceedings are as follows:

   (1) A claim made by the London Steam-Ship Owners' Mutual Insurance Association Ltd (which I will call 'the Club') against the Kingdom of Spain (which I will call 'Spain') for failure to honour an arbitral award of Mr Alistair Schaff QC dated 13 February 2013 (Claim No. Cl-2019-00097) ('the Spain Award Claim');

   (2) A claim by the Club against the French State (which I will call 'France') for failure to honour an arbitral award of Mr Schaff QC dated 3 July 2013 (Claim No. CL-2019-000424) ('the France Award Claim');

   (3) A claim by the Club against Spain for failure to abide by judgments and orders of Hamblen J dated 22 October 2013 and/or of the Court of Appeal dated 1 April 2015 (Claim No. CL-2019-000578) ('the Spain Judgment Claim'); and

   (4) A claim by the Club against France for failure to abide by judgments and orders of Hamblen J dated 22 October 2013 and/or of the Court of Appeal dated 1 April 2015 (Claim No. CL-2019-000649) ('the France Judgment Claim').

   I will refer to the Spain Award Claim and the France Award Claim, together, as 'the Award Claims', and the Spain Judgment Claim and the France Judgment Claim, together, as 'the Judgment Claims'.

3. Orders were made ex parte for service out of the jurisdiction on Spain and France (together, 'the States') of Claim Forms in each of those actions: by Teare J on 1 April 2019 (Spain Award Claim), by Waksman J on 18 November 2019 (Spain Judgment Claim), by Jacobs J on 4 October 2019 (France Award Claim) and by Jacobs J on 12 November 2019 (France Judgment Claim). The Club also contends that it has validly served Spain, on its solicitors, within the jurisdiction. The Part 11 applications with which I am now concerned, of which there is one for each action, seek, inter alia, the setting aside of the permission for service outside the jurisdiction of the Claim Forms and Particulars of Claim in each action, declarations that the States are immune from the English Court's jurisdiction, and declarations that the English Court has no jurisdiction to hear the Club's claims.

4. The principal grounds which have been relied upon in support of the Part 11 applications are, in summary, as follows:

   (1) In relation to the France Judgment Claim, France contends that there has been no valid service of the Claim Form;
   (2) In relation to each of the actions against them, the States contend that they have state immunity; and

(3) In relation to each of the actions against them, the States contend that this Court lacks territorial or personal jurisdiction over them.

5. The parties agreed that these grounds should be dealt with at two different sets of hearings in front of the same judge. Grounds (1) and (2) were accordingly dealt with at hearings held before me on 18 and 19 May 2020. Ground (3) was dealt with at hearings on 19, 22 and 24 June 2020. The parties were in agreement that I should give a single judgment addressing all the issues raised.

6. Between the two hearings, Henshaw J handed down judgment in the separate action between the Club and Spain, CL-2019-000192. That judgment ([2020] EWHC 1582 (Comm)) ('the Henshaw J judgment') was accordingly the subject of submissions at the second hearing before me.

Background

7. The background to these actions and applications, albeit involved, has been helpfully summarised in the parties' skeleton arguments, and is also set out in the Henshaw J judgment. For present purposes it may be briefly stated.

8. The disputes between the parties have their origins in a marine pollution incident in 2002, when the MT 'Prestige' ('the vessel') broke in two and sank off Cape Finisterre. The vessel had been carrying 70,000 MT of fuel oil, which escaped and polluted the Atlantic coastline of northern Spain and southern France, causing significant damage.

9. That incident led to the institution of criminal proceedings in Spain in late 2002. At the conclusion of the investigative stage of those proceedings in 2010, civil claims were brought by various parties within those criminal proceedings. In those proceedings:

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

(2) The shipowners ('the Owners') were also sued as vicariously liable for the master's conduct;

(3) The Club was sued pursuant to Article 117 of the Spanish Penal Code, as the liability insurers of the Owners under a contract of marine insurance. (It may be noted that the Club was also sued, in the same proceedings, pursuant to the Civil Liability Convention 1992 ('the CLC'). In 2003 the Club deposited a fund of approximately €22 million in respect of the Club's and the Owners' liability under the CLC with the Spanish Court. Those claims are not relevant to the present actions and applications).

10. Spain and France were each claimants in those proceedings: in the case of Spain both on its own behalf and on the basis that it was subrogated to certain claims of others.

11. The Club in its turn commenced arbitrations against Spain and France, separately, for declaratory relief, seeking declarations that: (i) Spain and France were each obliged to pursue their claims in London arbitration; (ii) the Club was under no liability to Spain or France by virtue, inter alia, of the inclusion in the insurance contract of a 'pay to be paid' clause; and (iii) (in the case of Spain), in any event, the liability of the Club was subject to the global limit of US$ 1 billion specified in the insurance contract.

12. This court appointed Mr Schaff QC as sole arbitrator in those arbitrations. Spain and France did not participate in them. In due course, Mr Schaff QC produced an award in each arbitration which included declarations that Spain and France were bound by the arbitration clause in the insurance contract and that their civil claims must be referred to arbitration in London; and that actual payment to the States by the Owners of the full amount of any insured liability was a condition precedent to any direct liability of the Club to them, pursuant to the 'pay to be paid' provision, and that in the absence of such prior payment the Club was not liable to Spain and France in respect of their claims. In the case of Spain, Mr Schaff QC further declared that the Club's liability was, in any event, not to exceed US$ 1 billion.

13. The Club then sought to enforce those awards as judgments pursuant to s. 66 Arbitration Act 1996 ('the 1996 Act'). Spain and France defended that claim and issued their own proceedings under ss. 67 and 72 of the 1996 Act for a declaration that the arbitrator had had no jurisdiction to render the awards.

14. The s. 66 and ss. 67/72 proceedings were heard before Hamblen J (as he then was) in October 2013. In his judgment (The 'Prestige' (No. 2) [2013] EWHC 3188 (Comm)) he rejected the ss. 67/72 applications and confirmed the decision of the arbitrator, and the awards were entered as judgments and orders were made in their terms. He also held that Spain and France were not entitled to invoke state immunity in respect of the Club's claims. He gave permission to the States to appeal in relation to some points.

15. Following the decision of Hamblen J, but before the Court of Appeal considered the appeal, the Provincial Court of La Coruña ('the Provincial Court') gave judgment in the Spanish proceedings on 13 November 2013. The master was acquitted of the crime of serious negligence against the environment. He was convicted of the crime of disobeying orders by the Spanish maritime authorities to accept a tow of the vessel, but this was held not to have had a causative effect. The Owners were not held liable and nor was the Club.

16. The Court of Appeal heard the appeal from the decision of Hamblen J in January 2015. In its decision on the appeal ([2015] EWCA Civ 333) the Court of Appeal upheld Hamblen J's decision, and further held that the States had submitted to the jurisdiction of the English Court by making the ss. 67/72 applications.

17. The Spanish case then came before the Spanish Supreme Court on a *recurso de casación* (cassation appeal) brought by Spain and France, amongst others, against the Provincial Court's judgment. The Spanish Supreme Court reversed the decision of the Provincial Court and held that the master was liable for the crime of serious negligence against the environment. It quashed his conviction for disobedience on the basis that his conduct had been taken into account in the first conviction. The Spanish Supreme Court went on to hold that the Owners were vicariously liable for the

master's conduct; and that the Club was directly liable to the Spanish claimants, including Spain and France. The Spanish Supreme Court also found that the Club's liability was subject to the limit of US$ 1 billion in the insurance contract.

18. The Spanish Supreme Court remitted the question of quantum to the Provincial Court. The Club participated in those proceedings. It contends that it did so 'under protest'. The Provincial Court rendered a judgment on quantum, and that judgment has, subject to a number of corrections, been upheld by the Spanish Supreme Court on appeal. On 2 January 2019, Spain applied to the Provincial Court for *ejecución* (enforcement) of the Spanish judgments on quantum. On 22 January 2019, France made a similar application. On 1 March 2019, the Provincial Court issued an execution order ('the Execution Order') setting out the amounts the various claimants were entitled to enforce as against the defendants in the proceedings. The Provincial Court declared Spain entitled to seek enforcement up to € 2.355 billion and France up to € 117 million, subject in the case of the Club to the limit of US$ 1 billion, which the Provincial Court declared to be a global limit of liability in the sum of € 855,493,575.65 (being the Euro equivalent of the dollar limit, less the value of the CLC fund deposited by the Club in 2003).

19. Spain then brought proceedings in this jurisdiction to have the Execution Order enforced against the Club. The Execution Order was registered by Spain (and not France), on an ex parte application, on 28 May 2019, by order of Master Cook, pursuant to Art. 33 of the Council Regulation (EC) No. 44/2001 ('Brussels I'). The Club has applied to set aside that registration order by way of an appeal under CPR Part 52. Those proceedings have been transferred to the Commercial Court. A CMC took place in January 2020, and directions have been given leading to a trial in December of this year.

20. The Club has served on the States a number of notices of arbitration commencing, or purporting to commence, fresh arbitration proceedings against them, seeking declarations that the States are in breach of their obligations not to pursue the direct civil claims other than by arbitration in London, as well as injunctive relief. It has also commenced arbitration claims in this Court, seeking the appointment of an arbitrator pursuant to s. 18 of the 1996 Act. That arbitration claim against Spain was the subject of the Henshaw J judgment.

21. The present proceedings were commenced by the Club on various dates in 2019. The avowed purpose of these actions is to allow it, should Spain and/or France be successful in enforcing the Spanish judgments in England or elsewhere, to set off against those judgments the amount of the judgments which the Club seeks to obtain in these actions.

The Four Actions

22. It is necessary to look at the nature of the four actions in somewhat more detail.

23. The Particulars of Claim in the Spain Award Claim relates the underlying facts, including the award made by Mr Schaff QC dated 13 February 2013 in the arbitration involving Spain, the continued pursuit by Spain of its claims in the Spanish courts

leading to the Spanish judgments, and the fresh arbitrations which the Club has commenced. The Spain Award Claim is summarised as follows (paragraph 7):

'In addition to those further claims brought in arbitration, the Club seeks in these proceedings declaratory relief that the Spanish State is in breach of its further and independent obligations to honour the Award [ie of Mr Schaff QC of 13 February 2013], obliging the Spanish State to pursue the non-CLC claims in London arbitration. Again, the Club also seeks an order that the Spanish State shall pay to the Club such sums as the Club is ordered to pay in any jurisdiction in which the Spanish judgments are recognised or enforced.'

24. The nature of the causes of action which the Club alleges in the Spain Award Claim appears from paragraphs 66-67 of the Particulars of Claim, which are as follows:

'66. For the reasons above, the Spanish State is bound to arbitrate its claims against the Club pursuant to Article 117 of the Spanish Civil Code 1995. That matter is *res judicata* by reason of the determination of the matter in the Award and the English Judgment.

67. Further, the Spanish State is a party to the Award and/or submitted to the arbitration and is therefore bound to honour the Award in contract and/or tort and/or as a matter of common law or statutory duty under the [1996] Act and/or in equity.'

25. The breach on the part of Spain of its 'obligation to honour the Award' is pleaded in paragraph 68 as having been the pursuit of its direct claims in the Spanish proceedings, up to and including the Spanish judgments and seeking their *ejecución*. It is also pleaded 'further and more generally', that Spain is in breach in having 'permitted the civil claims against the Club to continue and has failed immediately (or at all) to withdraw its claims before the Spanish Courts.' In paragraph 69 it is pleaded that as a result the Club has 'suffered loss in the form of a finding of liability pursuant to the Spanish Judgments and is liable to suffer further substantial loss and damages to the extent the Spanish Judgments are recognised or enforced against the Club in any jurisdiction worldwide.' In paragraph 70 the Club claims 'substantive relief, by way of damages or equitable compensation, for such loss and damage…'.

26. In paragraph 71 it is further alleged that Spain is obliged to pay to the Club the costs of the previous arbitral and court proceedings, agreed in the sum of £1,650,000.

27. The relief sought by the Club, pleaded in paragraph 72, is: (i) declarations that Spain is 'in breach of its obligation to honour the Award', and that if it takes further steps in Spain or elsewhere to enforce the Spanish judgments it will be in breach of its 'obligation to honour the Award'; (ii) damages or equitable compensation for these breaches; and (iii) £1,650,000 as debt or damages or equitable compensation.

28. The France Award Claim is *mutatis mutandis* the same.

29. The summary of the claim in the Club's statement of case in the Spain Judgment Claim is as follows (paragraph 8):

'In addition to those claims [ie its claims in the further arbitrations and in the Spain Award Claim], the Club seeks in these proceedings declaratory relief that the Spanish State is in breach of its further and independent obligations to abide by the English Judgment [ie the judgments and orders of Hamblen J of 22 October 2013 and/or of the Court of Appeal of 1 April 2015], obliging the Spanish State to pursue the non-CLC claims in London arbitration. Again, the Club also seeks an order that the Spanish State shall pay to the Club such sums as the Club is ordered to pay in any jurisdiction in which the Spanish judgments are recognised or enforced.'

30. The nature of the causes of action pleaded appears from paragraph 77 of the Particulars of Claim, which is in the following terms:

'Further, the Spanish State is a party to the English Judgment and/or submitted to the English Court Proceedings and/or agreed to be bound by the English Judgment and is therefore obliged to abide by the English Judgment in contract and/or tort and/or as a matter of common law duty and/or in equity."

31. The breaches, damages and relief pleaded are *mutatis mutandis* essentially the same as claimed in the Award Claims.

32. The France Judgment Claim is in materially the same terms, subject to the differences necessitated by there being different Defendants, as the Spain Judgment Claim.

Service on France of the France Judgment Claim

33. The first issue which arises is as to whether there has been valid service. This issue arises only in relation to one action, namely the France Judgment Claim. This is because the Award Claims have been served via the Foreign and Commonwealth Office, which both States accept to be valid service, and because Spain takes no point as to there having not been service of the Spain Judgment Claim. France does, however, take the point in relation to the Judgment Claim against it.

34. The point, though in itself an important one, is not likely to have any great significance in this case. This is because the Club has been seeking that the France Judgment Claim should be served via the Foreign and Commonwealth Office. There have been delays, apparently exacerbated by the COVID-19 lockdowns. Nevertheless, service is likely to be affected via this route relatively soon, and that, as I have said, France would accept to be valid service. Accordingly, the issue arises because of the timing of the hearing of these applications by comparison with the progress of service via diplomatic channels. Nonetheless, the point does arise, and has been fully argued.

35. The issue is whether service of proceedings on a Member State of the EU such as France can be affected by the methods prescribed in Regulation (EU) No. 1393/2007 ('the Service Regulation'), or can only be effected in accordance with the regime set out in s. 12 of the State Immunity Act 1978 ('the SIA'). The Club has sought to serve in accordance with s. 12(1) of the SIA, and by post under Art. 14 of the Service Regulation, by bailiff under Art. 15 of the Service Regulation, and through the designated agencies under Arts. 4-7 of the Service Regulation. There was no dispute

before me that, if service in accordance with the Service Regulation was required or permitted then there had been valid service by one or other of these methods. France, however, contends that the Service Regulation has no application to service on it or on other EU Member States. It contends that service via the Foreign and Commonwealth Office pursuant to s. 12 of the SIA is 'of mandatory and exclusive application'.

36. The two potentially applicable regimes are thus a domestic one, under the SIA, and an EU regime under the Service Regulation.

37. As to the first, s. 12 of the SIA provides, in part, as follows:

'(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.
…

(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) do not apply where service is effected in any such manner.
…'

38. The Service Regulation is the third iteration of a European instrument on service. On 26 May 1997 the Council adopted the first, a Convention on the service in the Member States of the EU of judicial and extrajudicial documents in civil or commercial matters ('the Service Convention'). The Service Convention did not enter into force because, though adopted under the Treaty of Maastricht, it had not been ratified before the Treaty of Amsterdam came into force in October 1997. On 29 May 2000, the EU enacted the second, namely Regulation (EU) No. 1348/2000 ('the Old Service Regulation'). This was the result of a proposal by the Commission for an EU directive on service, to bring the provisions of the Service Convention into force under the auspices of the EU. On 13 November 2007, the EU enacted the third, namely the Service Regulation, as a result of a proposal by the Commission to amend the Old Service Regulation.

39. The Service Regulation commences with 29 recitals, which include the following:

'…
(2) The proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between Member States.
…

(6) Efficiency and speed in judicial procedures in civil matters require that judicial and extrajudicial documents be transmitted directly and by rapid means between local bodies designated by the Member States. Member States may indicate their intention to designate only one transmitting or receiving agency or one agency to perform both functions, for a period of five years. …

(7) Speed in transmission warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the document received are observed. …
…

(17) Each Member State should be free to effect service of documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent.

(18) It should be possible for any person interested in a judicial proceeding to effect service of documents directly through the judicial officers, officials or other competent persons of the Member State addressed, where such direct service is permitted under the law of that Member State.'

40. Art. 1 of the Service Regulation provides, in part:

'1. This Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there. It shall not extend in particular to revenue, customs or administrative matters or to liability of the State for actions or omissions in the exercise of state authority (*acta iure imperii*).
…

3. In this Regulation, the term 'Member State' shall mean the Member States with the exception of Denmark.'

41. The Service Regulation then provides, in Art. 2, for the designation by each Member State of agencies for the transmission and reception of judicial or extrajudicial documents to be served in another Member State, and in Chapter II, Section 1 (Arts. 4-11) for the transmission of documents between the agencies designated pursuant to Art. 2.

42. Chapter II, Section 2 provides for 'Other means of transmission and service of judicial documents'. Its provisions are as follows:

'*Article 12*
Transmission by consular or diplomatic channels
Each Member State shall be free, in exceptional circumstances, to use consular or diplomatic channels to forward judicial documents, for the purpose of service, to those agencies of another Member State which are designated pursuant to Articles 2 or 3.

Article 13
Service by diplomatic or consular agents

1. Each Member State shall be free to effect service of judicial documents on persons residing in another Member State, without application of any compulsion, directly through its diplomatic or consular agents.
2. Any Member State may make it known, in accordance with Article 23(1), that it is opposed to such service within its territory, unless the documents are to be served on nationals of the Member State in which the documents originate.

Article 14

Service by postal services

Each Member State shall be free to effect service of judicial documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent.

Article 15

Direct service

Any person interested in a judicial proceeding may effect service of judicial documents directly through the judicial officers, officials or other competent persons of the Member State addressed, where such direct service is permitted under the law of that Member State.'

43. The Club's argument may be summarised as follows:

(1) The Service Regulation, as an EU Regulation, had, at the time of service, direct effect in the English legal order pursuant to s. 2 of the European Communities Act 1972, and thus automatic primacy in the UK, overriding inconsistent provisions of national law.

(2) The Service Regulation applies to all claims that are within its subject matter, namely civil and commercial matters. The Service Regulation specifically does not apply to proceedings concerned with the liability of a state for sovereign acts, but does apply in respect of a state as regards non-sovereign acts, and thus to claims against a state for such liability.

(3) The Service Regulation is a mandatory and exclusive regime for service, and permits no derogations for other means of service in national law.

(4) The Service Regulation contains a number of methods of service. The CJEU has held that there is no hierarchy between those methods, that one or more methods may be used, and that the effective date of service is the first date on which the document is served under any of those methods: Plumex v Young Sports NV [2006] I.L. Pr. 13.

(5) Accordingly, since the Club's claims are a civil or commercial matter and are required to be served on the territory of France, the Service Regulation applies exclusively and exhaustively, and the Club was both entitled and required to serve France by one of the methods which it provides for.

44. France's argument, by contrast, may be summarised as follows:

    (1) That s. 12 of the SIA is applicable.

    (2) It has been stated by the Court of Appeal, the judicial committee of the House of Lords and by the Supreme Court, including after the enactment of the Service Regulation, that where proceedings are brought against a state, the application of s. 12 of the SIA is mandatory. Reference was made to Kuwait Airways Corp v Iraqi Airways Co [1995] 1 WLR 1147; Al-Malki v Reyes [2019] AC 735; and General Dynamics UK Ltd v Libya [2019] 1 WLR 2913.

    (3) CPR 6.44 governs the situation where a party wishes to serve a Claim Form or other document on a state, and it requires service via the Foreign and Commonwealth Office in accordance with s. 12 of the SIA, save where s. 12(6) of that Act applies, and no mention is made of the Service Regulation.

    (4) France does not dispute that claims against a Member State can fall within the Service Regulation if not concerning *acta iure imperii*; and does not contend, in the light of the decision of the CJEU in Fahnenbrock v Hellenic Republic [2016] I.L. Pr. 4, that the Court can say at this stage that the Club's claim falls within the *acta iure imperii* exception to the Service Regulation. What France contends is that the Service Regulation itself preserves the ability of Member States to provide for service to be exclusively by diplomatic means, by its Art. 12. It is for each Member State to decide what constitutes an 'exceptional circumstance', and by s. 12 of the SIA and CPR 6.44 the UK has decided that, save where s. 12(6) applies, actions against states constitute such circumstances.

    (5) It is necessary for service to be effected by diplomatic means to ensure respectful dealings between states; and in such matters the executive, which is responsible for international relations, has a legitimate role in deciding when and how service is to be effected.

45. In my judgment the Club's arguments on this point are correct. The Service Regulation is applicable to the service of the relevant proceedings on France. I say this for the following reasons:

    (1) It was not in dispute that the Service Regulation is applicable to actions against Member States, save where they concern matters which can be manifestly seen to concern *acta iure imperii*. This appears to be clearly correct, given the terms of Art. 1.1 of the Service Regulation, and the decision of the CJEU in Fahnenbrock. It would be consistent with the objectives of the Service Regulation as identified in its recitals that this should be the case.

    (2) Where the Service Regulation applies, it establishes a mandatory regime for service, and does not permit derogations for other means of service in national law. That is established by the CJEU decision in Alder v Orlowska (Case C-325/11).

(3) Art. 12 of the Service Regulation is not intended to and does not provide for Member States to establish a method of service on Member States which is different from and excludes the other methods set out in the Service Regulation. Art. 12 is a liberty which is conferred on Member States, which may be exercised in exceptional circumstances. Art. 12 does not say that it excludes, and in my view clearly is not intended to exclude, the operation of the other provisions of the Service Regulation.

(4) The Service Regulation thus does not permit of national rules restricting service on a Member State to service under Art. 12. Furthermore, and in any event, s. 12 of the SIA would not be such a rule, because it does not expressly seek to restrict service to Art. 12 of the Service Regulation. Nor does it do so impliedly, because it is a different rule. Under s. 12 of the SIA service is effective on the Ministry of Foreign Affairs, whereas under Art. 12 service is on the receiving agency designated under Art. 2(2), which in France is a *huissier* (or bailiff).

(5) It would be incompatible with the rules in the Service Regulation for a national law, such as the SIA, to restrict service to a particular method such as service via diplomatic means, and would tend to undermine the objective and scheme of the Service Regulation which is intended to facilitate and expedite service, not to make it a more difficult or lengthy process.

(6) That it is the intention of the Service Regulation that service can be validly effected on Member States by any of the methods established by the Service Regulation is supported by the only commentary emanating from the organs of the EU which the parties have identified as bearing on the issue. Thus the Report of the Commission on the practical operation of the Service Regulation published on 4 December 2013 (COM/2013/858/final) contained the following:

‘3.2.2. Service of documents on States.
The Regulation does not extend, in particular, to revenue, customs or administrative matters or to liability of the State for actions or omissions in the exercise of state authority (*acta iure imperii*). In some Member States, questions have arisen regarding the service of documents on States. Article 1 excludes indeed the above-mentioned matters from the scope of the Regulation. *A contrario* and in accordance with the guidelines given by the European Court of Justice on the interpretation of the term “civil and commercial matters” in disputes between a public authority and a private person, such disputes may be covered by the Regulation to the extent that they concern civil claims and the State concerned acted as a private person (*acta iure gestionis*). <u>It is to be noted that even if the addressee of a judicial or extrajudicial document in a civil or commercial matter is a State or a State entity, all methods of transmission provided for by the Regulation may be used for purposes of serving documents abroad.</u>’ (emphasis added)

(7) None of the cases to which France referred in this context (<u>Kuwait Airways</u>, <u>Al-Malki</u> and <u>General Dynamics)</u> concerned service on an EU Member State or discussed the Service Regulation. Section 12 of the SIA is and remains mandatory, save where it is inconsistent with EU legislation which has primacy, which the Service Regulation has.

(8) While it may be right that the effect of the Service Regulation on service on EU Member States is not reflected in textbooks or in the CPR Rules, this does not affect its proper construction or effect.

(9) Respectful dealing between EU Member States does not require service solely through diplomatic channels because the EU Member States are bound by a regime which prioritises other considerations, namely the harmonisation of national rules on service and the development of a common European area of civil justice.

46. For these reasons, I conclude that France has been validly served with the France Judgment Claim.

State Immunity

The relevant provisions of the SIA

47. Spain and France contend that they are immune from the jurisdiction of this court in respect of the claims brought in the four actions by the Club. They rely on s. 1 of the SIA which provides:

‘**1. General immunity from jurisdiction.**
(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.’

48. The Club contends that the States are not immune, because one or more of the exceptions provided for by sections 2, 3(1)(a), 3(1)(b) and 9 of the SIA is or are applicable. Those sections provide, in relevant part, as follows:

‘**2. Submission to jurisdiction**
(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 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.
…

(6) A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim.
…

3. Commercial transactions and contracts to be performed in United Kingdom

(1) A State is not immune as respects proceedings relating to –

(a) A commercial transaction entered into by the State; or

(b) 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.

…

(3) In this section 'commercial transaction' means -

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

But neither paragraph of subsection (1) applies to a contract of employment between a State and an individual.

…

9. Arbitrations.

(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.'

The Parties' arguments

49. The Club's case may be summarised as follows:

(1) *Section 9*. The claims which the Club now brings 'relate to' the arbitrations which were commenced by the Club by notices of arbitration dated 16 January 2012, and in which, in accordance with the decisions of Hamblen J and the Court of Appeal in The Prestige (No. 2), the States were bound to pursue their claims against the Club under Article 117 of the Spanish Penal Code.

(2) In the case of the Award Claims the present actions were 'actions on the award [in each of those arbitrations] at common law, suing on the obligation to honour the award'. Such an action 'is obviously related to the arbitration and so within s. 9 of the [SIA]'.

(3) In the case of the Judgment Claims, the present actions are claims 'based on judgments which were themselves rendered under s. 66 of the Arbitration Act 1996 to enforce the Awards', and 'are thus part of the process of enforcing the parties' obligations in the Awards, as determined in the arbitration and confirmed in the judgments in which the Awards were confirmed.'

(4) *Section 3*. Whether or not s. 9 is applicable, each of s. 3(1)(a) and 3(1)(b) is applicable in relation to both Spain and France.

(5) As to s. 3(1)(a), the four actions relate to 'a commercial transaction entered into' by each of the States. That 'commercial transaction' is each State's 'pursuit of their civil claims in Spain, in ordinary proceedings for liability in civil law'. That falls within the wide meaning of 'commercial transaction' given to the phrase by s. 3(3).

(6) Furthermore, if, contrary to its submission that the pursuit of their claims did not otherwise fall within the terms of s. 3(3) (and thus s. 3(1)(a)), s. 3 should be construed to have that effect pursuant to s. 3 of the Human Rights Act 1998, which requires the Court to read the SIA consistently with Art. 6 of the ECHR. State immunity going beyond that permitted under international law is a violation of a litigant's access to court under Art. 6; and any interpretation of the SIA which goes further than the right to immunity for sovereign acts in international law is 'necessarily disproportionate' under the ECHR: see Benkharbouche v Embassy of the Republic of Sudan [2017] UKSC 62, [2017] 3 WLR 957, esp. at para [34]. The only relevant immunity under international law is the restrictive immunity in relation to truly sovereign acts, recognised in I Congreso del Partido [1983] 1 AC 244, which is confined to acts *iure imperii*. The pursuit of their civil claims in the Spanish proceedings was not, and has never been suggested to be, an act of Spain or France *iure imperii.*

(7) Section 3(1)(b) is also applicable because, under the contract of insurance made by the Club there is an obligation to arbitrate in London. It is not necessary for the relevant state to be an original party to the contract in question: see J.H. Rayner (Mincing Lane) v Department of Trade and Industry [1989] Ch 72 esp. at 222F per Nourse LJ. The present claims 'relate to' that obligation to arbitrate in London. In the case of the Award Claims this is because they are 'actions on arbitral awards rendered pursuant to the arbitration clause'; in the case of the Judgment Claims it is because those judgments were rendered in arbitration proceedings declaring the States bound by the obligation to arbitrate in the Club Rules and enforcing the awards rendered pursuant to that clause.

(8) *Section 2*. In relation to Spain only (ie in relation to the Spain Award Claim and the Spain Judgment Claim) the Club contends that there has been a submission for the purposes of s. 2. This is because Spain has applied ex parte to register the Execution Order of the Spanish courts as a judgment of the High Court in England. That has rendered Spain amenable to counterclaims provided that they arise out of the same legal relationship or facts as the claim. Here, the present proceedings could be brought as a counterclaim in the registration proceedings, and arise out of the same legal relationship or facts, and therefore Spain has no immunity in respect of the claims which the Club has brought against it.

50. Spain and France contend as follows:

(1) *Section 9*. Section 9 is of no application. The Club would have to identify how Spain and France had agreed to submit a relevant dispute to arbitration. There is no such relevant dispute which has been submitted to arbitration. The Club cannot successfully contend that it is the dispute which arose and which was resolved by Mr Schaff QC. That dispute did not involve any claim for damages or compensation as a result of putative non-compliance with the awards (or

judgments enforcing them). Further that dispute was fully and finally determined, at latest when final relief was granted by the courts. The present dispute is about the response of Spain and France following the awards and the judgments, in continuing with their civil claims in Spain. There has never been any agreement by the States to submit *those* disputes to arbitration, and it was not held in the English judgments that there had been.

(2) Further, the present proceedings brought by the Club do not relate to that arbitration. The Award Claims are not actions on the awards at common law or otherwise: they are not an 'enforcement' of the declaratory awards made in the arbitrations; they are instead actions for damages which are based on the fact that the declaratory awards made in the arbitrations were not sufficient for the Club's purposes. The claims for damages which the Club now makes were not made in the arbitrations and were not the subject of awards by Mr Schaff QC.

(3) The position is *a fortiori* in the case of the Judgment Claims. They are a further step removed from the arbitration, and cannot be said to relate to the arbitration which took place in front of Mr Schaff QC.

(4) *Section 3.* Section 3(1)(a) is inapplicable because the present proceedings do not 'relate to' any commercial transaction. Instead, they 'relate to' the awards of Mr Schaff QC and / or the judgments which are consequential upon them. The words 'relating to' in the section have been authoritatively interpreted as narrow, and as not extending to claims arising out of a judgment or an award: see <u>Svenska Petroleum Exploration v Government of the Republic of Lithuania</u> [2007] 1 Lloyd's Rep 193, and <u>NML Capital Ltd v Republic of Argentina</u> [2011] UKSC 31, [2011] 2 AC 495 per Lord Mance at [97].

(5) There is no scope for 'reading down' section 3(3) and 3(1)(a). Section 3(3) and 3(1)(a), interpreted in accordance with the States' construction, is consistent with international law, or is within the court's margin of appreciation in circumstances where there is no contrary customary international law definition of a 'commercial transaction', and Art. 6 of the ECHR is accordingly not engaged. Alternatively the interpretations given to s. 3 in <u>Svenska</u> and <u>NML</u> complies with Art. 6 because the restrictions in the SIA pursue a legitimate aim and are proportionate.

(6) Section 3(1)(b) is not applicable. The actions do not relate to obligations of the State which by virtue of a contract fall to be performed in the UK. The alleged obligation to honour the awards is not one which arises out of any agreement to arbitrate, because the arbitration has already taken place and there is nothing left to perform. The alleged obligation to honour the court judgments is not a contractual obligation.

(7) *Section 2.* Section 2 has no application. The current claims against Spain are not counterclaims in Spain's enforcement proceedings: they are Part 7 proceedings brought by distinct originating processes. Furthermore, the present claims could not be brought as counterclaims in the enforcement proceedings. By the enforcement proceedings Spain has submitted only to the appeal process allowed for by Brussels I and the CPR.

Analysis and conclusions

51. In my judgment, despite the sophistication with which the arguments on these points were pursued on both sides, what are raised are relatively short points as to the proper construction of the SIA and its application to the facts of the present case.

Section 9

52. I will begin, as did the parties, with s. 9. In my judgment while the Award Claims can be said to 'relate to' an arbitration for the purposes of s. 9(1), the Judgment Claims cannot.

53. The Award Claims are based on an obligation which the States are said to be under to honour the awards of Mr Schaff QC. As was held in The Prestige (No. 2), by bringing and pursuing non-CLC claims in Spain, France and Spain agreed in writing to submit the relevant disputes to arbitration: The Prestige (No. 2) [126]-[158] (Hamblen J), [55]-[70] (Court of Appeal). The Award Claims are based on the alleged breach of what the Club contends was the implied obligation on the States to honour the resulting award. That obligation, as I set out in more detail below, is said to arise in contract, or as a substantive equitable obligation or as a matter of statutory duty or at common law. As I say below, I consider that that case raises a serious issue to be tried. Those claims can, in my judgment, be properly said to 'relate to' the arbitrations to which, as found in The Prestige (No. 2), the States agreed to refer the disputes as to their entitlement to pursue their claims. The relationship arises from the fact that the Award Claims depend upon there having been an obligation on the States to honour and give effect to the arbitration awards, which arose by reason of the submission of the relevant disputes to arbitration.

54. The facts that the claims made in the present Award Claims were not themselves submitted to that arbitration, and that that arbitration is over are not, in my view, answers to this. Section 9 of the SIA can apply in relation to proceedings concerned with arbitrations which are no longer extant and where the tribunal is *functus*. This is the case in proceedings to enforce an award, as was the case in The Prestige (No. 2), Svenska and LR Avionics v Federal Republic of Nigeria [2016] EWHC 1761 (Comm).

55. The States also contended that enforcement of the awards had been concluded by their embodiment in the judgments of the court pursuant to the Club's s. 66 application. They referred in particular to what was said in paragraph [117] of Moore-Bick LJ's judgment in Svenska, as follows:

   'In our view an application under section 101(2) of the Arbitration Act 1996 for leave to enforce an award as a judgment is, as subsection (1) recognises, one aspect of its recognition and as such is the final stage in rendering the arbitral procedure effective.'

   The States emphasise the words 'the final stage' and contend that no proceedings subsequent to the enforcement of an award as a judgment can 'relate to' the arbitration for the purposes of s. 9 of the SIA.

56. In my judgment that is to read too much into what was said in that paragraph. The Court of Appeal was not there concerned with an action based on a failure to comply with the implied obligation to honour an award, and nor was it addressed with the complex arguments with which I have been presented as to the relationship between that sort of action and the statutory methods of enforcing awards under ss. 66 and 101 of the 1996 Act, and whether the former can survive enforcement of the award under the latter. The distinction which the Court of Appeal was making in the context of that case was between steps to secure recognition of the award and thus make the arbitral procedure effective and process in respect of property for the enforcement of an award, which is dealt with in s. 13(2)(b) of the SIA. I therefore do not consider that Svenska answers the issue which arises for decision as to whether s. 9 of the SIA means that the States are not immune in respect of the Award Claims. I should however add that, in terms of paragraph [117] of Svenska, I consider that the claims made in the Award Claims can be said to be a step aimed at rendering the arbitral procedure effective.

57. Ultimately, however, the question which arises in relation to s. 9 of the SIA is whether the Award Claims 'relate to' the arbitration which there has been. As a matter of the natural meaning of the phrase, I consider that they do.

58. By contrast, I do not think that the same can be said of the Judgment Claims. They are, quite specifically, based not on any obligation to submit claims to arbitration, or on any obligation to comply with the result of the arbitration, but on an alleged obligation to comply with judgments of this court. These obligations are said to arise by way of an implied contract on the part of a party to litigation to honour the judgment (ED & F Man (Sugar) v Haryanto (CA, 17 July 1996); or because the parties (including the States) voluntarily submitted to and participated in the earlier English court proceedings before Hamblen J and the Court of Appeal, and this amounted to a 'species of jurisdiction agreement'; or because the English court may order a litigant to compensate an opposing party for breach of a court order or judgment. They are said to be 'further and independent obligations', ie ones different from and independent of the alleged obligations to honour the arbitration awards.

59. In those circumstances, it seems to me that those claims 'relate to' the English proceedings, and to the judgments in which they culminated. Furthermore, given that the context and purpose for which this question is being asked is to determine whether the States are immune, claims which are said to be based on an obligation to adhere to judgments of the courts of one state raise different considerations from claims which can be said to relate to a consensual (whether contractual or here quasi-contractual) submission of disputes to a tribunal which is not a municipal court. The interposition of the English court proceedings and judgments thus makes, in my view, a significant difference for the purposes of the application of s. 9 of the SIA.

Section 3

60. I turn next to s. 3 of the SIA. In considering this section it is important to observe at the outset that it is, in my judgment, now clear that there may be an overlap of

exceptions to immunity between that provided for under s. 3 and that under s. 9 of the SIA; and that the possibility of an overlap is not a reason for giving a narrow construction to s. 3. This was the view expressed by four members of the Supreme Court in NML Capital, especially at paragraphs [30] (Lord Phillips), [112] (Lord Collins with whom Lord Walker agreed), and [150] (Lord Clarke). Whether or not this forms part of the ratio of the case, I find these expressions of view persuasive and I respectfully agree with them. Accordingly, if I am right that s. 9 is applicable to the Award Claims, that does not of itself mean that s. 3 is inapplicable. Equally, of course, if s. 9 of the SIA is inapplicable to the Award or Judgments Claims, that does not of itself mean that s. 3 is inapplicable.

61. I will consider first s. 3(1)(a) of the SIA. Here, the Club contends that the continued pursuit by Spain and France of their direct civil claims in the Spanish proceedings constituted a 'commercial transaction', because it was a 'transaction or activity … into which [the two States] entered or in which [they] engaged otherwise than in the exercise of sovereign authority' within s. 3(3)(c) of the SIA. I consider that the Club is clearly correct in relation to this. Section 3(3)(c) is very broadly expressed. The claims which Spain and France pursued in the Spanish proceedings were civil claims which, in English law terms, constituted an attempt to enforce the terms of the insurance contract. Similar claims were also brought against the Club in the Spanish proceedings by, and judgment was awarded to, 264 non-State parties. Those other litigants' claims were obviously not sovereign ones, and no more were Spain's or France's. The prosecution of such claims thus appears to me plainly to constitute an 'activity', which was of a 'commercial or similar character', in which the States 'engaged' which was not in the exercise of sovereign authority.

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

63. The cases of Svenska and NML Capital which Spain and France cited in relation to the meaning of 'relating to' are not of assistance to them. The point which arose in Svenska in relation to s. 3 of the SIA was whether the proceedings in question, which were enforcement proceedings, related to the award which had been rendered, or to the underlying transaction. It was held that the proceedings related to the award and not to the underlying transaction, because the 'subject matter of the proceedings' was the enforcement of the award. The reasoning of Moore-Bick LJ at paragraphs [135]-[137] was that the issues which would arise in the proceedings related to the enforceability of the award, not to the underlying merits of the transaction. The decision of the majority in NML Capital in relation to s. 3 was again concerned with whether the state's immunity extended to the actions for the enforcement of judgments. Again, Lord Mance, in paragraph [85], emphasised that claims based on judgments commonly give rise to quite different issues from those which are based on a cause of action where no judgment is involved. In neither case was there any equivalent of the present situation. Here, the actions relate directly to the underlying commercial transaction, identified in the way I have above.

64. I should add that there was, as it seemed to me, a tension between the States' cases as to s. 9 and s. 3(1)(a). For the purposes of their argument on s. 3, they stressed that the present actions 'relate to and are for the enforcement of the Awards and/or Judgments and the obligations said to be consequential upon them' (Defendants' Main Skeleton para. 31). That type of reasoning might be thought to suggest that the actions (or at least the Award Claims) related to the arbitrations which were conducted, and fell within s. 9. Yet the States deny that that is so, on the basis that those arbitrations have been concluded (including by enforcement). The States had difficulty, as I saw it, in articulating why the case fell within neither exception. In my view the correct analysis is that all the actions fall within s. 3, as relating to the commercial transaction constituted by the States' pursuit of their civil claims, and the Award Actions also fall within s. 9 because the pursuit of those civil claims can also be said to be a breach of obligations in respect of the awards of Mr Schaff QC.

65. Given my view that on an ordinary construction of s. 3 of the SIA the States are not immune in respect of the current proceedings, on the basis that they relate to an activity in which the States have engaged which is not in the exercise of sovereign authority, I do not need to consider the arguments which were addressed to the effect that the exception in s. 3 to the immunity in s. 1 must be interpreted more widely than would otherwise be the case in order to conform to Art. 6 of the ECHR.

66. After I had reached the conclusions which I have set out above, the Henshaw J judgment was handed down and the parties made submissions on it to me. I consider the reasoning of Henshaw J at [93]-[115] consistent with my own conclusions. In particular I entirely agree with Henshaw J's reasoning at paragraphs [99]-[100]. I also agree with his analysis that <u>Svenska</u> and <u>NML Capital</u> are distinguishable (both in the case of the action with which he was concerned and the actions with which I am concerned) because they do not consider an 'activity' equivalent to the States' pursuit of their civil claims in the Spanish proceedings which features in this case.

67. In light of my conclusion in relation to s. 3(1)(a), it is not necessary for me to reach a conclusion as to whether the Club's case in relation to s. 3(1)(b) is correct. In this context, it is to be noted that in the course of his judgment in <u>The 'Prestige' (No. 2)</u>, Moore-Bick LJ considered an argument that Spain and France were not immune from the proceedings then in issue by reason of s. 3(1)(b). At paragraphs [75]-[76], he said this:

'[75] … Once one accepts, however, that the proceedings relating to arbitration are not governed exclusively by section 9, the question is whether the present proceedings are proceedings "relating to an obligation which by virtue of a contract falls to be performed wholly or partly within the United Kingdom".

[76] In my view the answer to that question in this case is not straightforward. The appellants themselves have not incurred an obligation to the Club by virtue of a contract in the ordinary sense. At best, all that can be said is that, when a claim was asserted by the appellants and resisted by the Club, a difference arose which, by virtue of the Club rules, the appellants and the Club were entitled to refer to arbitration. It is arguable that that is not sufficient to constitute an obligation of the kind envisaged by section 3(1)(b) and since it is not necessary to reach a final decision on the point for the disposal of the appeal, I prefer not to do so.'

68. The question of the applicability of s. 3(1)(b) in the present case is no less difficult than that which arose as to the proceedings in The 'Prestige' (No. 2). Certainly the obligation relied on by the Club, which is effectively an obligation to abide by the arbitration awards and not to continue with proceedings elsewhere, is far from being the paradigm case falling within s. 3(1)(b). Given that it is not necessary for my decision, I also prefer not to express a concluded view on it.

Section 2

69. As to s. 2 of the SIA, the argument applies only to Spain. Once again, in light of my conclusions in relation to s. 3 it is unnecessary for me to express any views on this argument. It also appears to me undesirable that I should do so given that it may depend, at least in part, on what claims are or can be properly regarded as 'counter-claims' in the enforcement proceedings which Spain has brought. Those proceedings are not before me.

Jurisdiction

70. The States challenge the jurisdiction of the Court. The bases for this challenge differ between the sets of proceedings, and need to be introduced in some detail.

71. In relation to the Award Claims, it is common ground between the parties that the applicable rules governing jurisdiction are the common law rules. This is because it is common ground between the parties that these claims fall within the arbitration exception to Regulation (EU) No. 1215/2012 ('the Recast Regulation').

72. The States contend that the Court does not have jurisdiction over the Award Claims, and that service must be set aside. The Club answers that Spain has submitted to the jurisdiction, which Spain denies. Subject to that point, it is common ground that the issue of whether the States were validly served with the claims out of the jurisdiction depends on whether three requirements are met. Those three requirements are: (i) that the claims fall within a statutory gateway in PD6B, para. 3(1); (ii) that there is a serious issue of fact or law that should be tried; and (iii) that England is clearly or distinctly the most appropriate forum. While, as I understood it, not conceding (i), the States' argument concentrated on (ii). Further the States contended that, even if there was a point of law which met the 'serious issue to be tried' test, I should nevertheless now decide the point. The Club contended that there were serious issues to be tried, and that the Court should not seek to determine any issues which surmounted that hurdle on this application.

73. In relation to the Judgment Claims, the structure of the arguments was more complex. This is because the parties disagree as to whether those claims fall within the scope of the Recast Regulation. The States submitted that they do. The Club submitted that they do not, as falling within the arbitration exception to it.

74. The arguments presented in relation to the Judgment Claims were accordingly, in summary, structured as follows:

(1) Whether the Judgment Claims fall within the Recast Regulation, or within the arbitration exception to it.

(2) If the answer to question (1) is that they fall within the arbitration exception to the Recast Regulation, does the Court have jurisdiction according to the common law rules? That depends on whether Spain has submitted to the jurisdiction. Subject to that, it depends on whether the three requirements already mentioned are met: (i) whether the claims fall within a statutory gateway; (ii) whether there is a serious issue to be tried; and (iii) whether England is clearly the most appropriate forum.

(3) If the answer to question (1) is that they fall within the Recast Regulation, and not within the arbitration exception thereto, are they 'matters relating to insurance' within section 3 of the Recast Regulation? The States contend that they are; the Club contends that they are not.

(4) If the answer to question (3) is that they are 'matters relating to insurance', are the States within the categories of persons who are entitled to benefit from section 3 of the Recast Regulation?

(5) If the answers to questions (3) and (4) is 'yes', does the English court have jurisdiction in respect of Spain under Article 14(2) of the Recast Regulation (counterclaims within Section 3 of the Recast Regulation)?

(6) If the answer to question (3) or (4) is 'no', does the English court have jurisdiction in respect of Spain under Article 8(3) of the Recast Regulation (counterclaims)?

(7) If the answer to questions (3) or (4) is 'no' does the English court have jurisdiction over the States under Articles 7(1) or 7(2) of the Recast Regulation (contract and tort/delict)?

75. A further issue arises in relation to the claims which the Club seeks to bring in respect of the costs of the previous proceedings.

76. I turn to consider these issues, starting with those relating to the Award Claims.

The Award Claims

77. As I have said, the parties were agreed that the relevant jurisdictional rules are the common law rules. At common law, this court has territorial jurisdiction in respect of proceedings served on a defendant as of right within the jurisdiction. Otherwise it depends on whether there has been valid service out of the jurisdiction.

78. The Club argued, with regard to the Spain Award Claim (and not the France Award Claim), that the Court had jurisdiction because Spain had submitted to the jurisdiction of the court in bringing its enforcement proceedings. By commencing such proceedings, the Club said, Spain had submitted to the court's jurisdiction in respect of counterclaims which could be made against it. This, the Club argued, extended to the Spain Award Claim, notwithstanding that the Spain Award Claim is not in form a

counterclaim in the enforcement proceedings, and notwithstanding that there has been no determination in those proceedings that the Spain Award Claim, or any equivalent of it, could be brought as a counterclaim.

79. This argument, like the (distinct but cognate) issue in relation to s. 2 of the SIA, appeared to me to raise issues as to what claims could and what could not be regarded as counterclaims which the Club was entitled to bring in relation to the enforcement proceedings. Those proceedings are not before me. Had the issue of jurisdiction turned on the question of submission, I would have considered it desirable for there to be case management directions to allow the issue of whether the Spain Award Claim can be made, or should be treated, as a counterclaim in the enforcement proceedings, to be determined in those proceedings. For reasons which I set out below, however, I consider that the Court has jurisdiction over the Spain Award Claim in any event, irrespective of this argument as to submission. In the circumstances, it appears to me undesirable that I should express views on it, and unnecessary for me to make any case management directions of the sort I have mentioned.

80. The Club contends, whether it is right or wrong as to its argument as to Spain's submission, that the Court has jurisdiction because the Award Claims were properly served out of the jurisdiction. That requires satisfaction of the three requirements identified in paragraph [72] above.

81. The first is that the claims should fall within one of the jurisdictional gateways in PD6B paragraph 3.1. I am satisfied to the standard of a good arguable case that the Award Claims do fall within at least one jurisdictional gateway, namely that they are either within paragraph 3.1(10), as claims to enforce an arbitral award, or within 3.1(6)(c), being claims made in respect of a contract which is governed by English law. In relation to the latter, the claims can be said to relate to the arbitration clause in the contract of insurance. It has been held, in <u>Shipowners' Mutual P&I Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS (The 'Yusuf Cepnioglu')</u> [2015] EWHC 258 (Comm), [2015] 1 Lloyd's Rep 567, that claims in 'quasi-contractual' situations such as the present (ie where there is a direct claim made under an insurance by someone who was not an original party to that contract but where that claim is circumscribed by the terms of the insurance) fall within the 3.1(6)(c) gateway.

82. The third matter is that England should be clearly or distinctly the most appropriate forum for the resolution of the dispute. There was no issue between the parties that, if the other matters were established, this requirement was met.

83. I therefore turn to the second requirement. It was on this aspect that the States' submissions concentrated. They submitted that the Award Claims raise no serious issue. Even if they did, it was an issue of law which the court should resolve against the Club on this hearing.

84. These submissions require to be considered in the light of the authoritative guidance as to what is the proper approach to such issues on a hearing such as this.

85. In <u>Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran</u> [1994] 1 AC 438, Lord Goff said this (at 455D-G):

'… It has been consistently stated, at least since the judgment of Pearson J in the Dreyfus case, 29 Ch. D. 239 that it is a serious question whether the jurisdiction under Order 11 ought to be invoked, to put a person outside the jurisdiction to the "inconvenience and annoyance of being brought to contest his rights in this country:" pp. 242-243. It is, of course, true to say that any inconvenience involved has been much reduced by modern methods of communication; but the point of principle remains. This is however very largely met by the application in this context of the principle of forum conveniens … The effect of this development is that, given that jurisdiction is established under one of the paragraphs of rule 1(1) and that proper regard is paid to the principle of forum conveniens, it is difficult to see why the fact that the writ is served out of the jurisdiction should have any particular impact upon the standard of proof required in respect of the existence of the cause of action. On this point, I find myself in respectful disagreement with the opinion expressed by Lloyd LJ to the contrary in the Court of Appeal [1993] 1 Lloyd's Rep 236, 242. I prefer the approach of Stuart-Smith LJ when, at p. 248, he commended his preferred view as consonant with common sense and policy, and continued:

> "It seems to me to be wholly inappropriate once the question[s] of jurisdiction and forum [conveniens] are established for there to be prolonged debate and consideration of the merits of the plaintiffs' claim at the interlocutory stage.'"

86. In Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804 further guidance was provided in relation to what is involved. At paragraphs [84]-[85] Lord Collins, giving the judgment of the Board, said this:

'[84] The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts: eg Lonrho Plc v Fayed [1992] 1 AC 448, 469 (approving Dyson v Attorney General [1911] 1 KB 410, 414: summary procedure 'ought not to be applied to an action involving serious investigation of ancient law and questions of general importance …'); X (Minors) v Bedfordshire County Council [1995] 2 AC 633, 740-741 ('Where the law is not settled but is in a state of development … it is normally inappropriate to decide novel questions of law on hypothetical facts'); Barrett v Enfield London Borough Council [2001] 2 AC 550, 557 (strikeout cases); Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd [1990] 1 WLR 153 (summary judgment). In the context of interlocutory injunctions, in the famous case of American Cyanamid Co v Ethicon Ltd [1975] AC 396, 407 it was held that the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It was no part of the court's function 'to decide difficult questions of law which call for detailed argument and mature consideration'.

[85] In Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438, 452, Lord Goff said that if, at the end of the day, there remained a substantial question of fact or law or both, arising on the facts disclosed by the affidavits, which the plaintiff bona fide desired to try, the court should, as a rule, allow the service of the writ. The standard of proof in respect of the cause of action could broadly be

stated to be whether, on the affidavit evidence before the court, there was a serious question to be tried.'

87. The court also needs to bear in mind what was said in Lungowe v Vedanta Resources plc [2019] UKSC 20, [2019] 2 WLR 1051, in particular at paragraphs [9]-[14], per Lord Briggs JSC. What Lord Briggs said included the following:

'[9] Jurisdiction challenges frequently raise questions about whether the claim against one or more of the defendants raises a triable issue. As is now common ground, this broadly replicates the summary judgment test. Issues of this kind are, regardless whether contained within jurisdiction disputes, subject to a similar requirement of proportionality, the avoidance of mini-trials and the exercise of judicial restraint, in particular in complex cases [citation of Three Rivers District Council v Governor and Company of the Bank of England (No. 3) [2003] 2 AC 1 paragraphs [94]-[96]].

[10] The extent to which these well known warnings have been ignored in this litigation can be measured by the following statistics about the material before this court. The parties' two written cases (ignoring annexes) ran to 294 pages. The electronic bundles included 8,945 pages. No less than 142 authorities were deployed, spread over 13 bundles, in relation to an appeal which, on final analysis, involved only one difficult point of law.

[11] A particular reason for the requirement to exercise proportionality in jurisdiction disputes of this kind is that, in most cases, they involve a contest between two competing jurisdictions in either of which the parties could obtain substantial justice. …

[13] … Within every jurisdiction dispute, or embedded question whether there is a triable issue, the first instance judge faces a typical quandary: how to balance the requirement for proportionality against the need to ensure that resources are not wasted on an unnecessary trial. The choice, at how deep a level of detail to conduct that analysis and then in how much detail to express conclusions in a judgment, are matters for the experienced first instance judge, with which an appellate court should be slow to interfere.'

88. The States argued that no serious issue to be tried was raised by the Award Claims for five groups of reasons, which may be summarised as follows:

(1) The awards of Mr Schaff QC were only declaratory awards. They did not give rise to a positive or negative obligation to do (or refrain from doing) anything.

(2) The alleged obligation on the States to honour the awards did not exist as a matter of law and/or gave rise to no claim for damages. There was no obligation in contract, or for breach of statutory duty, or in tort. Whilst the States had been bound in equity to arbitrate their claims, those equitable obligations had not given rise to the exceptional right to claim equitable compensation.

(3) Even if the States had owed obligations to honour the awards, that/those cause(s) of action had merged with the s. 66 judgments in terms of the awards which the Club obtained from the English courts. The States submitted:

(a) That enforcement under s. 66 is an alternative to a common law action on the award, but each leads to a judgment;

(b) On the entry of the judgment, whether given pursuant to s. 66 or on the common law action on the award, any cause of action based on an implied promise to honour the award merges in that judgment (just as the underlying cause of action had merged in the award);

(c) This analysis is established by the decision of Flaux J in Sonatrach v Statoil Natural Gas [2014] 2 Lloyd's Rep 252, especially at [55].

(4) The Club had submitted to the jurisdiction of the Spanish Courts, at the quantum stage of the Spanish proceedings, by participating in, rather than applying to stay, the proceedings. This meant that it was not arguable that any failure by the States to honour the awards had caused any loss suffered by the Club, because that had been caused by the Club's choice to submit.

(5) The Award Claims are an abuse of the process of the Court because the same claims are being pursued in the new arbitrations which the Club has commenced, and in respect of which Foxton J and Henshaw J have each made an order for the appointment of an arbitrator.

89. The Club's contention is that there is, at least, a serious issue to be tried in relation to its Award Claims. It contends that this is so on the following basis.

(1) That in a situation in which the claimant and the defendant are original parties to an arbitration agreement, the claimant can sue in damages for a defendant's failure to honour the award. This is because the parties are bound by the award and there is an implied obligation that they should honour it. In this regard, the Club made particular reference to The Bumbesti [2000] QB 559, especially at 566, where Aikens J summarised the law as follows:

'[10] … the preferred analysis by the Court of Appeal in the leading case of Bremer Oeltransport GmbH v Drewry [1933] 1 KB 753 was that a claim on an award is a claim for damages for breach of an implied term in the submission to arbitration that any award made would be fulfilled: see particularly *per* Slesser LJ at p. 764, with whom Romer LJ agreed. That analysis was adopted by Lord Pearson in giving the advice of the Privy Council in FJ Bloeman Pty Ltd v City of Gold Coast Council [1973] AC 115, 126. He emphasises that in the case of an arbitration award a new cause of action arises once the award is made, but that the award "cannot be viewed in isolation from the submission under which it was made." Therefore a claimant wishing to enforce an award in English proceedings has to prove not only the award, but also the submission to arbitration which gave the arbitrators power to make their award and which contained the implied term that the parties would fulfil any award made pursuant to the submission.'

The Club also referred to the decision of the Privy Council in Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] 1 WLR 1041, at [9] in the judgment delivered by Lord Hobhouse.

This type of action on an award is available not just in respect of monetary awards, but also in respect of declaratory awards. In this regard the Club referred to African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederi KG [2011] 2 Lloyd's Rep 531 at [15]-[17] per Beatson J. The remedies which can be awarded include damages, whether the award is for damages or is a non-monetary award. For this proposition, the Club referred to Birtley & District Cooperative Society Ltd v Windy Nook and District Industrial Cooperative Society Ltd (No. 2) [1960] 2 QB 1, Mustill & Boyd Commercial Arbitration (2nd ed), p. 417, and in particular Xiamen Xinjingdi Group Ltd v Eton Properties Ltd and Others [2016] HKCA 143 at [163]-[177].

(2) These remedies are available to the Club, notwithstanding that this is a case in which the States were not original parties to the contract of insurance between the Owners and the Club. As held in The Prestige (No. 2), having pursued claims under the insurance the States are bound by the arbitration clause as long as they maintain those claims, and became parties to the arbitration. As such, they are bound to honour the resulting awards:

(a) In contract, namely one arising by reason of the submission of the particular dispute to arbitration by the States' claiming on the insurance in Spain. This, the Club says, is 'a novel question' which is not resolved by the decisions of Hamblen J or the Court of Appeal in The Prestige (No. 2) because the question of whether there was a contract at the point at which the dispute was submitted to arbitration was not before them; or

(b) In equity, because parties, such as the States here, in what may be called a 'quasi-contractual' situation are bound by a substantive equitable obligation to pursue any claims under the insurance consistently with the arbitration clause, and owe a similar equitable obligation to honour a resulting award; or

(c) As a matter of statutory duty, pursuant to s. 58 of the 1996 Act, which analysis the Club contends is supported by the decisions of Cooke J and the Court of Appeal in C v D, [2007] 2 Lloyd's Rep 367 and [2008] 1 Lloyd's Rep 239, and by Merkin on Arbitration Law 18.117, and Merkin and Flannery on The Arbitration Act 1996 (6th ed), p. 601; or

(d) In tort or otherwise at common law.

(3) There is no merger of the obligation to honour the award in a s. 66 judgment. The better view is that even the award does not merge into such a judgment: see Merkin and Flannery pp. 628-31. There is no basis in the 1996 Act for the argument that a domestic award, or the obligation to honour it is merged into a s. 66 judgment enforcing it. On the contrary the argument is inconsistent with s. 66(4) of the 1996 Act which provides that nothing in the section 'affects the recognition or enforcement of an award under any other enactment or rule of law'. It is an argument which is inconsistent with the rule that a foreign arbitral award which has been converted into a judgment abroad remains enforceable in England as an award (for which rule see Dicey Morris and Collins rule 71, and paras. 16-162, 16-169, and the treatment of New York Convention awards in ABCI v BFT

[1996] 1 Lloyd's Rep 485 at 489 and in LR Avionics Technologies Ltd v Nigeria [2016] EWHC 1761 (Comm)). There is no authority for the proposition that the obligation to honour the award is merged in the s. 66 judgment. It was not a point which arose for decision in Sonatrach v Statoil. To the extent that Flaux J expressed the view that the obligation to honour the awards (rather than the debts) had been lost, it was *obiter*, unreasoned, and the Club submitted, wrong. The case of Xiamen Xinjingdi v Eton Properties shows that there is no automatic merger of the common law action on the award with the statutory form of enforcement (ie the equivalent of s. 66). Whether it is still possible to pursue such an action depends on whether there is any inconsistency between the judgments which might be obtained by the two routes and whether an election has been made between them. Furthermore, in the present case the s. 66 judgment was entered before the States had breached the obligation to honour the awards. It was a nonsense to say that the entry of the s. 66 judgment meant that the Club lost the right to sue for a failure to honour the awards which had not yet occurred.

(4) There was no submission. The Club had participated in the Spanish proceedings, to the extent that it did, without prejudice to its right to arbitrate. No evidence had been adduced by the States that that amounted to a submission in Spanish law. In any event, the point being taken by the States was put as a causation point. In fact, given that the States were proceeding in breach of their obligations to honour the awards, it was a mitigation point, and the States would have to prove that had the Club taken the other steps suggested – in particular, applying for a stay – it would have avoided the loss it has sustained by the entry of the Spanish judgment. The States had not shown that and it could not be assumed.

(5) There is no abuse of the process. The juridical nature of the Award Claims is different from the claims made in the new arbitrations which the Club has commenced. In the latter, the claim is for the continued breach by the States of their obligation to arbitrate their claims; in the former it is for breach of their obligations to honour the awards. The Club contends that the Award Claims are not arbitrable. In any event the States have not applied to stay the Award Claims in favour of arbitration, and so in terms of the jurisdictional issues with which this hearing is concerned, it is of no relevance even if an application to stay these proceedings could hereafter be made, and made successfully.

90. I have reached the clear conclusion that the Award Claims raise serious issues to be tried. It is of the nature of such a conclusion that it does not bear a great deal of elucidation. In any event detailed elucidation of such a conclusion is often, and would here, be inappropriate given that the matters will proceed to trial. I consider that it is sufficient to say the following.

(1) Each of the stages of the Club's argument summarised in the preceding paragraph appears to me to stand a realistic prospect of success. One aspect of importance in this regard is whether there can be a claim for damages for non-adherence to declaratory awards of the nature involved here, or whether they only give rise to issue estoppels. As to this, I considered that the Club was right to say that there was no authority which had been identified by the States to the effect that there could be no claim for damages for failing to give effect to declaratory awards such as those involved here; and also that there is at least a serious argument that as a

matter of principle and policy compensation ought to be available as a remedy for such a failure.

(2) In relation to the existence and nature of the cause of action, this is a developing area of the law. The quasi-contractual situation with which this case is concerned, where the States were not original parties to the insurance contract, is one which throws up complexities of analysis. There is clearly an argument as to an obligation in equity, and I also consider that the Club is correct to say that there was no consideration in The Prestige (No. 2) of whether an implied contractual obligation to honour any award arises when a dispute is submitted to arbitration in circumstances such as the present. The Club's arguments on statutory duty and tort appear at present less strong, but I do not consider that it can be said that they are not seriously arguable, and in any event what is of significance is whether there is a serious issue to be tried as to the existence of a cause of action, and that question should in my judgment be resolved in the round.

(3) While the issue of merger was one on which Counsel for the States focussed particular attention, it appears to me to be a thoroughly arguable point. While the States can point to what was said in paragraph [55] of Sonatrach v Statoil, the Club has significant arguments to the effect that that passage was *obiter* and did not consider the type of issues which have been canvassed here, that there are a number of commentaries which are consistent with the Club's position, that the 1996 Act does not mandate the result for which the States contend and s. 66(4) may be inconsistent with it, and that a consideration of the position which appertains in relation to foreign awards militates against it.

(4) The issue of whether the Club submitted to the Spanish courts would need to be the subject of evidence which it has not been on this hearing. The States' suggestion that there is a causation (or perhaps mitigation) defence is one which would depend on it being established that it was the Club's failure to take certain steps in the Spanish proceedings, in particular the failure to apply for a stay, that resulted in the judgment against it. There is no evidence on this application which establishes that. These are issues which clearly demand a trial and cannot be disposed on the basis that there is no serious issue to be tried.

(5) It is clearly arguable that there is no abuse of the process involved here, in circumstances where the Club can point to a difference in the nature of the cause of action involved in the Award Claims as opposed to the new arbitrations. In any event, to the extent that the States contend that the Award Claims are arbitrable, it is arguable that it will be for them to apply to stay them in favour of arbitration. That has not yet happened.

91. As to the States' invitation that, even if of the view that there was a serious issue on any point of law, I should go on and resolve it, I decline to do so. I do not consider that this is an appropriate case for that course to be taken. I take that view for the following principal reasons:

(1) A proper resolution of these issues depends, in part, on factual issues, including issues of Spanish law and procedure, as to whether the Club's participation in the

Spanish proceedings amounted to a submission and whether such a submission had caused the Club's loss.

(2) Quite apart from the point in (1), the issues raised are ones of complexity and which require detailed consideration. On the present hearing, despite its lasting five days, because of the number of points which were in issue, there was not the focus on the particular points relevant here, or the time for submissions on them, which I consider would be desirable if they were to be finally resolved. Some indication of why this is so is given by the fact that about 200 authorities were included in the bundles for these hearings. It was not possible for the court to be taken to many of these. Moreover, counsel for Spain himself said that some submissions were being taken at a 'gallop'.

(3) Cases such as the present call, as Lord Briggs put it in Lungowe, for the exercise of 'judicial restraint'. If, notwithstanding that a point of law is involved and controversial, the court is persuaded to embark on its resolution on a jurisdiction challenge such as this, that encourages parties to seek to argue all such points on other jurisdiction challenges, with the resulting elaboration of arguments and prolongation of jurisdiction hearings.

92. For these reasons I conclude that leave was properly granted to serve the Award Claims out of the jurisdiction and that the court has jurisdiction over them.

The Judgment Claims

93. I have already outlined the structure of the arguments which were presented in relation to the Judgment Claims.

Do the Judgment Claims fall within the Recast Regulation?

94. The first issue is as to whether the applicable jurisdictional regime is that under the Recast Regulation or that at common law. Which is applicable depends on a question which is easier to state than to answer, namely whether these claims fall within the arbitration exception to the Recast Regulation. By Article 1(2)(d) of the Recast Regulation it is provided that

'2. This Regulation shall not apply to:
…

(d) arbitration.'

95. In simple terms, the argument is this. The Club contends that the relevant judgments were ones which enforced the arbitration awards, and the Judgment Claims seek remedies for breach of the States' obligations to abide by those judgments. There is no good reason why the Award Claims should fall within the exception, and the Judgment Claims should not. For the States, the fact that the Judgment Claims are based on obligations to abide by judgments of the court which are additional to and independent of any obligations to abide by the awards, is determinative that the Judgment Claims fall outside the arbitration exception.

96. The argument for the States is that the legal test for determining whether or not the arbitration exception applies is whether 'the essential subject matter of the claim concerns arbitration'. This, the States say, is the test articulated in Through Transport Mutual v New India Assurance Co. Ltd [2004] EWCA Civ 1598, [2005] 1 Lloyd's Rep 67, at [47], after a careful review of the relevant authorities, including in particular Marc Rich & Co. A.G. v Società Italiana Impianti pA (The 'Atlantic Emperor') [1991] ILPr 524. Given that the Judgment Claims are based on obligations said only to arise by virtue of the judgments, not the first arbitrations or the awards of Mr Schaff QC, it was clear that the essential subject matter of the Judgment Claims was not arbitration.

97. For the Club it was argued that the Judgment Claims were for breach of the States' obligations, contractual and delictual, to abide by the terms of judgments enforcing arbitration awards. The Club argued that there were strong reasons rooted in the travaux préparatoires for the predecessors of the Recast Regulation, in recital (12) to the Recast Regulation, and in authority as to why such claims fell within Article 1(2)(d).

98. The materials which the Club relied upon included, in the first place, the following passages in the reports which have a special status in the interpretation of the Brussels Convention and its successor, the Recast Regulation.

    (1) In the Jenard Report (which is a commentary on the Convention signed in Brussels on 27 September 1968) it is stated (at [1979] OJ C 59/1, p. 13):

    'There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration. The Brussels Convention does not apply to the recognition and enforcement of arbitral awards (see the definition in Article 25); it does not apply for the purpose of determining the jurisdiction of courts and tribunals relating to arbitration – for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings.'

    (2) In the Schlosser Report (the commentary on the 1978 Accession Convention to the Brussels Convention) appears the following (at [1979] OJ C 59/71, p. 93):

    '[64] (b) The 1968 Convention does not cover court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time limit for making awards or the obtaining of a preliminary ruling on questions of substance as provided for under English law in the procedure known as 'statement of a special case' (Section 21 of the Arbitration Act 1950). In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention.

> [65](c) Nor does the 1968 Convention cover proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards. This also applies to court decisions incorporating arbitration awards – a common method of recognition under United Kingdom law. If an arbitration award is revoked and the revoking court or another national court itself decides the subject matter in dispute, the 1968 Convention is applicable.'

99. The Club referred, in the second place, to recital (12) to the Recast Regulation. This provides in part:

'(12) This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreements, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.
…
This Regulation does not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.'

100. In the third place, the Club referred to the Opinion of Advocate General Darmon and the decision of the ECJ in The 'Atlantic Emperor'. As to the former, the Club relied in particular on the following passage (at [1991] IL Pr 524, 543):

'Legal writers agreed that the Convention does not apply to disputes relating to arbitration. The only disputed point concerns the difficulty with which I have already dealt, concerning the recognition and enforcement under the Brussels Convention of a judgment which disposes of the substance of a dispute despite the existence of an arbitration agreement. But even in the view of those authors who favour application of the Convention in such cases, all disputes concerning arbitration fall outside the scope of the Convention.'

In relation to the latter, the Club contends that the ECJ's decision in the case took an approach which was of the same breadth as the Advocate General's formulations of the exception ('disputes relating to arbitration' and 'disputes concerning arbitration'), in holding (at paragraph [18]):

'… It follows that, by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.'

101. In the fourth place the Club contended that the English authorities in the area supported a broad approach to the arbitration exception. What was said in paragraph [47] of Through Transport was:

'[47] In the result Mr Justice Aikens [in The Ivan Zagubanski], in our opinion correctly, held that the question in each case is whether the (or a) principal focus of the proceedings is arbitration. That test seems to us to be consistent, not only with The Atlantic Emperor, but also with the first instance decisions to which he referred and we agree with him that the reasoning in those decisions is to be preferred to that in The Heidberg. Another way of putting the same point is to ask the question posed by Mr Justice Rix in The Xing Su Hai, namely whether the essential subject matter of the claim concerns arbitration. We do not think that that is any different form the test which seemed to Mr Justice Clarke to be correct in The Lake Avery [1997] 1 Lloyd's Rep 540, namely whether the relief sought in the action can be said to be ancillary to, or perhaps an integral part of the arbitration process.'

The Club emphasised in particular the phrase used here, 'whether the (or a) principal focus of the proceedings is arbitration'.

102. Fifthly the Club drew attention to the decision in ABCI v BFT that when an arbitration award had been turned into a judgment of the Tribunal de Grand Instance of Paris, that judgment could not be registered in this jurisdiction under the Brussels Convention because judgments enforcing awards fell within the arbitration exception thereto.

103. As both sides agreed, there was no authority on a case where what was sought to be enforced in the action were rights arising as a result of a party failing to give effect to a judgment of a court which was entered to enforce an award and was in terms of the award. It is a type of action which does not appear to have been directly in contemplation in any of the travaux préparatoires or authorities to which I have been referred.

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

105. Furthermore, there could be many situations in which it could be alleged that a party should have redress for a failure by an opposing party to give effect to a judgment where the judgment has no origin in or connexion with arbitration at all. In other words, there is nothing intrinsically connected with arbitration in the nature of the action. I do not consider that there is a good reason why actions of this sort which arise from judgments which give effect to arbitration awards should be treated

differently from similar actions which arise from other judgments in civil and commercial matters.

106. The arbitration exception to the Recast Regulation and its predecessors was included in large part because of the existence of international conventions relating to arbitration, and in particular the New York Convention. The New York Convention contemplates proceedings for the recognition or enforcement of awards falling within its scope. An action of the sort involved in the Judgment Claims is not contemplated by the New York Convention, and falls outside the type of processes of recognition and enforcement which it envisages. Such an action is equally not a form of proceedings which are ancillary to or support the process of arbitration leading to the making of awards. Accordingly, a consideration of the origin and purpose of the arbitration exception does not suggest that it should apply to the present type of claim.

107. The test enunciated in paragraph [47] of <u>Through Transport</u> is put in three ways, which are all said to be the same: namely whether arbitration is 'the (or a) principal focus of the proceedings', whether 'the essential subject matter of the claim concerns arbitration', and whether the relief sought in the action 'can be said to be ancillary to, or perhaps an integral part of the arbitration process'. In my judgment an action of the sort involved in the Judgment Claims is not one which is readily or properly described as ancillary to, and still less an integral part of, the *arbitration process*. The English court's process is not being invoked to regulate or support arbitration or to provide oversight of an arbitration, or to enforce an arbitration award. For similar reasons, I do not consider that such an action has arbitration as the (or a) principal focus or that the essential subject matter of the claim concerns arbitration.

108. While the Club has relied on the terms of recital (12) to the Recast Regulation, I do not consider that it advances its case. Recital (12) indicates that the exception applies to 'any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award'. I do not consider that this embraces an action seeking to enforce independent obligations which arise from the judgments. The arbitral awards have already, in the past, been subject to actions and judgments concerning their recognition and enforcement. The present Judgment Claims are a further step beyond what is contemplated by an 'action or judgment concerning … the enforcement of an arbitral award' in recital (12).

The common law position in relation to the Judgment Claims

109. Given my conclusion that the arbitration exception thereto does not apply, the Recast Regulation is applicable to the Judgment Claims. Accordingly, the common law jurisdictional rules are of no application and it is unnecessary to address the arguments which were advanced on the basis that they governed.

Are the Judgment Claims 'matters relating to insurance'?

110. On the basis that the Judgment Claims do not fall within the arbitration exception, and thus that the relevant jurisdictional regime is that of the Recast Regulation, the basic rule, subject to the other provisions of the Recast Regulation, is that in Article 4,

by which persons domiciled in a Member State shall be sued in the courts of that Member State.

111. However, in 'matters relating to insurance', jurisdiction is to be determined in accordance with the provisions of Section 3 of Chapter II of the Recast Regulation.

112. It is convenient to set out here the terms of recital (18) and the relevant provisions of Section 3 of the Recast Regulation.

'[Recital] (18)
In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.
…

Section 3

Jurisdiction in matters relating to insurance

Article 10
In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.

Article 11
1 An insurer domiciled in a Member State may be sued:
(a) In the courts of the Member State in which he is domiciled;
(b) In another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled; or
(c) If he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

…

Article 12
In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 13
1 In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

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

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

Article 14

1 Without prejudice to Article 13(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.
2 The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

…'

113. It is also of relevance to note the terms of Article 26, within Section 7 of the Recast Regulation, which are as follows:

'*Article 26*

1 Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

2 In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance."

114. It was common ground between the parties that, if Section 3 is applicable, then (subject to Articles 7(5), 24 and 26) it is a mandatory and exclusive regime. The Club however denies the States' contention that Section 3 is applicable. The first issue which arises in this regard is whether the Judgment Claims are 'matters relating to insurance'.

115. The States' contention was that the Judgment Claims were obviously related to insurance. The States are the target of those claims precisely because they are parties which have brought a direct action against the Club in Spain which, while based on a Spanish statute, is also clearly based on the insurance contract between the Club and its Member. More specifically, the Judgment Claims seek to ensure that the 'pay to be paid' clause in the insurance contract is given effect to. The effect of that clause is one of the matters declared in the judgments. Further, the Judgment Claims seek compensation for the States' not disclaiming reliance on the Spanish judgment, which is a judgment that the Club, as liability insurer, is liable to pay up to the insurance policy limit to the States in respect of the damage caused by the casualty to the vessel.

116. The Club by contrast contended that, while the dispute was, in a 'but for' sense, connected with an insurance matter, the claims brought in the Judgment Claims were for breach of obligations to abide by judgments in English court proceedings, and were not 'insurance disputes'. Those claims cannot be sensibly equated with any of the true insurance matters which have been found to fall within Section 3. Further, this question only arises if it has been found that the Judgment Claims do not fall within the arbitration exception; and if arbitration is merely part of the background, *a fortiori* the insurance context is merely background.

117. Each party referred to the recent decisions, culminating in that of the Supreme Court, in Aspen Underwriting Ltd v Kairos Shipping Ltd (The 'Atlantik Confidence'). In that case consideration was given to the ambit of Section 3 of the Regulation and the meaning of 'matters relating to insurance'.

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

119. At each appellate level, the court concluded that the claims were 'matters relating to insurance' within Section 3. At first instance ([2017] EWHC 1904 (Comm), [2017] 2 Lloyd's Rep 295), Teare J said this, at [65]-[70],

'[65] The claim in the present case does not seek the rescission or avoidance of the policy of insurance. The claim can, to that extent, be distinguished from the counterclaim in Jordan v Baltic. Mr. MacDonald Eggers submitted that the claim does not concern the enforcement of a right under the Policy nor a dispute about rights and liabilities under the Policy. Rather, it concerns a payment made under or pursuant to the Settlement Agreement. It is that agreement of which rescission is sought. That is strictly true but the principal allegation made by the Hull Underwriters is that there was a misrepresentation that the loss of the Vessel was caused by a peril insured against under the Policy. Moreover, the sum agreed to be paid pursuant to the Settlement Agreement was the agreed sum under the Policy. Further, damages are sought because had the misrepresentations not been made the Hull Underwriters would not have been liable under the Policy because they were not liable for loss attributable to the wilful misconduct of the Owners pursuant to section 55(2)(a) of the Marine Insurance Act 1906.

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

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

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

[69] I accept that the mere fact that an insurance policy features in the history or pathology of the claim may not be enough to cause the subject-matter of the dispute to relate to insurance. But in my judgment the Policy on the Vessel is much more than a feature of the history or pathology of the claim brought by the Hull Underwriters against the Bank. The representations which form the basis of the claim expressly concern the question whether the Vessel was lost by reason of a peril insured against under the Policy. The Hull Underwriters expressly allege that the Vessel did not become a total loss by reason of a peril insured against under the Policy. That is the reason why the representations were misrepresentations and why the Hull Underwriters claim to be entitled to avoid or rescind the Settlement Agreement. The Hull Underwriters, when explaining their claim for damages, expressly allege that they are not liable for loss caused by the wilful misconduct of the Owners pursuant to the section 55(2)(a) of the Marine Insurance Act 1906. Of course, the claim raises considerations in addition to the question whether the Hull Underwriters were liable under the Policy, for example, whether the Bank made any misrepresentations and if so whether they were made negligently. But such issues concern the manner in which the claim under the Policy was presented.

[70] It is wise in these matters to stand back from the detail of the claim and its precise legal analysis in terms of English law. In my judgment the nature of the claim made by the Hull Underwriters against the Bank is so closely connected with the question of the Hull Underwriters' liability to indemnify in respect of the loss of the Vessel pursuant to the Policy that it can fairly and sensibly be said that the subject-matter of the claim relates to insurance and so is governed by Article 14.'

120. In the Court of Appeal ([2018] EWCA Civ 2590, [2019] 1 Lloyd's Rep 221), Gross LJ (with whom Moylan and Coulson LJJ agreed) said, after a consideration of the authorities, including Brogsitter v Fabrication de Montres Normandes EURL (Case C-548/12) and Arcadia Petroleum Ltd v Bosworth [2016] EWCA Civ 818, the following, at [77]-[78]:

'[77] With these considerations in mind, I find myself in full agreement with the Judge. It is correct that the Settlement Agreement was here interposed and, as the Judge observed (at [67]) its aim was to resolve all claims under the Policy. Moreover, as moneys had been paid by Underwriters to Owners (via Willis) pursuant to the Settlement Agreement, it is inevitable that Underwriters' claims needed to "tackle" the Settlement Agreement – and, as seen from the summary set out above, they do so, seeking its avoidance and/or rescission, restitution of sums paid thereunder and damages for misrepresentation.

[78] However, as a matter of reality and substance, the foundation of Underwriters' claims lies in the Policy. Central to Underwriters' claims, as the Judge explained (at [69] – [70], set out above), was the question of Underwriters' liability or non-liability to indemnify Owners under the Policy. The crucial (if not the only) question is whether the Vessel was lost by reason of a peril insured against under the Policy or whether the loss arose by reason of wilful misconduct on the part of Owners. On this footing, there is the most material nexus between Underwriters' claims and the Policy. Further still, a consideration of the Policy is indispensable to the determination of the claim. As a matter of common sense, having regard to the autonomous meaning to be given to Section 3 and fortified by <u>Brogsitter</u> and <u>Arcadia</u> , notwithstanding the interposition of the Settlement Agreement, Underwriters' claims come squarely within the heading "matters relating to insurance".'

121. In the Supreme Court ([2020] UKSC 11), Lord Hodge DPSC, with whom the other members of the Court agreed, said that he considered that Teare J and the Court of Appeal had not erred in their approach to this issue. He gave, in paragraphs [35] to [40], his reasons for this conclusion, as follows:

'[35] First, it is to my mind important to note that the title to section 3 "Jurisdiction in matters relating to insurance" is broader than the words of article 7(1) "matters relating to <u>a contract</u>" (emphasis added). Similarly, it is wider than the titles of section 4 "Jurisdiction over consumer contracts" and section 5 "Jurisdiction over individual contracts of employment". The difference in wording is significant as it would require to be glossed if it were to be read as "Matters relating to an insurance contract". Such a gloss would not be consistent with the requirement of a high level of predictability of which recital (15) speaks.

[36] Secondly, the scheme of section 3 is concerned with the rights not only of parties to an insurance contract, who are the insurer and the policyholder, but also beneficiaries of insurance and, in the context of liability insurance, the injured party, who will generally not be parties to the insurance contract.

[37] Thirdly, the recitals on which the Insurers found do not carry their case any distance. Recital (18), to which I will return below, sets out a policy of protecting the weaker party to certain contracts including insurance contracts. Recital (19) which calls for respect for the autonomy of parties to certain contracts to select the jurisdiction in which to settle their claims does not assist. Neither does article 15(5), which provides that in contracts of insurance which cover the risks set out in article 16 (such as damage to sea-going ships and aircraft) the parties may agree to contract out of section 3. The references to "the policyholder", "the insured," and "the beneficiary of the insurance

contract" in the other recitals to which the court was referred cast no light on the meaning of the title to section 3.

[38] Fourthly, as I will show below (para 57) the CJEU has often held that articles, such as article 7(1), which derogate from the general rule of jurisdiction under article 4 should be interpreted strictly. Article 14 by contrast reinforces article 4.

[39] "The Ikarian Reefer" (No 2) also does not assist the Insurers. The dispute in that case involved an action by the owners of the vessel against her hull and machinery underwriters which were represented by Prudential, and the Court of Appeal held that the vessel had been deliberately run aground and deliberately set on fire on the authority of her owners. Prudential recovered much of their costs from the owners and then applied under section 51 of the Supreme Court Act 1981 to recover the balance of their costs from a non-party, Mr Comninos, who was the principal behind the owners, and who it was said had directed and financed the litigation. The Court of Appeal held that, if the claim for costs constituted proceedings, those proceedings were not proceedings relating to insurance matters. If the claims were ancillary to the action by the owners against the underwriters that action related to insurance matters and had properly been raised in England. The underwriters were not seeking to raise claims relating to insurance matters against Mr Comninos. Rather they were seeking to recover unpaid costs incurred in a litigation relating to insurance matters in which they had been successful.

[40] Fifthly, and in any event, as Mr Berry submits, if "the Brogsitter test" is as Mr MacDonald Eggers characterises it and is applicable in relation to section 3, that test is met in the circumstances of this case. The Insurers' claim is that there has been an insurance fraud by the Owners and the Managers for which the Bank is vicariously liable. Such a fraud would inevitably entail a breach of the insurance contract as the obligation of utmost good faith applies not only in the making of the contract but in the course of its performance: Versloot Dredging BV v HDI Gerling Industrie Versicherung AG ("The DC Merwestone") [2016] UKSC 45; [2017] AC 1, para 8 per Lord Sumption. It is therefore not necessary for this Court to analyse the proper application of the jurisprudence in Brogsitter.'

122. From these judgments, it is possible to distil the following as of relevance to the approach to be adopted to the determination of whether the Judgment Claims involve a 'matter relating to insurance'.

(1) Section 3 is not to be restrictively construed.

(2) 'Matters relating to insurance' are not confined to "matters relating to insurance contracts".

(3) 'Matters relating to insurance' can extend to determinations of rights of persons who were not parties to an insurance contract, including beneficiaries and, in the context of liability insurance, injured parties.

(4) The question of whether particular proceedings are or involve a 'matter relating to insurance' calls for an evaluative judgment. It will not generally be enough that insurance forms part of the history or 'pathology' of a claim for it to be a 'matter relating to insurance'. On the other hand, a claim is not prevented from being a 'matter relating to insurance' by the intervention of some other legal connexion between the parties (such as the settlement agreements in The 'Atlantik Confidence').

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

123. Applying this approach, I consider that the Judgment Claims are 'matters relating to insurance.' It is true that they directly seek redress for failure to abide by judgments of the English court, but in my view the interposition of those judgments does not of itself mean that the claims are not 'matters relating to insurance' any more than the intervention of the settlement agreements did in The 'Atlantik Confidence'. The essential purpose of the Judgment Claims is to seek to ensure compliance with, or redress for non-compliance with, obligations which derive from an insurance policy, including its 'pay to be paid' provision. The States are sued in the Judgment Claims because they proceeded with their civil claims in Spain and have obtained, and are relying, on the Spanish judgment which finds the Club liable by reason of the insurance policy which it issued, up to the amount of the limit of cover under that policy. As a matter of substance, I consider that the proceedings can be said fairly and sensibly to be matters relating to insurance for the purposes of the Recast Regulation.

124. I should add that the Club's argument to the effect that the fact that the Judgment Claims are not, *ex hypothesi*, within the arbitration exception militates against their being 'matters relating to insurance', while superficially attractive, is unpersuasive. It depends on characterising the reason why the arbitration exception is inapplicable as being that arbitration is part of the 'background' and proceeds to say that if arbitration is part of the 'background' so too and *a fortiori* is insurance. But the reason why the arbitration exception is not applicable is not fully or properly described by saying that arbitration is part of the background. It depends in large measure on the nature of and reasons for the arbitration exception. The reasons for that exception are distinct from the considerations which underlie Section 3. In my judgment, once it is decided that a claim is not within the exception, and thus that the Recast Regulation is applicable to it, then the issue of whether it 'relates to insurance' is to be answered by reference to the nature of the claim directly, not through a prism created by the fact that it does not fall within an exception to the Recast Regulation.

Are the States entitled to take the benefit of the Section 3 provisions?

125. On the basis that the Judgment Claims are 'matters relating to insurance', the issue arises as to whether Article 14 has the effect that the Club is entitled only to sue in the courts of the States' domicile, namely Spain and France. The States contend that it does. The Club denies this, on the basis that it says that Spain and France are not 'weaker parties' entitled to benefit from Section 3.

126. The argument which the Club originally intended to make in this regard has been modified in light of the Supreme Court's decision in The 'Atlantik Confidence'. In that case it was decided that, whilst recital (18) to the Recast Regulation indicates that Section 3 is intended to protect 'the weaker party', parties falling within the classes of person listed in Articles 11 and 13 (ie policyholders, insureds, beneficiaries and injured parties in cases of liability insurance) are deemed to be weaker parties irrespective of their relative economic strength, and that Section 3 accordingly applies whenever a party is 'correctly categorised' as falling within that list of persons. Section 3 does not apply to persons who do not fall within those categories, subject to limited cases where extension of the protections in Section 3 is justified because the person in question is a weaker party. See paragraphs [42]-[60] of the judgment of Lord Hodge.

127. In the light of the decision of the Supreme Court the Club did not argue that, if either of the States was itself an 'injured party', it could nevertheless not rely on the protections of Section 3 because it was not the weaker party. But the Club did argue that the States fall within none of the classes of persons in Articles 11 and 13. The Club's argument was that they could only possibly fall within 'injured parties', but they had not been sued as 'injured parties'. Alternatively the Club argued that, even if either State was in any respect an 'injured party', Spain was not an 'injured party' in respect of that part of its civil claims in Spain which were claims of third parties to which it was subrogated, and to which it had acceded in accordance with a scheme established by Royal Decree Law 4/2003.

128. For the States it was submitted, tentatively by Ms Dilnot, but confidently by Mr Young QC, that they were 'beneficiaries' within the meaning of Section 3. In any event, it was submitted that they were both clearly 'injured parties'. This was so in relation to France and to Spain. In relation to the further point taken only against Spain in relation to its subrogated claims, Spain contended that this does not arise. Those of its claims which were for its own loss and damage amount to, or almost to, the amount of the Club's limit of indemnity. In any event it would be clearly contrary to the scheme of the Recast Regulation for there to be a division of its claims with its 'own claims' in one jurisdiction and its 'subrogated claims' in another.

129. I turn to the first part of the argument, and the question of whether the States are within one of the classes of person in Articles 11 and 13. While I see why it was submitted that they are 'beneficiaries', in that they successfully claimed in Spain the benefit of the insurance policy, I do not consider that the States are to be regarded as 'beneficiaries' for the purposes of the Articles forming part of Section 3 of the Recast Regulation. The States are not named as beneficiaries in the insurance. They were not, unlike the Bank in The 'Atlantik Confidence', loss payees. At the time of the conclusion of the insurance, the possibility that they - any more than very many other persons and entities - might come to have a claim on or interest in the policy was unknown. Section 3 of the Recast Regulation appears to draw a clear distinction between 'beneficiaries' and persons who are strangers to the insurance but who, because they have sustained loss, are 'injured parties'. Such injured parties, as Article 13(2) envisages, may have a direct claim on the insurer. The fact, however, that such injured parties may have a direct claim on the insurer, and thus be in that sense a beneficiary of the policy, does not stop them being 'injured parties' for the purposes

of the Section. I regard this analysis as supported by the treatment of 'injured parties' and 'beneficiaries' by the CJEU in FBTO Schadeverzekeringen NV v Odenbreit [2008] IL Pr 12, especially at paragraphs [26]-[27].

130. Accordingly I conclude that the States, if they fall within any of the categories in Articles 11 and 13, fall within the category of 'injured parties'.

131. As I have said, the Club argued that the States cannot be regarded as 'injured parties' because they are not sued as such but on the basis that they have not abided by the English judgments, and that as the Judgment Claims have not been brought against the States in their capacity of 'injured parties' Section 3 is not applicable to them. In my judgment this argument is ill-founded. By Article 10, if the matter is one which relates to insurance, as I have held it is, then jurisdiction is to be determined in accordance with the Section 3 provisions. Those provisions include Article 14, under which an insurer may bring proceedings only in the courts of the Member State in which *the defendant* is domiciled. It does not provide that the insurer may bring proceedings only in the courts of the Member State in which the policyholder, insured, beneficiary or injured party is domiciled. In other words, the jurisdictional allocation depends on whether the party concerned is or is not a defendant, and is not tied to the capacity in which it is sued. In any event, I consider that if a person or entity which has suffered loss as a result of the acts or omissions of an insured has made a direct claim on liability insurers, then that person will ordinarily count as an 'injured party' for the purposes of the Section 3 provisions, even if in the particular action it can be said that that person or entity is being sued in some other capacity, provided that it can still be said that the action is one which 'relates to' the liability insurance and that person's claim on it.

132. In light of this conclusion, I hold that the States are 'injured parties' for the purposes of the application of Section 3. Given this, and given what is said in The 'Atlantik Confidence' in the Supreme Court, especially at paragraphs [50], [51] and [56], they are entitled to the jurisdictional protections of Section 3, without it having to be shown that they are in fact economically weaker parties.

133. This conclusion is subject, however, to a consideration, in the case of Spain, of the Club's argument as to its subrogated claims. This issue requires further introduction. In brief:

(1) The claims which were made by the Spain in the Spanish proceedings included its own claims, and also claims in respect of a large number of payments to third parties in accordance with a compensation and subrogation scheme established under Royal Decree Law 4/2003 as developed and implemented by Royal Decree 1053/2003.

(2) Under this scheme, according to the First Witness Statement of Mr Rees on behalf of Spain, the Spanish State, through its Treasury, made the payments as 'an act of the State taking extraordinary special measures to reduce the social, economic and environmental impacts of the oil spill on the communities affected', and not as 'the operation of normal social security or state insurance schemes.'

(3) The payments made were of two types. The first type was pursuant to 'settlement agreements' made with individual applicants. There were three relevant categories of compensation concluded by settlement agreements under the scheme: (a) direct assessment (*estimación directa*) which was a method of compensation involving 'direct' assessment of losses by experts; (b) direct assessment for the mussel sector (*estimación directa para el sector mejillonero*), which involved compensation in a fixed amount per mussel pan; and (c) objective assessment (*estimación objectiva*) which involved compensation for loss of profits. The second type was pursuant to 'partnership agreements' made between the State and a number of public entities in respect of damage suffered in their territories. These payments were made: (a) to three municipalities in Galicia, Asturias and Cantabria; and (b) to four autonomous communities.

(4) Under the Decrees, it was provided that those entering into settlement agreements were required to withdraw from and waive the rights to all legal claims. The General Administration of the State was subrogated to the rights and actions to which the recipients of the compensation might be entitled in relation to the disaster. These steps were taken, as Mr Rees put it, by 'a government responding to a major emergency'.

(5) In the Provincial Court quantum judgment, the Spanish State was awarded €931,137,768 in respect of quantified losses. The sums awarded to Spain in respect of settlement agreements was €154,875,026. The sums awarded to Spain in respect of the partnership agreements is accepted by the Club as having amounted to €242,668,877.91. The two types of payments thus totalled €397,543,903.91.

(6) These sums were upheld on appeal by the Spanish Supreme Court, subject to a reduction in respect of fishing sector subsidies in the sum of €128,100,029. The quantified losses were therefore €803,037,739, of which €397,543,903.91, or approximately 49.5%, consisted of the subrogated claims.

(7) In addition, the Provincial Court awarded the Spanish State: (a) a further sum in respect of unquantified environmental damage, in the sum of 30% of the quantified losses, amounting to €279,341,330.40; and (b) an additional 30% in respect of 'compensable pain and suffering to the Spanish State', amounting to €363,143,729. After the deduction of the fishing sector subsidies, the environmental damages awarded ought to be proportionately reduced to €240,911,321.70, as should the pain and suffering damages to €313,184,718.21.

(8) Accordingly, the total awarded to Spain by way of principal amount, was €1,357,133,778.91. The Club seeks to say that 49.5% of that is to be regarded as the subrogated claims. In his witness statement, however, Mr Rees states that this is plainly wrong. The amount awarded in respect of unquantified environmental damage was granted to the Spanish State in its own right.

(9) The Club was found entitled to limit its liability in the Spanish proceedings to US$1 billion, which has been declared by the Spanish Courts to be a global limit of liability in the sum of €855,493,575.65 after deduction of the CLC fund already paid into court in Spain.

134. As I have said, the Club contends that as regards the subrogated claims, Spain was not an 'injured party', and that it would be entitled to rely on Section 3 only if it were established that it was a 'weaker party', which it clearly was not. It contended that this case was the equivalent of that considered by the CJEU in Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG [2010] 1 All ER (Comm) 603. There a social security institution had provided benefits to the victim of a road traffic accident while she was unfit to work; and had, using its statutory rights of assignment of the victim's claim, sought an indemnity from the liability of the insurers of the driver responsible for the accident. The CJEU had declined to apply the Section 3 jurisdictional rules to a party which did not need to be protected.

135. Spain submitted that it was or should be regarded as an injured party in respect of its subrogated claims, without regard to whether it was economically the weaker party. It relied on the decision of the CJEU in Landeskrankenanstalten-Betriebsgesellschaft (KABEG) v Mutuelles Du Mans Assurances (MMA IARD SA) [2018] Lloyd's Rep IR 556. That case concerned a public law establishment, which ran hospitals, which paid the salary of an employee while he was off work as a result of injuries sustained in a road traffic accident. Under Austrian law the employee's claim for compensation passed to his employers, KABEG. KABEG sued the insurers of the driver of the car which had injured the employee, in Austria. It was held that it was entitled to do so. The CJEU said (at paragraph [35]) that by Article 13(2) of the Regulation:

'… employers to which the rights of their employees to compensation have passed may, as persons which have suffered damage and whatever their size and legal form, rely on the rules of special jurisdiction laid down in articles [10]-[12] of that Regulation.'

136. If one considers Spain as a claimant in respect of its subrogated claims in isolation, then I regard it as in a position more similar to that of the claimant in Vorarlberger than in KABEG. The distinction between the two cases, as I understand the reasoning of the CJEU, is that in KABEG, it was an employer which had succeeded to the rights of its employee. Given that employers may vary considerably in terms of their economic position, and given that the CJEU considered that it was inappropriate to conduct a case-by-case examination of whether a particular employer is the economically weaker party because that would give rise to legal uncertainty (paragraph [34]), all employers to whom an employee's rights to compensation have passed are regarded as 'injured parties' 'whatever their size and legal form' (paragraph [35]). By contrast, in Vorarlberger the claimant was a social security institution which provided insurance pursuant to the Austrian General Law on Social Security (the *Allgemeines Sozialversicherungsgesetz*), and which was the statutory assignee of the claims against third parties of those it indemnified. A social security institution was, of its nature, not an economically weaker party, and indeed was a professional in the insurance sector (paragraph [42]). In the circumstances, the protections of Section were not to be extended to such institutions.

137. Applying that distinction, it appears to me that States (or other public bodies) which may set up statutory compensation schemes would fall within the type of entity which of its nature is not a weaker party.

138. Does this conclusion mean that Spain has two different capacities for the purposes of Section 3 of the Recast Regulation, with the result that different parts of

the Judgment Claims might have to be tried in two different courts, with the possibility that they reach different conclusions in relation to common issues? That would be a highly undesirable result, especially in light of the objectives of the Recast Regulation which, as set out in recital (21), include 'minimis[ing] the possibility of concurrent proceedings and [ensuring] that irreconcilable judgments will not be given in different Member States.' In my judgment, this is not the result. If a party has suffered its own losses, such that it counts as an 'injured party' in its own right, then it must be regarded as an 'injured party' for the purposes of Section 3 of the Recast Regulation, notwithstanding that it may also have subrogated claims. Further, even if that is not right as a general rule, though I think it is, it should at least apply when the relevant party's subrogated claims form a minority of its claims, as is the case here.

Is Article 14(2) applicable?

139. If it is right that Section 3 of the Recast Regulation is applicable and that the States are to be treated as 'injured parties', then by Article 14(1) the Club is to bring proceedings only in the courts of the Member State where the defendant is domiciled. Article 14(2) however provides that the provisions of Section 3 'shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending'. The Club contends, as against Spain, that it is entitled to bring the Spain Judgment Claim here because it is a 'counter-claim' to the enforcement proceedings which Spain has brought here.

140. In my judgment, Article 14(2) is plainly not applicable. Article 14(2) contemplates counterclaims in actions which are pending in the courts of a Member State **in accordance with this section** (viz. Section 3 of Chapter II). The type of claims which may be pending in accordance with Section 3 are actions to establish the rights of the parties, not proceedings to enforce judgments. Actions to enforce judgments are the subject matter of Chapter III. Given the structure of the Recast Regulation it appears to me clear that Article 14(2) does not contemplate or allow for a counterclaim where the 'original claim' is a procedure for recognition or enforcement of a judgment under Chapter III. My view is strengthened by the fact that rights to counterclaim are a derogation from the basic rules as to jurisdiction contained in Article 4 (and, in the context of Section 3, Article 14(1)) and are therefore to be restrictively construed.

Other issues

141. In light of these conclusions as to Section 3, the issues in relation to Articles 8(3) and 7(1) and (2) of the Recast Regulation do not arise.

The Costs Claim

142. As I have set out above, the Club has a claim for costs of the earlier proceedings. That the States should pay £1.65 million was the subject of an agreement made between the solicitors then acting for the States and the solicitors acting for the Club. This claim is made in all four actions. I did not understand there to be any independent jurisdictional objection to the claims at least as included in the Award

Claims. An objection was taken that it was abusive for the Club to claim these costs in more than one action against each State. The Club however said that it was not its intention to recover the costs more than once.

143. The matter was the subject of very limited argument before me. I was not persuaded that there was any abuse of the process of the court. Furthermore, if, as I consider to be the correct order, the court declines jurisdiction over the Judgment Claims, then the costs claims can still be advanced in the Award Claims and it will be clear that there is no duplication of claim or unnecessary waste of court resources.

Conclusions

144. For the reasons which I have set out above, my conclusions are:

(1) That the States are not immune from any of the four actions;

(2) The Court has jurisdiction in respect of the Award Claims;

(3) The Court has no jurisdiction or should decline jurisdiction in relation to the Judgment Claims.

145. I will hear argument as to the appropriate order which should be drawn up to give effect to these determinations.