Neutral Citation Number: [2020] EWHC 1582 (Comm)

Case No: CL-2019-000192

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION

Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: 18/06/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED

Claimant in the arbitration claim/
Respondent to the Part 11 application

- and –

THE KINGDOM OF SPAIN

Defendant in the arbitration claim/
Applicant in the Part 11 Application

M/T "PRESTIGE"

- -
- -

Christopher Hancock QC and Alexander Thompson (instructed by **Ince Gordon Dadds LLP**) for the **Claimant/Respondent**
Timothy Young QC and Jamie Hamblen (instructed by **Squire Patton Boggs (UK) LLP**) for the **Defendant/Applicant**

Hearing dates: 20 February, 28, 29 and 30 April 2020
Further written submission received from the Defendant/Applicant 15 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.

.....

Covid-19 Protocol: This judgment was handed down at a hearing attended by the judge remotely via Skype, and by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 18 June 2020 at 9:00 am.

Mr Justice Henshaw:

(A) INTRODUCTION

1. This judgment follows a hearing over four days of an application by the Kingdom of Spain ("***Spain***") under CPR Part 11 to set aside the order of Robin Knowles J dated 8 April 2019 granting the Claimant/Respondent ("***the Club***") permission to serve an arbitration claim form out of the jurisdiction. The arbitration claim form seeks the

appointment of an arbitrator pursuant to section 18 of the Arbitration Act 1996 ("***AA 1996***").

2. Spain invites the court to set aside the grant of permission because:

   i) Spain is immune from all suits brought by the Club pursuant to section 1 of the State Immunity Act 1978 (**"*SIA 1978*"**);

   ii) alternatively, the court has no jurisdiction to hear the claims set out in the arbitration claim form and the section 18 application (**"*the Arbitration Claims*"**).

   The scope of the hearing has extended more broadly to other issues relevant to whether or not the court should exercise its power (if any) to appoint an arbitrator under AA 1996 section 18.

3. This matter was originally due to be heard on 6 February 2020. Unfortunately Spain's then leading counsel became ill, and the hearing was adjourned to 20 February 2020. Shortly before the hearing on that date, replacement counsel expressed the view that the time estimate appeared too short, and correspondence ensued about the issues the court would need to address and how long they would take. Teare J as Judge in Charge of the Commercial Court directed that the issues of service (at live issue at that stage) and of whether a seriously arguable issue existed under section 18 be heard on 20 February, with state immunity deferred to a later date. That, however, gave rise to further correspondence arising from case law indicating that any immunity issue should be dealt with first. An assurance provided by the Club on 13 February satisfied the Judge in Charge but not, it appeared, Spain.

4. Ultimately, when the matter first came before me on 20 February, I concluded that that day and the further hearing (by then fixed for late April) should be treated as a single hearing and deal with both the state immunity and section 18 issues. Between 20 February and 28 April, helpfully, the parties agreed (and Teare J approved) a consent order providing that certain other issues previously due to be heard at the late April fixture should instead be heard at a single 4-day hearing before the same judge on 18-19 May and 18-19 June.

5. For the reasons set out below, I have concluded that Spain does not have immunity in respect of these proceedings; that the permission granted to the Club should stand; and that the court should appoint an arbitrator pursuant to section 18 of the Arbitration Act 1996 as the Club seeks, save in relation to the Club's proposed claim for breach of contract.

(B) BACKGROUND

(1) The proceedings in Spain

6. The underlying disputes between the parties ultimately arise out of a serious marine pollution incident in 2002, when the MT "*Prestige*" ("***the Vessel***") broke in two, discharging oil which caused significant pollution to parts of the shorelines of Spain and France.

7. The incident led to criminal proceedings against the Master, chief officer and chief engineer of the Vessel. Pursuant to Article 116 of the Spanish Penal Code, those found guilty of criminal offences are also liable under Spanish civil law in respect of loss and damage caused by the event constituting the crime. Civil claims were also brought, in the criminal proceedings, against the Vessel's owners, based on vicarious liability under Article 120 of the Spanish Penal Code. Several victims of the oil spill, including Spanish and French citizens as well as the Spanish and French States, joined the criminal proceedings, bringing civil claims pursuant to Article 116 in respect of the losses and damage they claimed to have suffered.

8. The Club, which provided P&I pollution cover to Owners and the managers of the Vessel, was added to the Spanish proceedings pursuant to Article 117 of the Spanish Penal Code, which provides for direct civil liability of liability insurers.

9. The Provincial Court of A Coruña handed down judgment on 13 November 2013, acquitting the Master of an offence of serious negligence against the environment, but convicting him of an offence of disobedience in not immediately complying with the Spanish national maritime authority's orders to take a tow. None of the Master, Owners, or the Club was held liable in the civil claims, on the basis that there was no causal link between the Master's disobedience and the incident. The Club did not participate in this phase of the proceedings.

10. The Provincial Court's decision was appealed to the Spanish Supreme Court (Criminal Chamber) in 2014. Again the Club did not participate. On 26 January 2016, the Supreme Court gave judgment, reversing the Provincial Court's decision in respect of the Master, convicting him of the offence of serious negligence against the environment and acquitting him of the offence of disobedience. In turn the Master and Owners were found liable in the civil claims, and the Club was held directly liable pursuant to Article 117.

11. The issue of quantum was sent back to the Provincial Court, which in November 2017, concluded amongst other things that the damage caused to Spain by the spill exceeded €1.5bn, but that the Club's liability in respect of the spill was limited to the contractual cap of US$ 1billion. The matter was once again appealed to the Supreme Court, which reduced Spain's damages and applied the US$ 1 billion cap on liability. The Club participated in these quantum proceedings.

12. On 1 March 2019, the Provincial Court ordered that the claimants were entitled to enforce against the Club up to the limit of €855,493,575.65 (reflecting the Euro equivalent of the US$1 billion cap, minus the sum paid by the Club towards the fund deposited pursuant to the Civil Liability Convention 1992 ("the ***CLC***")).

13. Each of these stages of the proceedings against the Club in Spain has been pursued in disregard of an arbitration clause in the contract of insurance to which the Club was a party ("***the arbitration agreement***"). Most of the stages have also been pursued in defiance of the February 2013 arbitration award, 2013 High Court judgment and 2015 Court of Appeal judgment referred to in section (B)(2) below.

(2) The First Arbitration Proceedings

14. On 16 January 2012 the Club commenced arbitration proceedings against Spain and France in London, relying on the arbitration agreement in the contract of insurance between Owners and the Club ("***the First Arbitration***"). The sole arbitrator was Alistair Schaff QC.

15. The first notice of arbitration stated that:

> "... the Club hereby gives [Spain] notice of commencement of London arbitrable proceedings in respect of all differences or disputes arising out of or in connection with the Insurance Contract or the Rules in respect of the loss of the M/f PRESTIGE and any resulting loss or damage (save for claims under the CLC) and calls upon and requires you to agree to the appointment of a sole arbitrator ..."

16. Spain did not participate in the arbitration.

17. On 13 February 2013 the Arbitrator published his Award ("***the 2013 Award***"), in which he declared, *inter alia*, that:

    i) Spain was bound by the arbitration clause in the contract of insurance and that its civil claims must be referred to arbitration in London;

    ii) actual payment of the full amount of any insured liability by the Owners was a condition precedent to any direct liability of the Club to Spain, by reason of the "*pay to be paid*" clause in the insurance contract: and so in the absence of any such prior payment, the Club was not liable to Spain in respect of its claims; and

    iii) the Club's liability to Spain in respect of its claims shall, in any event, not exceed the amount of US$1 billion.

18. On 14 March 2013 the Club applied under AA 1996 section 66 to enforce the 2013 Award. Spain defended that claim and issued its own proceedings under AA 1996 sections 67 and 72 for a declaration that the arbitrator had had no jurisdiction to render the award.

19. In *London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige (No 2))* [2014] 1 Lloyd's Rep 309, Hamblen J granted the section 66 application and rejected Spain's applications, concluding that Spain was bound by the arbitration agreement. This was on the basis that (in outline), whilst Spain was not a party to the arbitration agreement between the Club and Owners, by bringing the claims against the Club in the Spanish Proceedings (over and above the CLC limit), it asserted an obligation that was itself qualified by, and subject to, the arbitration agreement. An order in the terms of the 2013 Award was entered.

20. The Court of Appeal upheld Hamblen J's decision in *The Prestige (No 2)* [2015] 2 Lloyd's Rep. 33. I consider the reasoning for the decisions of Hamblen J and the

Court of Appeal (together, "***the section 66 Judgments***") in more detail in section (E)(4) below.

(3) Other proceedings pending in England

21. Shortly after the Provincial Court issued the enforcement order of 1 March 2019, Spain sought its registration in England pursuant to Council Regulation (EC) No 44/2001 (***"the Brussels I Regulation***"). On 28 May 2019 Master Cook made an order registering the enforcement order in England.

22. The Club have appealed Master Cook's registration order pursuant to Article 43 of the Brussels I Regulation, contending *inter alia* that the Spanish enforcement order is irreconcilable with the section 66 Judgments ("***the Enforcement Proceedings***"). The court has heard a CMC in the Enforcement Proceedings and the Club's appeal is due to be heard at a 5-6 day hearing in December 2020.

23. The Club has brought two further claims against Spain in England:

    i) On 12 February 2019 the Club commenced Part 7 proceedings seeking declaratory relief and damages against Spain alleging breach of obligations to honour the 2013 Award, as well as costs incurred by the Club in the section 66 proceedings ("***the 12 February Claim***"). Spain claims that it is protected by sovereign immunity and, in any event, denies that the court has jurisdiction with respect to these claims. A hearing of Spain's CPR 11 application in that action was fixed for 28-29 April 2020, but by agreement between the parties (and with the court's approval) was relisted to be heard with three related applications – also involving the proceedings between the Club and France – on 18-19 May and 18-19 June 2020.

    ii) On 17 September 2019 the Club commenced further Part 7 proceedings seeking declarations and damages against Spain, alleging breach of obligations to abide by the section 66 Judgments, as well as claiming the same costs claimed in the 12 February Claim and the costs incurred in any enforcement proceedings ("***the 17 September Claim***"). Those proceedings are also the subject of cross-applications concerning the court's jurisdiction over Spain.

(4) The present proceedings: the Club's fresh arbitration claims

24. The Club has served or purported to serve four notices of arbitration commencing fresh arbitration proceedings against Spain, the most recent being its notices of 8 January 2019 and 4 July 2019. The Club seeks the following relief in these new arbitration proceedings:

    i) a declaration that Spain is and will be in breach of its obligation not to pursue the claims made in the Spanish proceedings other than by way of London arbitration, insofar as Spain continues to pursue the Spanish proceedings and seeks enforcement of the Spanish judgment; and a declaration that the arbitral tribunal has jurisdiction to grant an anti-suit injunction, equitable compensation, damages in contract and damages in lieu of an injunction;

ii) equitable compensation for breach of an equitable obligation to arbitrate the claims brought in the Spanish proceedings, in the amount of any liability and costs incurred by the Club arising from Spain's pursuit of those claims and subsequent enforcement steps, in the sum of up to € 1,441,562,989.33. This is put forward as a claim for equitable compensation and/or damages, although the Club has not yet paid Spain any amounts or (Spain says) suffered the above loss;

iii) contractual damages (or a declaration of liability) for the same sums, for breach of a contractual obligation to arbitrate the claims brought in Spain, said to arise from Spain's participation in the section 66 proceedings;

iv) an anti-suit injunction to restrain the alleged breach of the equitable obligation, or damages in lieu pursuant to s.50 of the Senior Courts Act 1981 ("***SCA 1981***"), in the amounts described in (ii) above; and

v) an order that Spain withdraw the claims brought in the Spanish proceedings forthwith and that Spain be enjoined from taking any step to have the Spanish judgment recognised or enforced in any jurisdiction worldwide.

25. To date Spain has not responded to the notices of arbitration, having taken the view that it was only on the Club's fourth notice, served on 15 July 2019, that it managed to serve a document that articulated an intention to commence arbitration and gave Spain sufficient information as to the nature of the dispute it was seeking to refer to arbitration, in light of the matters that had already been arbitrated. The fourth notice was served after the present arbitration claim was commenced and after Spain had disputed the English court's jurisdiction. However, ultimately no point was taken before me arising from that fact.

26. On 22 March 2019, the Club commenced the present arbitration claim in this court, seeking the appointment of an arbitrator pursuant to AA 1996 section 18 ("***the section 18 Application***").

27. By an order dated 8 April 2019 made without notice to Spain, Robin Knowles J granted *inter alia*:

i) permission to serve the arbitration claim form along with any related documents on Spain out of the jurisdiction;

ii) a declaration that (i) the Club was entitled to serve the arbitration claim form and related documents on Spain pursuant to Articles 4 to 7 and/or 12 and/or 14 of Regulation (EC) No 1393/2007 ("***the Service Regulation***") and (ii) service pursuant to the Service Regulation constituted valid and effective service;

iii) a declaration that the Club was entitled to serve the arbitration claim form and related documents on Spain by post pursuant to s. 12(6) of the SIA; and

iv) a declaration that the Club was entitled to effect service on Spain through the Foreign and Commonwealth Office pursuant to s. 12(1) of SIA 1978 and CPR 6.44.

28. Spain brings the present application pursuant to CPR Part 11 to set aside those orders.

(C) ISSUES

29. Spain's application gives rise to the following issues:

    i) State immunity – whether Spain is entitled to immunity, or lacks immunity pursuant to:

        a) section 9 SIA 1978, because it has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration;

        b) section 3(1)(a) SIA 1978, because the proceedings relate to a "*commercial transaction*" (as defined) entered into by Spain;

        c) section 3(1)(b) SIA 1978, because the proceedings relate to an obligation owed by Spain which by virtue of a contract falls to be performed wholly or partly in the United Kingdom; or

        d) section 2 SIA 1978, because it has submitted to the jurisdiction.

    ii) Section 18 – whether the court lacks jurisdiction to appoint an arbitrator or should refrain from doing so because:

        a) the Arbitration Claims are not arbitrable and therefore do not fall within the terms of an arbitration agreement;

        b) the causes of action relied upon by the Club were merged into the 2013 Award and the section 66 Judgments, and therefore do not fall within the terms of an arbitration agreement; or

        c) an arbitrator would have no power to grant against Spain an injunction, damages in lieu of an injunction, or equitable compensation.

30. The burden and standard of proof in relation to these issues can be summarised as follows:

    i) In relation to the question of state immunity, it is common ground that this issue is one for the court to resolve now and that it falls to be decided, on the balance of probabilities, as a preliminary issue: see *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 2 Ch 72, 193-194 (Kerr LJ) and 252 (Ralph Gibson LJ).

    ii) In relation to questions as to the jurisdiction of the arbitrator, it is sufficient under section 18 AA 1996 for the Club to show a good arguable case: see *Flannery and Merkin* §18.4 (pp 262-264), and *Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd* [2017] 1 Lloyd's Rep. 154 §§ 26-27.

    iii) In relation to the merits of the claim, the court should leave these to the tribunal, unless the claim is obviously ill-founded e.g. it is clearly time barred (see *West of England v Hellenic* [1999] 1 Lloyd's Rep. 93, 107).

(D) STATE IMMUNITY: OVERVIEW AND APPROACH

31. The question to be determined is whether Spain is immune from the Club's present arbitration claim, seeking the appointment of an arbitrator pursuant to AA 1996 section 18.

32. SIA 1978 section 1 provides that:

> "(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."

33. The Club submits that Spain is not immune from these proceedings to appoint an arbitrator (and related relief), by reason of one or more of the exceptions set out in sections 9, 3(1)(a), 3(1)(b) and 2 of the Act.

34. The Club makes a number of preliminary observations relating to state immunity, which I accept.

35. First, at common law the English courts over time came to adopt the 'restrictive' doctrine of state immunity, under which immunity is available only in respect of truly sovereign acts. In the leading modern case, *I Congreso del Partido (Playa Larga (Owners of Cargo Lately on Board))* [1983] 1 AC 244, Lord Wilberforce stated the difference between sovereign acts (which did attract immunity) and non-sovereign acts (which did not) as follows:

> "…it is necessary to consider what is the relevant act which forms the basis of the claim: is this, under the old terminology, an act "*jure gestionis*" or is it an act "*jure imperii*": is it (to adopt the translation of these catchwords used in the "Tate letter") a "private act" or is it a "sovereign or public act," a private act meaning in this context an act of a private law character such as a private citizen might have entered into?" (p.263)

36. Secondly, the provisions of SIA 1978:

> "fall to be construed against the background of those principles of public international law as are generally recognised by the family of nations. The principle of international law that is most relevant to the subject matter of the Act is the distinction that has come to be drawn between claims arising out of those activities which a state undertakes jure imperii, i.e., in the exercise of sovereign authority, and those arising out of activities which it undertakes jure gestionis, i.e. transactions of the kind which might appropriately be undertaken by private individuals instead of sovereign states": *Alcom Ltd v Columbia* [1984] AC 580, 597-598 per Lord Diplock.

37. Thirdly, human rights considerations may come into play, since a claim for state immunity restricts access to the courts. Any interpretation of SIA 1978 that goes

further than the right to immunity for sovereign acts in international law "*is necessarily disproportionate*" under the European Convention on Human Rights ("***ECHR***"): see *Benkharbouche v Embassy of the Republic of Sudan* [2017] 3 WLR 957, [2019] AC 777 § 34.

38. Turning to the disposition of the issues before me, the Club submitted that if I concluded that Spain is not immune by reason of SIA section 2 or 3, then the issue – which arises under the SIA section 9 issue – about the scope of Spain's deemed submission to arbitration can and should be left to the arbitrator at least in the first instance (i.e. subject to the possibility of subsequent review by the court), so long as the Club had a good arguable case on that issue. That would be the ordinary approach in relation to questions of the jurisdiction of an arbitrator since he or she is the putative chosen tribunal. It also reflects the structure of AA 1996, in that section 30 permits the tribunal to rule on its own substantive jurisdiction, unless otherwise agreed, subject to the court's power under section 67 to review it after the issue of the award.

39. I raised the question of the impact, if any, of the Court of Appeal's decision in in *Enka Insaat v Chubb* [2020] EWCA Civ 574, which in part considers the question of how to approach the substantive jurisdiction of an arbitral tribunal when the court is being asked to grant anti-suit relief. The court said:

> "53. The primary role of the curial court in granting anti-suit relief is supported by principle. The anti-suit injunction jurisdiction is concerned to protect and enforce the integrity of the arbitration agreement. In order to do so it must necessarily interrogate the substantive jurisdiction of the arbitral tribunal (or the putative or potential tribunal if none has been or is intended to be appointed) in determining whether the foreign proceedings are a breach of the agreement to arbitrate the dispute in question. Questions of the substantive jurisdiction of the tribunal are paradigm issues of curial law assigned to the court of the seat. This curial jurisdiction to determine the arbitrators' substantive jurisdiction arises notwithstanding the international principle of *Kompetenz-Kompetenz*, reflected in our domestic law in s. 30 of the Arbitration Act 1996, that in the absence of contrary agreement the tribunal may rule on its own substantive jurisdiction. <u>This is because the court of the seat always remains the primary arbiter of the substantive jurisdiction of the tribunal and will examine that jurisdiction not only in a challenge to the tribunal's ruling on its own substantive jurisdiction, but if necessary in advance of it:</u> see *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [84] and [95]-[98], in which Lord Collins repeatedly refers to this as an aspect of what I have called the curial jurisdiction of the court of the seat; and the *AES Ust-Kamenogorsk* case at [40] per Lord Mance. This is the inevitable result of the fact that arbitration is consensual. As the learned editors of *Mustill& Boyd on Commercial Arbitration*

> 2nd ed put it at pp.6-7 "In the eyes of English law it is a logical absurdity to hold that the arbitrator can ask himself a question which if answered in the negative implies he had no jurisdiction to ask it". There must be a court with power to determine the substantive jurisdiction of an arbitral tribunal, and when an arbitral tribunal has been constituted or is in contemplation, this role is assigned to the court of the seat both before and after an award is made." (§ 53, my emphasis)

40. However, having heard argument, I consider that these considerations are not intended to alter the fundamental structure of AA 1996 referred to in § 38 above. The words *"if necessary"* in the passage I have underlined indicate that the court's willingness to determine the arbitrator's jurisdiction will depend on the circumstances. It is not difficult to see why it may be appropriate to do so at the outset where a party seeks an anti-suit injunction. In the present case, by contrast, the court is asked merely to appoint an arbitrator.

41. Nonetheless, if only for practical reasons, I do not consider it would be helpful for me to rest my decision solely on other provisions of SIA 1978, addressing the section 9 issue (if at all) only on a good arguable case basis. The section 9 argument was prominent among the parties' arguments, and the parties made clear that my decision (whichever way it went) was very likely to be appealed. The section 9 issue also overlaps with the jurisdiction issue arising in relation to AA 1996 section 18. In these circumstances I think it appropriate to address all the issues. Should an appellate court conclude the correct answer to be that Spain lacks immunity by reason of some provision other than section 9, and that it is necessary to consider only whether the Club has a good arguable case that the arbitrator would have jurisdiction over the dispute, then it would remain open to that court to take that course regardless of my conclusions in the present judgment.

(E) STATE IMMUNITY: SECTION 9 (AGREEMENT IN WRITING)

(1) Section 9(1)

42. SIA section 9(1) provides that:

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

(2) The parties' cases in outline

43. The Club submits, in outline, that this exception applies because:

i) The Club has commenced an arbitration and the Club's application to appoint an arbitrator under AA 1996 section 18 is related to that arbitration.

ii) In *The Prestige (No. 2)*, the High Court (Hamblen J) and the Court of Appeal have held that by bringing and pursuing in the Spanish court claims against the Club, the Spanish State agreed in writing to submit the relevant disputes to

arbitration: see §§ 126-158 of Hamblen J's judgment and §§ 55-70 of the Court of Appeal's judgment. Spain participated in those proceedings and is bound by those rulings.

iii) Even if the matter were being looked at afresh, applying the same logic Spain has agreed to submit to arbitration the present claims, which also arise out of the commencement and continued pursuit of the civil claims by Spain in the Spanish courts.

iv) The present proceedings are plainly court proceedings that 'relate' to the proposed arbitration.

44. Spain's position, again in outline, is as follows:

i) The 2013 Award and section 66 Judgments held that Spain was liable to arbitrate the disputes in question pursuant to the conditional benefit principle (see *The Prestige (No 2)* at §§ 65-70 per Moore-Bick LJ).

ii) The effect of the conditional benefit principle is that *"If a party, X, acquires rights arising under a contract between A and B, X can only enforce those rights consistently with the terms of that contract ..."* (*Aspen Underwriting Ltd v Credit Europe Bank (The "Atlantik Confidence")* [2018] EWCA Civ 2590, [2019] 1 Lloyd's Rep. 231 § 56 per Gross LJ). As I note in § 68 below, the Supreme Court in that case upheld the Court of Appeal's decision on this aspect of the matter.

iii) It follows from this principle that the rights of the third party (here, Spain) are conditional not absolute: the right to assert a direct action against the Club is a right to do so in arbitration (at least as a matter of English law). However, the position remains that the third party is not a party to the arbitration agreement, nor bound by it in the normal sense (see *The Prestige (No. 2)* at § 89 at first instance and § 69 in the Court of Appeal). It possesses a right which as a matter of English law is capable of enforcement only by arbitration, but in all other senses remains a third party to the arbitration agreement (see *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The "Jay Bola")* [1997] 2 Lloyd's Rep 279, 286 lhc per Hobhouse LJ).

iv) It follows that the only arbitrable claim is the assertion and enforcement of the conditional right itself, here Spain's substantive claims against the Club. The conditional benefit principle is inapplicable to all other claims, no matter how related, because the arbitration agreement enters the picture only as a conditional characteristic of Spain's direct action claims. In particular, it does not extend to any claims made by the Club *against* Spain.

v) Spain's conditional direct action claims against the Club have already been arbitrated between the parties. They are not the subject of the present arbitration.

vi) Further and in any event, the Club's claim for breach of an alleged contract arising by virtue of Spain having taken part in the section 66 proceedings could not be arbitrable (even if such a contract were to exist) because any such

contractual obligations (a) would be owed by Spain to the Club, not *vice versa*, and could not be subject to the conditional benefit principle, and (b) would not be subject to the arbitration agreement between Owners and the Club, or any arbitration agreement.

vii) Consequently, Spain has not agreed in writing (or otherwise) to submit to arbitration the claims which the Club now seeks to advance by way of arbitration, and these proceedings do not relate to an arbitration between the parties. Therefore SIA section 9 does not apply.

(3) Construction of section 9

45. In considering these submissions, a preliminary question arises as to the meaning of SIA section 9. The Club submits that for the section to apply, it is sufficient to show that (a) there is an arbitration agreement, (b) Spain has become bound by (as a 'deemed party' to) the arbitration clause and (c) the present court proceedings relate to an alleged breach of that arbitration agreement. It says the question of whether the claim falls within the ambit of the arbitration agreement does not go to the question of whether there is an agreement (the relevant question for immunity purposes), but only to the jurisdiction of the arbitrator under that agreement: a matter for the section 18 stage of the argument.

46. The Club accepts that it is necessary to give some rudimentary consideration to whether the dispute in question falls within the submission to arbitration, for example in a case where a dispute might relate either to contract A or contract B, only one of which contains an arbitration agreement to which the State has agreed. However, the question of whether the dispute is within the arbitration agreement falls to be determined by reference to the terms of the arbitration agreement, not by reference to section 9. In the present case, the arbitration clause is, typically, very wide. The Club submits that a third party such as Spain is in no different a position from an original party in this respect, as the breadth of the arbitration clause does not depend on how the relevant party becomes bound by it: once that party is bound by the arbitration agreement, it is bound by it in its full scope.

47. I am not sure the matter can be so simply disposed of. Suppose, for example, that a State pursues a particular contractual claim which it claims to be entitled to pursue by reason of an assignment, or a statute of the kind involved in the present case allowing the third party to make a direct claim against the contractual counterparty. The State will thereby be regarded as bound by the arbitration clause as regards that claim. It does not follow, however, that the State would be regarded as having agreed to arbitrate an entirely separate dispute which might arise or have arisen under the same contract. In terms of SIA section 9, the words *"the arbitration"* in the phrase "*proceedings … which relate to the arbitration"* refer in my view to the arbitration of the particular dispute which the State *"has agreed in writing to submit"*. It follows that the Club must in my view establish that Spain should be treated as having agreed to submit to arbitration the claims which the Club now seeks to pursue.

48. In considering that issue, it is necessary to consider the principal cases in which the conditional benefit principle has been developed and considered, including *The Prestige (No. 2)* itself.

(4) Authorities on the 'conditional benefit' principle

49. In "*The Jay Bola*", the insurers of cargo for the voyage charterer asserted rights, which had been assigned to them by the voyage charterer by subrogation under foreign law, by pursuing court proceedings in Brazil against the owner and the time charterer. On the application of the time charterer, Morison J granted an anti-suit injunction against the insurers, because the arbitration clause in the voyage charter regulated the means by which the transferred right could be enforced. The Court of Appeal upheld his order.

50. Hobhouse LJ (with whom the other members of the court agreed) first considered the position of the time charterer and voyage charterer, as direct parties to the arbitration agreement. He stated that if proceedings are brought overseas in breach of the arbitration clause, and the overseas court does not stay the proceedings itself, then the contractual counterparty's primary remedy must be to apply for an injunction to restrain the breach of contract; the aggrieved party also has the option to sue for damages for breach of contract, though this is rarely a satisfactory remedy ([1997] 2 Lloyd's Rep 279, 285).

51. In the case before the court, the overseas claimant insurance company was not a party to the arbitration agreement. However, the rights it acquired as assignee were subject to equities. Under the English Arbitration Acts a stay in favour of arbitration could be granted on the application of a person claiming through or under a contracting party; and (conversely) it had been held that a stay could be granted *against* an assignee: the assignee took the assigned right with both the benefit and burden of the arbitration clause (*ibid*., p.285). After referring to various authorities including his own decision in *The Jordan Nicolev* [1990] 2 Lloyd's Rep 11, Hobhouse LJ continued:

> "These authorities confirm that the rights which the insurance company has acquired are rights which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligation of the time charterers to pay that award. Likewise, the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognising the obligation to arbitrate.
>
> [Counsel for the insurers] submits that, even so, there is no right which can be asserted by the time charterers against the insurance company which gives a cause of action by the former against the latter. She submitted that to recognise any such cause of action would amount to treating the burden of the contract as having been transferred, something which would only occur if there had been a novation. In the present case all that had been transferred was a right of the voyage charterers against the time charterers. The burden of the contract was not transferred. The insurance company came under no actionable liability to the time charterers.

> In my judgment this argument fails to understand the nature of the equitable remedy which is being sought in this action. The simplest way in which to illustrate this is to take a simple analogy. If the assignee of a legal right of action seeks to enforce that right against the debtor without taking into account an equitable set-off which the debtor was entitled to raise against the assignor, the debtor's remedy, prior to the Common Law Procedure Acts and the Judicature Acts of the last century, would have been to apply in the court of Chancery for an injunction to restrain the assignee from asserting the common law right in the common law courts unless and until he recognised the equitable right of the debtor. The injunction was granted to provide the debtor with the appropriate protection from the unconscionable conduct of the assignee; it does not depend upon any liability of the assignee for the sums to be set-off.
>
> The right to apply for an injunction is not a "cause of action" of the same character as the right to sue for damages for breach of contract or tort or to collect a legal debt. It is an application for an equitable remedy to protect the plaintiff against the consequences of unconscionable conduct. Since the fusion of the jurisdiction of the Chancery and Common Law courts, the need of the aggrieved party to apply for an injunction no longer arises and the common injunction has been abolished by statute. He can raise the equity in response to and in the same proceedings as the common law action. However, where the action is brought by the assignee in another jurisdiction which does not recognise the equitable right of the debtor, the debtor's only remedy is (just as it was in the first half of the last century) to apply for an injunction to restrain the assignee from refusing to recognise the equity of the debtor.
>
> The present case is such a case. The insurance company is failing to recognise the equitable rights of the time charterers. The equitable remedy for such an infringement is the grant of an injunction.
>
> …
>
> This conclusion accords with the authorities about the scope of the jurisdiction to grant injunctions. … The present case falls clearly within the scope of that jurisdiction because the application of the time charterers for an injunction has been made to protect a contractual right of the time charterers that the dispute be referred to arbitration, a contractual right which equity requires the insurance company to recognise. …" (p.286, paragraph breaks interpolated)

52. *The Jay Bola* was followed in *Charterers' Mutual Assurance Association v British and Foreign* [1997] ILPr 838, where an action was brought against an insurer by an

action directe under French law. HH Judge Anthony Diamond QC (sitting as a judge of the Commercial Court) held that the right to bring an *action directe* was governed by the limits and defences available to the insurer under the terms of the relevant liability policy (§ 28), and that the rights sought to be enforced against the insurers were limited and qualified both by the arbitration clause and the equivalent of the pay to be paid clause in the policy (§ 44). He considered the case indistinguishable from *The Jay Bola*, and rejected the argument that relief should not be granted because the defendant had committed no breach of contract by instituting proceedings in France:

> "[53] … under English law, which is the proper law of the relevant contracts, the right of any member or of any third party to claim an indemnity from the Association is limited or qualified by the arbitration and jurisdiction clause set out in the Association's rules. If it be assumed, as may be the case, that a French court would not recognise that clause, then unless the court intervenes by way of injunctive relief the clause will be wholly ineffective and there will be no means of enforcing the Association's right under English law. There will be no possibility of the Association claiming damages for breach of contract. The situation will be allowed to continue which under English law is to be regarded as unconscionable and so unjust.
>
> [54] ... It is a case where the applicant for injunctive relief has a right to require disputes to be determined either by an English court or by arbitration in London and where that right would be ineffective unless an injunction be granted. In this context either considerations of comity play little or no part or, alternatively, they are greatly outweighed by the factors I have mentioned.' (§§ 53-54)

53. In *Through Transport Mutual Assurance Association v New India Assurance (The "Hari Bhum")* [2004] EWCA Civ 1598, [2005] 1 Lloyds Rep 67, goods carried by sea and then road were lost in transit. The shipper made a claim against its insurers, New India. The claim was compromised and the shipper assigned to New India its rights against the carrier, a Finnish company. The carrier was insured by the Through Transport mutual insurance club. New India brought a direct claim against Through Transport, pursuant to a Finnish statute permitting such a claim, in disregard of the arbitration agreement in the contract between the carrier and Through Transport.

54. The Court of Appeal held that New India was bound by the arbitration clause and granted a declaration to that effect. However, it held that in commencing proceedings in Finland, New India was not in breach of contract and could not have been sued in damages for so doing. The court thus set aside a declaration that there had been a breach of contract, and an anti-suit injunction, which had been granted at first instance. The court said:

> "52. Some of the argument in this appeal proceeded on the footing that the question is whether New India became a party to the agreement to arbitrate contained in clause D2 of the General Provisions in the Club Rules. However, we do not think that that is quite the right question and, as we read his

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

…

59. … we agree with the judge that, although the Act gives the claimant a right of action directly against the insurer without the need for the formalities of an assignment, what he obtains is essentially a right to enforce the contract in accordance with its terms. …

60. … the judge was right to hold that, if New India wishes to pursue a claim under the Finnish Act , it is bound to do so by arbitration in England because the Club is entitled to rely upon the arbitration clause, just as it is entitled to rely upon any other clause in the contract to defend the claim.

…

62. ... Once it is held by the English court that New India is bound to submit its claim under the Finnish Act to arbitration it does not seem to us that it would be just to stop the Club seeking a declaration to that effect in proceedings in England. ...

63. The declarations granted were set out in paras 2(a) and (b) of the order as follows:

> '(a) It is declared that the Defendant is bound to refer any claims against the Claimant, in respect of the consignment carried from Calcutta (India) to Kotka (Finland) and onwards to Moscow (Russia) pursuant to 2 bills of lading … and CMR International Way Bill ("the consignment"), to arbitration in accordance with the arbitration clause contained in Section D, Clause2.1 of [the certificate] ("the arbitration clause").
>
> (b) It is declared that the proceedings commenced by the Defendant against the Claimant in Kotka, Finland, by summons dated 16 December 2002 ("the Kotka proceedings"), are in breach of the arbitration clause.'

64. It seems to us to follow from the conclusions which we have reached so far that the Club is entitled to the first of those

> declarations. For the reasons given above under the heading 'the arbitration clause', an application of English conflict of laws principles leads to the conclusion that, if New India wishes to pursue a claim under the section 67 of the Finnish Act, it must do so in arbitration in London because the Club is entitled to rely upon the arbitration clause in the Club Rules, which are the very rules which New India relies upon in order to make a claim under the Act: see, in the context of the Third Parties (Rights Against Insurers) Act 1930 , *The Padre Island (No. 1)*.
>
> 65. It is less clear that the Club is entitled to the second declaration. In our view the Club is not entitled to such a declaration if it means, on its true construction, that New India was in breach of contract in commencing the Kotka proceedings. As indicated in para 52 above, we do not think that New India was in breach of contract. So, for example, the Club could not in our view sue New India for damages for commencing the proceedings in Finland. It seems to us that the declaration could be so construed and for that reason we think it right to set aside that declaration. As we see it, the Club is sufficiently protected by the first declaration and either does not need the second or, if it is construed as just suggested, is not entitled to it."

55. In discharging the anti-suit injunction, the Court of Appeal noted that all the authorities to which the first instance judge (Moore-Bick J) had referred when granting it were cases where the parties to the litigation or their privies had agreed to the jurisdiction or arbitration clause (§ 76). Moore-Bick J had considered that by parity of reasoning, *"those who by agreement or operation of law become entitled to enforce the bargain should equally be bound by all the terms of the contract".* The Court of Appeal disagreed, noting that the claim was brought in Finland under a Finnish statute, conferring rights on third parties against liability insurers in circumstances in which the insured is insolvent, the public policy behind which was no doubt very similar to that behind the Third Parties (Rights Against Insurers) Act 1930. The question was whether in all the circumstances the English court should grant an injunction restraining New India from bringing its claim under the Finnish Act in Finland. It was, the court said, always a strong step to take to prevent a person from commencing proceedings in the courts of an EU contracting state which has jurisdiction to entertain them, and the Court of Justice had held or in effect held that no such injunction should be granted in the case of an exclusive jurisdiction clause (*Gasser*) or on the ground that the proceedings are vexatious and oppressive (*Turner v Grovit*). Further, New India was not in breach of contract in bringing the proceedings in Finland, so that the principles in cases such as *The Angelic Grace* did not apply directly. Nor were the proceedings in Finland vexatious or oppressive: New India was simply proceeding in Finland under a Finnish statute which gave it the right to do so. In all the circumstances it was not just and convenient to grant an injunction (§§ 94-97).

56. The Court of Appeal's decision in *Through Transport* was later summarised by Waller LJ in *The Wadi Sudr* [2009] 2 CLC 1004, who *inter alia* said:

> "The court found that New India was not a party to the contract containing the arbitration clause and was thus not in breach of contract in commencing proceedings in Finland (see paragraph 65). It thus held that since New India were pursuing a claim which, under Finnish statute, it was entitled to do, it was not a case where an injunction should be granted (see paragraph 96)." (§ 50)

57. After the Court of Appeal's decision, Through Transport applied to the court for an appointment of an arbitrator pursuant to AA 1996 section 18, in order to pursue, in substance, a claim for a declaration that it was not liable to New India. The case came before Moore-Bick J again, who in *Through Transport (The "Hari Bhum") (No. 2)* [2005] EWHC 455 (Comm), [2005] 1 CLC 376 decided to appoint an arbitrator. He rejected New India's argument that the court had no jurisdiction to do so as the Court of Appeal had held that New India was not party to an agreement to arbitrate. Moore-Bick J explained the Court of Appeal's decision as follows:

> "12. … although the Court of Appeal did consider that New India was bound to pursue its claim in arbitration in accordance with the Club's Rules, it is clear that it did not regard New India as being a party to an arbitration agreement in the full sense and therefore under a positive obligation to arbitrate of a kind that would sound in damages in the event of a breach. …
>
> 13. The fact that New India was not a party to an arbitration agreement in the full sense was one of the factors that ultimately led the court to the conclusion that it was not just or convenient in this case to grant an injunction restraining it from continuing the proceedings in Finland. …
>
> 14. Mr Smith [counsel for New India] submitted that, since the court confirmed that the principles relating to the granting of anti-suit injunctions in support of arbitration agreements as applied in *The Angelic Grace* and subsequent authorities still apply, it would have had no hesitation in upholding the anti-suit injunction in this case if it had been satisfied that there was an arbitration agreement of any kind between the Club and New India. Its unwillingness to do so, he submitted, therefore provides strong support for the conclusion that, whatever the precise nature of the relationship between them, it does not amount to an arbitration agreement of the kind that is required before the court can exercise its jurisdiction under section 18 of the Act. However, Mr Smith did accept on the authority of *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola)* [1997] CLC 993 that an assignee of rights under a contract which contains an arbitration clause must pursue his claim in arbitration in accordance with the terms of the contract and that the court will normally

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

58. Moore-Bick J then considered the reasoning and conclusion reached in *The Jay Bola*, which of course included the grant of an anti-suit injunction. He suggested that the Court of Appeal's decision in *Through Transport* to set aside the anti-suit injunction could not be attributed simply to the absence of direct contractual relations between the parties, and was significantly influenced by the EU-related considerations referred to in §§ 95 and 97 of the Court of Appeal's judgment (quoted above). In response to the submission that New India was in a different position from an assignee, Moore-Bick J indicated that the more pertinent issue was the nature of the right New India sought to enforce, as opposed to the mechanism by which it had become entitled to enforce it. After citing *The Jay Bola* again, Moore-Bick J said:

> "22. … In my view the decision in this case is authority for the proposition that a person who obtains by an assignment or transfer of some other kind the right to pursue a claim under a

> contract can only enforce that right in accordance with the terms of the contract and subject to any restrictions or limitations which those terms may impose. In other words, what he obtains is a chose in action whose precise scope is determined by the contract under which it arises and which is inherently subject to certain incidents, in this case a requirement that it be enforced by arbitration. It is interesting to note that Lord Goff in *The Padre Island (No. 2)* and Sir Richard Scott V-C and Hobhouse LJ in *The Jay Bola* all speak in terms that suggest that an assignee of rights under the contract is bound by the arbitration agreement as a whole with the result that he both obtains the benefits of the agreement and is subject to its burdens."

59. Applying these principles to the case before him, Moore-Bick J stated as follows in a passage that needs to be set out in full:

> "24. …Whether one describes New India as a statutory transferee or simply as the beneficiary of a statutory provision, therefore, the right it enjoys is a right to enforce a chose in action which is itself subject to certain inherent limitations. One of those is the pay to be paid clause; another is the obligation to enforce any claim by arbitration in London. In Finland those limitations may be disregarded if mandatory provisions of the relevant legislation so require, but in English law, as the Court of Appeal has held, that legislation is not recognised as capable of affecting the parties' rights and obligations.
>
> 25. For these reasons I am satisfied that, however one describes its position, New India is seeking to enforce a chose in action which is subject to certain inherent limitations, including the obligation to enforce it by arbitration in London. Section 82(2) of the Arbitration Act 1996 provides that references in Part I of the Act to a party to an arbitration agreement include any person claiming under or through a party to the agreement. An assignee seeking to enforce the contract clearly falls within that provision because he claims under or through the assignor, as the Court of Appeal recognised in *The Jay Bola*. Accordingly, if New India were to commence arbitration against the Club, I have no doubt that it could apply to the court for relief under section 18. In the present case, however, the application for the appointment of an arbitrator is made by the Club which has sought to commence proceedings with a view to obtaining a declaration of non-liability. New India does not wish to pursue a claim in arbitration at all.
>
> 26. Mr Smith submitted that New India is entirely free to choose whether to pursue a claim against the Club. He contended that it is not bound to do so at all, either in this country or in Finland, and that if it chooses not to pursue a claim under the Third Parties (Rights against Insurers) Act, it is

not a person claiming 'under or through a party to the agreement' within the meaning of section 82(2). Until it does choose to pursue such a claim, he argued, section 18 has no application and the court has no jurisdiction to appoint an arbitrator on the application of the Club. If his submission is correct, it means that New India can initiate arbitration proceedings and invoke the assistance of the court, but the Club cannot.

27. The arbitration clause in the Club's Rules provides as follows:

> 'If any difference or dispute shall arise between you (or any other person) and the Association out of or in connection with any insurance provided by the Association or any application for or an offer of insurance, it shall be referred to arbitration in London.'

As one would expect, it provides not simply for any claim under the Rules to be made in arbitration, but for any differences or disputes between the insured and the Club to be referred to arbitration. The clause imposes a limitation on the chose in action represented by the insured's rights against the Club by regulating the manner in which they may be enforced. It follows, therefore, from the decision in *The Jay Bola* that any dispute between New India and the Club in relation to the enforceability of those rights is one that is capable of being referred to arbitration.

28. For the reasons given earlier I accept that New India's position is not quite the same as that of a simple assignee and I also accept that it has a right to choose whether to seek to enforce the rights of the insured against the Club. However, as soon as a third party in the position of New India makes a demand on the insurer there is the potential for a dispute to arise, as indeed happened in this case, and once a dispute has arisen in relation to the third party's right to recover from the insurer it is one which must be determined by arbitration in accordance with the contract. Clearly the third party can invoke the contractual arbitration machinery and as soon as he does so he becomes a person who claims under or through a party to the agreement within the meaning of section 82(2) of the Arbitration Act. However, I am unable to accept that once a dispute has arisen the insurer is powerless to act until the claimant chooses to take a formal step of that kind. The arbitration clause in the present case contemplates that either party may refer disputes to arbitration and that necessarily allows for the possibility that the Club itself may commence proceedings. In my view it was not necessary for New India to commence proceedings in order to bring itself within the scope of section 82(2); it became a person claiming under or through

> a party to the arbitration agreement within the meaning of that subsection as soon as it sought an indemnity from the Club in the right of Borneo Maritime Oy. Having rejected the claim, the Club was entitled to refer the resulting dispute to arbitration and to invoke section 18 of the Act against New India as a party to the arbitration agreement contained in the Club's Rules."

60. At first instance in *The Prestige (No. 2)* Hamblen J said:

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

61. Thus although *Through Transport (No. 2)* was, as Spain points out, a case involving no state immunity issue, Hamblen J and in due course the Court of Appeal in *The Prestige (No 2)* considered its essential reasoning equally applicable in a case that did involve a state immunity issue.

62. Hamblen J further concluded that a state that becomes party to an arbitration agreement in this sense *"has agreed in writing"* to submit a dispute to arbitration within the meaning of SIA 1978 section 9. Accordingly, he granted the Club's application under AA 1996 section 66 to enforce the 2013 Award.

63. The Court of Appeal upheld that decision ([2015] EWCA Civ 333). The critical part of its reasoning was set out by Moore-Bick LJ as follows:

> "65. The questions for decision, therefore, are (a) whether the appellants consented to arbitration and (b) if so, whether it is sufficient to satisfy section 9(1) of the State Immunity Act that a state has consented to arbitration in accordance with terms recorded in writing. If it were not for the fact that the appellants had brought proceedings in Spain I do not think that they could be said to have consented to arbitration, since they did not become parties in the full sense to an arbitration agreement with the Club merely by acquiring a right under Spanish law to make a claim against it: see *Through Transport* [2004] EWCA Civ 1598, [2005] 1 Lloyd's Rep. 67 at paragraph 52.

66. The appellants, of course, wish to enforce their claims against the Club without referring them to arbitration, but that is something they cannot do, for reasons I have already given. As a result of the assertion of those claims and the Club's rejection of them, a dispute has arisen which falls within the scope of the arbitration clause: see Through Transport (No. 2) . Accordingly, for as long as the appellants continue to maintain their claims I do not think that they can be heard to say that they have not consented to arbitration or that the consent necessary for a submission to the jurisdiction of the English courts as the courts exercising supervisory jurisdiction over the arbitration is lacking.

67. However, that still leaves the question whether the requirement in section 9(1) of the State Immunity Act for an agreement in writing can be satisfied by anything less than a document signed by or on behalf of the state. ...

68. Section 9(1) primarily contemplates at least that the state in question has made itself party in the full sense to an arbitration agreement expressed in writing. That was the position in both *Svenska* and *The 'Altair'*, in each of which the state had, by different means, become bound as, or to the same extent as, a party to the contract. In *Through Transport (No. 2)* the question was whether New India was a "*party to the arbitration agreement*" within the meaning of section 18(2) of the Arbitration Act. Since "*party*" is defined in section 82(2) as including any person claiming under or through a party to the agreement, I held that New India was a party for the purpose of section 18, because, having made a claim against the insurer, it was claiming under or through the insured, Borneo Maritime Oy. As a member of the Through Transport club Borneo Maritime was a party to the arbitration agreement under which New India was bound to pursue its claim.

69. Although in the present case the appellants must also pursue their claims by arbitration, they, like the claimant in *Through Transport*, are not parties to the arbitration agreement in the full sense. If they wish to pursue their claims they must do so in arbitration (see paragraphs 60 and 63 of the judgment of the Court of Appeal in *Through Transport*), but commencing proceedings in Spain did not involve a breach of an agreement to arbitrate (see paragraphs 65 and 95 of the same judgment). When the appellants began proceedings against the Club in Spain and the Club failed to concede the claim, disputes arose between themselves and the Club which were capable of being referred to arbitration and could only be validly determined in arbitration.

70. In *Through Transport (No. 2)* I held that once a dispute or difference had arisen it could be referred to arbitration by either

> side. That is because the dispute had arisen out of an attempt to enforce an obligation that was itself qualified by, and subject to, the arbitration agreement. The position in the present case is substantially the same. The appellants sought to enforce a claim against the Club in proceedings in Spain and, if the Club had not taken steps to protect its position, they would, if successful, have obtained a judgment against it capable of being enforced in this country. Mr. Smouha submitted that the appellants could not, as a result of having issued proceedings in Spain, be treated as having agreed in writing to submit the dispute to arbitration, but the commencement of proceedings was for these purposes nothing more than the formal assertion of claims that were subject to arbitration agreements. At the time when the State Immunity Act was passed it was already accepted that the expression "*arbitration agreement*" in section 32 of the Arbitration Act 1950 (defined as an agreement in writing to submit to arbitration present or future differences) did not require the agreement to be signed (see Mustill & Boyd, Commercial Arbitration, 2nd ed. page 55), a position now reflected in section 5(2) of the Arbitration Act 1996. That being so, it would be surprising if Parliament had intended section 9(1) to apply only in cases where there is a contract containing an arbitration clause formally signed by or on behalf of the state. Accordingly, I accept that the pursuit of a claim in the Spanish proceedings amounted to an adoption by each of the appellants of the agreements. That had two important consequences: it gave the Club (as well as the appellants) the right in each case to refer those disputes to arbitration and it satisfied the requirement of section 9(1) for an agreement in writing.
>
> 71. The proceedings under section 66 of the Arbitration Act 1996 are for permission to enforce each of the awards as a judgment. In *Svenska* this court held that such proceedings relate to the arbitration and so fall within section 9(1) of the State Immunity Act. If it were necessary to do so, therefore, I would hold, in agreement with the judge, that the appellants are not immune from the jurisdiction of the English courts in relation to the proceedings."

64. In *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386, following the loss of a vessel, the charterers commenced proceedings in Turkey seeking to attach as security assets in Turkey owned by the claimant P&I Club, which insured the shipowners against third party claims. The terms of the Club cover provided for London arbitration and for the Club to be liable only if the owner had paid the claims against it (the 'pay to be paid' clause). The Court of Appeal upheld the grant of an anti-suit injunction against the charterers to restrain the Turkish proceedings. It rejected the argument that since the charterers were not party to the arbitration agreement, an injunction could be granted only if their proceeding in

France was vexatious or oppressive, citing passages from *The Jay Bola* which the court said:

> "… deal with the very question raised by Mr Lewis in this case namely the relevance of the defendant not being a party to the contract containing the arbitration clause and hold that, if he is obliged to arbitrate, the fact that he is not a party to the contract containing the arbitration clause is irrelevant. They also make clear that the only way in which the claimant can be protected is by way of an injunction. The reference to *Halsall v Brizell* is instructive because in that case Upjohn J upheld the right of the beneficiary of a positive covenant given by the original house owners on a building estate to pay for the upkeep of the roads on the estate (a covenant which was prima facie unenforceable as not running with the land) because the defendants could only claim to have a right to use the roads on the estate if they were prepared to pay the costs which their predecessors in title had agreed to pay. The effect of the Jay Bola decision in 1997 is that the Commercial Court became free to follow the path pioneered by the Chancery Division 40 years earlier" (§ 24)

65. The Court of Appeal also cited *Charterers' Mutual*, rejecting the submission that it was distinguishable from *The Jay Bola* because in *The Jay Bola* the claimants were transferees or assignees of the rights under the policy and, for that reason, bound by the terms of the policy, while in *Charterers' Mutual* they were beneficiaries of a statutory right of action which said nothing about being bound by the terms of the policy:

> "It seems to me that, while that was a factual difference between the two cases, it is not a distinction of principle because the insurers had a right to require arbitration in both cases which was an empty right unless enforceable by injunction." (§ 27)

66. Finally, so far as relevant, the Court of Appeal considered its earlier decision in *Through Transport* to be inconsistent with *The Jay Bola*, preferring the latter. The court noted that *The Jay Bola* and *Charterers' Mutual* had not been cited in *Through Transport*. Longmore LJ (with whose judgment the other members of the court agreed) said:

> "For myself I have little hesitation in preferring *The Jay Bola* to *The Hari Bhum* for the simple reason given by Hobhouse LJ in the earlier case (at page 1001) namely that the Club's application for an injunction is made:
>
> > 'to protect a contractual right … that the dispute be referred to arbitration, a contractual right which equity requires the [third party/victim] to recognise.'
>
> It is only by way of an injunction to restrain Turkish proceedings that the charterers in the present case can be

> required to recognise the Club's right to have the dispute referred to arbitration. …" (§ 33)

67. Counsel for Spain informed me that the Supreme Court granted permission to appeal from the Court of Appeal's decision in *The "Yusuf Cepnioglu"* but that the case settled.

68. The Supreme Court in *Aspen Underwriting Ltd and others v Credit Europe Bank NV* [2020] UKSC 11 held that the conditional benefit principle did not apply where the relevant third party had made no attempt to assert rights under the contract containing the choice of forum clause. The claimants insured a vessel pursuant to an insurance policy which contained a clause giving exclusive jurisdiction to the courts of England and Wales. The third defendant, a Dutch bank which held a mortgage over the vessel, was named as loss payee in the insurance policy and took an assignment of it. The vessel sank and the insurers entered into a settlement agreement with the owners and managers of the vessel, to which the bank was not a party, pursuant to which the insurers paid a sum to the bank. The Admiralty Court later held that the owners of the vessel had deliberately sunk her. The insurers commenced proceedings in the High Court against the owners, the managers and the bank seeking damages for misrepresentation and restitution of the money which they had paid out. The Supreme Court affirmed the Court of Appeal's decision that the bank was not bound by the exclusive jurisdiction clause.

69. The insurers' argument on this point, as summarised by the court, was that:

> "… the obligation to submit to the jurisdiction of the English courts went further than the commencement of legal proceedings and covered any assertion of, or indeed reliance on, its rights in relation to the Policy by the Bank. For, on its proper construction, the exclusive jurisdiction clause extends to an obligation on an assignee to submit to the jurisdiction of the English courts if there were a dispute or claim relating to the Policy, as for example if the Bank received the Policy proceeds without any dispute at the time and without having initiated legal proceedings but there was later a dispute about its entitlement to those funds" (§ 22)

70. The Supreme Court rejected that argument. Speaking for the court, Lord Hodge said:

> "26. The Bank's entitlement to receive the proceeds of the Policy in the event that there was an insured casualty rests on its status as an equitable assignee. It is trite law that an assignment transfers rights under a contract but, absent the consent of the party to whom contractual obligations are owed, cannot transfer those obligations: *Tolhurst v Associated Portland Cement Manufacturers* (1900) Ltd [1902] 2 KB 660 , 668–670, per Collins MR. An assignment of contractual rights does not make the assignee a party to the contract. It is none the less well established that a contractual right may be conditional or qualified. If so, its assignment does not allow the assignee to exercise the right without being subject to the conditions or

qualifications in question. As Sir Robert Megarry V-C stated in *Tito v Waddell (No 2)* [1977] Ch 106 , 290, "*you take the right as it stands, and you cannot pick out the good and reject the bad*". This concept, which has often been described as "*conditional benefit*", is to the effect that an assignee cannot assert its claim under a contract in a way which is inconsistent with the terms of the contract. Several examples of its application or consideration were cited to the court. See, for example, *Montedipe SpA v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11 , 15–16, per Hobhouse J; *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161 , 171, per Lord Woolf; *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola)* [1997] 2 Lloyd's Rep 279 , 286, per Hobhouse LJ; *Youell v Kara Mara Shipping Co Ltd* [2000] 2 Lloyd's Rep 102 , paras 58–62, per Aikens LJ; *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS (The Yusuf Cepnioglu)* [2016] Bus LR 755 , paras 23–25, per Longmore LJ and *Aline Tramp SA v Jordan International Insurance Co (The Flag Evi)* [2017] 1 Lloyd's Rep 467 , para 40, per Sara Cockerill QC, sitting as a deputy judge of the Queen's Bench Division.

27. In my view, the formulation of the principle by Hobhouse LJ in *The Jay Bola* [1997] 2 Lloyd's Rep 279 , which the Court of Appeal approved in *The Yusuf Cepnioglu*, is the best encapsulation. In *The Jay Bola* the insurers of cargo for the voyage charterer asserted rights, which had been assigned to them by the voyage charterer by subrogation under foreign law, by raising court proceedings in Brazil against the owners and the time charterer. On the application of the time charterers, Morison J granted an anti-suit injunction against the insurers because the arbitration clause in the voyage charter regulated the means by which the transferred right could be enforced. The Court of Appeal upheld his order. Hobhouse LJ stated (at p 286):

> "the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognizing the obligation to arbitrate."

This formulation emphasises the constraint on the assertion of a right as being the requirement to avoid inconsistency and, whether the clause is an arbitration clause, as in *The Jay Bola* , or an exclusive jurisdiction clause, as in *Youell*, it is the assertion of the right through legal proceedings which is in

> conflict with the contractual provision that gives rise to the inconsistency.
>
> 28. In *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 , para 55, the Singapore Court of Appeal, commenting on *The Jay Bola* and the proposition that an assignee does not become a party to the contract but would not be entitled to enforce its rights against the other party without also recognising the obligation to arbitrate, stated:
>
> > "This approach of entitlement rather than obligation may be more easily reconcilable with the consensual nature of arbitration. This is because the assignee is only taken to submit to arbitration at the point it elects to exercise its assigned right."
>
> 29. In the present case the Bank did not commence legal proceedings to enforce its claim. Indeed, it did not even assert its claim but left it to the owners and the managers to agree with the Insurers the arrangements for the release of the proceeds of the insurance policy by entering into the Settlement Agreement. It is not disputed that the Bank was not a party to the Settlement Agreement and the Bank derived no rights from that agreement. … At the time of payment of the proceeds of the Policy there was no dispute as to the Bank's entitlement and no need for legal proceedings. There was therefore no inconsistency between the Bank's actions and the exclusive jurisdiction clause. The Bank therefore is not bound by an agreement as to jurisdiction under article 15 or article 25 of the Regulation.
>
> 30. The Insurers argue that, if they had refused to pay the proceeds of the Policy to the Bank and had commenced proceedings against the Bank in England seeking negative declaratory relief, the Bank would have been bound by the exclusive jurisdiction clause. They submit that it makes no sense to distinguish a claim for negative declaratory relief from the Bank's claim. This is because the Bank's right to sue for an indemnity under the Policy and the Insurers' right to sue for a declaration that it is not liable to the Bank are the same cause of action: *Gubisch Maschinenfabrik KG v Palumbo* (Case 144/86) [1987] ECR 4861, paras 15–19. This incoherence, it is submitted, militates against the Bank's analysis. I disagree. The Bank is not a party to the contract contained in the Policy. The Bank is not bound by that contract to submit to the jurisdiction of the English courts if the Insurers raise an action in England. ..."

71. As the Supreme Court's decision was not cited in the hearing before me, in the course of preparing this judgment I invited the parties to submit any observations on whether

it materially advanced the arguments in the present case in either direction. The Club considered that it did not. Spain provided a written submission dated 15 June 2020, which I have considered in reaching the conclusions set out in section (5) below.

(5) Application to the present case

72. The question of whether SIA section 9 applies to the Club's present application is in my view not directly answered by the section 66 Judgments in *The Prestige (No. 2),* or indeed by any of the other case law summarised above. With the exception of the point I make in § 77 below about one of the declarations granted in the 2013 Award, the existing case law concerns cases where the overseas defendant sought either an anti-suit injunction from the court, or to arbitrate the substantive disputes which the overseas claimant had asserted in the foreign proceedings.

73. In *The Prestige (No 2),* in particular, the question was whether immunity existed in relation to proceedings to enforce the 2013 Award. That Award, whose main conclusions are summarised in § 17 above, related (at least in large part) to the substantive claims against the Club which Spain had pursued in the Spanish courts. By pursuing those claims, which arose under a contract of insurance including an arbitration agreement, Spain was deemed to have adopted the arbitration agreement and to have consented to arbitration in respect of those substantive claims. That consent extended to arbitration proceedings commenced by the Club in respect of Spain's substantive claims.

74. In the present case, the dispute which the Club now seeks to arbitrate is not Spain's substantive claims against the Club. Rather, the Club seeks various forms of relief based on Spain's breach of its obligation to arbitrate the substantive claims.

75. As outlined earlier, Spain submits that it has not consented, nor can be deemed to have consented, to arbitration of any such dispute. It has, according to English law, consented solely to arbitration of its claims against the Club: not to claims by the Club against Spain. Further, it is common ground that by commencing and pursuing in Spain its substantive claims against the Club, Spain did not commit a breach of contract. Still less, Spain says, has it consented to arbitration in respect of a claim against it for an injunction, from which it is specifically immune pursuant to SIA 1978 section 13: a matter to which I return in section (I)(5) below.

76. This issue cannot in my view be answered simply by distinguishing between claims by Spain and claims against Spain. It is clear from *Through Transport (No 2)* and *The Prestige (No 2)* that once the claimant (meaning the claimant in the proceedings brought in disregard of the arbitration clause) has asserted a claim under the contract containing an arbitration clause and a dispute has arisen, then either party can refer that dispute to arbitration. The question is what is comprised in that dispute: is it limited to the substantive claim that the claimant asserts, or does it extend to remedies sought by the defendant arising from the claimant's pursuit of the foreign proceeding in disregard of the arbitration clause? If, for example, rather than seeking an anti-suit injunction from the court the defendant wishes to appoint an arbitrator for the purpose *inter alia* of seeking an anti-suit injunction, does that form part of the dispute or disputes to which the claimant is taken to have agreed should be resolved by arbitration?

77. The decision on the facts in *The Prestige (No. 2)* provides some support for the view that the answer is 'yes'. One of the declarations granted by Alistair Schaff QC in the 2013 Award was that Spain was bound by the arbitration clause in the contract of insurance and that its civil claims must be referred to arbitration in London. That was a ruling not on the substantive claims themselves but on Spain's obligation to arbitrate them. Hamblen J in *The Prestige (No 2)*, whose judgment at § 9 records *inter alia* that declaration, upheld the 2013 Award without any suggestion that Spain could not be taken to have consented to the arbitration of that particular dispute. The point does not, though, appear to have been specifically argued.

78. In a conventional case not involving a third party to the arbitration agreement, it is clear that a dispute about an alleged breach of the arbitration agreement itself generally falls within the scope of the arbitration agreement. Thus Males J said in *Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm), [2018] 2 All ER (Comm) 1009, [2018] 2 Lloyd's Rep 80:

> "A dispute as to whether the pursuit of foreign court proceedings is a breach of an arbitration clause is a matter which falls within the scope of a conventional arbitration clause. It is therefore 'a matter which under the agreement is to be referred to arbitration'. If that were not so, an arbitral tribunal would not have jurisdiction to order anti-suit relief, as its jurisdiction is limited to determination of the matters which the parties have agreed to refer to it. Accordingly it may be that a defendant to court proceedings claiming anti-suit relief can obtain a mandatory stay of the proceedings under section 9." (§ 38)

79. That view is of course consistent with the broad approach to the interpretation of arbitration clauses adopted in *Fiona Trust & Holding Corp v Privalov (Premium Nafta Products Ltd & Ors v Fili Shipping Co Ltd & Ors.)* [2007] UKHL 40, [2007] 4 All ER 951, [2008] 1 Lloyd's Rep 254, based on *"the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal"* (§ 13).

80. The arbitration clause in the present case (Rule 43.2 of the Club's Rules) applies when:

> "any difference or dispute shall arise between a Member and the Association out of or in connection with these Rules, or out of any Contract between the Member and the Association, or as to the rights and obligations of the Association or the Member thereunder, or in connection therewith, or as to any other matter whatsoever"

81. It is therefore a conventionally broad arbitration clause, which would cover disputes as to whether or not there had been a breach of the obligation to arbitrate a matter. Spain takes a point on construction to the effect that the clause relates to disputes between the Club and the member, as opposed to third parties. However, if and to the extent that the 'conditional benefit' principle results in Spain being bound by the

clause, Spain steps into the member's shoes for the purposes of the arbitration clause. To that extent, Spain can be in no better position than the member would have been. This was also the position in relation to the arbitration leading to the 2013 Award enforced in *The Prestige (No. 2).*

82. When addressing a 'third party' case such as the present one, I agree with the Club that it is helpful to consider the matter in terms of benefit and burden, as the courts have done in *The Jay Bola* (§ 51 above, referring to stays against assignees), *Through Transport (No. 2)* (§ 58 above, quoted § 22), *The Yusuf Cepnioglu* (§ 64 above, quoted passage citing *Halsall v Brizell*) and *Aspen Underwriting* (§ 68 above, quoted § 26 citing *Tito v Waddell (No. 2))*. By asserting and continuing to pursue (in Spain or elsewhere) a claim founded on a contract of insurance containing an arbitration clause, Spain has in my view assumed the burden represented by the arbitration clause insofar as it appertains to the claim being pursued. The arbitration clause applies to Spain's claim by obliging those bound by it to arbitrate not only the substantive claim itself but also any dispute about a party's compliance with the obligation to arbitrate. The two are closely linked, and it would be highly artificial to conclude that by pursuing its claim Spain has assumed the burden of the arbitration clause insofar as it relates to the substantive issues, but is free of the arbitration clause insofar as it covers disputes arising from a failure to observe the arbitration clause in relation to those same substantive claims (or, in other words, Spain's equitable obligation to arbitrate those same substantive claims).

83. In my view, the equitable obligation imposed on Spain to recognise the Club's right to arbitration includes the total impact of the arbitration clause on Spain's claim, hence including both (i) the Club's right to arbitration of the substantive claim and (ii) its right to seek relief through arbitration for any breach by Spain of the first right. Adopting the words used by Moore-Bick J in *Through Transport (No. 2)* in relation to assignees (§ 58 above, quoted § 22), Spain has become *"bound by the arbitration agreement as a whole"* insofar as it appertains to the claims which Spain has chosen to assert and pursue.

84. Spain submits that the Supreme Court's decision in *Aspen Underwriting* supports its case, by making clear that the sole respect in which the 'conditional benefit' principle requires the third party to *"recognise"* the obligation to arbitrate is by submitting to arbitration the substantive claim that the third party seeks to assert. Spain highlights a number of features of the statements made by Lord Hodge in the passages quoted earlier, referring to conditions or qualifications which regulate the means by which the third party can exercise or assert its right, and not to the third party coming under any obligation in the normal sense or committing any breach. It submits that the Supreme Court did not find or imply that the third party, by asserting its right, enters into a constructive choice of forum agreement that can govern any claim relating to its conditional right, or becomes subject to a free-standing actionable obligation to litigate or arbitrate. Spain points out that the court referred to the avoidance of inconsistency rather than the prevention of breaches.

85. I do not, however, consider that *Aspen Underwriting* was intended to, or did, alter or clarify the operation of the 'conditional benefit' principle in any respect that is material to the present case. The issue in *Aspen Underwriting* concerned the nature of the action by the third party that is required in order to engage the principle in the first place. The Supreme Court concluded that it was necessary for the third party to assert

its claim, and to do so through legal proceedings. Spain has, of course, done so in the present case. The effect of that assertion is that Spain must then *"recognise[] the obligation to arbitrate"*. The question in the present case, but which did not arise in *Aspen Underwriting*¸ is 'to arbitrate precisely what?' My conclusions on that question are set out in §§ 72-83 above.

86. Spain also makes a distinct point to the effect that the claims which the Club now seeks to pursue by arbitration are in reality not for failure to comply with the arbitration agreement but rather for breach of the 2013 Award or the section 66 Judgments. I do not agree. Spain's continuing and repeated steps in pursuit of its claims are contrary not only to the 2013 Award and the section 66 Judgments but also the underlying arbitration agreement itself. (This point is related to Spain's merger argument which I consider in section (I)(4) below.)

87. For these reasons, I conclude that the logic of *The Prestige (No 2)* applies with equal force to the Club's present claims referred to in § 24(i), (ii), (iv) and (v) above, which claims Spain resists. This is a dispute which Spain *"has agreed in writing"* to submit to arbitration for the purposes of SIA 1978 section 9. Spain accordingly has no immunity in relation to these claims.

88. The question arises whether the same conclusion follows in relation to the proposed arbitration claim referred to in § 24(iii) above, which is for breach of an alleged contractual obligation to arbitrate arising from Spain's participation in the section 66 proceedings.

89. The nature of that claim is described in the first and second witness statements of the Club's solicitor, Mr Volikas. It is alleged that Spain participated in the section 66 proceedings, by opposing the Club's claim to enforce the 2013 Award, and by applying to set the award aside. By seeking the court's determination of the validity of the 2013 Award, and thus of whether Spain was bound to pursue the non-CLC claims in arbitration, Spain contractually agreed that if it lost then it would be bound by the arbitration clause in the Club's Rules in respect of the non-CLC claims. Further, Mr Volikas says, *"Naturally, that was an agreement that Spain agreed was subject to the arbitration clause and to be determined in arbitration".* Thus the alleged contract is an implied agreement to comply with the arbitration clause, should Spain lose the section 66 application, and that alleged contract is itself said to incorporate the arbitration clause.

90. In terms of SIA section 9, I would therefore take the Club's argument to be that Spain has bound itself to the arbitration clause in the Club Rules (that being an agreement in writing) by a different route from that considered above in relation to the generality of the Club's proposed claims. The contractual claim is based on Spain having bound itself to the clause not by its pursuit of claims against the Club under the contract of insurance, but by its participation in court proceedings in England. The reasoning set out above in relation to the 'conditional benefit' principle does not directly assist in this context.

91. As I have already indicated in §§ 45-47 above, I consider that the Club must establish that Spain should be treated as having agreed to submit to arbitration the claims which the Club now seeks to pursue. Applying the 'conditional benefit' approach, I have concluded that Spain is bound in equity to submit to arbitration under the arbitration

clause its substantive claims against the Club, and any claims for relief arising from Spain's disregard of that obligation. However, the Club's claim for contractual damages is not a claim for such relief, but a claim for breach of a freestanding implied contract formed by conduct. The implied submission to arbitration arising from Spain's pursuit of claims against the Club does not, as it appears to me, extend to this distinct dispute arising not from the assertion of claims under the contract of insurance but from Spain's conduct in the ensuing litigation.

92. Thus in order to find that Spain lacks immunity by reason of SIA section 9 in relation to this particular dispute, I would have to be persuaded on the balance of probabilities that Spain had by its participation in the section 66 proceedings impliedly agreed to pursue its substantive claims solely by arbitration under the arbitration clause, and, moreover, that that implied agreement was itself subject to the arbitration clause. That, as it appears to me, makes it unavoidable to form a view on the merits of the argument that participation in the section 66 proceedings gave rise to such a contract. I am not persuaded that it did. I see no reason to infer that by taking steps in litigation with a view to resisting enforcement of an arbitration award a party is making a contractual offer to abide by the result. It may thereby be submitting to the jurisdiction of the court, but that is a different matter. The notion that by taking an opposing position in litigation a party can be regarded as entering into a fresh contractual relationship with the opposing party seems counter-intuitive, and the Club cited no authority in support of it. I am therefore not persuaded that Spain lacks immunity under SIA section 9 as regards the Club's application for appointment of an arbitrator to determine the dispute arising from the Club's contractual claim. If Spain lacks immunity in relation to that aspect of the application, it must be on the basis of some other provision of the 1978 Act.

(F) STATE IMMUNITY: SECTION 3(1)(A) (COMMERCIAL TRANSACTION)

93. SIA 1978 section 3(1)(a) provides:

> "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; …"

94. Section 3(3) provides:

> "In this section "commercial transaction" means—
>
> (a) any contract for the supply of goods or services;
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character)

> into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;
>
> but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual."

95. The sweep-up wording in subparagraph (3)(c) is very broadly worded, and in substance is wide enough to cover any non-sovereign activity other than the specifically excluded case of contracts of employment. I note that Lord Goff observed in *Kuwait Airways Corporation v Iraqi Airways* [1995] 1 W.L.R. 1147, 1159 that *"having regard to the very broad definition of "commercial transactions" in section 3(3) of the Act, it is probable that most, if not all, of the actions of a private law character in which a separate entity of a state is likely to engage will fall within that definition".*

96. It might be objected that to construe section 3(3)(c) in that way would make it overlap with other exceptions set out in the Act. It is not obvious though what areas of overlap might exist: other exceptions in the Act may include within their scope proceedings in relation to activities that could be regarded as having been done in the exercise of sovereign authority. For example, the exception in section 6 for proceedings in relation to aspects of a state's interest in property in the UK would apply even if the state claimed to hold the interest *qua* sovereign authority. Moreover, four members of the Supreme Court in *NML v Republic of Argentina* [2011] UKSC 31, [2011] 2 AC 495 (a case to which I return shortly) considered that the fact that section 9 would often overlap with section 3(1)(a), if the words *"relating to"* in section 3(1)(a) were widely construed, was not a reason for giving that provision a narrower construction (see § 30 (Lord Phillips), § 112 (Lord Collins, with whom Lord Walker agreed) and § 150 (Lord Clarke)). The Court of Appeal in *The Prestige (No 2)* noted that as Lords Phillips and Clarke dissented on the interpretation of section 3(1)(a), those expressions of opinion may not form part of the *ratio* of *NML* but carried strong persuasive force (§ 75). Applying the same approach, I would not regard the possibility of overlap with other provisions as a reason for giving a narrow construction to the list of activities in section 3(3)(c).

97. A question arises as to whether or not the words *"(whether of a commercial, industrial, financial, professional or other similar character)"* in subsection 3(3)(c) are intended to be exhaustive. On a purely linguistic approach, I would incline to the view that they are, since the words *"or other similar character"* seem designed to delimit the scope of the subsection. Lords Slynn and Mustill (dissenting) in *Kuwait Airways* evidently regarded the words in parentheses as qualifying words. However, as noted earlier, *Benkharbouche* indicates that, by reason of *inter alia* Article 6 of the ECHR, SIA 1978 is to be interpreted by reference to the restrictive version of state immunity, viz immunity only for sovereign acts. If there is a relevant category of non-sovereign activity falling outside the specific provisions of section 3(3)(a) and (b) and the words *"of a commercial, industrial, financial, professional or other similar character"* in 3(3)(c) if literally or narrowly construed, then *Benkharbouche* would suggest that it should nevertheless be regarded as falling within section 3(3)(c) read as a whole. As the Club points out, there should be no room for Spain to benefit from immunity for a sphere of activity that is non-sovereign, yet not *"of a commercial, industrial, financial, professional or other similar character"*. The Strasbourg Court has held that immunity beyond that permitted under international law is a violation of

a litigant's access to court under Article 6 ECHR, and international law reflects the simple dichotomy between sovereign/non-sovereign acts. That is the basis for the Supreme Court's conclusion at *Benkharbouche* § 34 referred to earlier.

98. Section 3 of the Human Rights Act 1998 requires the court to read SIA 1978 consistently with Article 6 of the ECHR. The general approach was summarised by the Employment Appeal Tribunal in *Benkharbouche* [2014] 1 CMLR 40, [2014] ICR 169§§ 37-42, citing *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, §§ 25-35 per Lord Nicholls. The words in section 3(3)(c) of the SIA 1978 "*commercial activity*" and *"activity (whether of a commercial, industrial, financial, professional or other similar character)"* can comfortably be read as covering the pursuit by legal proceedings of a contractual claim under a contract of insurance.

99. In any event, even without needing to apply the *Benkharbouche* approach, I consider that Spain's pursuit, in proceedings in Spain or elsewhere, of a claim under the Club cover was and is an activity of a commercial, financial or other similar nature. It was the invocation and attempted enforcement of a contract of insurance relating to the liabilities of a business viz the Owners' shipping activities. Section 69 of the judgment of the Spanish Supreme Court makes clear that the claim against the Club is founded on its having insured the owners' liabilities. Hamblen J (Judgment § 95) and the Court of Appeal (Judgment §§ 24-30) held the claim to be contractual in nature.

100. Further, the pursuit of the claim could not sensibly be argued to be an activity engaged in in the exercise of sovereign authority merely because Spain's *motive* in pursuing the claim is to obtain compensation for damage to its territory or citizens. As the Club points out, numerous other, private, claimants pursued the same claim against the Club in the Spanish courts alongside the states of Spain and France. In terms of the *I Congresso (Playa Larga)* test, it was and remains an act of a private law character such as a private citizen might have entered into and indeed has entered into.

101. The present application to appoint an arbitrator in respect of the claims referred to in § 24 above is a proceeding *"relating to"* that activity, with the result that on its natural meaning section 3 means in my view that no immunity exists.

102. Spain submits that that conclusion is precluded by the decisions of the High Court and Court of Appeal in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2005] EWHC 2437 (Comm), [2006] 1 Lloyd's Rep 181 and [2007] 1 Lloyd's Rep 193, and that of the Supreme Court in *NML*.

103. In *Svenska,* a joint venture agreement was concluded between Svenska and a Lithuanian state owned company, countersigned by the Lithuanian state. ICC arbitrators held that the dispute was arbitrable against Lithuania and a substantive award was issued. Lithuania claimed immunity in Svenska's application to enforce the award in England. Gloster J considered whether a claim to enforce an arbitration award constituted "*proceedings relating to*" the underlying commercial transaction on which the award was based. Gloster J noted at § 48 the decision of Stanley Burnton J in *AIC Ltd v. The Federal Government of Nigeria* [2003] EWHC 1357, [2019] 2 Lloyd's Rep. 211, that proceedings for the registration of a foreign judgment under the Administration o, f Justice Act 1920 were not proceedings relating to a

commercial transaction, having himself cited *inter alia* a dictum of Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573. Gloster J concluded:

> "In my judgment, I should follow the decision of Stanley Burnton J in *AIC Ltd v. The Federal Government of Nigeria* largely for the reasons which he gives. Although the view expressed by Lord Millett in the House of Lords in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, at 1588, that:
>
> > "In my opinion the words "proceedings relating to" a transaction refer to claims arising out of the transaction, usually contractual claims, and not tortious claims arising independently of the transaction but in the course of its performance."
>
> was strictly obiter, it shows that the phrase " *proceedings relating to the transaction* ", in the context of Section 3 of the 1978 Act, should indeed be given a narrow construction; that is to say, they should be limited to claims that arise out of the contract or transaction itself, and not extended to those arising out of some subsequent act, albeit that that act itself might loosely "relate to" the contract or transaction. A claim to enforce an arbitration award necessarily "arises out of" the award. As Mr Bools realistically accepted, there is a clear analogy between proceedings to register judgments and proceedings to enforce arbitration awards. The decision in *AIC Ltd v. The Federal Government of Nigeria* has been cited with some approval by Dame Hazel Fox QC in the introduction to her work The Law of State Immunity , Oxford University Press (2002) at page xxvii, although she questioned the judge's reasoning by reference to the utility of section 9 of the Act, stating ibid. that his reading "*may neglect the prime purpose of section 9 which was to construe consent to arbitration as submission to the English Court's jurisdiction*". Be that as it may, and even accepting, as Mr. Bools submits, that there well may be situations where there is no overlap between a section 3 case and a section 9 case, I conclude that these enforcement proceedings under section 101 of the 1996 Act do not relate to the underlying commercial transactions of the JVA, but rather to the arbitration and the Final Award"

104. The Court of Appeal affirmed Gloster J's decision on this point:

> "135. In *Alcom Ltd v Republic of Colombia* [1984] 1 A.C. 580 Lord Diplock at page 600 drew attention to the fact that the State Immunity Act 1978 draws a distinction between the jurisdiction of the courts of the United Kingdom to adjudicate on claims against foreign states (the "adjudicative" jurisdiction) and the jurisdiction to enforce by legal process judgments pronounced in the exercise of that adjudicative jurisdiction (the "enforcement" jurisdiction). Stanley Burnton J. held that an

> application to register a foreign judgment under the 1920 Act involves the exercise of the court's jurisdiction to adjudicate on matters before it, involving, as it does, consideration of certain aspects of the circumstances surrounding the judgment and an exercise of its discretion. We think that must be correct. More difficult is the question whether an application of that kind involves proceedings "relating to" the transaction on which the judgment is based. …
>
> 136. Mr. Bools submitted that *AIC Ltd v The Federal Government of Nigeria* was wrongly decided. He submitted that the expression "relating to" naturally bears a broad meaning and does not require that the proceedings arise directly out of the transaction in question. He argued that Svenska's application in the present case "related to" the Agreement and therefore fell within the scope of section 3 . Construing section 3 in that way, he submitted, would ensure that proper effect was given to the principle that a state should not be immune from suit in relation to its commercial activities.
>
> 137. In our view the expression "relating to" is capable of bearing a broader or narrower meaning as the context requires. Section 3 is one of a group of sections dealing with the courts' adjudicative jurisdiction and it is natural, therefore, to interpret the phrase in that context as being directed to the subject matter of the proceedings themselves rather than the source of the legal relationship which has given rise to them. To construe section 3 in this way does not give rise to any conflict with section 9, which is concerned with arbitration as the parties' chosen means of resolving disputes rather than with the underlying transaction. In our view *AIC Ltd v The Federal Government of Nigeria* was correctly decided and Gloster J. was right to follow it in the present case."

105. In *Svenska*, the proceedings were brought to enforce an arbitration award. They had only an indirect relationship with the underlying transaction that was itself the subject-matter of the arbitration. The present case, by contrast, does not concern an application by the Club to enforce an arbitration award or judgment. The "*activity*" within section 3(3)(c) is Spain's pursuit of its claims in the Spanish proceedings and elsewhere, in disregard of its equitable obligation to comply with the arbitration agreement in the underlying contract. The Club's proposed arbitration reference, in support of which it seeks the court's assistance by the appointment of an arbitrator, thus directly "*relates to*" the relevant *"activity"* (Spain's pursuit of its claim) rather than – as was the case in *AIC* and *Svenska* – to an arbitral or court decision that itself relates to the underlying transaction.

106. It may be part of Spain's argument that even if the Club's proposed new arbitration claims could be regarded as *"relating to"* the section 3(3)(c) activity comprising Spain's pursuit of its contractual claims, the Club's application under AA 1996 section 18 for the court to appoint an arbitrator does not. The argument would be that, by analogy with *Svenska*, the section 18 application relates to the Club's arbitration

claims, which in return relate to the section 3(3)(c) activity, but the section 18 application does not itself relate to the section 3(3)(c) activity. I do not, however, consider the analogy to be a good one. The arbitration award in *Svenska* was a new source of obligations, upon which the enforcement application was founded. By contrast, the section 18 application in the present case is in substance merely a facet of the arbitral process by which the Club seeks relief in relation to the section 3(3)(c) activity (Spain's pursuit of its contractual claims). The section 18 application in my view 'relates to' that activity in the same way as the proposed arbitration itself does.

107. Spain also argues that the Club's proposed arbitration *is*, similarly to the position in *Svenska*, in substance an attempt to enforce the 2013 Award and the section 66 Judgments. I do not agree with that characterisation of the proposed arbitration. What the Club thereby seeks is not the enforcement of the 2013 Award or the section 66 Judgments but various remedies arising from Spain's further and repeated acts in disregard of the arbitration agreement. The arbitration agreement has not ceased to exist or operate by reason of the 2013 Award or the section 66 Judgments. It remains in effect and continues to bind Spain in equity in the sense considered in section (E) above.

108. Even if the views expressed above were wrong, I would hold that the decision in *Svenska*, in so far as it suggests that section 3(1)(a) should be construed narrowly, cannot be reconciled with the conclusion which the Supreme Court has now reached in *Benkharbouche.* Spain points out that *Benkharbouche* did not consider *Svenska* or the earlier cases to which it referred. However, the courts in *AIG* and *Svenska*, and Lord Millett's consideration of section 3(1)(a) in *Holland*, did not consider the impact of Article 6, which does not appear to have been argued. It is now clear from *Benkharbouche* that SIA 1978 should be construed so as to give effect to the restrictive theory of sovereign immunity.

109. *NML* was in relevant part similar to *Svenska*. The defendant, the Republic of Argentina, issued a series of bonds under which it agreed a waiver of state immunity. The terms of the bonds provided that a final judgment in New York would be enforceable against the defendant in other courts in which it might be amenable to suit on the judgment. The claimant obtained a judgment in New York in respect of principal and interest on its holding of bonds, which it sought to enforce by bringing a claim on the judgment debt in England. It was ultimately held that the defendant had no immunity from such proceedings (a) because the waiver of immunity in the bond terms was a submission to the jurisdiction of the courts both of New York and any country where a New York court judgment could be enforced, and (b) by reason of section 31 of the Civil Jurisdiction and Judgments Act 1982[1], given that New York court would still have had jurisdiction even if it had applied rules equivalent to SIA sections 2 to 11.

[1] Section 31(1) provides that *"(1) A judgment given by a court of an overseas country against a state other than the United Kingdom or the state to which that court belongs shall be recognised and enforced in the United Kingdom if, and only if— (a) it would be so recognised and enforced if it had not been given against a state; and (b) that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the State Immunity Act 1978 ."*

110. The Supreme Court also considered the claimant's argument that there was no immunity by reason of SIA section 3(1)(a). The majority (Lords Mance, Walker and Collins) considered that proceedings "*relating to … a commercial transaction*" within the meaning of section 3 of the 1978 Act did not extend to proceedings for the enforcement of a foreign judgment which itself related to a commercial transaction; and that the English proceedings for the enforcement of the judgment obtained by the claimant in New York related to that judgment and not to the debt obligations upon which the New York proceedings were based. In the majority on the section 3 issue, Lord Collins (with whom Lord Walker agreed) said:

> "111. The question, to what do the proceedings for enforcement of the New York judgment "relate," can be given a narrow or a wide answer. The narrow meaning would result in a conclusion that they "relate" to the enforceability of the New York judgment, which would involve such matters (not likely to be the subject of dispute in a case such as the present one) as whether the New York court had in personam jurisdiction (here there was a clear submission to the jurisdiction of the New York courts) or whether enforcement could be resisted on any of the traditional grounds (such as want of natural justice, fraud, or public policy), none of which has any arguable application. The wider meaning would give effect to the practical reality that the proceedings relate to liability under the bonds, the issue of which was plainly a commercial transaction for the purposes of section 3.
>
> 112. My conclusion that the narrower meaning is the one which must be ascribed to Parliament rests on considerations somewhat different from the reasons articulated by Stanley Burnton J in the *AIC* case [2003] EWHC 1357 . I do not consider that a potential overlap with the arbitration provision in section 9 supports a narrow interpretation of section 3 . The overlap would not be complete, and it would be artificial and over-technical to use the potential overlap to cut down the scope of section 3 . Nor do I consider that the narrow construction is supported by an argument that section 3(1)(a) should be interpreted so as to require a link with the territorial jurisdiction of the United Kingdom. No such link is required in the 1978 Act in relation to the head of commercial transactions covered by section 3(3)(b) .
>
> …
>
> 114. What is not likely to be in doubt is that at the time the 1978 Act was enacted it would not have been envisaged that section 3 would have applied to the enforcement at common law of a foreign judgment against a foreign State based on a commercial transaction. That was because until RSC Ord 11, r 1(1)(m) (now Practice Direction 6B supplementing CPR Pt 6 , paragraph 3.1(10)) was enacted in 1982 (and came into force on 1 January 1 1984) a defendant outside the jurisdiction could

> not be served in an action on a foreign judgment even if there were assets within the jurisdiction to satisfy the judgment (and consequently no freezing injunction could be made in relation to those assets: *Perry v Zissis* [1977] 1 Lloyd's Rep 607). Nor is it likely that section 31 of the Civil Jurisdiction and Judgments Act 1982 would have been enacted in the form that it was enacted if Parliament had thought that the 1978 Act already applied to a class of foreign judgments.
>
> 115. I accept that neither of those points is conclusive as to the meaning of section 3. There is no impediment in public international law to the institution of proceedings to enforce a foreign judgment based on commercial transactions. It is now possible to serve a foreign sovereign out of the jurisdiction in such proceedings, and the 1978 Act could be construed in the light of present circumstances: *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 , 49; *Yemshaw v Hounslow London Borough Council (Secretary of State for Communities and Local Government intervening)* [2011] 1 WLR 433 , paras 5–27.
>
> 116. But for section 31 of the 1982 Act, and the almost invariable employment of wide express waivers of immunity, it might have been desirable as a matter of policy to give section 3 the wider meaning. There would, however, be no principled basis on which to found such a conclusion. The proceedings in England relate to the New York judgment and not to the debt obligations on which the New York proceedings were based."

111. Also in the majority on the section 3 point, Lord Mance said:

> "The pursuit of a cause of action without the benefit of a foreign judgment is one thing; a suit based on a foreign judgment given in respect of a cause of action is another. In the present case, the only issue arising happens to be the issue of state immunity with which the Supreme Court is concerned. But a claim on a cause of action commonly gives rise to quite different issues from those which arise from a claim based on a judgment given in respect of a cause of action. A claim on a cause of action normally involves establishing the facts constituting the cause of action. A suit based on a foreign judgment normally precludes re-investigation of the facts and law thereby decided. But it not infrequently directs attention to quite different matters, such as the foreign court's competence in English eyes to give the judgment, public policy, fraud or the observance of natural justice in the obtaining of the judgment." (§ 85)

112. He considered that it stretched the language of section 3 too far to read *"proceedings relating to ... a commercial transaction''* as covering proceedings relating to a judgment which itself relates to a commercial transaction, especially bearing in mind

the extreme care that the drafters of the Act took to define in section 3, in the widest terms, the concept of '*commercial transactions'*.

113. In the minority on this issue, Lords Phillips and Clarke concluded that section 3(1)(a) did apply, and that the decisions on this point in *AIG* and *Svenska* were wrong. Lord Clarke added:

> "149. I agree with Lord Collins that the expression "relating to" in section 3(1)(a) can be given a narrow or wide meaning. I also agree with him that these are proceedings relating to the foreign judgment. The question is whether they are also proceedings "relating to a commercial transaction" entered into by Argentina. I agree with Lord Collins in para 111 that the wider meaning would give effect to the practical reality that the proceedings relate to liability under the bonds, the issue of which was plainly a commercial transaction for the purposes of section 3 . For my part, I see no reason why, in construing the meaning of "relating to", the court should not reflect that practical reality.
>
> 150. I agree with Lord Collins in para 112 that a potential overlap with the arbitration provision in section 9 does not support a narrow interpretation and that there is no warrant for holding that section 3(1)(a) should be interpreted as requiring a link with the territorial jurisdiction of the United Kingdom. I also agree with him that the absence of reasoning in the Canadian case to which he refers in para 113 makes it of little assistance. In para 114 Lord Collins notes that it was decided in *Perry v Zissis* [1977] 1 Lloyd's Rep 607 that, since a defendant could not be served out of the jurisdiction in an action on a foreign judgment, no freezing injunction could be granted in respect of assets within the jurisdiction. I agree that that was indeed the position at that time. The position would surely be different now that the rules have been changed. Finally I agree with Lord Collins that it is not likely that section 31 of the Civil Jurisdiction and Judgments Act 1982 would have been enacted in the form in which it was if Parliament had thought that the 1978 Act already applied to a class of foreign judgments.
>
> 151. However, Lord Collins accepts at para 115 that neither of those points is conclusive as to the meaning of section 3 . That is because there is no impediment in international law to the institution of proceedings to enforce a foreign judgment. Lord Collins adds that it is now possible to serve a foreign sovereign out of the jurisdiction and that the 1978 Act could be construed in the light of present circumstances. … As stated in para 144 above, I would go further and hold that it should be given an updated meaning. As Lord Clyde said in *Fitzpatrick's case* [2001] 1 AC 27 , 49–50 in the passage quoted above, the general presumption is that an updating construction is to be applied.

> 152. As I see it, once it is concluded that an updating construction should be applied, the wider meaning would give effect to the practical reality that the sole purpose of the proceedings is to enforce Argentina's liability under a commercial transaction and that there is no impediment to such a construction in international law, both policy and principle lead to the conclusion that the wider interpretation is to be preferred.
>
> 153. Lord Collins suggests at para 116 that, but for section 31 and the almost invariable employment of wide express waivers of immunity, it might have been desirable as a matter of policy to give section 3 the wider meaning. He adds that there would, however, be no principled basis for doing so. I respectfully disagree. I do not think that either the enactment of section 31 or the fact that some parties use wide submission and waiver clauses points to a narrow meaning of "relating to", whether as a matter of policy or as a matter of principle. In my opinion, viewed as at the time the question has to be decided these proceedings relate both to the New York judgment and to the underlying commercial transaction."

114. Essentially the same points apply in considering *NML* as in relation to *Svenska.* The present application does not concern an attempt to enforce a judgment, itself relating to an underlying section 3(3)(c) activity. The application relates directly to the section 3(3)(c) activity itself. I am inclined to agree with the Club that the *rationes* of *NML* are the conclusions reached in relation to SIA 1978 section 2 and section 31 of the Civil Jurisdiction and Judgments Act, and that the conclusions in relation to section 3 are *obiter*. Even if they are not, however, *NML* is in my view distinguishable for the same reasons as I have given in relation to *Svenska*; and, further, would now need to be read (if and so far as necessary) in the light of *Benkharbouche*.

115. For these reasons I conclude that Spain lacks immunity by reason of section 3(1)(a).

116. Two further points remain to be addressed in this context.

117. The first is whether or not the conclusion expressed above is independent from the conclusions I have reached in relation to section 9. Spain submits in its first skeleton argument that *"… these proceedings could only relate to a commercial transaction, in so far as the pursuit of the Spanish claims and/or participation in the s.66 judgment provides consent for the Arbitration Claims to be referred to arbitration pursuant to the arbitration agreement between the Club and Owners. If they do not, the proceedings have no relationship with any "commercial transaction" entered into by Spain (the only alleged transaction being its involvement in court proceedings)."* I do not accept that submission. The Club's proposed arbitration and, as a facet of it, the current section 18 application relate to the section 3(3)(c) activity comprised by Spain's pursuit of the contractual claims against the Club. That conclusion does not in my view depend on whether Spain has consented to arbitration i.e. the arbitrator's substantive jurisdiction. That would be an issue to be decided by the arbitrator in the

first instance, subject to the possibility of subsequent review by the court under AA section 67.

118. The second point is whether the section 3(1)(a) exception extends to the dispute which the Club seeks to arbitrate about whether Spain is in breach of a contractual agreement to arbitrate arising from Spain's participation in the section 66 proceedings. Spain contends that the contractual claims, if they exist, are tantamount to an action on a foreign judgment and are not 'related to' any underlying transaction, *per* the majority in *NML*. I do not agree. The contractual claims are not relevantly similar to an application to enforce a foreign judgment. They relate directly to the same section 3(3)(c) activity as the Club's other claims, viz Spain's pursuit of contractual claims against the Club. In the case of the contractual claims, the duty alleged to have been breached is different from that for the remainder of its claims. It is said to have arisen from Spain's participation in the section 66 proceedings, and to be a duty to abide by the outcome of those proceedings by arbitrating its substantive claims in accordance with the arbitration clause. However, section 3(1)(a) loss of immunity arises not on the basis that the underlying transaction giving rise to the section 66 Judgment was a commercial transaction, but that Spain's ongoing pursuit of its contractual claims against the Club is itself such a transaction in the extended meaning given by section 3(3)(c). The reasoning in *NML* does not therefore apply.

119. I have concluded in section (E) above that the Club has not shown to the balance of probabilities standard that its contractual claim has merit. However, I do not consider that to be relevant to the question of immunity under section 3(1)(a). It is relevant to the question of whether to appoint an arbitrator, and I return to it in § 168 below.

(G) STATE IMMUNITY: SECTION 3(1)(B) (OBLIGATION TO BE PERFORMED IN UK)

120. SIA 1978 section 3(1)(b) provides:

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

Subsection (2) adds that the above provision does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

121. The Club contends that the relevant contractual obligation is Spain's obligation to arbitrate and to do so in London.

122. Hamblen J in *The Prestige (No 2)* said:

> "167. The Defendants further submitted that the SIA deals with arbitration specifically in s. 9. It cannot have been intended that a State could lose its immunity under s. 3 even

> though the requirements of s. 9 were not met. Further, there is no good reason for treating an arbitration which happens to have its seat here differently to any other arbitration agreement. Section 9 is clearly intended to be of general application.
>
> 168. In the light of my ruling on s. 9 it is not necessary to decide this issue, although I consider that there is force in the Defendants' contention that it is s. 9 alone which governs loss of immunity under the SIA in matters relating to arbitration."

123. The Court of Appeal dealt with the matter differently:

> "74. In paragraphs 129-137 of its judgment in *Svenska* this court considered whether an application to register a foreign arbitration award in this country under section 9 of the Administration of Justice Act 1920 constituted proceedings "relating to" the obligation on which the award was based so as to fall within the expression "proceedings relating to a commercial transaction" in section 3(1)(a) of the State Immunity Act . The court considered that it did not, because the subsection was to be interpreted as referring to the proceedings before the court rather than to the transaction underlying the award. In reaching that conclusion the court was influenced by the overlap that would otherwise exist between section 3 and section 9 .
>
> 75. The court's view that the narrower meaning of section 3(1) was to be preferred (though not the reasoning by which it reached its conclusion) was subsequently endorsed by a majority of the Supreme Court in *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 2 A.C. 495. However, four members of the court, Lord Phillips of Worth Matravers, Lord Walker, Lord Collins of Mapesbury and Lord Clarke of Stone-cum-Ebony, considered that a potential overlap with section 9(1) was not a ground for giving section 3(1) a narrow rather than a wide construction. Since Lord Phillips and Lord Clarke dissented on the interpretation of section 3(1)(a), those expressions of opinion may not form part of the ratio of the decision, but they carry strong persuasive force. The present case differs from NML, being concerned with proceedings to enforce an arbitration award obtained in this country. 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."

124. The Club submits, first, that for section 3(1)(b) to apply it is not necessary for the relevant state to be an original party to the contract in question: see *J H Rayner (Mincing Lane)* [AB/23], at 195 (Kerr LJ), 222F (Nourse LJ), and 252 (Ralph Gibson LJ). In that case, an international organization, the International Tin Council (ITC), entered into contracts with brokers on the London Metal Exchange and concluded loan agreements with a number of banks. When the ITC went insolvent, a number of the creditors sought to enforce arbitration awards against foreign states that were constituent members of the ITC, in respect of the ITC's liabilities. The court held that there was no contract between the creditors and the member states, and rejected alternative claims based on concurrent/secondary liability, as well as agency. On the question of state immunity, the court held (unanimously) that had the claims been legitimate, the States would not have had immunity from them, based on section 3(1)(b) of the Act. Nourse LJ said:

> "It is perfectly correct to say that the I.T.C.'s tin and loan contracts were not "entered into by" the states, but on no principle of statutory construction can that be held to be a requirement of section 3(1)(b). That paragraph includes any obligation of a state which by virtue of any contract falls to be performed wholly or partly in the United Kingdom irrespective of whether the state is a party to the contract or not." (p222F)

125. The Club submits that the same applies here, as the English courts have held that Spain has made claims under the insurance contract, and has thereby become bound by the arbitration clause. Spain's obligation to arbitrate in London is thus an obligation that arises "*by virtue of a contract*", even if it is not an original party to the contract.

126. That does not, however, directly address the doubt expressed by the Court of Appeal in § 76 of its judgment in *The Prestige (No 2)*, which I take to relate to the nature of the obligation arising from the 'conditional benefit' principle. The courts have held that it is not a breach of contract for a third party in the position of Spain to proceed in disregard of the choice of forum agreement. On the other hand, by pursuing claims under the insurance contract Spain has come under an obligation in equity to do so only in accordance with the arbitration agreement, which stipulates that any dispute *"shall be referred to Arbitration in London".* The point is finely balanced, and no further authority was cited on the point. However, I am inclined to the view that this obligation in equity is an *"obligation of the State"* within section 3(1)(b).

127. The second question is whether that obligation is one which, by virtue of a contract (here, the arbitration agreement in the Club Rules) falls to be performed in England. One might reasonably ask, for example, whether a party who simply declined to participate in proceedings in the chosen forum is thereby in breach of contract.

However, the Supreme Court stated at the outset of its judgment in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 that "*An agreement to arbitrate disputes has positive and negative aspects. A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever forum is prescribed. The (often silent) concomitant is that neither party will seek such relief in any other forum*" (§ 1). In § 21 the court referred to the positive and negative aspects as being equally fundamental. Further, the wording of the arbitration clause in the present case (like that of most if not all arbitration or jurisdiction clauses) is expressed in positive terms ("*shall be referred to Arbitration*"). I therefore conclude that the arbitration agreement does in principle contain a positive as well as a negative aspect.

128. In the present case, the positive aspect of the obligation to arbitrate falls to be performed in England, but that cannot in my view be said of the negative aspect. The Club's essential complaint here relates to Spain's breach of the negative aspect. The Club argues that its claims nonetheless still 'relate to' the positive aspect of the obligation, and that that is sufficient to bring the case within section 3(1)(b).

129. I consider this point too to be finely balanced. On balance, I consider the Club to be correct. On the footing that the arbitration agreement contains both positive and negative aspects, the one being the corollary of the other, the proceedings 'relate to' Spain's obligation in equity to pursue its claims against the Club by arbitration. As the Club says, a claim to enforce the negative covenant is in a very real sense a claim to enforce the positive covenant, which is an obligation to be performed within the jurisdiction. More generally, it is not unnatural to regard proceedings relating to an alleged breach of an exclusive forum clause, in favour of arbitration or litigation in London, as 'relating to' an obligation that falls to be performed in England.

130. Turning specifically to the Club's claims for breach of an implied contract arising from its participation in the section 66 proceedings, Spain submits that if and in so far as the Club establishes that Spain entered such a contract with the Club, and that such a contract contained an obligation which falls to be performed wholly or partly in the United Kingdom, then the section 3(1)(b) exception would *prima facie* apply to such a claim. However, Spain says, (a) there is no basis for such a contract to arise on such terms (or any terms) and (b) any such contract contains no jurisdiction or arbitration clause and so cannot properly be the subject of the present section 18 application.

131. The application of section 3(1)(b) to the Club's contract claim is not entirely easy. The contract claim is put as an implied agreement to abide, in certain circumstances, by the arbitration agreement. Both the implied agreement and the arbitration agreement could be regarded as 'obligations' within section 3(1)(b). However, in reality the contractual claim in my view involves only one obligation as such – that arising from the implied agreement – albeit the content of that obligation is framed by reference to the arbitration clause.

132. On that approach, in order to find Spain to lack immunity under section 3(1)(b) in respect of the contract claim I would need to find on the balance of probabilities that there was a contract by virtue of which the alleged implied obligation fell to be performed in the UK. The logic of *JH Rayner* (§ 30.ii) above) would suggest that the court cannot simply leave that issue for the arbitrator on the basis that it concerns the merits of the claim. As Ralph Gibson LJ said at p.252 of that case, section 3 refers to

a commercial transaction *"entered into"* by the state which *"falls to be performed"* in the UK: *"It does not say "allegedly entered into" or "which by virtue of a contract is alleged to fall to be performed". If a state claims immunity then, in my view, the statute requires that the issue be determined before the court can try the proceedings."*

133. Since I have concluded that the Club has not shown on the balance of probabilities that any such implied contract exists, it follows in my view that the Club has not shown (to the same standard) that its contractual claims involved any "*obligation of the State which by virtue of a contract … falls to be performed wholly or partly in the United Kingdom*" within section 3(1)(b).

134. It may seem paradoxical that I have thereby reached a different conclusion under subsections 3(1)(a) and (b) in relation to this part of the Club's claim, but the difference lies in the fact that section 3(1)(b) (like section 9) is based on finding a relevant agreement to exist whereas section 3(1)(a) is not.

(H) STATE IMMUNITY: SECTION 2 (SUBMISSION)

135. The Club alternatively argues that Spain has submitted to the jurisdiction within SIA section 2:

> "(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom
>
> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission
>
> (3) A State is deemed to have submitted—
>
> (a) if it has instituted the proceedings; or
>
> (b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
>
> (4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of—
>
> (a) claiming immunity; or
>
> (b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.
>
> …"

136. In *The Prestige (No 2),* the Court of Appeal noted that:

> "In *Kuwait Airways v Iraqi Airways* [1995] 1 Lloyd's Rep 25 this court considered what constitutes a step in the proceedings for the purposes of section 2(3)(b). All three members of the court held that it is a step of a kind which evidences an unequivocal election to waive immunity and allow the court to determine the claim on its merits: see per Nourse L.J. at page 32, col. 1, Leggatt L.J. at page 34, col. 1 and Simon Brown L.J. at pages 37, col. 2 to 38, col. 1" (§ 34)

Further:

> "If the application had been issued only for the purposes of claiming immunity, it would not have constituted a relevant step in the proceedings: see section 2(4)(a); but in fact by its application notice Spain sought a declaration that the arbitrator did not have substantive jurisdiction because there was no arbitration agreement between itself and the Club. The application notice, therefore, was directed to the substantive grounds for setting aside the award and had nothing to do with Spain's right to claim immunity from the jurisdiction of the court. Nonetheless, Mr. Smouha submitted that a state is entitled to resist enforcement at the same time as it claims immunity and that in this case Spain was forced by the compressed timetable sought by the Club to pursue its substantive objections to the Club's application concurrently with its claim to immunity in order to avoid being prevented from pursuing them at all." (§ 49)

> "… I accept that a state which wishes to claim immunity is not precluded from taking steps at the same time to resist enforcement, for example, by applying to set aside a default judgment, and that the acid test by which to determine whether it has taken a step in the proceedings otherwise than for the sole purpose of claiming immunity is whether it has acted in such a way as to demonstrate that it is willing to allow the court to determine the substance of the dispute. However, I do not think that it is enough in this case to say that Spain had made clear its intention to claim immunity; it is necessary to consider how it actually conducted itself in relation to the proceedings. The reference to state immunity in Mr. Meredith's witness statement did not make it clear that the only purpose of issuing the application under sections 67 and 72 was to claim immunity; indeed, it could hardly do so, given the nature of the relief sought. On the contrary, in the witness statement immunity was said to exist if there was no valid arbitration agreement. It is difficult to resist the conclusion, therefore, that Spain was positively inviting the court to determine whether the arbitrator had jurisdiction, which was the principal issue raised by the Club's application." (§ 50)

137. The Club argues that Spain has taken a step in the proceedings other than for the purpose "*only*" of claiming immunity, and therefore has submitted to the Court's jurisdiction and waived immunity, because:

i) Spain has filed a Part 11 challenge on the basis that immunity only arises in case it fails on jurisdiction, and has therefore invited the court to determine the jurisdiction issue first. However, immunity from suit is a preliminary issue that must be determined first. If a state invokes immunity in a combined application contesting territorial jurisdiction, the application should be made conditional on the outcome of the immunity challenge: see *A Company Ltd v B Company Ltd* (Comm, 3 April 1993), unrep. per Saville J; and *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 Lloyd's Rep. 25, 38 (Simon Brown LJ). Here, Spain has done the opposite, stating that the immunity challenge did not need to be determined if it were right on jurisdiction. Having failed to take its immunity challenge first, Spain has waived it.

ii) Spain has invited the court to set aside service based on the merits of the Club's claim. It is common ground that it would be possible to mount a jurisdiction challenge at the same time as an immunity plea, for example to contest the availability of any of the jurisdictional 'gateway' provisions in PD6B, paragraph 3; or to argue that England was not the proper forum. However, a challenge that attacks the merits of the claims is not consistent with pleading immunity from the merits.

138. The present proceedings were issued on 22 March 2019 and on 17 June 2019 Spain applied pursuant to CPR Part 11 and/or the inherent jurisdiction of the court, asking the court to:

i) set aside the order granting permission to serve the Arbitration Claim Form and related documents on Spain out of the jurisdiction;

ii) declare that the English court has no jurisdiction to hear any of the claims in this action;

iii) declare that Spain is, in any event, immune from the English court's jurisdiction to hear the claims, and

iv) hold that the Club pays Spain's costs of the application;

"for the reasons set out in the witness statement of Graham Derek Harris dated 17 June 2019, in particular,

(i) Spain is immune from the Court's jurisdiction to hear the Club's claims under s. 1(1) of the State Immunity Act 1978;

(ii) the Club has failed to effect good service on Spain pursuant to s.12 of the State Immunity Act 1978; and

(iii) there is no real issue to be tried on the merits because, inter alia, there is no agreement to arbitrate the disputes the Club seeks to refer to arbitration."

139. Mr Harris's witness statement included the following passages:

> "Spain respectfully submits that the Court does not have jurisdiction to hear the Arbitration Claims (as summarised above at paragraph 5). It disputes the English Court's jurisdiction to hear the claims on the following bases:
>
> (1) First, the Arbitration Claim disclose no real issue to be tried on the merits. As will be explained in further detail below, this is because the disputes which the Club seeks to refer to arbitration do not fall within the scope of an arbitration agreement that is binding upon Spain. In the absence of a relevant arbitration agreement binding on Spain, the Court cannot appoint an arbitrator pursuant to s.18 of the Arbitration Act 1996, nor can the arbitration purported to have been commenced by the Club be valid or effective. The Arbitration Claims accordingly have no prospect of success.
>
> (2) Second, and in any event, Spain is immune from the Court's jurisdiction pursuant to s. 1(1) of the SIA. This issue does not strictly arise in circumstances where the English Court does not have jurisdiction to hear the Arbitration Claims at all. This notwithstanding, Spain contends that it is immune from the Court's jurisdiction because (i) none of the exceptions upon which the Club relied are in fact applicable, and (ii) the Arbitration Claim Form and related documents have not been properly served in accordance with s. 12(1) of the SIA." (§ 13)
>
> "The question of the Court's jurisdiction to hear the Arbitration Claims logically precedes the question of whether Spain is immune from the Court's jurisdiction. If the Court does not have jurisdiction to hear the claims at all, then the issue of Spain's immunity does not arise. For that reason, I will first explain the grounds upon which Spain contends that the Court does not have the jurisdiction to hear the claims, before addressing the issue of immunity." (§ 37)

140. Thus, the Club argues, the proposed order of consideration of issues in Mr Harris' statement was first jurisdiction, secondly immunity, and it was made clear that if jurisdiction were determined in favour of Spain, then immunity would never arise. Further, the grounds on which the witness statement contended the court lacked jurisdiction included that the Club's claim had no real prospect of success on the merits: for example, that the Club had no prospect of establishing that the disputes fall within the terms of an arbitration agreement, that its causes of action had merged into the first 2013 Award, that an arbitrator would not have jurisdiction to grant the relief sought, and that the Club's notices to arbitrate were invalid. By thus asking the court to rule on the merits, albeit as part of a Part 11 jurisdiction challenge, Spain was submitting to the jurisdiction of the English court.

141. Spain makes the point that *The Prestige (No 2)* is distinguishable, because in that case it had made a separate application under AA 1996 section 67 invoking the court's jurisdiction to challenge the jurisdiction of the arbitrator. Here, it has made a single application, by which in the same breath it claims immunity and challenges the court's jurisdiction on other grounds (including the absence of an arguable case, that being relevant to jurisdiction).

142. According to the Club, that is an insufficient distinction: because Spain has taken a step which is not solely for the purpose of challenging immunity, it is deemed to have submitted by reason of SIA section 2(3) and the reasoning in *The Prestige (No 2)* §§ 49 and 50 applies.

143. In considering this issue it is necessary to revisit *Kuwait Airways*, the decision cited by the Club and whose reasoning the Court of Appeal applied in *The Prestige (No 2).* The Court of Appeal's decision in *Kuwait Airways* was reversed in part by the House of Lords, but not on this point. (Lord Goff noted at [1995] 1 WLR 1147, 1164 that no argument had been addressed to the Appellant Committee on the point, and in all the circumstances he was not prepared to depart from the decision of the Court of Appeal on it.)

144. The claimant (KAC) in *Kuwait Airways* had obtained a default judgment against a state entity (IAC). IAC issued a summons seeking a declaration that the court had no jurisdiction over IAC in respect of the claim, and that the claim was not justiciable, and an order setting the judgment aside. The application stated that the claim was not justiciable on act of state grounds, and that the court lacked jurisdiction by reason of state immunity, and *forum non conveniens*. KAC argued, highlighting the word *"only"* in SIA section 2(4), that IAC had submitted to the jurisdiction because it had not only claimed state immunity but had also sought a stay on *forum non conveniens* grounds and claimed non-justiciability on act of state grounds.

145. The Court of Appeal rejected that argument. Nourse LJ pointed out that there was no submission in the first place unless what is done by the state or state entity amounted to an intervention or step in the proceedings (p.31 rhc). That question was to be determined on ordinary principles. He adopted the test suggested by Lord Denning M.R. in *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd*., [1978] 1 Lloyd's Rep. 357, 361 that a 'step in the proceedings' is *"a step by which the defendant evinces an election to abide by the Court proceedings and waives his right to ask for an arbitration. Like any election, it must be an unequivocal act done with knowledge of the material circumstances"*, and must be *"one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration"* (p.32 lhc).

146. Nourse LJ stated that a defendant who seeks a stay on *forum non conveniens* grounds would no doubt usually thereby take a step in the proceedings, but IAC had not sought a stay: they relied on *forum non conveniens* merely as a ground for holding the court to have no jurisdiction (p.32). He continued:

> "In any event, it cannot possibly be maintained that IAC, by making such a case, is affirming the correctness of the proceedings or its willingness to go along with their

> determination by the English Courts. It is doing exactly the opposite.
>
> Turning to act of foreign state, I would accept that that is a doctrine which can be relied on, and is usually relied on, by way of defence. But once again it is clear that here it is being advanced only as a further ground for holding that there is no jurisdiction. That is a plea which might or might not succeed. But the mere making of it does not constitute an affirmation of the kind required, any more than "forum non conveniens".” (p.32 rhc)

147. As for the suggestion that the application for a stay of the judgment and the performance of conditions subject to which it was granted could amount to a step in the proceedings, Nourse LJ said *“Again IAC has acted only so as to disaffirm the correctness of the proceedings and its willingness to go along with their determination by the English Courts.”* (p. 32 rhc).

148. Simon Brown LJ cited the statement in *Mustill & Boyd* on *Commercial Arbitration* (2nd ed., p. 272) that the conduct of the applicant must, first, be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed, and, secondly, must have the effect of invoking the jurisdiction of the court. Simon Brown LJ continued:

> “… it seems to me quite impossible to hold that IAC here did anything that could properly be said to amount to taking a step in the proceedings. So far from conducting itself so as to "*demonstrate an election to abandon (its) right*" (here to immunity rather than a stay for arbitration), IAC through its advisors from first to last repeatedly emphasised its intention not to submit to the Court's jurisdiction. In the face of such protestations I would be loath to find that it had nevertheless done so.
>
> Whilst accepting entirely the correctness of Mr. Justice Saville's unreported decision in *A Co. Ltd. v. B Co. Ltd. and Republic of Z,* (Apr. 1, 1993) - that for a State expressly and formally to invoke and submit to the Court's jurisdiction to determine an application for a stay on the grounds of forum non conveniens *before* inviting the Court to determine its claim to immunity does indeed involve that State's submission to the jurisdiction for the purposes of s. 2 of the 1978 Act - I regard that case as readily distinguishable from the present one. To my mind, indeed, it lies at the very opposite end of the spectrum. Consider the differences. In the first place, the plea of forum non conveniens raised here by IAC was by no means a conventional one. On the contrary, the summons before the Court sought not a stay but rather a declaration that the United Kingdom Courts have no jurisdiction over IAC in respect of KAC's claim, and that such a claim is not justiciable. IAC was not suggesting that the claim against it could and should more

> appropriately be dealt with in some other competent and more convenient municipal forum. Its contention was rather that the dispute was clearly of an international character - intrinsically a plea directed to immunity and merely ancillary to the main argument. And that, indeed, was clearly how the matter was perceived by the various Judges hitherto seised of the case: that IAC's sole challenge was to the Court's jurisdiction on grounds of immunity from suit.
>
> The position was very different in *A Co. Ltd*. There, by contrast, a wholly distinct application lay before the Court - an application expressly requiring the Court to decide whether, assuming the defendants not to be immune, England was the proper forum for the resolution of the dispute. That was a conventional plea of forum non conveniens, a plea moreover not merely distinct from the immunity claim but expressly required to be separately dealt with at an earlier hearing. The contrast between the two cases could hardly be starker. ..."

149. In the present case, Spain has made no separate application, prior to asserting state immunity, invoking the court's jurisdiction or demonstrating an election to abandon its claim to state immunity. Nor has Spain, in my view, by combining an immunity claim and a jurisdictional objection in the same application, made any such election, still less any unequivocal election. Nor does the inclusion of arguments relating to the merits within the confines of a jurisdictional objection in my view give rise to such an election. I also do not consider that any such election was made by Mr Harris suggesting, in his witness statement, that the issue of jurisdiction was logically prior to the immunity issue and could or should be determined first. The application and witness statement as a whole, constituting a single act, made clear that Spain was resisting the court's jurisdiction and maintaining its plea of state immunity against any assertion of jurisdiction that the court might otherwise consider could be made. In these circumstances, Spain did not in my judgment take a step in the proceedings for the purposes of SIA section 2 or submit to the jurisdiction of the English court.

(I) ARBITRATION ACT SECTION 18

(1) Introduction

150. AA 1996 section 18 provides:

> "(1) The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.
>
> There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.
>
> (2) If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other

> parties) apply to the court to exercise its powers under this section.
>
> (3) Those powers are—
>
> (a) to give directions as to the making of any necessary appointments;
>
> (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
>
> (c) to revoke any appointments already made;
>
> (d) to make any necessary appointments itself.
>
> (4) An appointment made by the court under this section has effect as if made with the agreement of the parties.
>
> …"

151. The arbitration agreement in the present case provides for the appointment of a sole legal arbitrator, and sets out no appointment procedure. AA section 16(3) provides that in such circumstances *"If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so".* It is no longer in dispute that the Club has served a valid notice calling on Spain to agree to the appointment of an arbitrator but Spain has not done so. The default procedure in AA 1996 section 17 does not apply, therefore it is necessary for the Club to ask the court to appoint an arbitrator pursuant to section 18(3).

152. Spain argues that the court lacks jurisdiction to appoint an arbitrator under section 18, or should exercise its discretion not to do so, because:

i) the Club's proposed arbitration claims are not arbitrable and therefore do not fall within the terms of an arbitration agreement;

ii) the causes of action relied upon by the Club were merged into the 2013 Award and the section 66 Judgments, and therefore do not fall within the terms of an arbitration agreement; or

iii) there is no jurisdiction to grant an injunction against Spain, damages in lieu of an injunction, or equitable compensation.

(2) How the court should approach these issues

153. Beginning with the standard of proof, in relation to questions about the jurisdiction of the arbitrator it is sufficient under section 18 AA 1996 for the Club to show a good arguable case that an arbitration has been commenced and that the tribunal has jurisdiction to determine the claims: see *Flannery and Merkin* §18.4 (pp 262-264), and *Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd* [2017] 1 Lloyd's Rep. 154 §§ 26-27, making clear that it is a relatively low threshold. As a matter of

principle such questions should be determined by the arbitrator rather than the court, at least in the first instance.

154. In *Noble Denton Middle East v Noble Denton International* [2011] 1 Lloyd's Rep 387 Burton J, after considering commentary and authority, concluded that AA 1996 section 18, like section 17, is merely a 'gateway' provision designed to enable an arbitration to start. He continued:

> "8. It is quite plain that the primary purpose of the statutory regime for arbitration, fulfilling the well understood international approach to arbitration, is that a decision to arbitrate reflects what is often called the "autonomy of the parties" and should only very exceptionally be overridden by the courts. And the authorities and the textbooks, to which I have referred, underline the fact that arbitrators must, and are entitled to, decide not only issues but also the question of their own jurisdiction; the concept of Kompetenz-Kompetenz, as it is described, hence section 30 of the Arbitration Act among other provisions
>
> 9. Of course, there are occasions when the court will intervene. First, it will intervene after an arbitration when an application is made under section 67 by a losing party, if appropriate. Secondly, there can be references by the arbitrators in appropriate cases (or by the parties) under section 32. Thirdly, a non-party to arbitration, a party which has taken no part in arbitration and wishes to assert that it is not bound by an arbitration, can take steps under section 72. But in the absence of one of those three fall-back statutory protections, the party denying the existence of an arbitration still has the protection that the arbitrator itself can be invited to and does decide its own jurisdiction, as I have described.
>
> 10. In those circumstances it is not surprising and indeed, in my judgment, is correct that the test on section 18 is only one of whether there is an arguable case. It does appear that this point was over-looked at first instance in *Midgulf International Ltd v Groupe Chimique Tunisien* [2009] 2 Lloyd's Rep 411, and that when it was attempted to be put right in the Court of Appeal in *Midgulf* [2010] 2 Lloyd's Rep 543, the Court of Appeal understandably concluded that it was too late for the point to be taken."

On the facts it was conceded that a good arguable case existed there.

155. I respectfully agree with Burton J's observations. As the Club says, the court's role in this context is merely to support the arbitration, that being the parties' chosen adjudicative mechanism. The Club also points out arbitrators may have experience and expertise that particularly equips them to decide questions including whether the dispute falls within an arbitration clause, and their conclusions may in any event assist the court in any subsequent review. The existence of the court's supervisory

jurisdiction in AA section 67 and elsewhere does not alter the starting point that it is for the arbitrator to determine in the first instance whether the dispute falls within the arbitration agreement. Nor is that starting point altered by the fact that the court of the seat remains the primary arbiter of the substantive jurisdiction of the tribunal and will *"if necessary"* examine that jurisdiction in advance: see §§ 38-40 above citing *Enka Insaat*. It is not necessary for the court to do so when the application before it is merely to appoint an arbitrator pursuant to AA 1996 section 18.

156. In *Silver Dry Bulk,* after considering *Noble Denton* and other cases, Males J approved *Noble Denton* and added:

> "27. "Good arguable case" is an expression which has been hallowed by long usage, but it means different things in different contexts. For the purpose of an application under section 18 , I would hold that what must be shown is a case which is somewhat more than merely arguable but need not be one which appears more likely than not to succeed. I shall use the term "good arguable case" in that sense. It represents a relatively low threshold which retains flexibility for the court to do what is just, while excluding those cases where the jurisdictional merits are so low that reluctant respondents ought not to be put to the expense and trouble of having to decide how to deal with arbitral proceedings where it is very likely that the tribunal has no jurisdiction. In this connection it is important to remember that crossing the threshold of "good arguable case" means that the court has power to make one of the orders listed in section 18(3). It remains for consideration whether it should do so as a matter of discretion." (§ 27)

157. In *Crowther v Rayment* [2015] EWHC 427 (Ch), Andrew Smith J went further, saying:

> "To my mind proper regard for the kompetenz-kompetenz principle requires that the court refrains from anticipating a decision that might be made by the tribunal, unless the applicant's claim to be party to a relevant arbitration agreement can be rejected as having no real prospect of success or (which to my mind amounts to the same thing) would not raise a serious issue. Otherwise the principle demands that the court enforce any arbitration agreement that the parties might have made and leave it to the tribunal to determine the issues in the first instance. If this means that I am departing from what Burton J said in the Noble Denton case, then I respectfully do so (recognising though I do that the "good arguable case" test is endorsed by Merkin and Flannery in Arbitration Act, 1996, 5th ed (2014), p 105)." (§ 26)

On the facts, the judge held the dispute not to be covered by the arbitration agreement.

158. In the present case, as appears below, I do not find it necessary to consider whether something less than an arguable case exists as to the question of the arbitrator's jurisdiction.

159. Leaving aside questions of jurisdiction, the merits of the claim are for the tribunal to determine, save that if the court considered the claim to be obviously hopeless then there would be no point in appointing an arbitrator: see *West of England v Hellenic* [1999] 1 Lloyd's Rep. 93, 107 (whether claim obviously time barred).

160. Spain submits that if the issues arising under section 18 raise points of law, then the court should grasp the nettle and resolve them now. It refers to *Sinochem International Oil (London) v Fortune Oil Co* [2000] 1 Lloyd's Rep. 682, where Sinochem applied for the appointment of an arbitrator in a sale of goods dispute. Fortune denied that the alleged agreement had been made on its behalf, contending that the individuals with whom Sinochem dealt had no authority to act on Fortune's behalf, and it made a cross-application seeking a declaration to that effect. Colman J directed (for reasons which are not apparent from the later report) that there be a trial of that issue. At that trial, Toulson J decided Fortune was correct and dismissed the application to appoint an arbitrator.

161. *Sinochem* concerned an issue of fact going to the jurisdiction of the proposed arbitrator. Spain accepted that questions of fact would commonly be left to the arbitrator to determine, but submitted that an issue of pure law ought to be decided by the court at the outset. The Court of Appeal in *Airbus v Generali Italia* [2019] EWCA Civ 805, [2019] 4 All ER 745, [2019] 2 Lloyd's Rep 59, for example, indicated that when a question of law arises on an application to challenge jurisdiction it will sometimes be sensible for the court to decide it rather than merely deciding whether it is sufficiently arguable (§ 52-53). The court cited *AK Investment v Kyrgyz Mobil Tel* [2012] 1 WLR 1804 § 81, where Lord Collins stated that if the question of law goes to jurisdiction the court will normally decide it. Those comments relate, however, to questions going to the jurisdiction of the court itself, as opposed to that of an arbitrator in an arbitration whose commencement the court is invited to facilitate, where different considerations arise.

162. There may be cases where a court asked to appoint an arbitrator should address at the outset a short point of law going to the question of whether the arbitrator would have jurisdiction. Even on that basis, however, a distinction should in my view be drawn between questions of the arbitrator's jurisdiction to hear the dispute, and questions of the arbitrator's powers to grant specific heads of relief sought by a party. A possible illustration of the difference is the House of Lords' decision in *Lesotho Highlands Development Authority v Impreglio* [2005] UKHL 43, where the issue was whether the arbitrators had the power to express their award in particular currencies pursuant to AA 1996 section 48(4). The majority held that the arbitrators did not have such power, but that they had not thereby exceeded their powers for the purposes of section 68(2)(b) of the Act. A mere error of law, leading to the erroneous exercise of an available power, as opposed to a purported exercise of a non-existent power, could not by itself amount to an excess of power.

163. In the present case, Spain raises a number of issues about remedies the Club proposed to seek from the arbitrator by its proposed claims. These include several complex questions relating to novel and/or developing areas of law. These questions do not in

my view affect the jurisdiction of the arbitrator to hear the dispute. Even if they did, it would in my view be inappropriate for the court to resolve most of them on a section 18 application. Insofar as there are legal issues going to jurisdiction, it is sufficient for the Club to show a good arguable case. Legal issues going not to jurisdiction but to available remedies arising from the substantive dispute should be left to the arbitrator at least in the first instance, unless perhaps the Club's claim in relation to all the remedies sought is so obviously hopeless that there would be no point in appointing an arbitrator.

(3) Jurisdiction

164. In the light of my earlier conclusions, I can deal with this topic relatively briefly.

165. The Club submits that questions of jurisdiction can be determined simply by considering the scope of the arbitration clause, which is broad. I am not convinced that the matter can be dealt with so simply in a case such as the present involving a third party to the arbitration agreement. Similar considerations to those considered earlier in the context of SIA section 9 (§§45-47 above) may arise. The question is what claims must Spain be taken to have agreed to submit to arbitration by virtue of its pursuit of claims against the Club pursuant to the contract of insurance. It may not thereby have agreed to submit all claims that would, had Spain been a party to the contract of insurance in the usual sense, have fallen within the scope of the clause.

166. However, in the present case I have concluded in the context of section 9 that Spain has thereby agreed to submit to arbitration all of the Club's proposed claims, other than its claim for breach of contract. *A fortiori* the Club has a good arguable case in that regard.

167. Spain also submitted that to the extent that the Club seeks remedies that an arbitrator would lack power to award, the dispute is not arbitrable and Spain cannot be regarded as having submitted to arbitration for the purposes of SIA section 9. I do not accept that argument. The range of remedies which the Club might seek to persuade an arbitrator that he or she could grant does not, in my view, affect the question of whether Spain has submitted to arbitration in respect of disputes arising from its disregard of the arbitration agreement.

168. The Club's breach of contract claim appears, though, to stand on a different footing. I have concluded that the Club has not shown on the balance of probabilities that, by its participation in the section 66 proceedings, Spain has agreed that it is bound by the arbitration clause and has agreed to pursue its substantive claims against the Club only by arbitration pursuant thereto. Moreover, I have concluded that Spain's pursuit of its claims against the Club has not, pursuant to the 'conditional benefit' principle, resulted in Spain becoming obliged in equity to submit to arbitration in respect of this distinct freestanding claim. Nor do I believe the Club to have shown a good arguable case in that regard. It follows that I would not appoint an arbitrator pursuant to section 18 in respect of that particular dispute.

(4) Merger

169. Spain submits that the Club has no remaining cause of action capable of submission to arbitration, for the following reasons:

i) The principle of merger dictates that a suit brought upon a particular cause of action, judgment or award in favour of a claimant extinguishes all rights arising from that cause of action: see *Phipson on Evidence* 19th ed. at 43-17. Merger is not a matter of discretion and operates whenever there is a judgment or award on a cause of action, and a single cause of action cannot be split into two causes of action even if the first tribunal awards a claimant less than he was entitled to: see *Clark v In Focus Asset Management* [2014] 1 WLR 2502 §§ 6-7 per Arden LJ (financial ombudsman award).

ii) The only arbitrable causes of action are Spain's conditional direct action claims, which were arbitrated in the first arbitration. As a result, all rights arising from the conditional causes of action were extinguished in the 2013 Award and there is no cause of action left.

iii) Without prejudice to the foregoing, if or in so far as the Club's distinct private law rights are deemed arbitrable, such claims were nonetheless merged with the 2013 Award and section 66 Judgments.

iv) As an application of the above principles, when a final award is given in arbitration, all the causes of action referred to the arbitration become merged with the award, irrespective of whether all the disputes in the reference are dealt with during the substantive proceedings, and irrespective of whether they are dealt with in the final award: see *Purser & Co (Hillingdon) Ltd v Jackson* [1977] Q.B. 166 and *Phipson* § 43-22.

v) Declaratory judgments and awards give rise to mergers. This will only not occur when, properly analysed, the second claim is based on a cause of action which was not the subject matter of the first judgment/award: see *Zavarco Plc v Nasir* [2019] EWHC 1837 (Ch) at §§ 46-48.

vi) The original notice of arbitration in this case, and all subsequent notices of arbitration (save for that purportedly served 18 April 2017), contained identical terms of reference. They were deliberately drafted in the broadest possible terms. The Club referred both present and future loss or damage to arbitration:

> " ...the Club hereby gives you notice of commencement of London arbitrable proceedings in respect of all differences or disputes arising out of or in connection with the Insurance Contract or the Rules in respect of the loss of the M/f PRESTIGE and any resulting loss or damage (save for claims under the CLC) and calls upon and requires you to agree to the appointment of a sole arbitrator ..." (emphasis added)

vii) Consequently, to any extent that the proposed claims were arbitrable, they were referred to the original arbitration, and subsequently merged with the section 66 Judgments: see *Dalmia Dairy Industries v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223, 275 lhc, and *Sonatrach v Statoil* [2014] EWHC 875 (Comm) at § 55.

viii) Cases relied on by the Club in its evidence, for the proposition that a declaratory award does not preclude the making of a claim for damages in a subsequent arbitration, do not assist. In *Compagnie Granière SA v Fritz Kopp* [1980] 1 Lloyd's Rep. 463, the parties had expressly and deliberately only referred the issue of liability and not quantum to the original arbitration (see 463 lhc). In *FJ Bloemen Pty Ltd (formerly Canterbury Pipelines (Australia) Pty Ltd) v Council of the City of Gold Coast* [1973] A.C. 115, the Privy Council's *obiter* statement at 126F cited by the Club (to the effect that an arbitration award may not always supersede the underlying contractual liability) is consistent with the above analysis, and would be inconsistent with the binding authorities detailed above were it interpreted as stating that declarations of liability do not merge all causes of action referred to the relevant arbitration.

ix) It is no answer to submit, as the Club has, that Spain has committed successive breaches of its obligations so that the Club is entitled to bring further arbitration proceedings. The original notice of arbitration was in respect of '*any resulting loss or damage (save for claims under the CLC).*' The currently proposed arbitration claims are for 'resulting loss or damage", and were referred to the original arbitration. They could have been dealt with in the 2013 Award by way of a declaration of liability or indemnity, and thus were merged into the 2013 Award. The Club's only remedy then was to enforce the 2013 Award, and its only remedy now is to enforce the section 66 Judgment.

170. I do not accept these submissions. I consider that Spain's continued pursuit of its claims in disregard of the arbitration agreement has involved, and continues to involve, successive breaches of its obligations in equity, and has created successive new causes of action. The notion that the Club could have or did refer to the original arbitration these further causes of action, which at that time lay in the future and were not necessarily to be anticipated, is contrived and wrong.

171. The Club's original Notice of Arbitration in the First Arbitration was dated 16 January 2012. It indicated that the Club denied liability for Spain's substantive claims, sought declaratory relief to that effect, and stated that Spain's claims and the Club's claim for declaratory relief should be referred to arbitration. It gave notice of commencement of arbitration *"in respect of all differences or disputes arising out of or in connection with the Insurance Contract or the Rules in respect of the loss of the M/f PRESTIGE and any resulting loss or damage (save for claims under the CLC)"*. The words *"and any resulting loss or damage (save for claims under the CLC"* naturally referred to loss or damage resulting from the loss of the vessel, rather than to further causes of action that might at some point in the future arise from Spain continuing to pursue its claims in disregard of the arbitration clause. The wording of that notice contrasts with the Club's definitive notice of arbitration in respect of the current dispute, dated 15 July 2019, which explicitly sets out the steps taken by Spain in disregard of the arbitration clause and seeks relief in that regard. At the time of the 2012 notice of arbitration, Spain had commenced proceedings in the Provincial Court of A Coruña, but all the remaining steps lay in the future.

172. The Club's skeleton argument in the First Arbitration included the statement that *"the Club's claims for negative declaratory relief relate to any actual or prospective claims against the Club"* pursuant to specified provisions of Spanish law, being

claims *"which the Spanish State is bound to arbitrate and which, on a true analysis, are bound to fail".* That statement simply set out the scope of the claims or potential claims in respect of which the Club sought a declaration as to the merits. It did not, and in my view could not, purport to refer to arbitration causes of action that had not yet occurred with the result that any future breach by Spain of its obligations in equity could never be referred to arbitration.

173. The comparison which Spain seeks to draw with *India v India Steamship Co Ltd (The Indian Endurance and The Indian Grace) (No.1)* [1993] AC 410 is inapt. In that case a fire occurred on the defendants' vessel resulting in some cargo being jettisoned and the rest damaged. The cargo owners brought a successful claim for short delivery, recovering about £6,000. Later, they sued for £2.6 million in respect of the total loss of the cargo. The House of Lords held that since the damage and loss resulted from a single incident, the causes of action in the two sets of proceedings were the same. It was thus a case of a one-off breach. The position in the present case is entirely different. Each of the steps Spain has taken in disregard of the arbitration clause, most of which have occurred after the 2012 notice of arbitration (and indeed after the original 2013 Award itself), has given rise to a separate cause of action.

174. Spain further argues that the Club's present claims are an abuse of process contrary to the *Henderson v Henderson* principle, because they could and should have been made in the First Arbitration. It is common ground that the principle extends to arbitration (see *Siporex Trade v Comdel* [1986] 2 Lloyd's Rep 428, 434 rhc), save that the interests of other litigants cannot be a relevant consideration in the arbitration context.

175. I see no merit in this argument. It is absurd to suggest that the Club should in 2012 have anticipated, and sought all-encompassing relief (including injunctions to prevent actions not yet threatened) against, the possibility that Spain would in the future continue to act in disregard of its obligations following an award against it in the arbitration the Club was then commencing, and then continue to act in disregard of its obligations even in the face of decisions against it in the High Court and Court of Appeal.

176. Spain made the further suggestion in oral argument that the position must be either (a) that Mr Schaff QC is now *functus* as arbitrator and all the Club's claims have merged into the 2013 Award or (b) Mr Schaff QC is not *functus* and there is no case for a parallel arbitration relating to the same cause of action. For the reasons outlined above, I do not consider the Club's present claims to have merged into the 2013 Award, nor to arise from the same cause of action as the dispute before Mr Schaff QC. In these circumstances it is not necessary to decide whether or not Mr Schaff QC is *functus*, though there would appear to be a good argument that he is, having issued what he described as a *"final award"*.

177. For these reasons, I consider that the Club has, to put it at its lowest, a good arguable case that Spain's merger argument is wrong. The merger argument, if pursued, can be left to the arbitrator and is not a reason to decline to appoint an arbitrator.

(5) Arbitrator's power to grant an injunction against a State

178. Spain contends that an arbitrator would have no power to grant against Spain the injunction which the Club proposes to seek. This is one of a series of arguments to

the effect that an arbitrator would be unable to grant the relief the Club wishes to seek. I have already concluded that these points go to the merits rather than to jurisdiction, so that the relevant question is whether the Club's arguments are obviously wrong such as to make it pointless to appoint an arbitrator, though in case I am wrong on that point I shall consider whether the Club has a good arguable case on them.

179. SIA 1978 section 13(2)-(4) provides:

> "(2) Subject to subsections (3) and (4) below—
>
> (a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and
>
> (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
>
> (3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.
>
> (4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if—
>
> (a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or
>
> (b) the process is for enforcing an arbitration award."

180. Spain points out that there is no previous known case of any tribunal granting an injunction against a state.

181. Section 13 is not directly applicable to arbitrators. It falls within Part I of the Act, which is headed *"Proceedings in United Kingdom by or against Other States".* The starting point of Part I is the immunity from jurisdiction provided for in section 1, which is expressed to relate to courts:

> "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."

182. Sections 12 and 13 fall under the subheading *"Procedure"*, and section 13 is entitled *"Other procedural privileges"*. Both sections make express reference to aspects of court proceedings, and neither mentions or appears apt to relate to arbitration.

183. Spain argues, however, that AA 1996 section 48, read with SIA section 13, means that an arbitrator cannot grant an injunction against a state. Section 48 provides:

> "48.— **Remedies**.
>
> (1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.
>
> (2) Unless otherwise agreed by the parties, the tribunal has the following powers.
>
> (3) The tribunal may make a declaration as to any matter to be determined in the proceedings.
>
> (4) The tribunal may order the payment of a sum of money, in any currency.
>
> (5) The tribunal has the same powers as the court—
>
> (a) to order a party to do or refrain from doing anything;
>
> (b) to order specific performance of a contract (other than a contract relating to land);
>
> (c) to order the rectification, setting aside or cancellation of a deed or other document"

184. The question therefore is whether SIA section 13 either (a) has the effect that a court has no power to grant an injunction against a state, with the result that AA 1996 section 48(5)(a) confers no such power on an arbitrator, or (b) operates merely as a constraint on the exercise of the court's power, leaving arbitrators unconstrained.

185. There is a potential parallel with the grant of anti-suit injunctions by arbitrators in relation to proceedings in EU Member States. The Court of Justice held in Case C-536/13 *Gazprom OAO* [2015] 1 WLR 4937 that the grant of such an injunction is not contrary to the Brussels I Regulation or otherwise contrary to EU law. The Court of Justice had previously made clear that for a court of a Member State to grant such an injunction *was* contrary to the Brussels I Regulation and general principles of EU law (Case C-159/02 *Turner v Grovit* [2004] ECR I-3565)), even if the injunction were

granted in favour of arbitration (Case C-185/07 *Allianz SpA v West Tankers Inc* [2009] AC 1138).

186. Yet on Spain's approach to AA 1996 section 48, an English arbitral tribunal would be unable to issue an anti-suit injunction relating to proceedings in a Member State's courts, on the ground that an English court would lack the power to do so. That would be an odd result. As stated in *Raphael, "The Anti-Suit Injunction"* (2nd ed.):

> "12.52 Since the Brussels-Lugano regime imposes no barriers on arbitrators granting such relief, and since English arbitrators generally have the power to grant anti-suit awards, it would be strange if English law somehow removed that power when the competing proceedings were in the Brussels-Lugano zone. Yet is has been suggested that this is the effect of section 48(5) of the Arbitration Act 1996, which is often understood to be the basis of arbitrators' powers to grant injunctions in English arbitration law (absent specific agreement in the arbitration agreement or institutional rules).
>
> 12.53 Section 48(5) provides that, absent contrary agreement, 'the Tribunal has the same powers as the court – to order a party to do or refrain from doing anything'. It has been argued that, if the effect of *Turner v Grovit* is to preclude the 'power' of the court to grant an anti-suit injunction within the Brussels-Lugano zone, arbitrators will have no greater power. It is submitted that this is a non-existent problem. The purpose of section48(5) is not to require arbitrators in each case to consider whether the court would or could grant a particular injunction, but instead to allow arbitrators to grant the same *types* of injunctive remedies as the courts. The court continues to have power to grant an anti-suit injunction, where appropriate under section 37(1) of the Supreme Court Act 1981, and section 48(5) transfers the full extent of that power to the arbitrators. The effect of European law is that the court's power cannot be *exercised* in respect of (for example) proceedings before the courts of another member state, but the existence of the power under English law, and so its transference to the arbitrators, is unaffected; and the Brussels-Lugano regime's limitation on the *exercise* of the court's power is then not a limitation that applies to the exercise of the *same* power by arbitrators, who are unaffected by the principle of mutual trust. Another way of putting the same point is that any restriction of the court's powers under section 37(1) which is not a restriction which would logically apply to arbitrators does not meaningfully affect the powers transferred by section 48(5); if the powers are transferred subject to limitations that only affect courts, then any such limitations disappear once the power is in the hands of the arbitrators.
>
> 12.54 So far as the author of this work is aware, on each occasion any argument based on section 48(5) has been raised,

> to the effect that arbitrators have no power to grant arbitral anti-suit awards, it has been rejected by distinguished arbitration tribunals."
>
> (footnotes omitted)

187. Spain suggests that the analogy is inapt because the bar on a Member State court granting an anti-suit injunction in relation to proceedings in another Member State's courts relates to the exercise, as a matter of discretion, of the court's power to grant injunctions. However, as the Court of Justice said in *Gazprom* §§ 32 and 34, it held in *West Tankers* that such an injunction would be incompatible with the Brussels I Regulation and inconsistent with the trust which the Member States accord to one another's legal system and judicial institutions. As directly applicable EU legislation, the Brussels I Regulation was of no less legal force than SIA 1978 section 13. If the latter would be regarded as depriving the court of its power to grant an injunction then so would the former.

188. I consider the better view to be that SIA section 13 governs the exercise but not the existence of the court's power to grant an injunction, and that AA 1996 section 48 permits an arbitrator to grant an injunction against a state. There is also a cogent policy argument in favour of such an approach. An injunction granted by a court against another state impinges on the *par in parem* principle by purporting to set up an organ of one state in a position of authority vis à vis another state. Such considerations apply with much less force, if at all, to arbitration, since it is founded on consent (whether actual or, as in the present case, imputed).

189. It is also arguable that even SIA 1978 section 13 should not be construed as prohibiting the grant by a court of an injunction in respect of a non-sovereign act or activity. The Club advanced a cogent argument to the effect that, applying *Benkharbouche*, a bar on injunctive relief other than in relation to acts *jure imperii* would go further than necessary in order to give effect to the restrictive doctrine of sovereign immunity, and would restrict access to court in a manner contrary to Article 6 of the ECHR. The Club pointed out that in pre-SIA cases, the courts did not perceive there to be any difficulty in the idea of an injunction being granted against a state in relation to a commercial activity. In *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 Lloyd's Rep 581, the Court of Appeal held that the Central Bank was not an organ of the state. Lord Denning MR and Shaw LJ held that the restrictive doctrine of sovereign immunity was the correct one, so that even if the Central Bank were an organ of the state, it was not immune from suit. The Court of Appeal continued a freezing order against it. In *Hispano Americana Mercantil v Central Bank of Nigeria* [1979] 2 Lloyd's Rep 277, the Court of Appeal (Lord Denning MR, Waller and Cumming-Bruce LJJ) followed *Trendtex,* holding that although SIA 1978 had been enacted in the meantime, it did not apply retrospectively.

190. Hence, the Club submits, if SIA 1978 is interpreted as it should be in the light of the restrictive doctrine and ECHR Article 6, there can be no objection to an injunction being granted against a state in relation to a non-sovereign act.

191. Spain objects that the cases cited above are distinguishable, as the Central Bank was not a state but merely assumed *obiter* to be an organ of the state. It is unclear, however, why that should make a difference of principle when considering the scope

of the restrictive doctrine. Spain also suggests that the injunction against the Central Bank might have been justified under SIA section 13(4). However, the Court of Appeal in *Hispano* evidently though not, noting that section 14(4) indicated that property of a central bank is not to be regarded as in, or intended for, commercial use within section 13(4).

192. Whether the Club's argument on this particular point is correct or not may well depend at least in part on whether the protections given by ECHR Article 6 should be construed as including the availability of particular remedies such as an injunction. In the light of my conclusion in § 188 above, it is unnecessary to reach a conclusion on this further point. However, I do consider the Club to have a good arguable case on this alternative point too.

(6) Equitable damages in lieu of an injunction

193. Spain submits that the Club's proposed claim for damages in lieu of an injunction pursuant to section 50 of the SCA 1981 is not arbitrable. Section 50 provides:

> "... Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance ..."

194. The correct test, Spain argues, is not whether the court has a technical or theoretical jurisdiction: it is whether the High Court could order an injunction, leaving aside the likelihood that it would do so: *Jaggard v Sawyer* [1995] 1 W.L.R. 269, 285 per Millett LJ and *Lavery v Pursell* (1888) 39 Ch. D. 508, 519 per Chitty J. Consequently, it is not sufficient that, absent SIA 1978, the Court would have jurisdiction to grant an injunction. Damages in lieu of an injunction can only be granted if, practically and in light of section 13 SIA 1978, the court could feasibly have granted an injunction. Since the court could not do so, then neither could an arbitrator.

195. Two strands can be identified in Spain's argument. The first is that in a 'third party' case such as this, the only available remedies in principle are an injunction or a declaration. The second is that since no injunction could be granted against a state, it follows that damages in lieu of an injunction could not be granted.

196. As to the first strand, Spain highlights statements in *The Jay Bola* (p286 col 2), *Through Transport* (§ 65) and *Yusuf Cepnioglu* (§§ 24, 26 and 33) to the effect that, in a 'third party' case such as this, the counterparty's only remedy for the overseas claimant's disregard of the jurisdiction or arbitration clause is an injunction, and that there is no breach of contract such as could found a claim for damages.

197. In *West Tankers v Allianz Spa (The "Front Comor")* [2012] 2 Lloyd's Rep 103, an arbitral tribunal had decided that the Court of Justice's decision in *West Tankers* meant that the charterers' insurers, who had pursued litigation in Italy against the vessel's owners in disregard of the arbitration clause in the charterparty, could not be held liable in damages. Flaux J held that conclusion to be incorrect. He held that since arbitration falls outside the Brussels I Regulation, an arbitral tribunal is not required to give effect to the principle of effective judicial protection underlying the

Court of Justice's decision (§ 68), and that EU law did not deprive the tribunal of the jurisdiction to award equitable damages for breach of the obligation to arbitrate, which *"might well be a strongly arguable claim in the future"* (§§ 76 and 78). It is not entirely clear whether the type of equitable damages contemplated in this case were damages in lieu of an injunction or some form of freestanding equitable damages; however, the reference at § 63 to *"the rules of equity and any statutory power under section 50 of the Senior Courts Act 1981 to award equitable damages"* suggests that both were in contemplation and, at least, that section 50 damages certainly were.

198. In *Airbus*¸ a case relating to insurers claiming under subrogated rights, after quoting the *Jay Bola* passage mentioned in § 196 above Males LJ speaking for the Court of Appeal said he would not accept that Hobhouse LJ in *The Jay Bola* was saying that the court could not even grant a declaration: that question did not arise (§ 92). He noted that Colman J in *West Tankers* [2005] 2 Lloyd's Rep 257 had granted both an injunction and a declaration; and stated the position to be as follows:

> "(1) Insurers exercising rights of subrogation to make a non-contractual claim are bound by an English arbitration or jurisdiction clause to the same extent as their insured would have been.
>
> (2) Whereas the commencement and pursuit of proceedings contrary to the terms of an arbitration or jurisdiction clause by the insured would constitute a breach of contract, the commencement and pursuit of such proceedings by insurers constitutes a breach, not of the contract but of an equivalent equitable obligation which the English court will protect.
>
> (3) The remedies available in such a case include the grant of a declaration in an appropriate case." (§ 96)

199. With the possible exception of Flaux J's decision in *The Front Comor*, none of these cases actually addressed the question of whether a third party acting in disregard of an arbitration clause could be liable to pay damages in lieu of an injunction. It is, though, notable that the court in *Airbus* referred to such a third party as having an *"an equivalent equitable obligation which the English court will protect".* None of the cases is authority for the proposition that damages could *not* be awarded in lieu of an injunction in such circumstances.

200. As to the second strand, a preliminary question arises as to how section 50 of the SCA 1981 interacts with AA 1996 section 48. In relation to injunctions, section 48(5) provides that an arbitrator has the same powers as the court. However, as regards damages, section 48(4) provides simply that an arbitrator *"may order the payment of a sum of money, in any currency"*. The power is thus not explicitly linked to that of a court. If it were, then the question would arise whether SCA 1981 section 50, read with section 48, had the effect that an arbitrator may award damages 'in lieu' where a court "*has jurisdiction to entertain an application for an injunction"*, or where the arbitrator has such jurisdiction. It is well arguable that the latter is the correct position, with the result that on the basis of my conclusion in § 188 above, an arbitrator would have the power to award damages in lieu of or in addition to an

injunction. Even if the former is the position, I have concluded in § 192 above that there is a good arguable case that even a court can grant an injunction against a state in relation to a non-sovereign act. It follows that there must also be a good arguable case that either a court or an arbitrator would have power to award damages against a state in lieu of or in addition to an injunction.

201. Further, it is arguable that a court would have power to award damages in lieu of an injunction even if SIA 1978 section 13 would prevent it from granting an injunction. Section 13, where it applies, prevents the grant of an injunction against a state but does not necessarily deprive the court of its *"jurisdiction"* to entertain an application for one.

202. *Spry on "Equitable Remedies"* (9th ed, 2013) explains that the cases draw a distinction between matters that go to jurisdiction and those going only to discretion.

> "… the view which is supported by the preponderance of authorities and which accords more nearly with the words of the material enactments, is that the statutory power of awarding damages subsists whenever at the material time the contract in question is susceptible of specific performance or the right in question is susceptible of protection or enforcement by injunction, whether or not the relief might be refused on a discretionary ground" (p.650-651)

Thus, Spry states, in order for section 50 to apply, it is necessary for example to show that a court of equity is prepared to assume jurisdiction over the defendant, for example that no territorial limitation applies, and that the particular right in question is of a kind that, leaving aside discretionary considerations, would be appropriate to enforce by an injunction (pp. 651-652). Hence it has been held that the court has no jurisdiction in this sense to grant specific performance if no relevant contract exists or if it is impossible for the defendant to carry out his material obligation, or if it is illegal that he should do so. Conversely, there is no bar to damages in lieu if an injunction would be refused on the grounds that the court, exercising its discretion, considers that an injunction would be oppressive (as was the case in *Jaggard v Sawyer* [1995] 1 WLR 269).

203. There is again a potential analogy with the position under the Brussels I Regulation. In *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs (The "Alexandros T")* [2014] EWHC 3068 (Comm), Flaux J had to consider proceedings brought in another EU Member State (Greece) in breach of a settlement agreement. He considered *obiter* an argument that damages in lieu of an injunction could be awarded even though the *Turner v Grovit* line of EU case law made clear that no injunction could be granted. Flaux J stated:

> "… Given that conclusion, it is not strictly necessary to consider Mr Bailey QC's fallback points but I will do so briefly. He submits firstly that since for the reasons I have given the settlement provisions in the CMI and LMI settlement agreements contain a promise or covenant not to sue the insurers or their servants or agents, the HD parties would be entitled to enforce that promise by way of the equitable remedy

> of injunction, were it not for the principles established by the European Court of Justice in Turner v Grovit (Case C-159/02) [2005] 1 AC 101 and West Tankers that such an injunction would be an illegitimate interference with the powers of the Greek court to determine its own jurisdiction. However, Mr Bailey QC submits that the court has power to award damages in lieu of an injunction and the Court of Appeal in the present case has held that an award of damages does not interfere with the Greek court or otherwise infringe EU law. In my judgment, Mr Bailey QC is right on this point and the court could award the HD parties damages in lieu of an injunction for breach by Starlight and OME of the covenant or promise not to sue which is implicit in clauses 2 of the CMI settlement agreement and clause 3 of the LMI settlement agreement." (§ 89)

204. As before, I do not accept Spain's suggested ground of distinction from the present case, namely that the Brussels I Regulation merely makes it 'not appropriate' for the court to grant an injunction, so that such cases can be assimilated to those where an injunction is refused on discretionary grounds. Rather, *The Alexandros T* is a case where an injunction would have been unlawful, yet Flaux J considered (*obiter*) that damages might have been awarded in lieu.

205. Finally, Spain advanced in its second skeleton argument, dated 14 February 2020, an argument that damages under section 50 can be awarded only where a claim for damages would exist at common law or in equity, citing *Leeds Industrial Co-operative Society v Slack* [1924] AC 851, 857, 868-9, *Experience Hendrix v PPX Enterprises* [2003] 1 All ER (Comm) 830 (CA) §§ 35 and 56, *WWF World Wildlife Fund for Nature v World Wrestling Federation Entertainment* [2007] BUS LR 1252 (CA) § 54, *Force India Formula One Team v 1 Malaysia Racing Team* [2012] RPC 29 § 393 and *Vestergaard Frandsen A/S v BestNet Europe Ltd* [2009] EWHC 1456 (Ch) at [35]. I do not, however, consider that can be correct. As the Club points out, there is no such requirement in the statute, and it is well-established that damages under section 50 are available in support of restrictive covenants running with land, for which there is no right to damages at law or in equity: see (among others) *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 79; and *Jaggard v Sawyer*. Since Spain did not elaborate the point in oral argument, I do not think it necessary to consider it further, save to say that I note that in the two most recent cases Spain cites (*Vestergaard Frandsen A/S v BestNet Europe Ltd* [2009] EWHC 1456 (Ch) and *Force India Formula One Team v 1 Malaysia Racing Team* [2012] RPC 29), Arnold J made clear that there was a line of cases in support of the view that section 50 damages *can* be granted even in support of a purely equitable right (see §§ 33 and 390 respectively).

206. For these reasons, I consider that the Club has a good arguable case that the arbitrator would have power to award damages in lieu of or in addition to an injunction.

(7) Other equitable compensation

207. Spain submits that the Club has not explained the nature of the equitable obligations said to entitle the Club to claim equitable compensation on some basis outside SCA section 50. It says Spain is not subject to any equitable obligation that could justify

an award of equitable compensation: see *Through Transport Mutual Assurance Association v New India Assurance* [2005] 1 Lloyds Rep 67 §§ 52 and 65. There is no reported case in which damages have been awarded by the courts for breach of such an obligation, and there is no principle of the traditional rules of equity which would permit such compensation, even on the assumption that the Club could demonstrate that English law would govern such obligations. Spain refers to *Raphael on The Anti-Suit Injunction* §§ 14.41 to 14.53 and the authorities cited therein.

208. The possibility of a claim for equitable monetary compensation was not in fact considered in *Through Transport,* or indeed in *The Jay Bola, Charterers Mutual* or *Yusuf Cepnioglu.* As noted earlier, Flaux J in *The Front Comor* appears to have had both section 50 damages in lieu and possibly some other form of equitable damages in contemplation, and referred at § 76 to there being *"what might be a strongly arguable claim"*. However, the focus of his decision and comments was on whether the EU legal regime prevented any such award being made rather than on the basis or cogency of the domestic law arguments that might underlie it.

209. The Club gains some assistance from the Court of Appeal's reference in *Airbus* to *"an equitable right enforceable against subrogated insurers who seek to act inconsistently with the clause"* (§ 95), *"an equivalent equitable obligation which the English court will protect"* (§ 96) and *"an equivalent obligation in equity which Airbus is entitled to enforce"* (§ 97), and to the non-exhaustive nature of its reference in § 96(3) to the available remedies.

210. *Raphael on The Anti-Suit Injunction* states at § 14.41 that *"Monetary compensation (and possibly damages in equity) can be awarded in equity for infringements of equitable rights, independent of section 50 of the Supreme Court Act 1981. In principle, therefore, compensation could be awarded in respect of foreign litigation that breached an equitable obligation not to pursue such litigation abroad."* Raphael cites *inter alia* Arnold J's decisions in *Vestergaard* and *Force India,* in both of which he suggested that equitable compensation may well be available even in cases where section 50 damages are not (see §§ 35 and 393 respectively).

211. *Raphael* states that if there is a general substantive equitable obligation not to commence vexatious and oppressive or unconscionable litigation abroad which is capable of supporting such a claim for compensation, it is a "*shy creature*" which has not been sought in any reported case (§ 14.42). These observations are, however, made in the context of foreign litigation which is objectionable on vexation or similar grounds. By contrast, in cases such as the present one, the courts have explicitly recognised an equitable obligation not to proceed in disregard of an arbitration clause. The case for equitable compensation may therefore be stronger. As *Raphael* puts it, the landscape here may be different and it is *"possible, but again debatable, that a positive equitable obligation could also support a claim for equitable compensation or damages"* (§§ 14.48 and 14.52). *Raphael* makes the point that that would be consistent with Flaux J's decision in *The Front Comer,* and that consideration would need to be given to the Court of Appeal's *obiter* comments on damages in *Through Transport,* albeit the latter *"seem to have been focusing solely on contractual damages and did not directly address equitable compensation or equitable damages independent of contract"* (§ 14.52 and footnote 93). There is significant force in those observations.

212. This is in my view a good example of a complex and novel point of law which the court need not and probably should not seek to resolve, on limited argument, at the stage of dealing with an AA 1996 section 18 application to appoint an arbitrator. It is not an issue that goes to the jurisdiction of the arbitrator, still less of the court. Even if it did, I consider that the Club has a good arguable case on it. The issue should be left to be resolved by the arbitrator, at least in the first instance, with the benefit of full argument.

(8) Conclusion in relation to AA 1996 section 18

213. For the reasons set out above, I conclude that the requirements for an order pursuant to AA 1996 section 18 for the appointment of an arbitrator are made out, save in relation to the Club's proposed claim for breach of contract.

(J) CHOICE OF ARBITRATOR

214. The Club's application seeks the appointment as arbitrator of the same, eminently well-qualified, person as has been appointed in a parallel arbitration between the Club and the Republic of France. Counsel for Spain indicated at the hearing that before reaching a conclusion on the identity of any arbitrator to be appointed, it may be appropriate to consider whether appointment of the same individual could give rise to any concerns about fairness or apparent bias. As a result it was, I believe, common ground that that issue should be addressed following further argument in the light of my judgment.

(K) CONCLUSIONS

215. Spain's application pursuant to CPR Part 11 does not succeed. Spain does not have immunity in respect of these proceedings, and the court will appoint an arbitrator pursuant to section 18 of the Arbitration Act 1996, save in relation to the Club's proposed claim for breach of contract. I shall hear further argument as to the choice of arbitrator and any other matters arising from this judgment.

216. I am most grateful for all counsel for their extremely thorough and expertly presented written and oral submissions.