Neutral Citation Number: [2024] EWCA Civ 1536

Appeal Nos: CA-2024-000178 (the Brussels Appeal)
CA-2024-000180, CA-2024-000182, CA-2024-000597 (the Arbitration Appeals)
CA-2024-000588 (the Human Rights Appeal)

IN THE COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
MR JUSTICE BUTCHER
[2021] EWHC 1247 (Comm)
[2023] EWHC 2473 (Comm)
[2023] EWHC 2474 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2004

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE ANDREWS
and
LADY JUSTICE FALK

- -

The M/T Prestige

BETWEEN:

The Kingdom of Spain
Arbitration Respondent/Claimant/Appellant

and

The London Steam-Ship Owners' Mutual Insurance Association Limited
Arbitration Claimant/Defendant/Respondent

AND BETWEEN:

The Kingdom of Spain
Arbitration Respondent/Claimant/Appellant

and

The London Steam-Ship Owners' Mutual Insurance Association Limited
Arbitration Claimant/Defendant/Respondent

AND BETWEEN:

The French State
Arbitration Respondent/Claimant/Appellant

and

The London Steam-Ship Owners' Mutual Insurance Association Limited
Arbitration Claimant/Defendant/Respondent

Timothy Young KC, **Naina Patel**, and **Jamie Hamblen** (instructed by **Squire Patton Boggs (UK) LLP**) for **The Kingdom of Spain** (Spain)

Anna Dilnot KC and **Naomi Hart** (instructed by **K&L Gates LLP**) for the **The French State** (France)

Christopher Hancock KC, Thomas de la Mare KC, Philippa Webb, Charlotte Tan and **Alexander Thompson** (instructed by **Wikborg Rein LLP**) for **The London Steam-Ship Owners' Mutual Insurance Association Limited** (the Club)

Josephine Norris (instructed by **Knights Professional Services Limited**) for **the European Commission** (the Commission)

Hearing dates: 29 October to 1 November 2024, 4 to 6 November 2024

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Approved Judgment

This judgment was handed down remotely at 10:00am on Thursday 12 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

Index

Section A: Introduction

1. On 19 November 2002, the M/T Prestige (the vessel) broke in two and sank off the coast of Spain in the course of a voyage from St. Petersburg to the Far East. The vessel was carrying 70,000 metric tonnes of fuel oil. The resulting oil spillage caused significant pollution damage to the Spanish and French coastlines. The vessel was owned by Mare Shipping Inc (the owners) and managed by Universe Maritime Limited (the managers). The Club provided Protection and Indemnity (P&I) and Freight, Demurrage and Defence (FD&D) insurance to the owners and managers in respect of the vessel. The terms of that insurance included two critical clauses. The first required London arbitration (the arbitration clause). The second was a "pay to be paid" clause that provided for the Club only to be liable if the owners and managers had first actually paid the full amount of their liability out of their own monies (the pay to be paid clause).

2. There are five appeals before this Court from orders made following three separate judgments of Mr Justice Butcher (the judge). The first concerned human rights and was delivered on 12 May 2021 ([2021] EWHC 1247 (Comm) – the first judgment). The second judgment delivered on 6 October 2023 is the most substantial one, and concerned many issues relating to Spain's, France's and the Club's claims ([2023] EWHC 2473 (Comm) – the second judgment). The third judgment was also delivered on 6 October 2023 and concerned France's claims against the Club ([2023] EWHC 2474 (Comm) – the third judgment). The five appeals fall into three categories.

3. The first appeal (CA-2024-000178) concerns the question of whether a judgment for some €855,493,575.65, which was obtained by Spain and other claimants against the Club in the Spanish Courts on 1 March 2019 (the Spanish judgment), should have been registered in England pursuant to Chapter III of Regulation (EC) No. 44/2001 (the Brussels I Regulation). The events took place before Brexit. Spain says in support of its appeal that the Spanish judgment should be enforced in England and Wales, relying on a decision of the Court of Justice of the European Union (the CJEU) (*The Prestige [2023] 1 WLR 1*) delivered on 20 June 2022 (the CJEU's decision), after the judge had referred certain questions to it on 21 December 2020. The judge decided that the CJEU's decision did not bind him to register the Spanish judgment, because (a) the CJEU had exceeded its jurisdiction, and (b) Hamblen J in *The Prestige (No 2)* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep 309 (Hamblen J's judgment) and the Court of Appeal in *The Prestige (No 2)* [2015] EWCA Civ 333, [2015] 2 Lloyd's Rep 33 (the CA's section 66 judgment) had decided under section 66 (section 66) of the Arbitration Act 1996 (the 1996 Act) that an order should be made in the terms of an arbitration award delivered on 13 February 2013 (Mr Schaff's award) by Mr Alastair Schaff KC (Mr Schaff). Mr Schaff's award had declared that Spain was bound to arbitrate its claims against the Club. Hamblen J's judgment and the CA's section 66 judgment are together referred to as the "section 66 judgments". Accordingly, since the judge held that he was not bound by what the CJEU had decided, he decided that the section 66 judgments created issue estoppels that were irreconcilable judgments preventing the registration of the Spanish judgment in England & Wales under article 34(3) of the Brussels I Regulation (article 34(3)).

4. In addition, the judge held that there was an issue estoppel created in favour of the Club as against Spain by Mr Schaff's award, which would anyway have prevented the registration of the Spanish judgment as a matter of English public policy under article 34(1) of the Brussels I Regulation (article 34(1)).

5. The judge, therefore, set aside the registration ordered originally by Master Cook. The issues raised by the first appeal have been designated by the parties as the "Brussels Appeal". It may be noted at this stage that, whilst Mr Schaff also made a similar award against France in separate arbitration proceedings, France has never sought to register the Spanish judgment in its favour against the Club in England & Wales. Mr Schaff's awards against each of Spain and France are referred to together as "Mr Schaff's awards".

6. The second set of three appeals are Spain's appeal numbered CA-2024-000180, France's appeal numbered CA-2024-000182, and the Club's cross appeal concerning France numbered CA-2024-000597. The issues raised by the second set of appeals have been designated by the parties as the "Arbitration Appeals". The Arbitration Appeals all concern the question of whether separate arbitration awards made by Sir Peter Gross against Spain and by Dame Elizabeth Gloster (together the Arbitrators) against France should be upheld. The Arbitrators and the judge held that the Club was entitled to equitable compensation from Spain and France in respect of their breach of an equitable obligation to arbitrate their claims against the Club. The essential question in the Arbitration Appeals is whether they were right as a matter of law. The Club says they were, and Spain and France say that no such equitable compensation is available in law. There are two important connected, but subsidiary, questions raised by these appeals. The first is whether an injunction restraining the Spanish proceedings could or should have been granted against either Spain or France, and the second is whether the Club was, either in addition to equitable compensation or instead of it, entitled to equitable damages in lieu of or in addition to such an injunction against Spain and France. Equitable damages, as opposed to equitable compensation, are claimed under section 50 of the Senior Courts Act 1981 (section 50), which was the statutory successor to section 2 of the Chancery Amendment Act 1858 (known as Lord Cairns's Act). Spain and France support the judge's holding that no injunctions can be granted against them because of section 13(2)(a) of the State Immunity Act 1978. They appeal the judge's determination to uphold the Arbitrators' decisions to award the Club equitable compensation. The Club appeals the judge's decision to refuse it equitable damages under section 50, which the Arbitrators had each declined to award for different reasons. It also appeals the judge's decision that injunctive relief could not be awarded against it.

7. The fifth appeal is the Club's appeal numbered CA-2024-000588. This is designated by the parties as the "Human Rights Appeal". The Club contends that the judge ought also to have refused to register the Spanish judgment on the grounds that: (a) the conclusions on civil liability on which it was founded were arbitrary or manifestly unreasonable, and impermissibly decided new facts not found by the lower court, in violation of Article 1 of Protocol 1 (A1P1) and article 6 of the European Convention on Human Rights (ECHR), (b) the conviction of the vessel's Master was not "subject to review by a higher tribunal" as required by article 14(5) (article 14(5)) of the International Covenant on Civil and Political Rights (ICCPR), and (c) the recognition of the Spanish judgment was, therefore, "manifestly contrary to [the] public policy" of England & Wales under article 34(1). Spain contends that the judge was right to reject the Club's human rights arguments. He held, in effect, that article 36 of the Brussels I Regulation, which provides that "under no circumstances may a foreign judgment be reviewed as to its substance", prevented him examining the substance of the Spanish judgment. The Club argued that the judge failed properly to apply the principles laid down in *Diageo Brands BV v. Simiramida-04 EOOD* (Case C-681/13) [2016] Ch 147 (*Diageo*)

and in *Bamberski v. Krombach* (Case C-7/98) [2001] QB 709 at [37] (*Bamberski v. Krombach*).

8. These appeals have been argued over many pages and 7 court days. Yet essentially, they raise two short central questions. They are whether the judge was right: (i) to have refused to register the Spanish judgment against the Club, and (ii) to have awarded equitable compensation to the Club. In the following paragraphs, the main issues beyond these two short questions are identified.

The issues in the Brussels Appeal

9. Issue 1: Whether the judge was correct to decide that he was not bound by the CJEU's decision to hold that article 34(3) was inapplicable and Hamblen J's judgment and the CA's section 66 judgment were not irreconcilable judgments. This issue involves deciding: (a) whether the CJEU's decision was vitiated by an excess of jurisdiction or procedural unfairness, (b) whether Hamblen J's judgment created a binding issue (or cause of action) estoppel that made [54]-[73] of the CJEU's decision irrelevant, and (c) whether Spain submitted to the jurisdiction of the English Court (resulting in Hamblen J's decision) thus waiving its right to rely on the insurance and *lis pendens* provisions in the Brussels I Regulation.

10. Issue 2: If the judge was wrong under issue 1, whether the judge was correct to decide that Mr Schaff's award created a binding issue estoppel preventing registration of the Spanish judgment on public policy grounds under article 34(1).

11. Issue 3: Whether Hamblen J's judgment created a binding issue estoppel (as the judge decided) or a binding cause of action estoppel (as the Club contends) preventing registration of the Spanish judgment under article 34(1).

The issues in the Arbitration Appeals

12. Issue 4: Whether the judge was right to hold that the Arbitrators had power to award the Club equitable compensation against Spain and France for breach of the equitable obligation to arbitrate their disputes with the Club.

13. Issue 5: Whether the judge was right to hold that an injunction restraining enforcement of the Spanish judgment could not have been granted against Spain or France, and that Dame Elizabeth Gloster had been wrong to grant such an injunction against France.

14. Issue 6: Whether the Arbitrators had the power to award the Club damages in lieu of or in addition to an injunction under section 50.

The issue in the Human Rights Appeal

15. Issue 7: Whether the judge was right to conclude that the registration of the Spanish judgment should not be refused under article 34(1) as manifestly contrary to English public policy on human rights grounds.

Summary of conclusions

16. For the reasons I will try to give as shortly as possible, the essentials of what I have decided are as follows:

i) The judge was wrong to hold that he was not bound by [54]-[73] of the CJEU's decision. He was bound to follow what the CJEU decided. The CJEU answered the questions referred in a way that the judge had not anticipated, but the CJEU had not exceeded or gone outside its jurisdiction or violated the principles of procedural fairness.

ii) The judge was wrong to think that Hamblen J's judgment (as upheld by the CA's section 66 judgment) created a binding issue estoppel, justifying him in departing from [54]-[73] of the CJEU's decision as to the meaning of article 34(3). It did not. The section 66 judgments decided nothing about the meaning of "judgment" in article 34(3). Accordingly, the Spanish judgment ought to have been registered on a proper application of the CJEU's interpretation of article 34(3).

iii) Mr Schaff's awards did, however, create a binding issue estoppel. It was manifestly contrary to English public policy for the Spanish judgment to be recognised under article 34(1). Accordingly, the judge was right, in the result, to refuse to register the Spanish judgment.

iv) The judge was right to hold that he was bound to decide that the section 66 judgments did not create a binding issue estoppel that could prevent registration of the Spanish judgment as a manifest breach of English public policy under article 34(1) by reason of the CJEU's answer to the third question it was asked.

v) Although the categories of case in which equitable compensation may be awarded are not closed, the Arbitrators and the judge were wrong to think that equitable compensation could be awarded in this case.

vi) The judge was right to hold that that an injunction restraining enforcement of the Spanish judgment could not be granted against Spain or France by reason of section 13(2)(a) of the State Immunity Act 1978. He was, therefore, right to hold that Dame Elizabeth Gloster ought not to have granted such an injunction against France.

vii) Since no injunction could have been granted against either Spain or France, the judge was right to hold that equitable damages under section 50 were not available against them either.

viii) The primary remedy for the failure to abide by the equitable obligation to arbitrate is an injunction. In a case where neither an injunction nor damages in lieu are available, equitable compensation cannot be granted.

ix) The judge was also right, for substantially the reasons he gave, to reject the Club's arguments in support of its contention that the Spanish judgment should not be registered because of the Spanish Court's manifest breaches of the public policy of England & Wales under article 34(1). It was not open to the Club to argue that article 14(5) of the ICCPR was a rule of customary international law. There was no manifest breach of the Club's human rights attributable to the way the Spanish Supreme Court dealt with the findings of fact against the Master. The Master had already lost appeals to the Spanish Constitutional Court and the European Court of Human Rights (ECtHR).

x) Accordingly, the first appeal brought by Spain (CA-2024-000178) will be dismissed. Spain's and France's appeals (CA-2024-000180 and CA-2024-000182 respectively) against the award of equitable compensation will be allowed, and the Club's cross appeal (CA-2024-000597) will be dismissed. The Club's Human Rights Appeal (CA-2024-000588) will also be dismissed.

17. I shall explain my reasons for reaching these conclusions under the following headings: Section B: The relevant provisions of the Brussels I Regulation, Section C: The essential background facts, Section D: The opinion of the Advocate General and the CJEU's decision, Section E: The judge's judgments, Sections F-L: The 7 issues, and Section M: Conclusions.

Section B: The relevant provisions of the Brussels I Regulation

18. Article 32 provides as follows:

> For the purposes of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

19. Article 33 provides as follows:

> 1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

20. Article 34 provides as follows:

> A judgment shall not be recognised:
>
> 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
>
> 2. where it is given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
>
> 3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
>
> 4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

21. Article 35(1) provides as follows:

> Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

22. Article 36 provides as follows:

> Under no circumstances may a foreign judgment be reviewed as to its substance.

23. Article 1(2) provides as follows:

> The [Brussels I Regulation] shall not apply to … (d) arbitration.

24. Section 3 of Chapter II, at Articles 8 to 14, deals with "jurisdiction in matters relating to insurance". Article 9(1) provides as follows:

> An insurer domiciled in a Member State may be sued:
>
> (a) in the courts of the Member State where he is domiciled, or
>
> (b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled…

25. Article 10 provides as follows:

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

26. Article 11 provides as follows:

> (1) In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.
>
> (2) Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.
>
> (3) If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

27. Article 12(1) provides as follows:

> Without prejudice to Article 11(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

28. These articles of the Brussels I Regulation are all referred to in this judgment simply by the article number.

Section C: The essential background facts

29. This brief summary of the essential factual background is largely a much-abbreviated version of [5]-[33] and [4]-[61] and [3]-[13] of the first, second and third judgments respectively.

30. The Club provided P&I cover for the owners and managers in respect of pollution liabilities up to a maximum aggregate amount of US$1 billion for any one occurrence. The pay to be paid clause in rule 3.1 of the vessel's P&I cover was in the following terms:

> 3.1 If any Member shall incur liabilities, costs or expenses for which he is insured, he shall be entitled to recovery from the Association out of the funds of this Class, PROVIDED that:
>
> 3.1.1 actual payment (out of monies belonging to him absolutely and not by way of loan or otherwise) by the Member of the full amount of such liabilities, costs and expenses shall be a condition precedent to his right of recovery …

31. The arbitration clause (and the governing law clause) was in the following terms:

> 43.2 … if any difference or dispute shall arise between a Member and [the Club] out of or in connection with these Rules, or out of any contract between the Member and [the Club], or as to the rights or obligations of [the Club] or the Member thereunder, or in connection therewith, or as to any other matter whatsoever, such difference or dispute shall be referred to Arbitration in London before a sole legal Arbitrator and the submission to Arbitration and all the proceedings thereunder shall be subject to the provisions of the Arbitration Acts 1950, 1979 and 1996 and any Statutory modification or re-enactment thereof, and to English law…

32. The Club also insured the owners' liabilities under the International Convention on Civil Liability for Oil Pollution Damage 1969 as amended by the 1992 Protocol (the CLC).

33. After the vessel sank, criminal proceedings were commenced in Spain in late 2002 against the vessel's Master (the Master) and others.

34. On about 28 May 2003, the owners submitted a document to the Spanish Court in Corcubión saying, in effect, that the limit of their CLC liability was €22,777,986, and that the Club had or would pay that sum into the Spanish Court. The Spanish Court acknowledged that that payment had been made in an order dated 16 June 2003. It is not known whether that sum has ever been distributed to claimants in the Spanish proceedings.

35. The investigation phase of those proceedings before the Corcubión Investigation Court No. 1 lasted until 2010. Civil proceedings against the owners, managers and the Club were tried together with the criminal proceedings, in a trial which commenced in October 2012. Article 116(1) of the Spanish Penal Code 1995 provided that persons held liable for a criminal offence would also be liable in civil law if losses were caused. The main civil claims were made under article 117 of the Spanish Penal Code 1995, which provided third-party victims with a right of direct action against the liability insurer of a wrongdoing insured. France, as well as Spain, made such claims. A large number of smaller claimants, including local authorities and private parties, also made

civil claims. All these parties made claims under the CLC as well as article 117, but none of the claimants, except Spain, has ever sought to enforce any of their claims against the Club in England & Wales. The Club did not initially take part in the Spanish proceedings.

36. London arbitration claims were begun by the Club against Spain in January 2012. Spain declined to take part. Mr Schaff's award dated 13 February 2013 (during the course of the 9-month Spanish trial) granted the following substantive relief (in addition to costs) in relation to the public liability arising from the sinking of the vessel:

> [Spain] is bound by the arbitration clause [in the] Club Rules and such claims must be referred to arbitration in London.
>
> [A]ctual payment to [Spain] of the full amount of any insured liability by the Owners and/or Managers (out of monies belonging to them absolutely and not by way of loan or otherwise) is a condition precedent to any direct liability of [the Club] to [Spain] …
>
> [I]n the absence of any such prior payment, [the Club] is not liable to [Spain] in respect of such claims …
>
> [The Club's] liability to [Spain] shall, in any event, not exceed [US$1 billion].

37. Separate London arbitration claims were begun by the Club against France in early 2012. France also declined to take part. The award made by Mr Schaff on 3 July 2013 granted substantively the same relief as had been granted against Spain.

38. In March 2013, the Club brought proceedings against Spain (and later France) in the Commercial Court to enforce Mr Schaff's awards under section 66. Spain and France argued that (i) Mr Schaff had no jurisdiction, (ii) his awards should be set aside or were of no effect under section 67 of the 1996 Act (challenging substantive jurisdiction), section 72 (saving for persons taking no part) and (iii) they were entitled to state immunity under section 9 of the State Immunity Act 1978 (written agreement to arbitrate). On 22 October 2013, Hamblen J's judgment determined that the Club should have permission to enforce Mr Schaff's awards as judgments, in the same terms as the awards themselves. Hamblen J dismissed Spain's and France's applications, holding that they should be taken to have agreed to arbitrate, but rejected the Club's argument that they had also lost immunity by submitting to the English Courts. Both Spain and France were represented at the hearings before Hamblen J and subsequently the Court of Appeal.

39. A few days after Hamblen J's order, on 13 November 2013, the Provincial Court in Spain decided that the Master was guilty only of a lesser criminal offence of disobedience, and that the Master, owners and the Club had no civil liability to Spain, France and others. Both the Master and the claimants, including Spain and France, appealed.

40. On 1 April 2015, the Court of Appeal (Moore-Bick, Patten and Tomlinson LJJ) dismissed Spain's and France's appeals against Hamblen J's judgment in the CA's section 66 judgment. The Court of Appeal decided that Spain and France had lost state immunity because they had submitted to the English court's jurisdiction.

41. On 26 January 2016, the Spanish Supreme Court decided to convict the Master of the offence of aggravated serious negligence against the environment, but not disobedience. It is this judgment that the Club submitted impermissibly decided new facts on appeal. The Spanish Supreme Court imposed civil liability for the losses on the Master, the owners and the Club (up to its US$1 billion limit).

42. On 11 April 2016, the Spanish Supreme Court dismissed the Master's nullity petition based on his rights under the Spanish Constitution, A1P1 and article 6. On 2 March 2017, the Spanish Constitutional Court declared the Master's *amparo* application non-admissible. It had alleged breaches of the Master's fair trial rights, also including A1P1 and article 6.

43. On 15 November 2017, the Provincial Court gave judgment on the quantum of Spain's and France's claims, endorsing the Club's US$1 billion limit of liability. The Club participated in these proceedings subject to a reservation of rights. The Spanish Supreme Court substantially upheld that judgment on 19 December 2018.

44. On 18 January 2018, a single judge of the ECtHR declared the Master's application, alleging that the Spanish Courts had breached (a) his A1P1 rights, and (b) his article 6 rights by convicting him and finding new facts without hearing from him, inadmissible and manifestly ill-founded. The Master's challenge to that decision was later rejected. The Master's complaint against Spain to the UN Human Rights Committee on similar grounds was also unsuccessful, though (on 14 July 2023) his challenge to the Spanish Supreme Court's decision under article 14(5) of the ICCPR was upheld.

45. On 1 March 2019, the Provincial Court issued the Spanish judgment against the Club for €855,493,575.65, which was the equivalent of US$1 billion less a fund deposited by the Club under the CLC. France was held to be entitled to seek enforcement against the Club for some €117 million.

46. On 28 May 2019, Master Cook made an order registering the Spanish judgment under the Brussels I Regulation, as sought by Spain, without notice to the Club. He gave the Club permission to appeal, which it duly did under article 43 on 26 June 2019. The appeal was transferred by consent to the Commercial Court. The Club appealed on the grounds that (i) the Spanish judgment was irreconcilable with (in effect, Mr Schaff's award and) the section 66 judgments under article 34(3), (ii) it would be manifestly contrary to English public policy, under article 34(1), to recognise the Spanish judgment because (a) of the issue estoppel and *res judicata* created by Mr Schaff's award and the section 66 judgments, and (b) the Spanish process involved a violation of the human rights of the Master, owners and the Club. France has not, as I have said, sought or obtained an order to register its Spanish judgment in England & Wales.

47. The Club also commenced fresh arbitration proceedings in 2019, seeking: (a) a declaration that enforcing the Spanish judgment would put Spain in breach of its obligation to arbitrate its claims against the Club, (b) a declaration that the arbitrator had jurisdiction to grant an anti-suit injunction, equitable compensation, damages in contract and damages in lieu of an injunction, (c) equitable compensation for breach of Spain's equitable obligation to arbitrate its claims in the amount of any liability and costs incurred by the Club arising from Spain's pursuit of those claims, (d) contractual damages in the same sums arising from Spain's participation in the hearing before Hamblen J, (e) an anti-suit injunction to restrain breach of the equitable obligation to

arbitrate, or damages in lieu under section 50, and (f) an order requiring Spain to withdraw its Spanish claims and an injunction preventing Spain taking steps to have the Spanish judgment recognised or enforced anywhere.

48. On 22 March 2019, the Club also began and served out of the jurisdiction on Spain, with permission, a claim seeking the appointment of an arbitrator pursuant to section 18 of the 1996 Act. Henshaw J (*The Prestige (No 3)* [2020] EWHC 1582 (Comm), [2020] 1 WLR 4943) decided on 18 June 2020 to dismiss Spain's application to set aside the Club's permission to serve out, and ultimately appointed Sir Peter Gross as arbitrator. Henshaw J decided that (a) Spain had no immunity from all but the contractual claims because of section 9(1) of the State Immunity Act 1978 (agreement to submit to arbitration), and no immunity from the contractual claims because of section 3(1) (commercial transactions), and (b) the Club had a good arguable case that an arbitrator had jurisdiction over all its claims other than the breach of contract claim.

49. On 14 February 2020, Foxton J ([2020] EWHC 378 (Comm)) made a similar decision (in the absence of France) in relation to the Club's application to the Commercial Court to appoint Dame Elizabeth Gloster as sole arbitrator in relation to its claims that France was in breach of its obligation to arbitrate, for an injunction, equitable compensation and equitable damages under section 50. Foxton J duly appointed Dame Elizabeth Gloster and decided that France was not immune from the proceedings.

50. On 3 November 2020, Spain filed an application seeking references to the CJEU. Over 8 days in December 2020, Butcher J heard that application and the appeal against Master Cook's registration of the Spanish judgment. Since the implementation period of the UK's withdrawal from the EU was due to expire on 31 December 2020, he decided on 18 December 2020 to refer 3 questions to the CJEU as follows:

> (1) Given the nature of the issues which the national court is required to determine in deciding whether to enter judgment in the terms of an award under Section 66 of the [1996 Act], is a judgment granted pursuant to that provision capable of constituting a relevant "*judgment*" of the Member State in which recognition is sought for the purposes of [article 34(3)]?
>
> (2) Given that a judgment entered in the terms of an award, such as a judgment under Section 66 of the [1996 Act], is a judgment falling outside the material scope of [the Brussels I Regulation] by reason of the Article 1(2)(d) arbitration exception, is such a judgment capable of constituting a relevant "*judgment*" of the Member State in which recognition is sought for the purposes of [article 34(3)]?
>
> (3) On the hypothesis that [article 34(3)] does not apply, if recognition and enforcement of a judgment of another Member State would be contrary to domestic public policy on the grounds that it would violate the principle of *res judicata* by reason of a prior domestic arbitration award or a prior judgment entered in the terms of the award granted by the court of the Member State in which recognition is sought, is it permissible to rely on [article 34(1)] as a ground for refusing recognition or enforcement or do [articles 34(3) and (4)] provide the exhaustive grounds by which *res judicata* and/or irreconcilability can prevent recognition and enforcement of a Regulation judgment?

51. [218]-[222] of the second judgment explains what he thought had not been referred to the CJEU. He said this:

> … the Court had refused to refer questions which might have involved at least part of the line of argument adopted by the CJEU. … Spain had asked in its application for a reference for a number of points to be referred … questions 3 and 4 raised issues related to *lis pendens* and question 5 related to the insurance provisions [of the Brussels I Regulation].
>
> In making a reference of two specific questions relating to Article 34(3), the Court was refusing to refer the other questions which Spain had sought to be referred and, in particular, was refusing to refer questions relating to *lis pendens* or as to the insurance provisions of the [Brussels I Regulation].
>
> … That [[28] and [36] of the judgment that the judge had given making the reference to the CJEU (the Reference judgment)] made it clear that I did not consider that the other issues canvassed were suitable for a reference, and that I was refusing to make a reference in relation to them. I should add, though I did not say this in the Reference [j]udgment, that the reasons I did not consider the other issues suggested by Spain to be suitable for a reference included that they involved or might involve a consideration of issues of *res judicata* as a matter of English law, and issues as to whether Spain had submitted to the jurisdiction of the English Courts in the s. 66 proceedings [the case before Hamblen J] and if it had what the relevance of that might be.
>
> … for the purposes of the test in para. [41] of [*Touring Tours und Travel and Sociedad de Transportes* (Case C-412/17) (*Touring Tours*)], I consider that there was an express refusal, or at the least an implicit refusal, to make a reference to the CJEU of questions in relation to *lis pendens* or the insurance provisions, or of any other question which Spain had proposed apart from those which were actually referred.

52. On 12 May 2021, the judge handed down the first judgment on the human rights issues. He decided that registering the Spanish judgment was **not** manifestly contrary to the public policy of England & Wales as a result of breaches to the Master's and others' fundamental rights, so as to engage article 34(1). We are deciding the appeal from that judgment in the Human Rights Appeal.

53. On 4 November 2021 (*The Prestige (Nos 3 & 4)* [2021] EWCA Civ 1589, [2022] 1 WLR 3434 (*The Prestige (Nos 3 & 4)*), the Court of Appeal (Males, Popplewell, and Phillips LJJ) dismissed Spain's appeal from Henshaw J's decision as to its lack of immunity from the arbitration due to take place in front of Sir Peter Gross. At [59]-[69], the Court of Appeal decided that section 9 of the State Immunity Act 1978 (written agreement to submit a dispute to arbitration) applied to the application to the court to appoint arbitrators, so that neither France nor Spain had immunity. At [64], the Court of Appeal said:

> Given that it has already been determined [via the section 66 judgments] that by asserting the Article 117 Claim in the Spanish proceedings, and refusing to arbitrate, the States agreed in writing to arbitrate the Club's disputed claim for a declaration that the States were bound to arbitrate the Article 117 Claim, did Spain

> thereby also agree to arbitrate the Club's disputed claim for coercive relief in the form of an injunction to support the right to have the Article 117 Claim arbitrated and monetary compensation for failure to do so? We consider that the answer is obviously yes. … To draw a distinction in this respect between a claim for a declaration and a claim for coercive relief, which in each case relies upon identical rights and obligations would involve absurd hair-splitting …

54. On 30 November and 1 December 2021, the Court of Appeal heard argument on the Club's appeal against Butcher J's decision to make the CJEU reference.

55. On 31 January 2022, the CJEU held an oral hearing of the CJEU reference.

56. On 1 March 2022 the Court of Appeal allowed the Club's appeal against the judge's reference to the CJEU (*The Prestige (No 5)* [2022] EWCA Civ 238, [2022] 4 WLR 39) (the CA's reference decision). It held that the CJEU reference had not been necessary, because the human rights issues raised by Spain had not been finally resolved. Phillips LJ said this at [57]:

> Following the circulation of the draft of this judgment, the parties informed the court that the reference was heard by the CJEU on 31 January 2022 and that the opinion of the Advocate General is expected on 5 May 2022, with the judgment of the CJEU to be delivered at any time thereafter. The Club applied for an order that the determination of the question I propose be referred to the Judge [pursuant to CPR 52.20(2)(b)][which was "whether, in the light of this Court's judgment, the reference he made to the CJEU on 21 December 2020 should be withdrawn by him"] should be expedited to ensure that any decision to withdraw is communicated as soon as possible and in any event prior to the judgment of the CJEU (withdrawal being permitted and effective at any time until notice of the date of delivery of judgment has been served). For my part, I consider that it is sufficient for this court to indicate that the hearing before Butcher J should take place as soon as possible, and in any event in time for any decision to withdraw the reference to be effective.

57. On 18 March 2022, Butcher J notified the CJEU of the CA's reference decision, informing it that a hearing had been fixed before him for the week of 25 April 2022 to hear the parties' submissions on whether the reference to the CJEU should be withdrawn.

58. On 31 March 2022, the UK Supreme Court (the UKSC) granted permission to Spain to appeal from the CA's reference decision, and listed the hearing for 22 June 2022. As a result, Butcher J vacated the hearing he had fixed to decide whether the reference to the CJEU should be withdrawn. He notified the CJEU.

59. On 5 May 2022, Advocate General Collins delivered his Opinion on the reference to the CJEU (the AG's opinion). On 20 June 2022, the CJEU handed down the CJEU's decision. [54]-[73] decided that Hamblen J's judgment under section 66 could not amount to an (irreconcilable) judgment for the purposes of article 34(3) "where the award in the terms of which that judgment was entered was made in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of that regulation, of a judicial decision falling within the scope of that regulation". In other words, the CJEU's decision said that Hamblen J's decision to convert Mr Schaff's award into a court judgment could not create an irreconcilable

"judgment" under article 34(3) because of the insurance provisions of the Brussels I Regulation permitting court proceedings to be brought in the jurisdiction of the insured or where the harm took place (i.e. Spain), and the existence of the Spanish proceedings that pre-dated Mr Schaff's arbitration that were, therefore, a *lis pendens*. I should interpose that the Club contests the question of whether the Spanish courts would anyway be the proper jurisdiction for a claim against it under the insurance provisions of the Brussels I Regulation. The Club submits that the claim against it is not in respect of "liability insurance" on the proper construction of those provisions. The pay to be paid clause in the P&I coverage provided by the Club meant that the insurance was properly to be regarded as indemnity, rather than liability, insurance (see *The Fanti and Padre Island (No 2)* [1991] 2 AC 1).

60. Sir Peter Gross held hearings of the arbitration before him both before and after the CJEU's decision. On 6 January 2023 Sir Peter Gross issued his first partial award (the first Gross award). His critical findings for our purposes were as follows:

    i) The CJEU's decision did not deprive him of jurisdiction, and did not decide that Spain was not bound to arbitrate its disputes with the Club.

    ii) The reasoning at [54]-[73] of the CJEU's decision would not bind the English court and therefore could not bind him.

    iii) That he would make a declaration in favour of the Club that Spain had acted and continued to act in breach of its equitable obligation not to pursue its non-CLC claims against the Club otherwise than by way of London arbitration.

    iv) The Club was entitled to equitable compensation for Spain's breach of its equitable obligation to arbitrate.

    v) The tribunal had jurisdiction to grant an injunction against Spain, but would not, as a matter of discretion, grant the injunctive relief sought by the Club.

    vi) While it would be appropriate to grant damages in lieu of an injunction, he declined to decide whether damages in lieu of an injunction could be granted to the Club against Spain under section 50 if there was no power to grant an injunction.

61. On 22 March 2023, Sir Peter Gross issued his second partial award (the second Gross award) setting out the formal terms of the relief he granted including:

    i) An order that, if and when Spain obtained a final monetary judgment or any precise monetary enforcement order against the Club in any jurisdiction outside Spain, Spain should give the Club credit for and indemnify the Club in an equal and opposite amount.

    ii) An order that, if and when Spain obtained satisfaction in any country of any amounts awarded by the Spanish courts or orders deriving from them, Spain should pay to the Club and indemnify the Club in an amount equal to the sum obtained.

iii) An order that the jurisdiction of the tribunal was reserved to order Spain to pay any costs incurred by the Club and not otherwise recoverable from Spain in such proceedings.

62. On 8 February 2023, Dame Elizabeth Gloster produced her first partial award (the first Gloster award). She decided that she had jurisdiction to hear the arbitration, and that the Club had not submitted to the jurisdiction of the Spanish courts. In relation to equitable compensation and costs, she granted substantially similar relief to that granted by the first Gross award, save that she decided to grant an injunction restraining France from enforcing any of the judgments of the Spanish courts and did not, therefore, award the Club equitable damages under section 50.

63. On 2 May 2023, Dame Elizabeth Gloster issued her second partial award (the second Gloster award) setting out the formal terms of the relief she granted reflecting the first Gloster award in a similar manner to the second Gross award.

64. On 3 February 2023, Spain issued proceedings in the Commercial Court challenging the first Gross award under sections 67 (substantive jurisdiction), 68 (serious irregularity) and 69 (point of law) of the 1996 Act. The grounds of challenge included (a) the alleged misinterpretation of the CJEU's decision, (b) lack of jurisdiction to award an injunction or damages in lieu against Spain under section 13(2) of the State Immunity Acy 1978 and section 48(5) of the 1996 Act, and (c) arguments that the remedy of equitable compensation was not available outside established types of case, and section 50 damages were not available at all where an injunction could not be granted.

65. On 30 May 2023, France issued proceedings in the Commercial Court seeking permission to appeal questions of law arising out of the first and second Gloster awards under section 69 of the 1996 Act, including (a) whether the tribunal had power to grant an injunction against France, (b) whether the tribunal had the power to award equitable compensation for breach of an equitable obligation to arbitrate arising by application of the conditional benefit principle, and (c) whether equitable compensation could be granted where its effect is to neutralise the effect of a foreign judgment which is granted recognition under English law (as to which permission to appeal was not granted).

Section D: The AG's opinion and the CJEU's decision

66. At [70], the Advocate General concluded on the first and second questions referred that a section 66 judgment was capable of constituting a relevant "judgment" for the purposes of article 34(3) notwithstanding that it fell outside the scope of the Brussels I Regulation by reason of article 1(2)(d).

67. In view of this answer, the Advocate General did not think it necessary to answer the third question, but addressed it briefly. He said that article 34(1) had to be interpreted strictly and could be relied on only in exceptional cases (see *Meroni v. Recoletos Ltd* (Case C-559/14) [2017] QB 85 at [38] (*Meroni*)). The CJEU could not define the content of a Member State's public policy, but could review the limits. Reliance on public policy under article 34(1) could only occur where enforcement would "constitute a manifest breach of a rule of law regarded as essential in the legal order of the Member State in which recognition is sought or of a right recognised as fundamental within that legal order" [74]. *Hoffmann v. Krieg* (Case 145/86) [1988] ECR 645 (the *Hoffmann* case) at [21] had held that reliance was precluded when the issue concerned

compatibility with a national judgment (see also the Jenard report at page 45). Articles 34(2), (3) and (4) constituted a *lex specialis* in relation to article 34(1) which was of a general nature. So, to the extent that other exceptions addressed the relevant public policy, article 34(1) was inapplicable.

68. On that basis, the Advocate General opined that the European Parliament had intended to "regulate exhaustively the issue of *res judicata* and/or irreconcilability by means of article 34(3) and (4)", excluding the recourse to public policy [77]. The CJEU should not, therefore, adopt a broad interpretation of article 34(1). His conclusion at [78] was, therefore, that, if the CJEU held that article 34(3) did not apply to the section 66 judgments in this case, it should hold that the referring court could not "rely on article 34(1) … to refuse to recognise or to enforce a judgment of another Member State by reason of the existence of a prior domestic arbitral award or judgment entered in the terms of that award" and that articles 34(3) and (4) exhaust the grounds on which recognition can be refused by reason of *res judicata* and/or irreconcilability.

69. Unlike the Advocate General, the CJEU gave a qualified answer to the first and second referred questions. At [48]–[53] the CJEU decided that "a judgment entered in one Member State in the terms of an arbitral award is capable of constituting a 'judgment', within the meaning of [article 34(3)], which prevents the recognition, in that Member State, of a judgment given by a court in another Member State if those two judgments are irreconcilable". To that extent the CJEU agreed with the Advocate General that the fact that the arbitral tribunal (rather than the court of the Member State itself) had ruled on the substantive dispute, was no impediment, nor was the fact that proceedings for recognition and enforcement of arbitral awards are excluded from the Brussels I Regulation by article 1(2)(d), as the CJEU acknowledged at [45]. The CJEU did, however, qualify what it had said at [48]-[53] by going on to explain that a judgment entered in terms of an arbitral award would only constitute a "judgment" within the meaning of article 34(3) if it fulfilled certain criteria.

70. Spain relies on three paragraphs of the CJEU's decision in particular. At [45], the CJEU made clear that "[p]roceedings for the recognition and enforcement of an arbitral award are therefore covered not by [the Brussels I Regulation] but by the national and international law applicable in the Member State in which recognition and enforcement are sought [(see *Gazprom* (Case C-536/13), [2015] 1 WLR 4939 at [41] (*Gazprom*)]".

71. At [54], the CJEU began its reasons for deciding that the position was different "where the award in the terms of which that judgment was entered was made in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of that regulation, of a judicial decision falling within the scope of that regulation". The first reason given was at [55] to the effect that account needed to be taken of the context of article 34(3) and all the objectives pursued by the Brussels I Regulation, in addition to its own wording and objective. The objectives of the Brussels I Regulation included the principles of free movement of judgments in civil matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the EU [56]-[57]. That mutual trust did not extend to decisions made by arbitral tribunals or to judicial decisions entered in their terms. It followed that a judgment based on an arbitral award could only "produce effects in the context of [article 34(3) if it did] not infringe the

right to an effective remedy guaranteed in article 47 of the Charter of Fundamental Rights of the European Union" [58].

72. At [59], the CJEU made clear that Mr Schaff's award "could not have been the subject of a judicial decision falling within the scope of [the Brussels I Regulation] without infringing two fundamental rules of that regulation concerning, first, the relative effect of an arbitration clause included in an insurance contract and, secondly, *lis pendens*".

73. At [60]-[63], the CJEU explained its first point (relative effect) by saying: (i) a jurisdiction clause in an insurance contract could not be invoked against a victim of insured damage who, where permitted by national law, wished to bring an action before the courts of where the harmful event occurred or of the victim's domicile, (ii) it followed that another court should not declare itself to have jurisdiction on the basis of such an arbitration clause, in order to guarantee the Brussels I Regulation objective of protecting injured parties against insurers (*Assens Havn v. Navigators Management (UK) Ltd* (Case C-368/16) [2018] QB 463 at [31], [36] and [40]-[41] (*Assens Havn*)), (iii) that objective would be compromised if a judgment entered in the terms of an arbitral award based on such an arbitration clause were to be regarded as a "judgment given in a dispute between the same parties in the Member State in which recognition is sought", within the meaning of article 34(3), and (iv) the circumstances here illustrated that, if registration of the foreign judgment were prevented by a judgment entered in the terms of such an award, the victim would be deprived of effective compensation.

74. At [64]-[69], the CJEU said that there was a *lis pendens* because proceedings were already pending before the Spanish courts between (effectively) the same parties in respect of (effectively) the same cause of action before the arbitration proceedings were commenced on 16 January 2012.

75. At [70]-[71], the CJEU said that one objective of the Brussels I Regulation was the minimisation of the risk of concurrent proceedings. The court considering whether to enter judgment on an arbitral award had to verify that those objectives had been complied with, in order to prevent their circumvention. That verification had not taken place before either Hamblen J or the Court of Appeal, and no reference to the CJEU had been made by them.

76. The CJEU recited the third question at [39] and [40] making it clear that it understood that the question was whether, if article 34(3) did not apply, it was permissible to rely on the public policy ground in article 34(1) to refuse recognition on the grounds of the *res judicata* "of **a prior domestic arbitration award or** a prior judgment entered in the terms of the award" (emphasis added).

77. When the CJEU came to answer the third question, it carried greater significance than the Advocate General had allowed it, because of the conclusions the CJEU had reached on the first two questions. And yet the CJEU was careful not to answer the entirety of the third question referred. At no stage did it say that the public policy ground in article 34(1) could not be used as a reason for refusing recognition of a foreign judgment on the basis of the *res judicata* created by an arbitral award itself as opposed to a "judgment entered in the terms of an arbitral award". Spain points to the fact that at [79], the CJEU endorsed [77] of the Advocate General's opinion, but that paragraph of the judgment also only refers to a "judgment given previously", not an award.

78. At [74]-[80], the CJEU answered the third question by saying that, where article 34(3) does not apply to a judgment granted in the terms of an arbitral award, article 34(1) meant that "recognition or enforcement of a judgment from another Member State [could not] be refused as being contrary to public policy on the ground that it would disregard the force of *res judicata* acquired" by that judgment.

79. Before leaving the CJEU's decision, it is worth mentioning the transitional provisions upon the UK's departure from the European Union that make decisions of the CJEU (such as this one) directly binding on the UK and the English courts.

80. Article 86(2) of the UK's Withdrawal Agreement with the EU (2019/C 384 I/01) provided as follows:

> The [CJEU] shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period.

81. Article 89(1) of the Withdrawal Agreement (article 89) provided as follows:

> Judgments and orders of the [CJEU] handed down before the end of the transition period, as well as such judgments and orders handed down after the end of the transition period in proceedings referred to in Articles 86 and 87, shall have binding force in their entirety on and in the United Kingdom.

Section 7A of the European Union (Withdrawal) Act 2018 (section 7A) provided that rights, powers, liabilities, obligations, restrictions, remedies and procedures arising under the Withdrawal Agreement are to be enforced and given effect in the UK (see also *HMRC v. Perfect* [2022] EWCA Civ 330, [2022] 1 WLR 3180).

Section E: The judge's decisions

The first judgment

82. In the judge's overview at [39]-[49] of what he described as the "human rights public policy ground" that he was deciding, he set out some important authorities that were to guide his decision.

83. At [43], he cited extensively from *Diageo*, upon which the Club placed heavy reliance before us. He said that "[t]he main principles applicable to the application of the [a]rticle 34(1) exception were summarised by the CJEU" in *Diageo*. The main paragraphs that he cited from *Diageo* dealt with:

(i) the need for a strict interpretation of article 34 as it constituted an obstacle to the attainment of one of the fundamental objectives of the Brussels I Regulation, and article 34(1) "may be relied on only in exceptional cases" [41],

(ii) the fact that Member States remained free to determine their own public policy requirements, but "the limits within which the courts of a Member State may have recourse to that concept" were a matter for the CJEU [42],

(iii) article 36 prohibited a Member State from refusing recognition solely on the basis of a discrepancy between the legal rules applied by the courts of the state in which the

judgment was given as compared to the receiving state. It was in that context that it was said that the receiving state "may not review the accuracy of the findings of law or fact made by the court of the state of origin" [43],

(iv) thus, recourse to the public policy exception was only possible where the incoming judgment "would be at variance to an unacceptable degree with the legal order of the state in which recognition is sought, in as much as it would infringe a fundamental principle". In order for the prohibition on review of the substance of an incoming judgment to be observed, the infringement would have to "constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which recognition is sought or of a right recognised as being fundamental within that legal order" [44],

(v) the public policy exception only applies where that error of law means that recognition by the incoming state "would result in the manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State" [50], and

(vi) defendants had to avail themselves of all the legal remedies available in the state of origin to prevent a breach of public policy in the incoming state before it occurs, save where specific circumstances make it too difficult or impossible [64].

84. At [45], the judge referred to *Bamberski v. Krombach* at [25]-[27] for the proposition that the CJEU has consistently held that ECHR rights are those which might constitute a ground of public policy capable of bringing article 34(1) into operation.

85. At [49], the judge held that, whilst the word "manifestly" could not rule out a sufficient investigation of the facts to understand the nature of the violation of public policy, it emphasised that the incoming judgment then had to be shown to be plainly or obviously contrary to public policy (see Patterson J in *Laserpoint Ltd v Prime Minister of Malta* [2016] EWHC 1820 (QB) at [60] (*Laserpoint*) and Cooke J in *Smith v. Huertas* [2015] EWHC 3745 (Comm) at [16] (*Huertas*)). The judge concluded: "If there is room for serious argument as to whether public policy was contravened (either because it was seriously debatable as to what public policy was or as to whether the judgment contravened it) then it would be most improbable that it could be said that enforcement was manifestly contrary to public policy".

86. The judge then dealt with each of four violations alleged by the Club in turn.

87. In relation to article 14(5) of the ICCPR, it is to be noted that the Club had not argued before the judge, as they did before us, that it represented a rule of customary international law. The judge held at [51]-[68] that article 14(5) was not part of domestic legislation (even though the UK had signed the instrument), was not a fundamental legal right within the English legal order, and did not create English rights, let alone creating an offence to English public policy. In any event it did not fall within EU limits on that concept.

88. The judge rejected the Club's complaint that the Spanish Supreme Court had made new findings of fact affecting the Master without hearing from him or relevant witnesses, which were inconsistent with those found by the Provincial Court, on several grounds. First, he held at [75] that the right not to have new facts found only applied to the Master's criminal liability, and not to a civil judgment, which was what was relied upon

by the Club. That was enough, by itself, to mean that the public policy objection was not engaged. Secondly at [76]-[83], the new facts complaint was rejected by the Spanish Supreme Court, the Constitutional Court and the ECtHR. As in *Huertas* at [20]-[21] and [34]-[37] and *Interdesco SA v. Nullifire Ltd* [1992] ILPR 97 (*Interdesco*), the Club could not avoid the consequences of the rejection of the Master's other challenges. Thirdly at [84]-[88], on the basis of the expert evidence that he heard, the judge held that there was "at the least, a *bona fide* and significant argument that no new material factual findings were made by the [Spanish] Supreme Court", and (despite on one point Spain's acceptance of a new factual finding), there was no "plain and obvious denial of the Master's fair hearing rights".

89. At [119]-[126] of the first judgment in relation to A1P1 and article 6, the judge gave three reasons for holding that enforcement of the Spanish judgment was not to be refused under article 34(1) on the ground that it was arbitrary or irrational so that registration would be manifestly contrary to English public policy.

90. First, the judge held that the Club's complaints were an impermissible attempt to invite the court to review the substance of the Spanish courts' decisions contrary to articles 36 and 45(2) of the Brussels I Regulation. The judge placed reliance on *Meroni* at [41], where it was said that "the court of the Member State in which recognition is sought may not review the accuracy of the findings of law or fact made by the court of the Member State of origin". The judge said that there might be cases where the decision was "manifestly unreasonable" or "arbitrary", if, for example, there was "no attempt at legal reasoning", or the result was "manifestly made to depend on a matter which [had] nothing to do with a view of the relevant law or facts":

> But if there is a process of fact finding and legal analysis, then the *Meroni* approach dictates that the enforcing court should not examine them to see whether they are right.

The Club's complaints were each an attempt to review the Spanish courts' legal or factual decisions, or the application of the law to the facts.

91. Secondly, the Club had not overcome the strong presumption that the courts of the originating Member State provided a procedure compliant with article 6 of the ECHR (see *Maronier v. Larmer* [2003] QB 620 at [23]-[26] (*Maronier*)). The judge was not in a position to make any informed assessment of how the Spanish Supreme Court's conclusions had related to the submissions made to it, because the Club had not shown what arguments and materials were put before it.

92. Thirdly, the Club never participated in the Spanish proceedings so as to assert its own rights. It could have argued that there were contraventions of A1P1 or article 6, even at the quantum stage. It was not a sufficient answer, and could not be assumed, that a nullity appeal to the Spanish Supreme Court would have been pointless because it would never have changed its mind.

The second judgment: decision on registration of the Spanish judgment and its irreconcilability with the section 66 judgments under article 34(3)

93. The judge dealt at [83]-[251] with the first of the remaining issues in the Club's appeal against Master Cook's order registering the Spanish judgment (beyond the human

rights issues he had dealt with in the first judgment). That first issue was whether enforcement of the Spanish judgment should be refused on the ground that it was irreconcilable with Hamblen J's judgment, and the orders made by Hamblen J and the Court of Appeal in the terms of Mr Schaff's award. He decided, of course, to allow the appeal against Master Cook's order and that he was not bound by [54]-[73] of the CJEU's decision.

94. At [165]-[183], the judge determined that Hamblen J had decided once and for all that the jurisdictional regime of the Brussels I Regulation did not apply to arbitration and was accordingly not applicable to Mr Schaff's awards. The judge also held that Hamblen J had decided, again finally, that because the Brussels I Regulation did not apply to arbitration it was also not relevant to the question of whether Mr Schaff's awards should be registered that the English court could not have heard the claims in the Spanish proceedings by reason of the *lis pendens* provision in article 27 and the direct action insurance provision of article 11 of the Brussels I Regulation. Spain had abandoned its appeal against Hamblen J's conclusions on those issues, creating a binding issue estoppel. The argument that the judge was accepting was explained at [163(1)]. It was that the section 66 judgments in these respects were binding as between the Club and Spain, and could not be displaced by a subsequent decision of the CJEU (as to which, see *Kapferer v. Schlank & Schick GmbH* (Case C-234/04), [2006] 2 CMLR 19 at [19]-[21] (*Kapferer*)).

95. At [184]-[203], the judge dealt with Spain's arguments as to the inconsistency of the section 66 judgments with the Spanish judgment, and with exceptions to the *res judicata* principle and the application of the EU law principles of effectiveness and equivalence, in the event (as he had held) that the section 66 judgments were valid and binding. He decided at [203] that he should give effect to the issue estoppel, notwithstanding [54]-[73] of the CJEU's decision, which could not be binding. The CJEU did not have jurisdiction to give rulings in circumstances where the national court would not be bound by its interpretation (see *Kleinwort Benson Ltd v. Glasgow City Council* (Case C-346/93) [1996] QB 57 at [23]-[24]).

96. At [204]-[239], the judge dealt with what he described as the Club's Jurisdiction Ground, namely that [54]-[73] of the CJEU's decision decided matters which had not been the subject of the reference or impermissibly applied the law to the facts. He concluded, as Sir Peter Gross had done, that the CJEU had done both. At [208]-[209], he summarised the law, drawing mostly on what Sir Peter had said as follows:

    i) The preliminary reference procedure was based on a judicial dialogue between the national court and the CJEU.

    ii) The procedure divided responsibilities and gave the national court sole responsibility for defining the subject-matter, the formulation, content and relevance of the questions it asked (*Trasporti Castelletti Spedizioni Internazionali SpA* (Case C-159/97) at [14], and *Touring Tours* at [39]-[40]).

    iii) The CJEU could reformulate questions referred, answer a question by reference to additional or different provisions of EU law and answer a logically anterior question. But the CJEU must not answer questions which the referring court has expressly or implicitly refused to refer. In *Touring Tours* at [41]-[42] the CJEU said that, if the referring court implicitly refused to submit a question, the CJEU

"may not answer that question or take it into account in the reference for a preliminary ruling".

iv) The CJEU needed to limit itself to answering the questions referred in order to safeguard the rights of people making observations (see *Phytheron International SA v. Jean Bourdon SA* (Case C-352/95) at [14]).

v) The national court had to determine the facts and apply the law to those facts (*AC-ATEL Electronics Vertriebs GmbH* (Case C-30/93) at [16]-[17]).

vi) If the CJEU purported to answer a question falling outside those referred, the national court was not bound to follow it (see *R v. Secretary of State for Transport ex parte Factortame (No 5)* [2000] 1 AC 524 at page 550; *Arsenal FC v. Reed* [2003] 3 All ER 865 (CA) at [25]; and *HMRC v. Aimia* [2013] UKSC 15, [2013] 2 All ER 719 at [55]-[56] (*Aimia*)).

97. The judge said that, applying those principles, the first two questions referred (i) unambiguously related to clearly defined issues of EU law (raised under *Solo Kleinmotoren GmbH v. Boch Case* (C-414/92) [1994] ECR I-2237 (the *Solo* case) and the *Hoffmann* case), and (ii) did not ask whether there were other reasons why article 34(3) might be inapplicable. He had expressly, or at least implicitly, refused, having regard to his Reference judgment, to refer the questions that "involved at least part of the line of argument adopted by the CJEU". Moreover, at [54]-[73], the CJEU wrongly applied the law to the facts, with "an incomplete understanding of those facts, including in relation to" the section 66 judgments. At [54]-[73], the CJEU ignored the applicable *res judicata* created by those decisions. The judge expressly rejected at [228] the argument that the CJEU had simply qualified their answer to the first two questions, holding that its qualification had answered substantially different questions. It was wrong to say that the CJEU would have had to give inaccurate answers without its qualifications. The *Solo* case and the *Hoffmann* case gave rise to specific legal issues. Accordingly, the judge decided that [54]-[73] of the CJEU's decision was not binding on him.

98. At [234]-[239], the judge held that the consequence of his not being bound by [54]-[73] of the CJEU's decision was that he would follow the reasoning of the Court of Appeal in *Prestige (Nos 3 & 4)* at [79]-[85] and *Soleymani v. Nifty Gateway LLC* [2022] EWCA Civ 1297, [2023] 1 WLR 436 at [60]-[88] to the effect that the reasoning in *Assens Havn* could not apply to an arbitration clause.

99. The judge then said that, had he thought that [54]-[73] was binding on him, he would have seen much merit and importance in the Club's argument (now raised before us by Respondent's Notice) that the CJEU reached its decision in breach of the requirements of natural justice. In relation to the Club's further argument that the reference was anyway invalid because the Court of Appeal had held in *The Prestige (No 5)* that it should not have been made, he held that the complaint did not translate into any legally cogent objection to the binding force of the CJEU's decision.

The second judgment: decision on registration of the Spanish judgment and whether it was contrary to English public policy under article 34(1) as violating res judicata

100. The judge dealt at [252]-[292] with the second of the remaining issues in the Club's appeal against Master Cook's order registering the Spanish judgment. He held that article 34(1) was applicable even if article 34(3) were not (though he had held that it was). Whilst the answer given in the CJEU's decision to the third question referred bound him to hold that article 34(1) could not apply to *res judicata* arising from the section 66 court decisions, it did **not** bind him to hold that that article 34(1) could not apply in those circumstances to a *res judicata* arising from an arbitral award. Thus, if article 34(3) were not applicable, article 34(1) would apply to prevent registration of the Spanish judgment by reason of the *res judicata* arising from Mr Schaff's award.

The second judgment: decision on whether Sir Peter Gross had jurisdiction

101. The judge dealt at [298]-[304] with Spain's challenge to the arbitrator's jurisdiction under section 67 of the 1996 Act. He held that the argument was not open to Spain. It had been finally determined by the Court of Appeal in *The Prestige (Nos 3 & 4)* at [59] and [60]-[69] that Sir Peter Gross had jurisdiction.

The second judgment: decision on whether there was jurisdiction to award the Club equitable compensation

102. The judge dealt at [323]-[337] with the question of equitable compensation. He dismissed the appeal from Sir Peter Gross's decision that he did have jurisdiction to award the Club equitable compensation.

103. At [336] the judge expressed his reasons as follows:

> (1) This is a case of the breach by Spain of an equitable obligation which is 'equivalent', to use the word employed by Males LJ in [*Airbus SAS v. Generali Italia SpA* [2019] EWCA Civ 805, [2019] 4 All ER 745 (*Airbus*)] at [95]-[96], to the contractual obligation which the insured itself would have owed. Breach of the contractual obligation would give rise to a remedy in damages. I do not see why there should not be a corresponding monetary remedy for breach of the equivalent equitable obligation.
>
> (2) It would appear to me to be a sensible incremental development of the law to recognise the availability of equitable compensation in such a case as this. There is, by contrast, no good reason why the availability of a monetary remedy in such a situation as this should be tied to the availability of an injunction.
>
> (3) The fact that the equivalent of Lord Cairns' Act has been re-enacted does not mean that the law as to the availability of equitable compensation must have remained the same as it was when Lord Cairns' Act was first enacted. It may be that the circumstances in which that Act is now relevant have diminished; but its re-enactment cannot have restricted the development of the law.
>
> (4) I would only depart from the decision of Sir Michael Burton in [*Argos Pereira España S.L. v. Athenian Marine Ltd* [2021] EWHC 554 (Comm), [2021] 2 Lloyd's Rep 387 *(The Frio Dolphin)*] if I were convinced it is wrong. I do not consider it to be wrong. On the contrary, as Sir Peter Gross said, I consider that it reflects the way in which the tide is and should be flowing in this area of the law.

The second judgment: decision on whether there was jurisdiction to award an injunction against Spain

104. The judge dealt with this question at [338]-[363], deciding that Sir Peter Gross had been wrong to decide that he had jurisdiction to grant an injunction against Spain preventing it seeking to enforce the Spanish judgment (and Dame Elizabeth Gloster had been wrong to grant an injunction). The judge's reasons were, in summary, (i) the only power in the Arbitrators to grant an injunction was in section 48(5) of the 1996 Act. The effect of section 13(2)(a) of the State Immunity Act 1978 (section 13(2)(a)) was to deprive the court of the power to grant an injunction against a state, where it did not consent. Section 48(5) of the 1996 Act gives arbitrators the powers of the court. Since the court had no power to injunct a state, the arbitrator did not (see *A Co Ltd v. Republic of X* [1990] 2 Lloyd's Rep 520 at page 525). The rule in *Gazprom* that a court could not grant an anti-suit injunction in respect of Brussels I Regulation proceedings, but arbitrators could, did not extend the arbitrator's powers under section 48(5) of the 1996 Act.

105. The judge rejected the argument that the maxim *par in parem non habet imperium* (equals have no sovereignty over each other) underlay section 13(2)(a), so that it should not apply to arbitrators, on the ground that it did not overcome the clear meaning of sections 13(2)(a) and 48(5) read together.

106. Finally on this point, the judge at [363] deferred his decision on whether section 13(2)(a) should be read down to comply with article 6 to await the decision of the Court of Appeal in *The Resolute* on appeal from Sir Ross Cranston at [2022] EWHC 1655 (Comm), [2022] 1 WLR 4856. In the event, I decided in *The Resolute* [2023] EWCA Civ 1497 on 20 December 2023 (and Popplewell and Phillips LJJ agreed) that section 13(2)(a) should not be read down, upholding Sir Ross Cranston.

The second judgment: decision on whether there was jurisdiction to award equitable damages in lieu of or in addition to an injunction under section 50

107. At [364]-[367], the judge decided that, since there was no power to grant an injunction against a state, there was no power to grant damages in lieu of or in addition to an injunction against a state (see *Jaggard v. Sawyer* [1995] 1 WLR 269 at page 285 (*Jaggard v. Sawyer*), where Millett LJ had said that section 50 damages could only be granted where, at the date of the writ, an injunction **could** (not would) be granted).

The third judgment

108. At [48]-[56] of the third judgment, the judge decided, for the same reasons as he had given in relation to Spain and some other reasons, that Dame Elizabeth Gloster had no power to grant an injunction against the French state. At [58] he decided for the same reasons as he had given in relation to Spain that Dame Elizabeth Gloster had been right to think that equitable compensation could be awarded against France. It is worth noting that he did not deal in the third judgment with the question of the availability of equitable damages under section 50, because Dame Elizabeth Gloster had said that it was "neither necessary nor appropriate" for her to decide that question.

The Brussels Appeal

Section F: Issue 1: Was the judge correct to think that he was not bound by the CJEU's decision that article 34(3) was inapplicable and Hamblen J's decision was not an irreconcilable judgment?

109. As I have already said, there are essentially three questions under this heading. The first is whether, for the various reasons enunciated by the judge and argued by the Club, [54]-[73] of the CJEU's decision are or are not binding on this court. These so-called "jurisdictional grounds" include the arguments that the CJEU exceeded its jurisdiction in answering questions which were not referred, applying the law to the facts, and basing its reasoning on a misapprehension of the facts. The second is whether Hamblen J's judgment and the CA's section 66 judgment create a binding issue (or cause of action) estoppel requiring this court to hold that those judgments are irreconcilable with the Spanish judgment preventing its registration or recognition under article 34(3). The third is the question raised by the Club in its Respondent's Notice as to whether Spain submitted to the jurisdiction of the English Court (resulting in Hamblen J's decision) thus waiving its right to rely on the insurance and *lis pendens* provisions in the Brussels I Regulation.

110. Underlying all three of these questions is a proper understanding of what Hamblen J and the Court of Appeal decided between 2013 and 2015, and the CJEU decided in 2022. Before turning to that, it is useful to set the scene by explaining the parties' arguments on the first two main points.

The parties' positions on the jurisdictional questions affecting whether the judge and the Arbitrators were right to hold that they were not bound by [54]-[73] of the CJEU's decision

111. Spain submits that both the judge and the Arbitrators were wrong, founding itself mostly on the provisions of the Withdrawal Agreement and the EU (Withdrawal) Act cited above at [80]-[81]. The Club says that the judge was right at [204]-[233] of the second judgment.

112. There are a number of reasons why the Club says that [54]-[73] of the CJEU's decision were not binding, but they can be summarised as follows: (a) the CJEU went impermissibly beyond the questions that the judge had referred, so that, under both English and EU law, it exceeded its jurisdiction, (b) the CJEU was neither provided with nor understood the factual history of the section 66 judgments, making it impossible to rely on what it decided, (c) the history of the reference shows that the CJEU, the Advocate General and the parties knew that the question that was answered at [54]-[73] was not what had been asked, making it procedurally unfair and unacceptable for the answer to be binding.

The parties' positions on whether the section 66 judgments create a binding issue estoppel requiring this court to hold that those judgments are irreconcilable with the Spanish judgment preventing its registration or recognition under article 34(3)

113. On this subject, Spain submits that Hamblen J simply did not address the article 34(3) question leaving it for another day. He was only dealing with whether it was **arguable** that a section 66 judgment would be regarded as an irreconcilable judgment under article 34(3). The Court of Appeal followed his approach. The Club, on the other hand, says that, on a proper analysis of Hamblen J's judgment, it must be interpreted as having

decided (rightly or wrongly) that the section 66 judgment he was giving would be an irreconcilable one for the purposes of article 34(3). Spain abandoned any appeal against that point on the second day of the hearing before the Court of Appeal. Even if Hamblen J has been shown by the CJEU's decision to have been wrong, that does not make his decision any the less binding now, 10 years later. There must be finality to litigation, and EU law itself acknowledges that final domestic decisions made before the CJEU alters the law must stand (see *Kapferer* at [19]-[21]).

114. With those brief introductions, I turn to the question of what (a) Hamblen J and the Court of Appeal on the section 66 applications and (b) the CJEU actually decided.

What Hamblen J decided

115. A good starting point is, perhaps, [5] of the headnote in the Lloyd's Reports which reads as follows:

> On an application under section 66, the court had a discretion whether or not to enforce the award. In the present case there was a clear utility in granting leave to enforce, and the [Brussels I Regulation] regime was not a good or sufficient reason for preventing the Club from seeking to realise the full benefit of its awards. Accordingly, the court would exercise its discretion to grant the section 66 application.

116. Hamblen J said as follows at [182]-[194]:

> 182. On an application under s.66, the Court has a discretion whether or not to enforce the award – it "may" do so.
>
> 183. … I accept that the discretion is a wide one to be exercised in the interests of justice and that it will embrace issues such as the utility of a declaratory judgment, as is illustrated by *West Tankers Inc v Allianz SpA* [2012] 1 Lloyd's Rep 398…
>
> 186. The Club relied upon Field J's discretionary decision in *West Tankers* and submitted that it was on all fours with the present case. The Club's stated objective in these proceedings is to obtain an English judgment which, by virtue of Article 34(3) of the [Brussels I Regulation], would take primacy over any inconsistent Spanish judgment which might be rendered in November. A similar issue arose in *West Tankers*. Field J decided that the declaratory award would be enforced because there was utility in so doing.
>
> He stated that: …
>
> > " … 30. On an application under s. 66 or to set aside a s. 66 order, it is enough, in my view, in a case such as this, for the party seeking to enforce the award to show that he has a real prospect of establishing the primacy of the award over an inconsistent judgment. It is not necessary, nor is it appropriate, for the court finally to decide this hypothetical question– hypothetical because the unsuccessful party to the arbitration will not have obtained an inconsistent judgment in a Member State at the time the court is dealing with the s. 66 application."
>
> 187. Similarly there is here a real prospect of establishing the primacy of the award

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

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

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

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

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

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

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

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

192. In short, the non-Regulation nature of the s.66 proceedings allows the Court to ignore the mandatory stay imposed by the Regulation and yet it would assert the status of having issued a Regulation judgment in order to trump the judgment of the Court first seised. The Defendants submitted that such a result is not countenanced by the Regulation and that the Court should not exercise its discretion so as to encourage such a result.

193. This argument assumes that the Court should treat the present application as if

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

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

117. I have cited extensively from Hamblen J's judgment because it makes clear that what he decided was: (i) that there was clear utility in granting a section 66 judgment in respect of Mr Schaff's awards, because there was a real prospect of establishing the primacy of the awards over any inconsistent judgment which might in the future be rendered in Spain, and (ii) that the application for a judgment under section 66 was an arbitration application and the question of whether such a judgment might (or might not) subvert the scheme of the Brussels I Regulation (and, in particular, its insurance provisions, *lis pendens* provisions and stay provisions) provided no good reason **not** to exercise the court's discretion to grant the section 66 application.

118. Hamblen J did **not** decide, as the Club submits he did, that the section 66 judgment was an irreconcilable judgment under article 34(3), nor did he decide anything about the Brussels I Regulation regime, save that it was not a good reason for refusing to exercise the domestic court's discretionary jurisdiction in relation to arbitration awards under section 66.

119. On the section 66 appeal from Hamblen J, Moore-Bick LJ (who gave the only substantive judgment) dismissed Spain's and France's appeals, having described at [8(iv)] part of what Hamblen J had decided as follows:

> … that it was appropriate in the exercise of his discretion to give permission to enforce [Mr Schaff's] awards as judgments, because there was a real possibility that the resulting judgments would fall within [article 34(3)] and would prevent enforcement of any Spanish judgment in this country or elsewhere in Europe.

120. The judge's core reasoning for holding that the section 66 judgments created an issue estoppel is found at [177] as follows:

> … it is clear that Hamblen J had reached a final conclusion that the alleged inconsistency with the Regulation jurisdictional regime was not a good reason for not entering a s. 66 judgment because the Regulation did not apply to arbitration. This was not simply a decision on the basis that there was an arguable case that the Regulation scheme might be irrelevant. The argument he was facing was that the English Court should not render the s. 66 Judgment at all, and that if it did, and was a relevant judgment, it would subvert the Regulation regime because it would prevent enforcement of any Spanish judgment. The English Court could not have proceeded to enter a judgment which would have that effect on the basis that it was merely arguable that it was not a violation of the jurisdictional rules of the Regulation: the very question before the Court was whether it should grant that relief, and if it might have been a subversion of the Regulation scheme to grant it,

then the court should not have granted it. In fact, Hamblen J proceeded to enter the s. 66 Judgment because he considered that to do so would not involve any subversion of the Regulation scheme, because the Regulation scheme was not applicable to arbitration.

121. Hamblen J did not, in fact, decide finally whether the section 66 judgment **would** achieve primacy over a future Spanish judgment. He made that clear at [187] where he said that there was "a real prospect of establishing the primacy of the award over any inconsistent judgment which may be rendered in Spain". Again at [189], Hamblen J said that "it would not be appropriate to decide that issue in circumstances where any inconsistency is still hypothetical and that it is sufficient for there to be a real prospect of establishing primacy".

122. At [190]-[193] of Hamblen J's judgment, he is dealing with the argument that there was a **possibility** that a section 66 judgment would be regarded (as a matter of EU law) as a judgment for the purposes of article 34(3). Spain said it would be an inappropriate exercise of discretion to enter such a judgment because the ultimate effect, **if** the section 66 judgment turned out to be an article 34(3) judgment, would be to subvert the regime of the Brussels I Regulation, including the insurance and *lis pendens* provisions. The judge said it would not subvert the regime to give the section 66 judgment because arbitration was outside the Brussels I Regulation.

123. Hamblen J did not say that the section 66 judgment he was giving was outside the Brussels I Regulation, let alone decide the question of EU law as to whether it was a "judgment" for the purposes of article 34(3). All Hamblen J really decided was that the possibility that his judgment might be held later to be within article 34(3) was not a good reason for refusing it, because arbitration was excluded from the Brussels I Regulation. And that is what the judge said at the start of [177]. His error was later in that paragraph where he said: "if it might have been a subversion of the Regulation scheme to grant [the section 66 application], then the court should not have granted it". In fact, Hamblen J rejected that approach. He did not need to decide the EU law question, because he thought (a) there was sufficient utility in making the order because it might protect Mr Schaff's awards under article 34(3), and (b) he did not need to worry about subverting the Brussels I Regulation, when he was just dealing with registration of English arbitration awards in the English court and such awards were outside the Brussels I Regulation.

What the Court of Appeal decided on appeal from Hamblen J

124. As the judge recorded at [180]-[181], the appeal against [182]-[194] of Hamblen J's judgment was abandoned, but as was discussed in the Court of Appeal on the second day, that left the question of whether the section 66 judgment was or was not a "judgment" for the purposes of article 34(3) to be decided if and when it arose. For that reason, the judge was wrong to treat Hamblen J's explanation of why matters such as *lis pendens* were irrelevant to his decision to enter a section 66 judgment (i.e. because the Brussels I Regulation jurisdictional regime was not applicable) as a definitive answer to points which Hamblen J had left open in deciding the utility issue on a real prospect basis.

125. The Club argues that the abandonment of Spain's third ground of appeal crystallised the issue estoppel on which it relies. It put the matter as follows in its skeleton:

> Spain said that it would pursue that Ground at the enforcement stage (without clearly distinguishing between the two different arguments it had raised for these purposes). The question of utility could logically be deferred to the enforcement stage, which is what Hamblen J had held in accordance with the Club's submission and the earlier decisions in [*West Tankers Inc v Allianz SpA (The Front Comor)* [2011] 2 All ER (Comm) 1, [2012] 2 All ER (Comm) 113 (CA) and *African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH & Co Reederei KG* [2011] 2 Lloyd's Rep 531], above. However, Spain could not logically withhold its second argument, which went to the question of whether s.66 relief could ever be proper at all, viz. whether the Club should have the material benefit of the awards for the purposes of setting up a blocking judgment under [article 34(3)]. Spain's Leading Counsel (acting on instructions) abandoned that point.

126. The point is that Hamblen J did not decide, for good and all, in the paragraphs that I have cited that his section 66 judgment was to be regarded as a "judgment" for the purpose of the irreconcilability provisions in article 34(3). He decided that it might be, and therefore there was utility in making a section 66 order. As I have said, he left the EU law decision for another day.

What the CJEU actually decided at [54]-[73]

127. The Club contends that the CJEU went beyond answering the first two questions referred by the judge, and answered a quite different question, and one that had already been definitively and finally answered by Hamblen J in 2013. I have dealt already with the latter point. Hamblen J certainly did not answer any question about whether a section 66 judgment was a "judgment" for the purposes of article 34(3). Spain and the European Commission contend that the CJEU's answer to the first two questions was orthodox and entirely open to it. They submit, in effect, that the CJEU did what is quite common in its procedure, and answered the questions by saying "yes, but …", having first explained the objectives of the Brussels I Regulation.

128. It is worth setting out in full the CJEU's ruling on the first two questions, which was that a section 66 judgment was not a "judgment" for the purposes of article 34(3):

> where a judicial decision resulting in an outcome equivalent to the outcome of that award could not have been adopted by a court of that Member State without infringing the provisions and the fundamental objectives of [the Brussels I Regulation], in particular as regards the relative effect of an arbitration clause included in the insurance contract in question and the rules on *lis pendens* contained in [article 27].

129. The CJEU thus concluded that, in that situation, the section 66 judgment would not prevent, in that Member State, the recognition of a judgment given by a court in another Member State.

130. It will be recalled also that the judge's first two questions were, in essence, whether a section 66 judgment was capable of constituting a relevant "judgment" for the purposes of article 34(3) given: (i) the nature of the issues which the national court was required to determine in deciding whether to enter such a judgment, and (ii) that a section 66 judgment falls outside the material scope of the Brussels I Regulation by reason of the arbitration exception.

131. The judge explained his reasons for referring these two questions at [52] of his judgment. He cited [48]-[49] from his formal Request to the CJEU for a Preliminary Ruling, appended to his order of 21 December 2020. Those paragraphs explained that:

i) The issue in the first question was whether the requirements described in the *Solo* case applied here. Those requirements were that, in order to be a "judgment" for the purposes of article 34(3), the decision "must emanate from a judicial body of the relevant Member State and must decide issues between the parties". In other words, the question was whether a section 66 judgment qualified as a "judgment" where the national court had determined certain issues, but the substantive merits had been decided by the arbitration tribunal.

ii) The issue in the second question was whether a section 66 judgment, which fell outside the material scope of the Brussels I Regulation by reason of the article 1(2)(d) arbitration exception, could prevent the Spanish judgment being recognised. The *Hoffmann* case had held that a divorce decree, which fell outside the Brussels I Regulation, prevented enforcement of a maintenance order, which fell within it. The *Hoffmann* case was not, however, a case specifically about the arbitration exception.

132. Against that background, the Club suggested that it was not open to the CJEU to go beyond answering the points raised by the *Solo* case and the *Hoffmann* case. That was particularly so, when, as I have explained at [51] above, the judge thought he had refused to refer the questions the CJEU actually answered. With all that in mind, it is necessary, as I have said, to ascertain what the CJEU decided.

133. It is not in dispute that the first thing the CJEU decided was at [48]-[53], where it said, in effect, that a section 66 judgment was capable of being a "judgment" within the meaning of article 34(3). That decision effectively concluded the argument on both the *Solo* case and the *Hoffmann* case. Neither the fact that **the court** (as opposed to Mr Schaff) had not decided all the issues, nor the fact that a section 66 judgment was caught by the arbitration exception, automatically meant that it was not a "judgment" for article 34(3) purposes.

134. The CJEU did not leave its answers there, as the judge and the Club thought it should have done. Instead, it added a critical caveat. It said that the position was different "where the award in the terms of which that judgment was entered was made in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of that regulation, of a judicial decision falling within the scope of that regulation". The following paragraphs explained what it meant. In simple terms, the CJEU thought that what Mr Schaff decided could not have been the subject of a **judicial** (as opposed to an arbitral) decision under the Brussels I Regulation without infringing two of its fundamental rules as to where insurance claims could be brought and the primacy of pending proceedings. Accordingly, such section 66 judgments could not be judgments that would be regarded in EU law as irreconcilable with the Spanish judgment. It does not seem to me to matter, for these purposes, whether the CJEU was right or wrong about where insurance provisions of the Brussels I Regulation mandated proceedings for the relief granted by Mr Schaff to be brought. As I have said, the Club thought such proceedings were not mandated to be brought in Spain because the insurance concerned was indemnity, rather than liability,

cover. But the CJEU was simply laying down the circumstances that had to be fulfilled for a "judgment" to qualify as such under article 34(3).

135. It is true that this part of the CJEU's decision draws on the facts of the case, but the facts as to when the proceedings began and where the proceedings were started were not disputed. The decision itself was, however, one of pure EU law. It explained, as a matter of EU law, what manner of judgment could be considered as a "judgment" for the purposes of the irreconcilability provision in article 34(3). That was what the judge had asked the court to do, even though he had directed the court's attention to two reasons that might, but in the event did not, take the section 66 judgments outside the scope of article 34(3).

136. Much argument was directed to whether [71] of the CJEU's decision was essential to its reasoning. It seems to me that it was not. There, the CJEU simply said that, because one objective of the Brussels I Regulation was the minimisation of the risk of concurrent proceedings, and because it also made specific provision for insurance, a section 66 court ought to "verify that the provisions and objectives of [the Brussels I Regulation] had been complied with, in order to prevent their circumvention", which is not what had happened before Hamblen J or the Court of Appeal in this case. The Club submitted that Hamblen J had undertaken such a verification, but as I have explained already Hamblen J did not decide the meaning of article 34(3), confining himself to deciding that there was a possibility that it would apply. In any event, [71] contains comments about what should happen in the future in the light of the CJEU's answers to the first two questions, rather than direct answers themselves.

137. So, to conclude, it seems clear to me that the CJEU did indeed answer the questions asked on the basis of EU law as the CJEU determined it to be, even though the caveats that it entered went further than the judge had envisaged they would.

Were the judge and the Arbitrators right to hold on jurisdictional grounds that they were not bound by [54]-[73] of the CJEU's decision?

138. These arguments were wide-ranging, but, simply summarised, they were that the CJEU exceeded its jurisdiction in answering questions which were not referred, applying the law to the facts, basing its reasoning on a misapprehension of the facts, and engaging in procedural unfairness.

139. Mr de la Mare KC, leading counsel for the Club, relied on 12 elements of factual background to the reference to the CJEU as follows: (i) the judge expressly refused to refer 4 questions including those seeking to impugn the section 66 judgments on the grounds of the insurance and *lis pendens* provisions of the Brussels I Regulation, (ii) the judge refused to include facts relating to the questions that were not referred, including the section 66 judgments, (iii) the Club confined its written observations to the three points referred, (iv) France raised points about the non-referred questions, (v) Spain made submissions on the insurance provisions, *Assens Havn* and mutual trust in an attempt to re-open the non-referred questions, (vi) even Spain did not reintroduce *lis pendens* arguments, (vii) the Club complained to the CJEU about the new points raised by Spain and France, (viii) the CJEU set measures of organisation directing the parties to concentrate at the oral hearing on the first two questions and the questions raised by France on irreconcilability, inferentially excluding *Assens Havn* and *lis pendens* arguments, (xi) the Club said orally that France's arguments went outside the questions

referred in breach of *Touring Tours*, (x) the hearing did not discuss either *Assens Havn* or *lis pendens*, (xi) the Advocate General answered **only** the three questions referred, and said that the CJEU should refuse to answer questions not referred following *Touring Tours*, and (xii) the CJEU gave judgment without hearing the Club or reopening the procedure on arguments it had itself raised.

140. Perhaps the high point of the Club's argument is Lord Reed's judgment in *Aimia*, where he said this at [55]-[56]:

> 55. As I have explained, the Court of Justice recognised that the reference in the present case raised no new point of law. The court however endeavoured to clarify how established principles applied in the circumstances of the case, so far as they emerged from the reference. It is particularly unfortunate in those circumstances that, as I have explained, the reference failed to reflect fully either the facts on the basis of which this court must proceed or the issues at the heart of the dispute, with the consequence that the Court of Justice did not fully address those facts or those issues.
>
> 56. The Court of Justice's analysis of the legal issues focused in the reference, on the basis of the facts as it understood them, is not open to question. This court is required by s 3(1) of the European Communities Act 1972 (as amended by s 3 of and the Schedule to the European Union (Amendment) Act 2008) to determine 'any question … as to the validity, meaning or effect of any EU instrument' in accordance with 'any relevant decision of the European Court'. Nevertheless, this court's responsibility for the decision of the present case on the basis of all the relevant factual circumstances, and all the arguments presented, requires it to take into account all the facts found by the tribunal, including those elements left out of account by the Court of Justice, and to consider all those arguments, including those which were not reflected in the questions referred. That responsibility under domestic law is also recognised in EU law, as the Court of Justice explained in the *AC-ATEL* judgment (see [1994] ECR I-2305, paras 17 and 18 of the judgment). In the exceptional circumstances of this case, this court cannot therefore treat the ruling of the Court of Justice as dispositive of its decision, in so far as it was based upon an incomplete evaluation of the facts found by the tribunal or addressed questions which failed fully to reflect those arguments...

141. In my judgment, however, both the Club and the judge were wrong to think that either these principles or those I have recorded at [96] above led to the conclusion that the CJEU exceeded its jurisdiction in this case. I can give my reasons quite shortly.

142. First, there were, in my judgment, no facts relevant to [54]-[73] of the CJEU's decision of which the CJEU was not aware. That is quite simply because (a) the CJEU was provided with the section 66 judgments (indeed it referred to them at [71]) and the CJEU was actually deciding questions of law, not fact, and (b) whilst it is true that the CJEU drew inevitable conclusions as to the outcome under article 34(3) in this case, its operative decision was one of EU law. It decided (i) that a section 66 judgment **could** be a "judgment" for the purposes of the irreconcilability provision in article 34(3), but (ii) it would not be if the national court would not have had jurisdiction under the insurance or the *lis pendens* provisions of the Brussels I Regulation. The judge had asked the CJEU whether a section 66 judgment was a relevant "judgment" for the

purposes of article 34(3). The court's answer was not one the judge wanted or expected, but it was one of EU law.

143. Secondly, the fact that the judge had not referred questions that might have raised head-on the insurance or the *lis pendens* provisions of the Brussels I Regulation did not prevent the CJEU answering the questions that were asked as it saw fit. The so-called "rule" in *Touring Tours* is simply that the CJEU must not answer a question explicitly or implicitly not referred. Even the judge at [218] only suggested that the questions not referred "might have involved at least part of the line of argument adopted by the CJEU". A brief perusal of the 4th and 5th questions not referred at [46] of the second judgment demonstrates that, whilst they had some relevance to the insurance and *lis pendens* provisions of the Brussels I Regulation, they certainly did not ask whether a section 66 judgment was or was not to be regarded as a "judgment" for the purposes of article 34(3), because the national court would not have had jurisdiction under those provisions of the Brussels I Regulation. That is because nothing could have been further from the judge's mind. He thought, as we now know, that the section 66 judgments had created a binding *res judicata*, and simply wanted to be assured that they were not to be disregarded as "judgments" because either: (a) the court (as opposed to Mr Schaff) had not decided the substantive issues (the *Solo* case), or (b) of the arbitration exception in article 1(2)(d) (the *Hoffmann* case). If either of those cases applied by analogy, the section 66 judgments would not be irreconcilable ones under article 34(3) preventing recognition of the Spanish judgment. *Touring Tours* is really a long way from this case. As is clear from [35]-[37] in that case, the problem there was that the CJEU was being asked by a party to answer a question on a completely different Directive from that referred. Here, of course, the questions and answers were about the proper interpretation as a matter of EU law of the Brussels I Regulation.

144. In my judgment, there is and was nothing in the suggestion that the CJEU was answering questions that were not referred. As I have explained above, the CJEU was answering the first two questions referred at [54]-[73] by saying that the section 66 judgments might be "judgments" under article 34(3) **but** would not be in some circumstances. In other words, the CJEU gave a qualified answer to the question posed. In those circumstances *Touring Tours* is simply not relevant.

145. Thirdly, I do not agree that the CJEU had a misapprehension of the facts. As I have explained at [115]-[123], Hamblen J did not decide whether his section 66 judgment was or was not to be regarded as a judgment for the purposes of article 34(3). He left that question to be decided if and when it arose.

146. Fourthly, in my judgment, the suggested procedural unfairness is much overstated. This was hard fought commercial litigation, albeit that a single round was being fought out before the non-adversarial forum of the CJEU. The Club knew what questions had been referred and both saw and responded to the observations of Spain and France. The CJEU's directions may have failed to point directly to the reasoning it eventually adopted, but there was nothing directly misleading in what it said. I can entirely understand why the Club felt that it had been wrong-footed, but I do not think that the CJEU's procedures were violated in any sense. Nor do I think that there was any unfairness, beyond the Club's legitimate view (which is its real complaint) that the actual decision in [54]-[73] causes potentially problematic practical commercial consequences for the interaction between exclusive international arbitration clauses and processes on the one hand and the ambit of the Brussels I Regulation on the other. There

is nothing to be made of the point that the Court of Appeal in *The Prestige (No 5)* decided that the reference ought not to have been made or of the speed at which the CJEU got out its judgment, or of the fact that it disagreed with the Advocate General.

147. Fifthly, the Club pointed out repeatedly that the reference process had broken down in this case. In effect, the safety valve of a second reference was not available to the court as it would have been had the reference not been made days before the end of the implementation period. I agree that some of the more extreme problems demonstrated by this case might have been avoided if the judge had been able to refer some of the matters I have mentioned back to the CJEU on the basis that it is its own final arbiter as to the extent of its jurisdiction (see [72] of *RS (Effect of the Decisions of a Constitutional Court)* (Case C430/21)). As it seems to me, however, we have to do the best we can with the situation with which we are faced. Neither the judge nor we can refer this case back to the CJEU. We have to interpret and apply its decision in the best way possible. I simply observe that, because the CJEU did confine itself to the questions posed, it is unnecessary to consider whether the judge was correct to conclude that a national court has power to consider whether the CJEU has exceeded its jurisdiction.

148. In my opinion, the judge was wrong to think that he was not bound by the CJEU's decision on the grounds of any excess or want of jurisdiction. Article 89 and section 7A gave the CJEU's decision binding force in its entirety on and in the United Kingdom. The reference was carried out in accordance with article 267 of the Treaty on the Functioning of the European Union, and the Club's criticisms of the process cannot vitiate the outcome, however unsatisfactory they may contend that outcome to be.

Did the section 66 judgments create a binding issue estoppel requiring this court to hold that those judgments are irreconcilable with the Spanish judgment preventing its registration or recognition under article 34(3)?

149. I have already set out what the judge decided on this point at [94] above.

150. At [165]-[183], the judge determined that Hamblen J had decided once and for all that the jurisdictional regime of the Brussels I Regulation did not apply to arbitration and was accordingly not applicable to Mr Schaff's awards. The judge also held that Hamblen J had decided, again finally, that because the Brussels I Regulation did not apply to arbitration it also was not relevant to the question of whether Mr Schaff's awards should be registered that the English court could not have heard the claims in the Spanish proceedings by reason of the *lis pendens* provision in article 27 and the direct action insurance provision of article 11 of the Brussels I Regulation. Spain had abandoned its appeal against Hamblen J's conclusions on those issues, creating a binding issue estoppel. The argument that the judge was accepting was explained at [163(1)]. It was that the section 66 judgments in these respects were binding as between the Club and Spain, and could not be displaced by a subsequent decision of the CJEU (see *Kapferer)*.

151. I have also explained why Hamblen J did not decide the same issue as the CJEU decided at [54]-[73] at [115]-[123] above. For those reasons, the section 66 judgments cannot have created a binding issue estoppel requiring this court to hold that those judgments are irreconcilable with the Spanish judgment preventing its registration under article 34(3).

Was the judge bound to decide that Spain had submitted to the jurisdiction before Hamblen J to decide if the insurance and lis pendens provisions of the Brussels I Regulation were relevant to the article 34(3) question?

152. The Club also made a subsidiary argument that the Court of Appeal held, on appeal from Hamblen J, that Spain had submitted to the English jurisdiction, so that, even if the CJEU's decision did require an analysis of the insurance provisions of the Brussels I Regulation and *lis pendens*, those questions had already been decided by Hamblen J and the Court of Appeal. I have already explained why Hamblen J and the Court of Appeal in the section 66 judgments did **not** decide anything about the relevance of the insurance and *lis pendens* provisions of the Brussels I Regulation to the meaning of "judgment" in article 34(3).

153. Accordingly, in my judgment, whilst Spain was held by the CA's section 66 judgment to have submitted to the jurisdiction before Hamblen J, Hamblen J had not decided finally whether the insurance and *lis pendens* provisions of the Brussels I Regulation were relevant to the article 34(3) question. I refer again to the reasons I have given at [118], [122] and [123] above.

Section G: Issue 2: If not, was the judge correct to decide that Mr Schaff's award created a binding issue estoppel preventing registration of the Spanish judgment on public policy grounds under article 34(1)?

154. The judge dealt with this question predominantly at [252]-[292] of his judgment as I have already explained.

155. Spain's central submission on this point is that the CJEU's decision must be taken to have decided that article 34(1) does not, as a matter of EU law, allow national courts to refuse to register judgments on the grounds of domestic public policies concerning any kind of *res judicata* including those arising from domestic arbitration awards. Spain submitted that any other reading of the CJEU's decision makes no sense. Whilst Spain accepted, as my analysis at [76]-[78] above shows, that the CJEU did not refer specifically to an issue estoppel arising from Mr Schaff's award, as distinct from one arising from Hamblen J's judgment, the Advocate General did so refer at [78]. Moreover, reading the CJEU's decision intelligently as Spain submits one should, [58] explains that arbitrations and judgments arising from arbitrations can only produce effects if the objectives of free movement of judgments and mutual trust are achieved and the right to an effective remedy is not infringed. The CJEU's decision must be read, submits Spain, as saying that those principles would be infringed if Mr Schaff's award were to create an issue estoppel preventing registration under article 34(1). Whilst the CJEU could not rule on domestic public policies, it could rule on the limits of those policies (see [67] above and *Meroni*).

156. In *Bamberski v. Krombach* the CJEU said this at [37]:

> Recourse to the public policy clause in [what is article 34(1) in the Brussels I Regulation] can be envisaged only where recognition or enforcement of the judgment delivered in another contracting state **would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought in as much as it infringes a fundamental principle**. In order for the prohibition of any review of the foreign judgment as to its substance to be observed,

the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order (emphasis added).

157. In broad terms I would endorse what the judge decided at [259]-[292] of his second judgment. For the reasons he gives, to fail to give effect to the *res judicata* created by a binding arbitration award, such as Mr Schaff's award, would be manifestly contrary to English public policy within article 34(1).

158. The first question that we have to address is whether Spain is right to suggest that the CJEU's decision binds us to hold that article 34(1) cannot apply to an arbitration award on which the section 66 judgments were based. I am clearly of the view that it does not.

159. It is true that the Advocate General did reach that conclusion in [78] of his opinion. He said that the "referring court cannot rely on article 34(1) … to refuse to recognise … a judgment of another Member State by reason of the existence of a prior domestic arbitral award or judgment entered in the terms of that award made by a court of the [incoming state]" because, in effect, article 34(3) and (4) "exhausts the grounds upon which recognition or enforcement may be refused by reason of *res judicata* and/or irreconcilability". In other words, he said that, if the section 66 judgments were not to be considered irreconcilable under article 34(3), article 34(1) could not be used to prevent recognition on the basis of either the award or the section 66 judgment. The CJEU was obviously well aware of what he had said. Indeed, the CJEU's decision at [79] expressly agreed with [77] of the Advocate General's opinion, where it said that the EU legislature had "intended to regulate exhaustively the issue of the force of *res judicata* **acquired by a judgment given previously and, in particular, the question of the irreconcilability of the judgment** to be recognised with that earlier judgment by means of Article 34(3) and (4)" (emphasis added). Had the CJEU's decision intended to include *res judicata* created by an arbitration award in what it said, it could and would have said so. It did not. That disposes of what the parties referred to as the *lex specialis* argument.

160. So, the key question is whether failing to recognise the *res judicata* created by a binding arbitral award, such as Mr Schaff's award, would "constitute a manifest breach of a rule of law regarded as essential in the legal order of the Member State". In my judgment, it would, just as the judge decided. There are a number of reasons why that is the case. But the most critical ones can be summarised as follows.

161. First, there must be finality to litigation. Secondly, it is wrong as a matter of fundamental legal principle for the domestic courts to ignore and to allow parties to ignore arbitral decisions by which those parties have been finally held by the courts of competent jurisdiction to be bound. Thirdly, the regime of the New York Convention makes it clear that it would be wholly undesirable, as a matter of English public policy, to ignore Mr Schaff's award. As the judge explained at [285] and [292], inconsistency should be avoided between the effect of the New York Convention and a domestic award. Article 73(2) of the Recast Regulation (the successor to the Brussels I Regulation) is explicit that it does not affect the application of the New York Convention, and that must also be the position under the Brussels I Regulation. Fourthly, the ability of international parties to agree to binding international arbitration is of great importance to the legal system in England and Wales and to the economy of

the United Kingdom. That militates in favour of considering the *res judicata* or issue estoppel created by a binding arbitral award as essential in the legal order of the United Kingdom.

Section H: Issue 3: Did Hamblen J's judgment create a binding issue estoppel (as the judge decided) or a binding cause of action estoppel (as the Club contends) preventing registration of the Spanish judgment?

162. The judge decided that the CJEU's answer to his third question precluded him from deciding that Hamblen J's judgment created a binding issue estoppel preventing registration on the grounds of English public policy under article 34(1). The Club challenges that conclusion.

163. The Club contends that Spain cannot take advantage of the CJEU's judgment whatever it means, because Hamblen J and the Court of Appeal reached a final decision, which was neither appealed nor referred to the CJEU, to the effect that a section 66 judgment was an irreconcilable judgment for the purposes of article 34(3). That decision may now have been shown by the CJEU's decision to be wrong as a matter of EU law, but it is still a binding *res judicata* on this court as a matter of domestic and EU law (see *Kapferer*).

164. For the reasons I have already explained at [115]-[123] and [149]-[151], that is a misunderstanding of what Hamblen J decided. In my judgment, it is clear for those reasons also, and because the CJEU's answer to the third question is binding on this court, that Hamblen J's judgment created no binding issue estoppel nor a binding cause of action estoppel preventing registration of the Spanish judgment.

The Arbitration Appeals

165. The parties separated out their arguments on what I have described as issues 4 and 6 above. In essence there are two questions: (i) whether equitable compensation is available for breach of an equitable obligation to arbitrate, and (ii) whether equitable damages are available in lieu of or in addition to an injunction under section 50. In my view, these questions are connected as they both go to the question of when, as a matter of current law and equity, compensation or damages are or ought to be available for breach of equitable as opposed to legal obligations, and specifically for breach of the type of equitable obligation in issue here.

166. I am acutely conscious of the fact that some academic writers have made it abundantly clear that they think there should be no distinction between legal and equitable remedies. I refer specifically, for example, to the statement in Burrows on Remedies for Torts, Breach of Contract, and Equitable Wrongs (4th edition, 2019) at page 520, where he said "all these technical distinctions between common law damages, equitable compensation, and equitable damages, bring no credit to the legal system. They are the irrational historical residue of an unfused system that should be swept away" (see also the Preface to the 21st Edition of McGregor on Damages and [1-016], written by Justice James Edelman of the High Court of Australia, and the first Gross award at [174]-[175]).

167. I am also conscious of what Sir Peter Gross described as "the way the tide is flowing" at [183] in the first Gross award. This is perhaps best demonstrated by the judgment of

the majority of the Judicial Committee of the Privy Council (JCPC) in *Convoy Collateral Ltd v. Broad Idea International Ltd* [2021] UKPC 24, [2023] AC 389 (*Broad Idea*), and by the UKSC in *Wolverhampton City Council v. London Gypsies and Travellers* [2023] UKSC 47, [2024] AC 983 (*Wolverhampton*). In the latter case, the UKSC reminded us at [17] that "[t]he injunction is equitable in origin, and remains so despite its statutory confirmation. The power of courts with equitable jurisdiction to grant injunctions is, subject to any relevant statutory restrictions, unlimited" (see *Broad Idea* at [57]). At [146]-[153] in *Wolverhampton*, the UKSC stated some important basic principles by which, I believe, we must be guided in deciding this case. *Wolverhampton*, of course, concerned the court's jurisdiction to grant injunctions against all the world, and in particular newcomers, who had not previously violated the landowners' rights. I cite more extensively than would be normal so as not to lose the nuance:

> 145. … it behoves this court to go back to first principles about the means by which the court navigates such uncharted water. Much emphasis was placed in this context upon the wide generality of the words of section 37 of the 1981 Act. …
>
> > "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."
>
> This or a very similar formulation has provided the statutory basis for the grant of injunctions since 1873. But in our view a submission that section 37 tells you all you need to know proves both too much and too little. Too much because, as we have already observed, it is certainly not the case that judges can grant or withhold injunctions purely on their own subjective perception of the justice and convenience of doing so in a particular case. **Too little because the statutory formula tells you nothing about the principles which the courts have developed over many years, even centuries, to inform the judge and the parties as to what is likely to be just or convenient**.
>
> 146. Prior to 1873 both the jurisdiction to grant injunctions and the principles regulating their grant lay in the common law, and specifically in that part of it called equity. It was an equitable remedy. From 1873 onwards the jurisdiction to grant injunctions has been confirmed and restated by statute, **but the principles upon which they are granted (or withheld) have remained equitable**: see *Fourie v Le Roux* [2007 1 WLR 320 (paras 16 and 17 above) per Lord Scott of Foscote at para 25. Those principles continue to tell the judge what is just and convenient in any particular case. **Furthermore, equitable principles generally provide the answer to the question whether settled principles or practice about the general limits or conditions within which injunctions are granted may properly be adjusted over time**. **The equitable origin of these principles is beyond doubt, and their continuing vitality as an analytical tool may be seen at work from time to time when changes or developments in the scope of injunctive relief are reviewed**: see eg *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 (para 21 above).
>
> 147. **The expression of the readiness of equity to change and adapt its principles for the grant of equitable relief which has best stood the test of time lies in the following well-known passage from Spry** … at p 333:

> "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. **The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate**."

148. In *Broad Idea* … at paras 57-58 Lord Leggatt (giving the opinion of the majority of the Board) explained how, via *Broadmoor Special Health Authority v Robinson* [2000] QB 775 and *Cartier International AG v British Sky Broadcasting Ltd* [2017] Bus LR 1, [2018] 1WLR 3259, that summary in Spry has come to be embedded in English law. The majority opinion in *Broad Idea* also explains why what some considered to be the apparent assumption in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39-40 that the relevant equitable principles became set in stone in 1873 was, and has over time been conclusively proved to be, wrong.

149. **The basic general principle by reference to which equity provides a discretionary remedy is that it intervenes to put right defects or inadequacies in the common law. That is frequently because equity perceives that the strict pursuit of a common law right would be contrary to conscience**. That underlies, for example, rectification, undue influence and equitable estoppel. But that conscience-based aspect of the principle has no persuasive application in the present context.

150. **Of greater relevance is the deep-rooted trigger for the intervention of equity, where it perceives that available common law remedies are inadequate to protect or enforce the claimant's rights**. The equitable remedy of specific performance of a contractual obligation is in substance a form of injunction, and its availability critically depends upon damages being an inadequate remedy for the breach. Closer to home, the inadequacy of the common law remedy of a possession order against squatters under CPR Part 55 as a remedy for trespass by a fluctuating body of frequently unidentifiable Travellers on different parts of the claimant's land was treated in *Meier* [2009] 1WLR 2780 (para 67 above) as a good reason for the grant of an injunction in relation to nearby land which, because it was not yet in the occupation of the defendant Travellers, could not be made the subject of an order for possession. Although the case was not about injunctions against newcomers, and although she was thinking primarily of the better tailoring of the common law remedy, the following observation of Lady Hale at para 25 is resonant:

> "**The underlying principle is ubi ius, ibi remedium: where there is a right, there should be a remedy to fit the right. The fact that 'this has never been done before' is no deterrent to the principled development of**

the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted."

To the same effect is the dictum of Anderson J (in New Zealand) in *Tony Blain Pty Ltd v Splain* [1993] 3 NZLR 185 (para 130 above) at p187, cited by Sir Andrew Morritt V-C in *Bloomsbury* [2003] 1 WLR 1633 at para 14.

151. **The second relevant general equitable principle is that equity looks to the substance rather than the form**. …

153. **Fourthly, there is no supposed limiting rule or principle apart from justice and convenience which equity has regarded as sacrosanct over time**… (emphasis added).

168. As it seems to me, much of what is said by the UKSC in that passage in relation to injunctions applies equally to equitable compensation, and even to the award of equitable damages in lieu of or in addition to the grant of an injunction under section 50. The principles of equity are not exactly the same as those of the common law, and the distinction between equitable compensation and common law damages has not yet been swept away. It is with that introduction that I address three introductory topics before considering the issues I have identified as requiring resolution in relation to the Arbitration Appeals.

169. The three introductory topics are: (i) the statutory provisions that are relevant to the resolution of the Arbitration Appeals, (ii) the authorities that relate to the availability of equitable compensation for the breach of an equitable obligation to arbitrate, and (iii) the authorities that relate to the availability of equitable damages in lieu of or in addition to an injunction. I will then deal with issues 4, 5 and 6, but not in that order.

The statutory provisions that are relevant to the resolution of the Arbitration Appeals

170. Section 48 of the 1996 Act provides as follows under the heading "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.

171. Section 13 of the State Immunity Act 1978 provides as follows under the heading "[o]ther procedural privileges":

> (1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.
>
> (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.
>
> (2A)…
>
> (3) Subsections (2) and (2A) above do not prevent the giving of any relief or the issue of any process with the written consent of the State concerned...

172. Section 50 of the Senior Courts Act 1981 (the successor to Lord Cairns's Act 1858) provides as follows under the heading "[p]ower to award damages as well as, or in substitution for, injunction or specific performance":

> 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.

Authorities on equitable compensation

173. The authorities relevant to the question of the award of equitable compensation in the circumstances of this case concern both what has been described as the "conditional benefit principle" and the circumstances in which there arises what has been described as a "derived rights obligation" (DRO). To explain at the outset, the conditional benefit principle is simply the concept that it is unconscionable for a non-contracting party to seek to take advantage of the benefits of a contract without submitting to its burdens. A DRO is one of the obligations of such a contract to which the non-contracting party is or becomes subject. The three types of DRO that have been recognised are cases of an insurer seeking to assert the subrogated rights of an assured, cases of assignment of rights, and cases of a claimant seeking to assert direct rights against an insurer for the party liable. It has been said in *The Yusuf Cepnioglu* [2016] EWCA Civ 386, [2016] 2 All ER (Comm) 851 at [23] and [47] (*The Yusuf Cepnioglu*) that there is or should be no distinction between these three types of case, but I note the point at the outset. I will deal with the most relevant authorities in chronological order, even though they may seem to arise in different, even unrelated, fields of law.

174. In *Halsall v. Brizell* [1957] Ch 169, Upjohn J described the conditional benefit principle as "ancient law" at page 182 in a case where a non-party to a deed of covenant sought to take advantage of the right to use roads and sewers in a development without paying the monies required to be paid under the deed. Upjohn J cited *Elliston v. Reacher* [1908] 2 Ch 665 at 669 as authority. At page 183, Upjohn J said: "… the defendants here

cannot, if they desire to use this house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder. Under that principle, it seems to me that they are bound by this deed, if they desire to take its benefits".

175. In *Schiffahrtsgesellschaft Detlev Von Appen GmbH v. Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep 279 (*The Jay Bola*), Hobhouse LJ explained at page 284 that the insurer asserting the rights of its insured in a Brazilian action were "rights derived from and dependent upon the rights of the voyage charterers". He relied on a series of authorities to conclude at page 286 that "the rights which the insurance company has acquired are rights which are subject to the arbitration clause" (to which the policy was subject). What is most important about the case for our purposes, however, is how he explained the equitable remedy that was being sought by the time charterers against the insurance company. Hobhouse LJ said this:

> The simplest way in which to illustrate this is to take a simple analogy. If the assignee of a legal right in 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 recognized 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 recognize 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 recognize the equity of the debtor. The present case is such a case. The insurance company is failing to recognize the equitable rights of the time charterers. The equitable remedy for such an infringement is the grant of an injunction.

176. Sir Richard Scott V-C agreed with Hobhouse LJ, and said at page 291 that the time charterers' remedy was "*prima facie*" the grant of an injunction to restrain the insurer's attempt to enforce its insured's rights otherwise than by arbitration.

177. *Through Transport Mutual Insurance Association Co Ltd v. New India Assurance Association Co Ltd (No 1)* [2004] EWCA Civ 1598, [2005] 1 Lloyd's Rep 67 (*The Hari Bhum (No 1)*), and *The Hari Bhum (No 2)* [2005] EWHC 455 (Comm), [2005] 2 Lloyd's Rep 378 raised the same point as *The Jay Bola*. The Court of Appeal granted a declaration in favour of a P&I Club to the effect that a direct action against it in Finland was in breach of an agreement to arbitrate by which an insurer had become bound.

178. In *Force India Formula One Team Ltd v. Malaysia Racing Team* [2012] EWHC 616 (Ch) (*Force India*), Arnold J decided at [388]-[424] that equitable compensation was available for breach of an equitable (non-contractual) obligation of confidence and that the same approach to the assessment of damages was to be adopted whether the obligation was contractual or equitable. Arnold J doubted at [389]-[393] that equitable damages under section 50 were available in that case.

179. In *West Tankers Inc v. Allianz SPA* [2012] EWHC 854 (Comm), [2012] 2 Lloyd's Rep 103 (*The Front Comor*), Flaux J gave the clearest possible indication that he thought "equitable damages" were available for a breach of the equitable obligation to arbitrate. The Club accepts that that was not actually the *ratio* of his decision (though that was what the arbitrators had been asked to award). At [56], Flaux J said that the claim for damages for breach of the obligation to arbitrate "would include a claim to be put in the same position as if the Italian court had not ruled against the appellant on the merits". At [76], Flaux J accepted the submission the arbitrators had been wrong in law to dismiss the claim for damages as having "shut out what might well be a strongly arguable claim in the future". At [78], he said that he was answering the question of law posed to him by saying "the tribunal was not deprived, by reason of European law, of the jurisdiction to award equitable damages for breach of the obligation to arbitrate". The submissions before Flaux J suggested that both equitable compensation and section 50 equitable damages should be available, but he did not clearly distinguish between the two (see also *Starlight Shipping Co v. Allianz Marine and Aviation Versicherungs AG* [2014] EWHC 3068 (Comm) (*The Alexandros T*), [2015] 2 All ER (Comm) 747 at [89])).

180. In *Airbus*, the question was whether proceedings brought in Italy were in violation of an English exclusive jurisdiction clause. Males LJ (with whom Lewison and Davis LJJ agreed) decided at [85]-[96] that "an English arbitration or jurisdiction clause gives rise to an equitable right enforceable against subrogated insurers who seek to act inconsistently with the clause", that the pursuit of the Italian proceedings by an insurer exercising a right of subrogation was accordingly a "breach, not of the contract, but of an equivalent equitable obligation which the English court will protect", and that the remedies available for that breach included a declaration in an appropriate case. Apart from approving the right to seek a declaration (in addition to or instead of an injunction), it does not seem to me that Males LJ said anything binding on us about the availability of either equitable compensation or equitable damages under section 50.

181. In *Auden McKenzie v. Patel* [2019] EWCA Civ 2291, [2020] BCC 316 (*Auden*), David Richards LJ (with whom Lewison and Newey LJJ agreed) spoke about the nature of the remedy of equitable compensation in a breach of fiduciary duty case. He said at [30] that it was a "wide concept capable of more than one application", and continued at [31] as follows:

> Equitable compensation is the personal remedy (as opposed to a tracing or proprietary remedy) available against trustees, or others in a fiduciary position, whose acts or omissions amount to a breach of trust or fiduciary duty. Breaches of duty may take many forms, but in broad terms they are often with good reason analysed as falling within one of three main categories: first, transactions involving the unauthorised payment or disposal of or damage to trust assets, causing loss to the trust; second, breaches of duties of loyalty, involving the trustee in making profits at the expense of the trust or by the use of information or opportunities

> available to the trustee in that capacity; third, breaches of duties of skill and care, resulting in loss to the trust. In the case of breaches in the second category, an account of profits may be the appropriate remedy, and is the only remedy where the trust could not itself have made a profit.

182. It seems unlikely that David Richards LJ was attempting an exhaustive definition of when equitable compensation might or might not be available. *Auden* was in fact considering the proper approach to the assessment of equitable compensation in breach of trust or fiduciary duty cases, considering the seminal decisions in *Target Holdings v. Redferns* [1996] AC 421 and *AIB Group (UK) Plc v. Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503.

183. In *Aspen Underwriting Ltd v. Credit Europe Bank NV* [2020] UKSC 11, [2021] AC 493 (*The Atlantik Confidence*), the UKSC applied *The Jay Bola*. Lord Hodge endorsed the conditional benefit principle at [26]. At [27], in approving Hobhouse LJ's approach in *The Jay Bola*, he emphasised that Hobhouse LJ had said at page 286 that the insurance company was "not entitled to assert its claim inconsistently with the terms of the contract". That formulation emphasised the constraint on the assertion of a right as being the requirement to avoid inconsistency, and it was the assertion of the right through legal proceedings in conflict with the contractual provision that gave rise to the inconsistency.

184. The question of the availability of equitable compensation in circumstances similar to this case came directly before Sir Michael Burton GBE in *The Frio Dolphin*. He decided that such compensation was available for the following reasons at [17]-[19]:

> 17. The case made by Mr Wright is a powerful one, and he submits that there is nothing in the authorities cited by Mr Corby to stand in his way, or hence in mine:
>
> (i) As to Hobhouse LJ in [*The Jay Bola*], no case was being made before him for recovery of equitable compensation, and Sir Richard Scott V-C at p 291 does not seem … to have read his statement as predicating an injunction as being the exclusive remedy …
>
> (ii) Whereas Mr Wright recognises that, in the passages cited from the judgments of Judge Diamond QC in *Charterers Mutual* [1998] IL Pr 838 and Longmore LJ in [*The Yusuf Cepnioglu*], both judges referred to the clause being ineffective or the right being empty without the availability of an injunction, he submits that there is no reason to conclude that they were thereby ruling out the remedy of damages, and similarly so in respect of Moore-Bick LJ.
>
> (iii) He submits likewise that there is no reason to conclude that Colman J in the passage which Mr Corby cites from his *The Front Comor* [2005] 2 All ER (Comm) 240 judgment was limiting the relief available to an injunction, when he notes that Males LJ in [*Airbus*], while approving Colman J's dictum, went on to record at para 96(3) the availability of a declaration in an appropriate case.
>
> (iv) Males LJ's statement was plainly not exclusive, in terms of ruling anything out: "The remedies available in such a case include the grant of a declaration in an appropriate case."

18. On the other hand:

(i) In the passage referred to in *The Front Comor* [2012] 2 All ER (Comm) 395, Flaux J stated at para 77 in relation to what was a breach of a DRO by subrogated insurers; "it seems to me there would be a strong case for awarding damages for breach of the duty to arbitrate". Raphael, Anti-Suit Injunctions, 2nd ed, para 14.50 considers it more likely that he was not referring to section 50 damages.

(ii) Finally, and most recently, Henshaw J in *The Prestige (No 3)* [2020] 1 WLR 4943, para 209 refers to the "non- exhaustive nature" of the reference in *Airbus* to the available remedies, and cites Raphael, Anti-Suit Injunctions, 2nd ed, para 14.41 to the effect that: "Monetary compensation (and possibly damages in equity) can be awarded in equity for infringements of equitable rights, independent of section 50. In principle therefore, compensation could be awarded in respect of foreign litigation that breached an equitable obligation not to pursue such litigation abroad."

At p 211 Henshaw J … concludes that the Club had a good arguable case for equitable compensation "a good example of a complex and novel point of law", which he said he did not have to resolve, but I do.

19. In my judgment, the submissions of Mr Wright are cogent and persuasive, and unless I am prevented from concluding that there should be equitable compensation for breach of a DRO, including this "extended DRO", irrespective of and additional to the remedies of injunction or declaration, I would so conclude. I am satisfied that for, all the reasons he gives, which I have set out above, logic and equity reach the same conclusion and there is no authority which deters me from it. Accordingly I consider that the arbitrator, albeit without the benefit of the detailed arguments that have been set out before me, was right to come to the conclusion that he did.

Authorities on equitable damages in lieu under section 50

185. The leading authority on section 50 is *Jaggard v. Sawyer* (1995). The Court of Appeal was there considering the award of damages under section 50 in lieu of an injunction to restrain the defendant from accessing their property over a cul de sac owned by the claimant. No interlocutory injunction had been sought and it would have been oppressive to grant a permanent injunction when there had been no blatant disregard of the claimant's rights. The judgments of Sir Thomas Bingham MR and Millett LJ merit reading in their entirety as they explain the conundrum that previous and subsequent courts have grappled with. That conundrum is the problem caused when claimants who are denied injunctions to prevent future, sometimes trivial, infringements of their rights, complain that awarding them, sometimes trivial, damages for the perpetual infringement of their rights would turn the court into a "tribunal for legalising wrongful acts" (see Lindley LJ at pages 315-6 in *Shelfer v. City of London Electric Lighting Co.* [1895] 1 Ch 287). *Jaggard v. Sawyer* shows the far-reaching consequences of Lord Cairns's Act were caused mainly by the fact that it permits equitable damages to be awarded for **future**, as well as **past** breaches, for which an injunction could have been granted, but in fact was not.

186. Both substantive judgments in *Jaggard v. Sawyer* assume that the section 50 jurisdiction depends on the court having the ability to grant an injunction in the particular case. As Millett LJ put it at pages 284-5:

> the power to award damages under Lord Cairns's Act arises whenever the court 'has jurisdiction to entertain an application' for an injunction or specific performance. This question must be determined as at the date of the writ. If the court would then have had jurisdiction to grant an injunction, it has jurisdiction to award damages instead. … [that] question is effectively one of jurisdiction. The question is whether, at the date of the writ, the court *could* have granted an injunction, not whether it *would* have done …

187. In *A Co. v. Republic of X* (*supra*) Saville J decided at pages 524-5 that where section 13(2)(a) applied to the grant of an injunction against a state, there was simply no power to grant the injunction and that decision had to be made once and for all at the outset. The court could not allow the injunction to continue on the basis that there was a good arguable case that immunity did not exist.

188. In *One-Step Support v. Morris-Garner* [2018] UKSC 20, [2019] AC 649 (*Morris-Garner*), the UKSC was dealing with "negotiation damages" (first enunciated in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798). Lord Reed said this at [44]-[45]:

> 44 Damages awarded in substitution for an injunction are, as one might expect, a monetary substitute for an injunction. As Viscount Finlay stated in *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, 859, "the power to give damages in lieu of an injunction must in all reason import the power to give an equivalent for what is lost by the refusal of the injunction". Where it is likely that the refusal of an injunction will result in the claimant's sustaining loss and damage as a consequence of the tort, breach of contract or other wrongful act which the court has declined to prevent, the damages should provide compensation for that loss and damage, as Bingham MR and Millett LJ explained in *Jaggard v Sawyer* at pp 276-277 and p 286 respectively.
>
> 45 The power to award damages in substitution for an injunction is dependent on the court's having jurisdiction to grant an injunction, determined as at the commencement of the proceedings. The provision that damages can be awarded "in substitution for such injunction" might be thought to imply that the court must also have before it an application for an injunction, which it has decided to withhold. The point does not arise for decision in these proceedings, but I would be inclined for that reason to hesitate before endorsing the first part of Lord Walker JSC's principle (5), set out in para 4 above.

189. The principle that Lord Reed was hesitating to endorse was that "[a]lthough damages under Lord Cairns's Act are awarded in lieu of an injunction it is not necessary that an injunction should actually have been claimed in the proceedings".

190. In *United Utilities Water Ltd v. Manchester Ship Canal Co Ltd* [2024] UKSC 22, [2024] 3 WLR 356 (*United Utilities*), the UKSC held that the Water Industry Act 1991 had not ousted, expressly or impliedly, common law causes of action to protect the enjoyment of property, so that canal owners could bring actions in trespass or nuisance against a

sewerage undertaker for the discharge of foul sewerage into the waterway. At [128], Lords Reed and Hodge acknowledged that the scheme of the 1991 Act might be disrupted if injunctions were granted requiring the undertaker to spend large sums to create new infrastructure, but that did not mean that damages could not be awarded instead. At [130], Lords Reed and Hodge said this:

> There is therefore no basis for excluding a common law claim or an award of damages at common law. Further, as explained in para 7 above, section 50 of the Senior Courts Act 1981 provides that the Court of Appeal or the High Court may make an award of damages "in addition to, or in substitution for," an injunction or specific performance where the court has "jurisdiction to entertain an application for an injunction or specific performance". As a result, the court has the power at common law to award damages for past invasions of property rights, and the power in equity to award damages for future or repeated invasions of those rights: see [*Jaggard v Sawyer*]. The power to award damages is not curtailed when a court exercising its discretion does not grant an injunction. So long as the court has jurisdiction to grant an injunction, it may award such damages under section 50: see the fourth and fifth propositions of Millett LJ in *Jaggard*, pp 284-285, and [*Morris-Garner*], para 45. In our view the 1991 Act does not remove that jurisdiction. It constrains by implication the court's exercise of its discretion as to the grant of injunctions which would be inconsistent with the operation of the statutory mechanisms for the allocation of capital expenditure and the enforcement of the section 94 duty, but it does not remove the court's jurisdiction. In so far as the court is implicitly constrained by the scheme of the 1991Act from granting such an injunction, it has the power to award damages both at common law and, in equity, in substitution for the injunction.

191. All these authorities seem to me to point in one direction. There has to be power or jurisdiction to grant an injunction before equitable damages under section 50 are available. As Millett LJ put the matter: "[t]he question is whether, at the date of the writ, the court *could* have granted an injunction, not whether it *would* have done".

Further introduction to the resolution of the issues in the Arbitration Appeals

192. It will perhaps already be apparent that it will be more convenient to deal with issues 4, 5 and 6 in a different order. It is clear from all the authorities, notably *The Jay Bola*, that the primary remedy for breach of an equitable obligation to arbitrate is an injunction. In this case, of course, injunctions were not (for the most part) obtained because Spain and France are sovereign states. Accordingly, it is probably best to start with issue 5 (can an injunction be granted against sovereign states), then to deal with issue 6 (can equitable damages be awarded against Spain and France under section 50), before turning to what, in my judgment, is the core issue in this part of the case, namely issue 4 (whether, in these circumstances, equitable compensation can be granted against Spain and France).

<u>Section I: Issue 5: Was the judge right to hold that an injunction restraining enforcement of the Spanish judgment could not have been granted against Spain or France, and that Dame Elizabeth Gloster had been wrong to grant such an injunction against France?</u>

193. I agree with the judge on this issue, broadly for the reasons he gave at [347]-[361]. It is essentially a matter of the construction of the statutory provisions I have set out above, namely section 13(2) of the State Immunity Act 1978 and section 48(5) of the 1996 Act.

194. Section 48 of the 1996 Act provides for the remedies that arbitrators can award. Its structure is important. Section 48(1) provides that the parties "are free to agree on the powers exercisable by the arbitral tribunal as regards remedies". The remainder of the section specifies, according to section 48(2), the powers of the tribunal "[u]nless otherwise agreed by the parties". Sections 48(3) and (4) make specific provisions about declarations and payments of money being available to be ordered in any currency. Section 48(5) uniquely ties the power to grant injunctions, specific performance, and rectification (i.e. equitable remedies) to the powers of the court. It says expressly that "[t]he tribunal has the same powers as the court … to order a party to do or refrain from doing anything".

195. As Saville J's judgment in *A Co. v. Republic of X* (*supra*) demonstrated at page 525, if section 13(2)(a) of the State Immunity Act 1978 applies, the court has no power or jurisdiction to grant relief (i.e. remedies) "against a State by way of injunction". If the court does not have the power to grant an injunction against a state, nor, in my judgment, does an arbitrator, unless either the state consents under section 13(3) of the State Immunity Act 1978 or has agreed something different under section 48(1) of the 1996 Act.

196. I acknowledge that Henshaw J in *The Prestige (No 3)* said at [188] that he thought the better view to be that section 13(2) limited the exercise rather than the existence of the court's power to grant an injunction, arguing that there was less force in the *par in parem non habet imperium* (equals have no sovereignty over each other) argument in relation to arbitration. But that, with respect, is a *non sequitur*. Because of the way section 48 is formulated, the primary question is whether the court has power to grant an injunction. If it does not, then nor do the arbitrators, whatever the reasons for the rule in section 13(2)(a) may have been.

197. As I have said, the judge at [363] deferred his decision on whether section 13(2)(a) should be read down to comply with article 6 to await the decision of the Court of Appeal in *The Resolute* [2023] EWCA Civ 1497. That decision was to the effect that section 13(2)(a) could not be read down. Accordingly, for the reasons given in my judgment in that case at [52]-[60], that argument must also fail.

198. In these circumstances, I would hold that there was no power in the Arbitrators to grant an injunction restraining enforcement of the Spanish judgment against Spain or France. As the judge rightly held, Dame Elizabeth Gloster was wrong to grant such an injunction against France.

<u>Section J: Issue 6: Did the Arbitrators have power to award the Club damages in lieu of or in addition to an injunction under section 50?</u>

199. This question is, in my judgment, critical, because, in a normal case, where states are not involved, the natural route to achieving compensation for losses suffered by reason of the breach of the equitable obligation to arbitrate would be through an award of equitable damages under section 50. For that reason, I believe that the rationale for

section 50 and the way in which it should be applied, as explained in *Jaggard v. Sawyer*, is critically important to the outcome of the Arbitration Appeals.

200. As I have already indicated at [186] and [188] above, there has to be power or jurisdiction to grant an injunction before equitable damages under section 50 are available. For our case, however, there is a more important point. The judgments in *Jaggard v. Sawyer* grapple with the problem that Lord Cairns's Act created by allowing damages to be awarded instead of an injunction in respect of future, as well as past, breaches of an equitable obligation. In the breach of covenant cases, the claimants, who had been denied injunctions, complained how unfair it was that the court was effectively licensing the defendant to breach their equitable obligations in the future in return for a single payment of equitable damages assessed in advance. *Jaggard v. Sawyer* rejected this complaint and explained that that was exactly what, in a proper case, Lord Cairns's Act authorised.

201. Sir Thomas Bingham MR said this at pages 280-1:

> It is of course true that the court cannot, on an application of this kind, revoke a covenant or grant the defendant a right of way. But if the court, in exercise of its jurisdiction derived from Lord Cairns's Act, instead of granting the plaintiff an injunction to restrain the defendant's apprehended future unlawful conduct, awards the plaintiff damages to compensate him for that conduct, it seems to me that a succession of future actions based on that conduct would, if brought, be dismissed or struck out, since a plaintiff could not complain of that for which he had already been compensated.

202. Millett LJ explained the point as follows at pages 285-7:

> … it is not the award of damages which has the practical effect of licensing the defendant to commit the wrong, but the refusal of injunctive relief. Thereafter the defendant may have no right to act in the manner complained of, but he cannot be prevented from doing so. The court can, in my judgment, properly award damages 'once and for all' in respect of future wrongs because it awards them in substitution for an injunction and to compensate for those future wrongs which an injunction would have prevented. The doctrine of *res judicata* operates to prevent the plaintiff and his successors in title from bringing proceedings thereafter to recover even nominal damages in respect of further wrongs for which the plaintiff has been fully compensated.
>
> It has always been recognised that the practical consequence of withholding injunctive relief is to authorise the continuance of an unlawful state of affairs. If, for example, the defendant threatens to build in such a way that the plaintiff's light will be obstructed and he is not restrained, then the plaintiff will inevitably be deprived of his legal right. This was the very basis upon which before 1858 the Court of Chancery had made the remedy of injunction available in such cases. After the passing of Lord Cairns's Act many of the judges warned that the jurisdiction to award damages instead of an injunction should not be exercised as a matter of course so as to legalise the commission of a tort by any defendant who was willing and able to pay compensation. …

> Nevertheless references to the 'expropriation' of the plaintiff's property are somewhat overdone, not because that is not the practical effect of withholding an injunction, but because the grant of an injunction, like all equitable remedies, is discretionary. Many proprietary rights cannot be protected at all by the common law. The owner must submit to unlawful interference with his rights and be content with damages. If he wants to be protected he must seek equitable relief and he has no absolute right to that. In many cases, it is true, an injunction will be granted almost as of course; but this is not always the case …

203. This approach was endorsed by the UKSC in both *Morris-Garner* and *United Utilities*. At [44] in *Morris-Garner*, Lord Reed said that: "[d]amages awarded in substitution for an injunction are, as one might expect, a monetary substitute for an injunction". He explained that where the refusal of an injunction will result in the claimant sustaining loss as a consequence of the wrongdoing which the court has declined to prevent, the damages should provide compensation for that loss. Lord Reed reiterated at [45] that the power to award equitable damages in substitution for an injunction was "dependent on the court's having jurisdiction to grant an injunction, determined as at the commencement of the proceedings". Likewise in *United Utilities* Lords Reed and Hodge said at [130] that the court had "the power at common law to award damages for past invasions of property rights, and the power in equity to award damages for future or repeated invasions of those rights … So long as the court has jurisdiction to grant an injunction, it may award such damages under section 50".

204. These passages make clear the answer to this issue in our case. Since there was no power or jurisdiction for the Arbitrators to injunct Spain and France from continuing the Spanish proceedings, there was no power for them to award equitable damages in place of such an injunction. Accordingly, the judge was right at [367] so to hold.

<u>Section K: Issue 4: Was the judge right to hold that the Arbitrators had power to award the Club equitable compensation against Spain and France for breach of the equitable obligation to arbitrate their disputes with the Club?</u>

205. It can now be more clearly seen what needs to be decided under this issue. The Club could have obtained an injunction restraining the Spanish proceedings against non-state parties making civil claims against them. It could also have been awarded equitable damages under section 50 if the court had decided not to grant an injunction or decided that an injunction was not a sufficient remedy because, for example, the Club had already suffered losses in consequence of the breach of the obligation to arbitrate before it applied for an injunction. But the Club could not, as a matter of English law, have obtained an injunction to restrain Spain or France from pursuing the Spanish proceedings. Nor could the Club have been awarded damages in lieu of such an injunction under section 50, for the reasons I have given.

206. The position of Spain and France is, however, to be contrasted with that of any other claimant. We were told that there are many hundreds of civil claimants in the Spanish proceedings alongside Spain and France. Those parties were mostly making small claims within the CLC limit of indemnity (which, as I have said, the Club had already paid into court in Spain in 2003). But it is important, I think, to compare the position of a non-state claimant seeking to pursue a claim against the Club in the Spanish court with the position of the states that sought to do so. The power of the court that is asserted to award equitable compensation against Spain and France cannot be any different from

the power of the court to award equitable compensation against a non-state party also acting in breach of its equitable obligation to arbitrate.

207. The Club's primary remedy against a non-state party commencing the Spanish proceedings would, as I have already said, have been an injunction on the basis of the conditional benefit principle. Those parties assumed an equitable obligation to arbitrate their claims against the Club when the Spanish proceedings were initiated and, at that point, an injunction would, in all likelihood, as a matter of discretion, have been granted against them by arbitrators appointed under the arbitration clause. Had the Club **not** sought an injunction, it could, in theory, have asked the arbitrators to award it equitable damages in lieu of an injunction. Had the arbitrators wanted to do so, they would have had to assess a sum in compensation that covered both the past breach in starting the Spanish proceedings and the future breaches that would occur when the non-state parties continued the Spanish proceedings in breach of the equitable obligation to arbitrate. Once such a sum had been awarded, the Club could no longer complain of the breach of the equitable right just as was explained in *Jaggard v. Sawyer*. The arbitral tribunal would have had a difficult task to make an appropriate assessment of what damage the Club might suffer as a result of not obtaining an injunction against the pursuit of the Spanish proceedings, but it would have had to do its best. As Millett LJ explained in *Jaggard v. Sawyer* at pages 285-7 (see [202] above) it is not the award of damages which has the practical effect of licensing the defendant to commit the wrong, but the refusal of injunctive relief. One thing is perhaps certain; if equitable damages had been sought by the Club against a non-state party under the principles I have explained, in place of an injunction, it would have been unlikely to obtain an award of damages against a non-state party on the scale of the indemnities awarded by the Arbitrators against Spain and France in this case.

208. It is worth, at this point, reminding ourselves that the Club was awarded past and future indemnities against Spain and France in respect of its costs and in respect of any future successful enforcement of the Spanish judgment anywhere in the world. It is perhaps also worth recalling that the reason why the Club is not liable to Spain and France is **not** because of the arbitration clause, but because of the pay to be paid clause. It is, therefore, at first sight odd that an indemnity against the enforcement of Spain's substantive claim is awarded as equitable compensation for breach of the equitable obligation to arbitrate, which has nothing to do with the pay to be paid clause. One might ask rhetorically how the breach of the equitable obligation to arbitrate can have caused that loss. What caused that loss was the failure of the Club to appear in the Spanish court, or to persuade that court, that it (the Club) had no liability to anyone unless the pay to be pay clause was satisfied, which it was not.

209. By way of additional background, it is worth mentioning that, despite the strong words adopted by the Arbitrators and in some of the previous judgments, it is hard to see how the Spanish proceedings could have been completely avoided. First, the CLC claims had to be brought in the Spanish court and the Club proactively paid the limit of the owner's CLC liability into the Spanish Court. Secondly (and particularly in circumstances where the Club was not the only defendant), the non-state claimants could only sensibly claim in Spain for their losses. Thirdly, the criminal proceedings against the Master were obviously a matter for the Spanish court, and the attachment of civil proceedings to criminal proceedings is a function of Spanish law and procedure, however strange that may seem to common law eyes. Obviously, none of this

completely justifies Spain and France in acting in breach of the arbitration clause, but at least it explains in part why the Spanish proceedings occurred, and how they might not have been undertaken solely in an attempt to get over the pay to be paid clause.

210. Against that background, I turn to consider whether equitable compensation was an available remedy in the Arbitrations. Spain and France suggested that *Auden* indicated that a remedy of equitable compensation was confined to the three main categories set out by David Richards LJ in that case. I do not think that was what he intended to say. He did not have in mind the line of cases starting with *The Jay Bola* that I have mentioned above. Moreover, it has never been suggested that the categories within which equitable relief will be granted are or should be closed (see *Wolverhampton* and *Broad Idea* at [167] above). So, in my view, *Auden* does not answer the question we have to decide.

211. The cases that I have summarised above demonstrate that the conditional benefit principle is now well-established. It certainly applies in a case, such as the present one, where third party claimants (Spain and France) seek to enforce an insurer's obligations to its insured by direct action in a foreign state, in violation of an arbitration clause. Once such proceedings are initiated, an equitable obligation arises on those claimants not to take the benefit of the contract upon which they claim without accepting its burdens. The relevant burdens of the owner's P&I cover in this case were the arbitration clause and the pay to be paid clause. The question under this issue is whether Spain and France's breaches of their equitable obligation to arbitrate their claims allows the Club to claim equitable compensation against them. That derived rights obligation or DRO, namely the obligation not to bring a claim under the insurance otherwise than by arbitration, is said to arise when, but only when, Spain made a claim against the Club otherwise than by arbitration.

212. The judge put the matter at [336] on the basis of "a sensible incremental development of the law to recognise the availability of equitable compensation in such a case as this" and there being "no good reason why the availability of a monetary remedy in such a situation as this should be tied to the availability of an injunction". It may be said at the outset that the established law I have set out shows that, under section 50 at least, the availability of a monetary remedy is indeed tied to the availability of an injunction.

213. So, the question resolves into asking (i) whether the authorities actually justify the grant of compensation in place of an injunction outside section 50, and (ii) if they do not, whether such an extension is appropriate either generally or in this case as a result of the approach I have described in *Wolverhampton* and *Broad Idea*.

214. In my judgment, the authorities I have summarised at [173]-[184] above clearly establish that both an injunction and a declaration can be awarded by the court or by arbitrators (against non-state parties) for breach of DROs in general and for the breach of an equitable obligation to arbitrate in particular. I accept that *The Frio Dolphin* decided at first instance that equitable compensation was also available, and I accept that Flaux J said as much, albeit *obiter*, in *The Front Comor*. We have, however, had much more detailed argument, and I do not feel bound to follow those decisions unless I am sure they are right as a matter of law.

215. The most compelling authority is the judgment of Lord Hodge in *The Atlantik Confidence*, where he explained the underlying rationale for the remedies granted

where the conditional benefit principle was violated. At [27], he approved Hobhouse LJ's approach in *The Jay Bola* and said that the entitlement to relief was based on the premise that the claimant was "not entitled to assert its claim inconsistently with the terms of the contract", which emphasised "the constraint on the assertion of a right as being the requirement to avoid inconsistency". It was the assertion of the right through legal proceedings in conflict with the contractual provision that gave rise to the inconsistency.

216. In *The Jay Bola* itself, of course, Hobhouse LJ had made clear at page 286 (see [175] above) that the right to apply for an injunction was not a "cause of action" of the same character as the right to sue for damages for breach of contract. It was, instead "an application for an equitable remedy to protect the [claimant] against the consequences of unconscionable conduct". Hobhouse LJ explained that law and equity had been fused so that the claimant could "raise the equity in response to and in the same proceedings as the common law action". Importantly, though, he went on to explain that: "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". He said that that case was such a case, where the claimant was "failing to recognise the equitable rights of the time charterers", and "[t]he equitable remedy for such an infringement [was] the grant of an injunction".

217. In my judgment, this case is in the same category, and the authorities I have mentioned bind us to hold that an injunction and a declaration are the remedies that have, thus far, been established for a breach of the equitable obligation to arbitrate. In particular, I do not read Males LJ's references to equitable rights and obligations in *Airbus* at [95] and [96] as binding us to hold that a financial remedy is available, an issue which did not arise for consideration in that case.

218. The question then arises as to what is to happen if no injunction can be granted as is the case here in respect of Spain and France. A critical point is that equitable compensation cannot be used to short circuit, for sovereign states, the well-established approach adopted under section 50. It is clear on authority, as I have explained, that the primary remedy for the breach of an equitable obligation to arbitrate is an injunction, not compensation, and that the rationale for an award of damages under section 50 is that they compensate for the refusal of an injunction or for losses incurred at a time before injunctive relief was sought. Moreover, the conditional benefit principle does not give rise to a cause of action of a conventional kind.

219. The Arbitrators thought that equitable compensation could automatically be awarded in the same measure as common law damages. I do not agree. As it seems to me, there may be cases where equitable damages could be awarded against non-state parties in a similar situation under section 50 as I have explained and which (unlike the position at common law) would aim to compensate for future as well as past losses. In such circumstances there would be no reason to resort to equitable compensation as a remedy for the breach. Moreover, for the reasons I have already explained, to widen the categories of case in which the power to award such compensation has currently been recognised so as to embrace this scenario would circumvent, and potentially render otiose, the statutory power under section 50. Even if it were permissible to award equitable compensation in this context, I do not think that such compensation could ever be awarded on the same basis as it might be for a common law breach of contract.

The only case in which the question has really been analysed was *Force India* (see [178] above), and I am not sure that the same approach would apply to equitable compensation for breach of an equitable obligation to arbitrate as might apply to equitable compensation for a breach of an equitable obligation of confidence.

220. In this case, as I have said, the indemnities that the Arbitrators awarded the Club were supposedly to compensate the Club for future violations of the arbitration clause. Even if that were otherwise possible in principle, in reality, as I have said, that was not what they were compensating the Club for at all. They were compensating the Club for the fact that the Spanish Supreme Court had overridden or ignored the pay to be paid clause and given judgment in breach of it. It does not matter who is to be blamed for what occurred, and whether the Club was right or wrong only to appear in the Spanish court at the quantum stage. What matters is whether, as a matter of law, it was within the power of the Arbitrators to award the Club substantive indemnities against past costs and all future enforcement liability occasioned by the Spanish judgment. In my judgment, it was not. Even if equitable compensation is available at all, beyond section 50, such compensation cannot possibly extend to all the consequences of a breach of a pay to be paid clause, which did not found the claim made by the Club. Whilst it is true that the conditional benefit principle required Spain and France to respect the pay to be paid clause as well as the arbitration clause, the breach of that clause was not the foundation on which the remedies against Spain and France were sought.

221. To be clear, therefore, since there was no power to award an injunction against Spain and France, there was no power to award equitable damages either in lieu of or in addition to such an injunction under section 50. I accept that the categories of case for which equitable compensation may be available are not closed. I cannot, however, see how indemnities of the kind awarded by the Arbitrators can, as a matter of law, have been awarded in this case. First, those indemnities disregard the nature of the conditional benefit principle as not creating a conventional cause of action. Secondly, the costs incurred by the Club and to be incurred by the Club and the losses flowing from any future enforcement (perhaps in foreign jurisdictions) did not flow from the breach of the equitable obligation to arbitrate. If anything, they flowed from a breach of the pay to be paid clause, which was not the claim asserted. Thirdly, the normal remedy, where an injunction is not granted, is for damages in lieu assessed as a matter of discretion as explained in *Jaggard v. Sawyer*. That was not the exercise that the Arbitrators undertook. They could not have done so because they had no power to grant an injunction against Spain and France and therefore no power to award equitable damages against them.

222. Further, an analogy can be drawn between the nature of the indemnities awarded by the Arbitrators in respect of future enforcement and the court's approach to anti-enforcement injunctions. Given that the Spanish judgment is not being recognised in this jurisdiction, the remaining object of those indemnities would be to neutralise attempts to enforce it in third countries. As Christopher Clarke LJ said in his comprehensive discussion of anti-enforcement relief in *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231, recognition and enforcement in a third country "is a matter which it is, intrinsically, for the relevant court to decide according to its applicable law" ([136]).

223. Finally in this connection, I do not think that the decisions in *Wolverhampton* or *Broad Idea* justify sweeping away the clear distinction that has survived in our law between

common law and equitable damages and compensation. That distinction is very deep seated as *The Jay Bola* and *Jaggard v. Sawyer* and the UKSC cases upholding those decisions demonstrate.

224. I would, therefore, decide that the judge was wrong to uphold the Arbitrators' awards of equitable compensation against Spain and France. Even if such a jurisdiction exists, it should not have been exercised here for the reasons I have given.

The Human Rights Appeal

Section L: Issue 7: Was the judge right to conclude that the registration of the Spanish judgment was **not** manifestly contrary to English public policy on human rights grounds including breaches of A1P1 and article 6 of the ECHR, and article 14(5) of the ICCPR?

225. I have set out the judge's reasons for dismissing the Club's appeal on human rights grounds in detail at [82]-[92] above. The Club advanced the following main criticisms of the judge's reasoning: (i) he took [41] of *Meroni* out of context, thinking mistakenly that he could not review the accuracy of the Spanish Supreme Court's findings of law or fact, (ii) had he applied *Diageo*, *Bamberksi v. Krombach* and *Meroni* properly, he would have seen that the Spanish judgment was arbitrary and irrational and decided new facts against the Master without hearing him in breach of the rules of natural justice, and (iii) the Spanish Supreme Court convicted the Master of an offence of which the lower court acquitted him, without being subject to review by a higher tribunal contrary to article 14(5) of the ICCPR, which had become a rule of customary international law applicable by the English court. Accordingly, the judge ought to have decided that the Spanish judgment was manifestly in breach of English public policy, notwithstanding article 36, so that article 34(1) was applicable and registration should have been refused.

226. In my judgment, the judge was right in his first judgment for the reasons he gave. I can deal with the Club's criticisms briefly in the light of the fact that I have already decided that the Spanish judgment should not be registered as it is manifestly in breach of English public policy as conflicting with Mr Schaff's awards.

227. I do not think that the judge misunderstood the applicable authorities. As I have recorded above, he set out the relevant passages from each of *Diageo*, *Bamberksi v. Krombach* and *Meroni* in meticulous detail and applied them to the Spanish judgment, on which he had heard lengthy expert evidence. The single sentence from [41] of *Meroni* was "the court of the [incoming state] may not review the accuracy of the findings of law or fact made by the court of the Member State of origin".

228. Moreover, the judge did not misunderstand that sentence or take it out of context. He realised that he had to perform the difficult exercise of (a) not violating article 36 by reviewing the substance of the foreign judgment, whilst (b) making sure that he had examined it sufficiently to be sure that it was not manifestly irrational or in breach of A1P1 or finding new facts. [49], [84] and [124] of the first judgment illustrate how the judge did that exercise correctly. At [49], he said expressly that the word "manifestly" in article 34(1) could not rule out a sufficient investigation of the facts to understand the nature of the violation of public policy. But *Laserpoint* and *Huertas* demonstrated that where there was "room for serious argument" as to whether public policy was contravened, then it would be most improbable that it could be said that enforcement

was manifestly contrary to public policy. At [84], he held that, having considered the expert evidence as to whether new facts had been found, it was "not a case where, on an examination of the case, it [was] plain or obvious that there has been a contravention of the Master's fair hearing rights". Likewise, at [124], the judge acknowledged that there could be cases where the judgment was unenforceable because it was manifestly unreasonable or arbitrary, but the incoming court should not examine the court of origin's process of fact finding and legal analysis to second guess whether they were right. It seems to me that the judge did exactly what *Diageo* mandated. Specifically, at [44] in *Diageo*, the CJEU had said that the receiving court could only review the substance of an incoming judgment where the infringement would constitute a **manifest** breach of a rule of law regarded as essential in the legal order of the incoming state. It is hard to see how arguable points as to whether public policy had been infringed could properly be regarded as "manifest". That is all the judge was really saying.

229. In any event the judge had further reasons for reaching the conclusions that he did. In particular, the Club was seeking to rely on the rights of the Master in criminal proceedings, not its own rights. The Master's complaints had already been considered and rejected, including by the ECtHR. Further, the judge rightly had regard both to the strong presumption that the courts of the originating Member State provided a procedure compliant with article 6 of the ECHR, and to the Club's failure to assert its rights in the Spanish proceedings (see [88], [91] and [92] above). I agree.

230. Finally, I do not think it was open to the Club to argue before us that article 14(5) of the ICCPR had become a rule of customary international law. It tried to introduce evidence in argument before us as to the number of states that applied article 14(5), but it had not put that material before the judge, seemingly accepting in the lower court that it was not a rule of customary international law. Even though the UK has acceded to the ICCPR, it is not part of our national law. Several significant states have entered a reservation to article 14(5), the details of which were not examined before us. In my judgment, this court simply did not have the material before it to decide whether article 14(5) satisfied the test necessary to become a rule of customary international law. That test is, of course, whether it has been shown to represent the widespread, representative and consistent practice of states which was accepted by them on the footing that it was a legal obligation (see *Benkharbouche v. Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 777 at [31]).

231. The judge was therefore right, in my view, to conclude that the registration of the Spanish judgment was **not** manifestly contrary to English public policy on any of the human rights grounds alleged including the supposed new facts found against the Master, and the breaches of A1P1 and article 6 of the ECHR, and article 14(5) of the ICCPR.

Section L: Conclusions

232. As will have been seen, I have held that the judge was right to hold that the Spanish judgment should not be recognised or registered in England & Wales for one of the reasons he gave. It would be manifestly in breach of the public policy applicable in England & Wales under article 34(1) for the Spanish judgment to be recognised, when it conflicts with Mr Schaff's awards that are binding and enforceable against Spain and France. The judge was also right to think that the alleged violations of the Master's

human rights in the Spanish courts were not manifestly in breach of the public policy applicable in England & Wales under article 34(1) so as to prevent registration of the Spanish judgment.

233. The judge was wrong to think that he was not bound by the CJEU's decision whether as a matter of an excess of jurisdiction or by reason of an issue estoppel arising from the section 66 judgments. He was so bound. As a result, the judge was wrong to hold that the section 66 judgments could be regarded as irreconcilable judgments preventing registration of the Spanish judgment under article 34(3).

234. The judge and the Arbitrators were wrong to think that equitable compensation could be granted in this case, and the Arbitrators were wrong to think that equitable damages under section 50 could be granted in lieu of or in substitution for an injunction.

235. It seems to me that the decisions we have reached accord with the justice of the case. The Spanish judgment should not be enforced against the Club in breach of the pay to be paid clause, which is undoubtedly binding in law on Spain and France as Mr Schaff's awards made plain. The equitable compensation sought would create extra-territorial consequences (if the Spanish judgment were to be enforced in other countries in circumstances that cannot be predicted) that are not justified in law or on the facts.

236. Accordingly, Spain's appeal (CA-2024-000178) will be dismissed. Spain's and France's appeals (CA-2024-000180 and CA-2024-000182 respectively) against the award of equitable compensation will be allowed, and the Club's cross appeal (CA-2024-000597) will be dismissed. The Club's Human Rights Appeal (CA-2024-000588) will also be dismissed.

237. I should say, in conclusion, that I am grateful to Lady Justice Andrews and Lady Justice Falk for their careful concurring judgment, with which I agree.

LADY JUSTICE ANDREWS AND LADY JUSTICE FALK:

238. We have had the advantage of reading in draft the judgment of the Master of the Rolls and are grateful to him for his clear and detailed exposition of the issues. We agree with his judgment in its entirety. We add this concurring judgment only to emphasise what we regard as some key considerations.

239. The first point relates to the CJEU's decision. We heard a great deal of argument, including from the European Commission, as to whether the judge was entitled to conclude that the CJEU had exceeded its jurisdiction by answering questions not referred, or whether (as Spain and the Commission maintain) the CJEU is in effect the sole arbiter of its jurisdiction, a point which they say is unaffected by the EU withdrawal arrangements.

240. In the result, none of that argument is relevant. This is because, in disagreement with the judge, we have concluded that the CJEU did confine itself to the questions referred. It simply answered them in a qualified way, as it was entitled to do. As the Master of the Rolls has explained, we are bound by what the CJEU decided, as was the judge. Accordingly the correctness of the judge's approach on the question of jurisdiction, which would appear to involve an extension of the principles discussed in *Aimia*, is best left to a case where it is necessary to decide it.

241. It is however necessary to look carefully at what the CJEU actually decided. The judge correctly identified that the CJEU did not decide that an issue estoppel arising from an arbitral award falls outside the limits of Article 34(1) of the Brussels I Regulation. The third question referred expressly raised that issue (see [50] above) and the Advocate General addressed it, but neither the Court's answer to the question nor the reasoning that led to that answer did so.

242. It is clear from reading the CJEU's decision that this must have been a deliberate choice. It is also understandable. The analysis of the third question at [74]-[79] of the CJEU's decision focuses on the inapplicability of Article 34(3) to Hamblen J's judgment, and explains that in those circumstances it could not be a breach of public policy to disregard that judgment. This is because of the principle of *lex specialis* (meaning a specific rule which will prevail over a more general rule). The specific rule in Article 34(3) constitutes a *lex specialis* in relation to the more general public policy provision in Article 34(1). That was an issue that had been decided in the *Hoffmann* case at [21]. But Article 34(3) concerns only judgments, not arbitral awards, so it can have no application to Mr Schaff's award.

243. It follows that the judge was not bound by the CJEU's decision to conclude that the *res judicata* arising from Mr Schaff's award fell outside the limits of Article 34(1). Nevertheless, he still had to determine whether it did in fact fall within that provision, which (as the CJEU said at [77]) must be interpreted strictly and may be relied on only in "exceptional cases". This is the second point on which we wish to comment.

244. It is worth noting that Spain's appeal in relation to the effect of Mr Schaff's award under Article 34(1) was confined to the question of whether *res judicata* arising from an arbitral award is capable of falling within that provision. There was no appeal against the judge's conclusions that the doctrine of *res judicata* and the principle of finality are matters of English public policy, or that they are rules of law regarded as essential in the English legal order. In any event, we agree with the judge's analysis of those issues at [259]-[270].

245. As the judge explained there, *res judicata* and the principle of finality are significant and longstanding matters of public policy in the legal order of this jurisdiction. Those principles apply to arbitral tribunals as well as to courts, as reflected in section 58 of the 1996 Act. We would also emphasise, as the Master of the Rolls has said at [161] above, that the ability of parties to agree to binding arbitration is of great significance to the legal system of England and Wales and to the UK economy. That significance depends, among other things, on arbitral awards that have been properly obtained not being deprived of effectiveness in this jurisdiction by recognition or enforcement of a judgment obtained in breach of an agreement to arbitrate.

246. A further important consideration is the potential for inconsistency between the effect of a domestic arbitral award and the treatment of non-domestic awards under the New York Convention 1958. As the Master of the Rolls has also explained, Article 73(2) of the Recast Regulation (the successor to the Brussels I Regulation) is explicit that it does not affect the application of the New York Convention, and that must also be the position under the Brussels I Regulation.

247. In his opinion at [68], Advocate General Collins highlighted the undesirability of a non-domestic arbitral award being afforded a superior position in the legal order of the

member state in which recognition is sought, as compared with a domestic arbitral award that had been enforced by the courts of that member state. As the Advocate General pointed out, when a member state has recognised a foreign arbitral award under the New York Convention, it cannot subsequently invoke the provisions of the Brussels I Regulation in order to enforce a member state judgment that contradicts that non-domestic arbitral award. However if the person in whose favour the award has been made wishes to enforce it in the same jurisdiction as the seat of the arbitration, the New York Convention will not apply. Instead that person must rely on domestic rules of recognition and enforcement of domestic awards. If the Brussels I Regulation could be invoked to enforce a member state judgment that contradicted the domestic arbitral award, the person seeking to enforce the award would be worse off domestically than in any other member state.

248. Although the Advocate General's observations were made in support of his opinion that the word "judgment" in Article 34(3) included a judgment entered in terms of a domestic arbitral award, we consider that they apply with equal force to the question whether *res judicata* arising from such an award falls within the scope of Article 34(1). To take the same illustrations as were given by the Advocate General, if the *res judicata* arising from Mr Schaff's award did not preclude the enforcement of the Spanish judgment in England, the English award would be deprived of legal effect in the jurisdiction of the seat of the arbitration but could, nevertheless, be enforced in another member state in preference to the Spanish judgment. For example, if the French courts were to consider that the New York Convention obliged them to recognise the English award, the Brussels I Regulation would not prevent the enforcement of the award in France and the French courts would be under no obligation to recognise the Spanish judgment to the extent that it is irreconcilable with the award.

249. The New York Convention was designed to promote enforceability of foreign arbitral awards by putting someone who obtains an arbitral award in a convention state in as good a position to enforce it in foreign states who are parties to that convention as they would be in the state of the seat of the arbitration. Parity of treatment between domestic and foreign arbitral awards is at the heart of the Convention. For example, Article III provides that:

> "There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".

There is no discernible justification in principle or as a matter of policy for applying Article 34(1) in a manner that would leave Mr Schaff's award free to be enforced in any other New York Convention state whilst rendering it nugatory in the state in which it was originally obtained. Indeed the parties' choice of England and Wales as the seat of the arbitration would be frustrated if the ability of the successful party to enforce the award domestically were precluded by a judgment obtained in contravention of the agreement to arbitrate, forcing them to go abroad in order to do so.

250. The third point is the critical issue of equitable compensation. Given the decision not to recognise the Spanish judgment, the awards of Sir Peter Gross and Dame Elizabeth Gloster would apply to costs incurred by the Club in the Spanish proceedings and would

also provide a broad indemnity aimed at neutralising any attempts to enforce the Spanish judgment outside this jurisdiction.

251. We agree with the Master of the Rolls that awards of that kind would, in effect, ride roughshod over the jurisprudence that has developed in relation to both the conditional benefit principle and section 50, and accordingly would amount to an impermissible extension of the boundaries within which equitable compensation may be awarded. Further, it would amount to an unwarranted erosion of the principle of privity of contract.

252. Hobhouse LJ made clear in *The Jay Bola* that the right to apply for an injunction was 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 (see [175] above). He suggested that the only remedy was to apply for an injunction to restrain the refusal to recognize the equity of the debtor. We now know that a declaration may also (or alternatively) be granted, but both are essentially negative in nature: they aim to protect the debtor in a defensive manner, rather than to enable a claim to be brought that requires positive action, such as the payment of money.

253. This reflects the nature of the conditional benefit principle. The Club has no independent right in law or equity in respect of the States' failure to arbitrate. A form of equitable right and corresponding obligation was engaged when the non-CLC claim was brought against the Club in the Spanish courts, but it operates as a restriction on the benefit that the States can take. That benefit is conditional; there is no self-standing right. For example, it could not be used positively to force the States to engage in arbitration proceedings, still less to enforce the pay to be paid clause. The fact that the relief granted by the courts in conditional benefit cases has been entirely negative or declaratory in nature is consistent with this. It reflects the fact that the third party is not in fact a party to the contract so cannot be sued for breach of it, either for damages or by way of mandatory injunction or specific performance. If this were not so then principles of privity of contract would be materially eroded.

254. In other words, what has been described (effectively in shorthand) as an "equitable right" with a corresponding "equitable obligation" (*Airbus* at [95] and [96]) is not in fact the kind of right that can found a positive claim to anything other than remedies which are aimed at ensuring that the burdens of the contract are accepted by anyone seeking to claim the benefit, by curtailing actions that would otherwise flout that principle.

255. This is consistent with the approval of Hobhouse LJ's formulation in *The Atlantik Confidence* at [27]. A claim may not be asserted inconsistently with the terms of the contract. That operates as a constraint on the assertion of the right to claim the benefit under the contract.

256. The Club sought to escape this limitation by relying on *Halsall v Brizell* [1957] Ch 169 and *Thamesmead Town v Allotey* (1998) 30 HLR 1052, where non-parties to deeds of covenant were required to pay money in accordance with the terms of the deeds if they wished to make use of the roads and services in question. However, the facts of those cases are very different. They concerned actions not for the consequences of a breach of duty but for the enforcement of a condition or incident of the contract that the landowner was taken to accept on a continuing basis by using the relevant services.

257. Thus, the equitable right and corresponding obligation that arises in conditional benefit cases is of a peculiar kind. It cannot be asserted against the third party in an offensive rather than defensive way by an action equivalent to one for breach of contract, because that would disregard the fact that the third party is not a party to the contract and so cannot be sued for breach of the obligations contained in it.

258. Ms Dilnot suggested that it was appropriate to draw a distinction between rights acquired under direct action statutes (such as Article 117 of the Spanish Penal Code) and rights acquired by assignment or subrogation. However, not only is *The Yusuf Cepnioglu* authority for the proposition that no such distinction should be drawn (see [173] above), but it is also difficult to justify such a distinction under English law. The nature of the conditional benefit principle is the same in each and the principle of privity of contract applies with equal force.

259. The authorities on section 50 that the Master of the Rolls has referred to are also of key significance. Lord Cairns's Act enabled courts to grant equitable damages in respect of future as well as past breaches, which would have been impossible at common law. It could potentially be relied upon against non-state parties, but not against state parties, because it applies to awards of damages in addition to or in substitution for an injunction, and in the latter case is intended to compensate for the refusal of injunctive relief. No injunction could be granted in this case (either by the courts or by an arbitrator) and so there is no possibility of awarding damages in substitution.

260. The principles under which damages may be awarded under section 50, including its role in relation to future losses, have been endorsed by the UKSC both in *Morris-Garner* and recently in *United Utilities*. It is evident that section 50 was not regarded as simply reflecting part of a broader power of the court to award financial compensation. If it had been, then Lord Reed would not have needed to emphasise, as he did in *Morris-Garner* at [45], that the court must have had jurisdiction to grant an injunction. The same point was made in *United Utilities* at [130]: see [203] above. This is because damages under section 50 operate as a monetary substitute for an injunction, as Lord Reed said in *Morris-Garner* at [44].

261. In *Wolverhampton* at [149]-[150] the UKSC explained the role of equity as intervening to put right defects or inadequacies in the common law, and specifically in this context where common law remedies are perceived to be inadequate. The conditional benefit principle is an example of that. Injunctive relief was the key remedy developed to address such inadequacies, and Lord Cairns's Act provided important additional flexibility where an injunction was not appropriate. Section 50 continues to provide that flexibility where it applies, but its limits must be observed.

262. Finally, we would wish to associate ourselves explicitly with the Master of the Rolls' views about the overall justice of the case.

263. Given that Mr Schaff's award against Spain has been found by Hamblen J and the Court of Appeal to be a binding arbitral award, it accords with the justice of the case, as well as the principles of *res judicata* and finality and the significance accorded to arbitration, to refuse Spain's application for recognition of the Spanish judgment in this jurisdiction. But it does not follow that any further relief would be appropriate, even if it was possible to grant it as a matter of law.

264. It is worth recalling that the Spanish trial followed a lengthy investigation which was initiated in 2002 and completed in 2010. Criminal prosecutions were obviously a matter for the Spanish court, as was the fact that civil proceedings were attached to them, to which the Club was just one of a number of defendants. There were numerous claimants in addition to Spain and France. The CLC claims, to which the Club was in any event subject, had to be brought in the Spanish courts. The claimants fairly relied on a provision of the Spanish Penal Code that provided them with direct rights of action against the Club. Leaving to one side the analysis which subsequently determined that (as a matter of English law) claims against the Club were in fact subject to arbitration, none of this can be the subject of any legitimate criticism.

265. The Club took no steps to initiate arbitration claims until January 2012, only a few months before the Spanish trial commenced. There was therefore a significant delay. Mr Schaff's awards were made during the course of the trial, and were not upheld by the High Court and Court of Appeal until after its completion. It is true that those decisions were available before the hearing in the Spanish Supreme Court, but again that hearing covered criminal as well as civil proceedings against a number of defendants, and was conducted under Spanish law. In truth, any arguable unconscionability is from an English, not Spanish, law perspective and relates to the fact that Spain and France continued to assert a civil claim in the Spanish proceedings beyond CLC limits after the arbitrations and section 66 judgments.

266. The Club also chose not to participate in the Spanish proceedings until the later quantum phase. Although Sir Peter Gross determined that such non-participation had been reasonable due to the risk of the Club being treated as having submitted to the jurisdiction, the fact is that the Spanish courts were deprived of the benefit of its arguments not only about the arbitration clause but also (and critically) the pay to be paid clause.

267. In reality, it was the fact that the Spanish courts did not apply the pay to be paid clause that resulted in the Club incurring costs in the quantum proceedings in an attempt to mitigate its exposure. In the same way, the non-application of the pay to be paid clause will be the cause of any other costs the Club may incur in connection with enforcement of the Spanish judgment outside this jurisdiction. The States' contribution to the Club's difficulty in that respect was limited to continuing to participate in the Spanish proceedings without themselves volunteering that the pay to be paid clause was engaged, if indeed it was as a matter of Spanish law, a matter which Sir Peter Gross found to be unclear.

268. Further, by granting equitable compensation as they did in relation to costs that may be incurred in connection with enforcement in other jurisdictions, the Arbitrators were in effect seeking to interfere with those enforcement processes by neutralising their effect. As the Master of the Rolls has noted at [222], there is an analogy with anti-enforcement injunctions, which were discussed in some detail by Christopher Clarke LJ (with whom Etherton and Patten LJJ agreed) in *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231. While cases that consider such injunctions tend to involve delay in seeking relief at an earlier stage in the form of an anti-suit injunction, the comments made in *Tanoh* about comity are relevant where, as here, an injunction would in any event not be available. As Christopher Clarke LJ said at [136], recognition and enforcement in a third country "is a matter which it is, intrinsically, for the relevant court to decide according to its applicable law".

269. In conclusion, Mr Schaff's award prevents recognition of the Spanish judgment under Article 34(1). That issue was not addressed by the CJEU's decision but non-recognition on that ground is required by considerations of public policy. Equitable compensation is not an available remedy in the context of the conditional benefit principle and in circumstances where damages cannot be awarded under section 50. These conclusions also accord with the overall justice of the case and with considerations of comity.