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Case No: CL-2019-000518
CL-2023-000050

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/10/2023

Before :

THE HON MR JUSTICE BUTCHER

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Between :

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED	**Appellant in the Appeal / Defendant in the ss. 67-69 Applications**
- and –	
THE KINGDOM OF SPAIN	**Respondent in the Appeal / Claimant in the ss. 67-69 Applications**

M/T 'PRESTIGE'

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Christopher Hancock KC, Thomas De La Mare KC (May 2023) Charlotte Tan (December 2020) and Alexander Thompson (instructed by **Wikborg Rein LLP**) for the **Appellant/Defendant Club**

Timothy Young KC and Jamie Hamblen (instructed by **Squire Patton Boggs (UK) LLP**) for the **Respondent/Claimant State**

Hearing dates: 2-3, 7-10, 17-18 December 2020
15-18 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 6 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher :

1. There are before the court a number of related matters, which form part of the protracted litigation arising from the sinking of the M/T Prestige in 2002. The parties to these proceedings are the London Steam-Ship Owners' Mutual Insurance Association Limited (which I will call 'the Club') and the Kingdom of Spain (which I will call 'Spain').

2. Specifically, the following matters fall to be resolved by the Court:

   (1) The remaining issues and the outcome of the Club's Appeal in Claim No. CL-2019-000518.

   (2) Spain's challenges to the First and Second Partial Awards of Sir Peter Gross dated 6 January 2023 and 27 March 2023 under ss. 67, 68 and 69 Arbitration Act 1996 ('AA 1996'), in Claim No. CL-2023-000050.

3. The history leading up to these matters coming before the Court is now a lengthy one. I have already summarised much of this history in my judgment at [2021] EWHC 1247 (Comm). What follows should be read with that.

Background

4. In November 2002 the M/T Prestige (or 'the vessel') suffered damage from a storm surge, and subsequently sank. The resulting oil spillage caused significant pollution damage to the Spanish and French coastlines.

5. In late 2002 criminal proceedings were commenced in Spain against the Master and other officers of the vessel as well as against a Spanish official who was responsible for handling the immediate aftermath of the casualty. At the conclusion of the investigative stage of those proceedings, in 2010, the Master was charged with the offence of serious negligence against the environment under Articles 325 and 331 of the Spanish Penal Code and with the offence of disobedience to the authorities. Civil claims were also brought by various parties against the Master and crew, the Owners and Managers of the vessel, and against the Club, with which the vessel had been entered for P&I cover at the time of the casualty. The Owners were sued on the ground of vicarious liability for the Master's conduct. The Club was sued directly pursuant to Article 117 of the Spanish Penal Code (or 'Article 117') as Owners' liability insurer. In addition the Club was sued pursuant to The International Convention on Civil Liability for Oil Pollution Damage 1992 or Civil Liability Convention ('the CLC').

6. Both Spain and the French State (together, 'the States') made claims under Article 117 in those proceedings. In the case of Spain, it was a claimant both on its own behalf and on the basis that it was subrogated to the claims of other claimants whom it had compensated for losses caused by the pollution from the vessel under a compensation scheme established under Spanish law.

7. The Club's position was that the States' pursuit of Article 117 claims was contrary to an obligation binding on them contained in the Club Rules to pursue their claims by arbitration in London. The Club accordingly commenced separate arbitrations against Spain and the French State. Mr Alistair Schaff KC was appointed by the Commercial

Court as the sole arbitrator in each of those arbitrations. The States did not participate in those arbitrations. I will call the arbitration in which Mr Schaff KC was arbitrator and which involved Spain, 'the Schaff Arbitration'.

8. In the Schaff Arbitration, by an Award dated 13 February 2013 ('the Schaff Award'), the arbitrator upheld many of the Club's claims for negative declaratory relief. He made declarations that:

(1) Spain was bound by the arbitration clause contained in the Club's Rules and its claims must be referred to arbitration in London;

(2) Pursuant to the 'pay to be paid' clause in the Club's Rules, the Club was not liable to Spain in respect of such claims in the absence of prior payment to Spain by the Owners and/or Managers of the vessel of the full amount of any insured liability.

(3) In any event the Club's liability was subject to the global limit of US$1 billion specified in the contract of insurance.

9. The Club then sought to enforce the Schaff Award as a judgment, and to enter judgment in terms of the Schaff Award pursuant to s. 66 AA 1996. Spain participated in those proceedings, both by defending the Club's application, and by issuing its own proceedings under ss. 67 and 72 AA 1996, seeking a declaration that Mr Schaff had had no jurisdiction to make the Schaff Award. Spain also claimed state immunity from the Court's processes in relation to the s. 66 AA 1996 application.

10. In its ss. 67 and 72 AA 1996 applications Spain contended that the direct rights which it was pursuing in its Article 117 claims were independent rights under Spanish law rather than contractually-based rights. It was further argued that they were not arbitrable because they were brought under a criminal statute and were bound up with issues of criminal liability and/or because they involved Spain and the Public Prosecutor fulfilling a constitutional, public policy function, namely the protection of the environment.

11. These applications came before Hamblen J in October 2013. He handed down judgment on those applications on 22 October 2013 (*The Prestige (No. 2)* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep 309). Hamblen J held that Spain's jurisdiction challenge failed and the Club's application for enforcement of the Schaff Award succeeded.

12. In approaching the proper characterisation of Spain's Article 117 claims, Hamblen J had regard to the decision of the Court of Appeal in *Through Transport Mutual Insurance Association Co Ltd v New India Assurance Co Ltd (The 'Hari Bhum') (No. 1)* [2004] EWCA Civ 1598, [2005] 1 Lloyd's Rep 67. Hamblen J posed the question as to the substance of Spain's claim: was it, in substance, a claim to enforce the contract of insurance or a claim to enforce an independent right of recovery? He found that that involved a consideration of the right as a matter of Spanish law, followed by an exercise of characterisation applying English conflict of laws principles. He concluded that the direct action right was in substance a right to enforce the contract. He also held that Spain's claim was arbitrable. He rejected the contention that the reference of the dispute was an attempt to delegate to an arbitrator a matter of public interest which could not be determined within a private contractual process, or that such a reference

was inarbitrable. Finally, he concluded that Spain had lost the right to state immunity pursuant to s. 9 of the State Immunity Act 1978 ('SIA'), as it had agreed in writing to submit the relevant dispute to arbitration. He reasoned that a third party making a claim under an insurance policy containing an arbitration clause was, when the claim was disputed, bound to refer the dispute to arbitration in accordance with the arbitration agreement; and that when a State was so bound, it had 'agreed in writing' to submit a dispute to arbitration within the meaning of s. 9(1) SIA.

13. Accordingly, Hamblen J gave the Club permission to enforce the Schaff Award pursuant to s. 66(1) AA 1996 and entered judgment in terms of the Schaff Award pursuant to s. 66(2) AA 1996.

14. Hamblen J gave Spain permission to appeal on certain issues. The appeal was fully contested. On 1 April 2015 the Court of Appeal upheld the order of Hamblen J and dismissed the appeal (*The Prestige (No. 2)* [2015] EWCA Civ 333, [2015] 2 Lloyd's Rep 33). I will call the decisions of Hamblen J and of the Court of Appeal on appeal, together, 'the English s. 66 Judgments'.

15. In giving judgment on the appeal, Moore-Bick LJ reasoned, in part:

(1) That the court was concerned with the characterisation of issues not claims, and that the relevant issues were whether the Club's liability could be enforced only in arbitration and whether the 'pay to be paid' clause operated to defeat a claim under the policy;

(2) That these were issues relating to an obligation sounding in contract, and that they were to be determined in accordance with English law as the proper law of the obligation;

(3) That, applying English law, if Spain wished to pursue claims against the Club it must do so in accordance with the terms of the contract of insurance and subject to the 'pay to be paid' clause;

(4) That Spain had lost its right to State immunity both by reason of an agreement in writing within s. 9(1) SIA, and also because Spain had submitted to the jurisdiction pursuant to s. 2(3)(b) SIA.

16. Between the judgment of Hamblen J and the decision of the Court of Appeal, on 13 November 2013, the Provincial Court of La Coruña ('the Provincial Court') gave judgment in the Spanish proceedings. The Master was acquitted of serious negligence against the environment. He was convicted of the crime of disobeying orders of the Spanish maritime authorities, but this was held not to have had causative effect and, accordingly, civil liability could not be imposed on the Master, the Owners or the Club.

17. There was then an appeal against the Provincial Court's decision. On 14 January 2016 the Spanish Supreme Court: (1) convicted the Master of the offence of serious negligence against the environment; (2) acquitted the Master of the offence of disobedience; and (3) found civil liability on the part of the Master, the Owners (as vicariously liable), and the Club (as directly liable to the claimants including Spain) subject to the global limit of US$1 billion in the contract of insurance. The question of quantum was remitted to the Provincial Court.

18. In the quantum proceedings before the Provincial Court, the Club participated under protest. On 15 November 2017 the Provincial Court issued a judgment on quantum (subsequently rectified by an order dated 11 January 2018). The Provincial Court found the Master, Club and Owners liable in respect of 272 parties, in amounts in excess of EUR 1.6 billion, but accepted that the Club's liability was limited to US$1 billion. That judgment (with some corrections) was upheld by the Spanish Supreme Court on appeal. In January 2019 Spain applied to the Provincial Court for enforcement of the Spanish quantum judgments against the Owners and the Club. On 1 March 2019 the Provincial Court ordered that Spain was entitled to seek enforcement up to about EUR 2.355 billion, subject in the case of the Club to a limit of EUR 855,493,575.65 (being the Euro equivalent of US$1 billion less EUR 22,777,986 being the value of the CLC Fund deposited by the Club in May 2003). I will call this 'the Spanish Judgment'.

19. On 26 March 2019 Spain issued a CPR Part 23 application seeking to enforce the Spanish Judgment pursuant to Article 43 of Regulation (EC) No. 44/2001 ('the Regulation'). The Spanish Judgment was registered *ex parte* by order of Master Cook on 28 May 2019 ('the Registration Order'). The Club appealed against the Registration Order pursuant to Article 45 of the Regulation, in Action CL-2019-000518. That is described in this judgment as 'the Club's Appeal'.

20. The Club appealed on three broad grounds, as follows:

(1) That pursuant to Article 34(3) of the Regulation, the Spanish Judgment was irreconcilable with the English s. 66 Judgments ('the irreconcilability ground');

(2) That pursuant to Article 34(1) of the Regulation, recognition of the Spanish Judgment would be contrary to principles of English public policy relating to *res judicata* by reason of the prior Schaff Award and the English s. 66 Judgments ('the *res judicata* ground'); and

(3) That pursuant to Article 34(1) of the Regulation, recognition would be contrary to principles of public policy because the Spanish proceedings and Judgment involved a violation of the human rights of the Master, Owners and Club ('the human rights ground').

21. In the meantime, the Club had commenced fresh arbitration proceedings against Spain, including by notices of 8 January 2019 and 4 July 2019. In these arbitration proceedings, the Club sought:

(1) A declaration that Spain was and will be in breach of its obligations not to pursue the claims made in Spain in the Spanish proceedings other than by way of London arbitration insofar as Spain continued to pursue the Spanish proceedings and to seek enforcement of the Spanish Judgment; and a declaration that the arbitral tribunal had jurisdiction to grant an anti-suit injunction, equitable compensation, damages in contract and damages in lieu of an injunction;

(2) Equitable compensation for breach of an equitable obligation to arbitrate the claims brought in the Spanish proceedings, in the amount of any liability and costs incurred by the Club arising from Spain's pursuit of those claims and subsequent enforcement steps;

(3) Contractual damages (or a declaration of liability) for the same sums, for breach of a contractual obligation to arbitrate the claims which had been brought in Spain, which obligation was said to have arisen from Spain's participation in the earlier s. 66 AA 1996 proceedings;

(4) An anti-suit injunction to restrain the alleged breach of the equitable obligation to arbitrate, or damages in lieu pursuant to s. 50 Senior Courts Act 1981 ('SCA 1981'); and

(5) An order that Spain withdraw the claims brought in the Spanish proceedings forthwith and that Spain be enjoined from taking any step to have the Spanish Judgment recognised or enforced in any jurisdiction worldwide.

22. On 22 March 2019 the Club commenced an arbitration claim seeking the appointment of an arbitrator pursuant to s. 18 AA 1996. By *ex parte* orders of Robin Knowles J dated 8 April 2019, the Club was given permission to serve the Arbitration Claim Form on Spain out of the jurisdiction. Spain brought an application pursuant to CPR Part 11 to set aside those orders, on the grounds that (1) Spain was immune from all suits brought by the Club pursuant to s. 1 SIA, alternatively (2) the Court had no jurisdiction to hear the claims set out in the Arbitration Claim Form and the s. 18 AA 1996 application.

23. Henshaw J heard Spain's application under CPR Part 11 in February and April 2020, and handed down judgment on 18 June 2020. In relevant part, Henshaw J decided as follows:

(1) That Spain had no immunity, by reason of s. 9(1) SIA, in respect of the Club's claims summarised in para. 21(1), (2), (4) and (5) above. They were remedies sought by the Club arising from Spain's breach of its equitable obligation to pursue its substantive claim in arbitration. S. 9(1) SIA did not, however, mean that Spain had no immunity in respect of the Club's claim for contractual damages for breach of the obligation said to have arisen from Spain's participation in the s. 66 AA 1996 proceedings;

(2) That Spain's pursuit in Spain of a contractual claim under a contract of insurance was a 'commercial transaction' for the purposes of s. 3(1)(a) SIA, and that the Club's application to appoint an arbitrator in respect of its new arbitral claims was a proceeding 'relating to' Spain's pursuit of those proceedings, and thus Spain had no immunity pursuant to s. 3(1)(a) SIA;

(3) That the Club had established that it had a good arguable case that an arbitrator had jurisdiction over all its claims other than the breach of contract claim;

(4) That it was appropriate to appoint an arbitrator pursuant to s. 18 AA 1996 save in relation to the Club's claims for breach of contract;

(5) That Spain's CPR Part 11 application should be dismissed.

Henshaw J proceeded to appoint Sir Peter Gross as arbitrator pursuant to s. 18 AA 1996.

24. I now turn back to the progress of the Club's Appeal from the Registration Order. This came in front of me in December 2020. Before it came on, Spain had issued an

application for a Reference to the CJEU for Preliminary Rulings in relation to a number of points. At the hearing of the Appeal in December 2020, I heard evidence and argument relating to all three of the Club's grounds, which I have identified above, and Spain's application for a Reference. Spain urged that I should, if possible, decide on whether to make a Reference promptly, given that the implementation period of the UK's withdrawal from the EU would expire on 31 December 2020, after which no Reference could be made. At the conclusion of the oral proceedings, I decided to make a Reference to the CJEU on three points. I will return to this in considerably more detail below. At this point it is sufficient to record that the points referred did not, on any view, impact the Club's human rights ground.

25. After the conclusion of the December 2020 hearing, I proceeded to produce a draft judgment relating to all the points which had been argued before me (including on the points referred to the CJEU, which represented my views on those points subject to the determination of the CJEU on them). On 17 February 2021 I notified the parties that I had produced such a judgment, and indicated that I was minded to hand it down promptly. Both parties then invited me not to hand down the judgment until after the Court of Appeal had decided on an application for permission to appeal made by the Club in relation to my order for a Reference to the CJEU. On 5 March 2021 Males LJ gave the Club permission to appeal. I then asked the parties for further submissions on the hand down of the judgment. There were delays in the parties responding. The parties both tended to favour my not handing down the judgment on any matter pending the decision of the Court of Appeal. In a ruling given on 5 May 2021, however, I decided that, in the interests of expedition and efficiency, I should hand down judgment confined to the Club's human rights point.

26. On 12 May 2021 I proceeded to hand down judgment on the human rights ground: [2021] EWHC 1247 (Comm). I rejected the Club's case that Article 34(1) of the Regulation was applicable by reason of breaches of fundamental rights. I proceeded to give permission to appeal against that decision; but the time for appealing has been extended until the remainder of the Club's Appeal has been determined, and so no appeal has yet been heard.

27. The next matter to record is the outcome of an appeal by Spain against Henshaw J's decision of June 2020. The Court of Appeal dismissed the appeal: *The Prestige (Nos. 3 & 4)* [2021] EWCA Civ 1589, [2022] 1 WLR 3434. The Court of Appeal concluded (at [57]-[58]) that Henshaw J was correct as to the application of s. 3(1)(a) SIA. The Court proceeded to say this, at [59]:

'Our conclusion that the States do not have immunity by reason of the exception in section 3(1)(a) of the 1978 Act renders it unnecessary to consider the other exceptions relied on, and we do not propose to do so, save in one respect. In their written skeleton arguments each side urged us to decide whether section 9 applied to the section 18 Application, because it involves a determination of whether the States are bound to arbitrate the Arbitration Claims. In the course of oral argument, the Club took a more neutral stand, but the States still urged us to decide the point one way or the other. Although it is not an issue which falls to be conclusively determined in relation to the jurisdiction dispute, where the issue is whether there is a serious issue to be tried that there is a good arguable case to that effect, Henshaw J chose to reach a final conclusion on the point, both by reference to section 9 immunity and jurisdiction. It is an issue which will determine the jurisdiction of the arbitrator in each of the Arbitration Claim

references, and although the court will not always determine jurisdiction questions in advance, leaving it in the first place to the arbitrator to determine on the basis of the Kompetenz-Kompetenz principle, it may do so in an appropriate case. Having heard full argument and reached a clear view, we propose to decide the issue, which will avoid any application challenging the arbitrators' jurisdiction under section 67 of the Arbitration Act 1996.'

28. The Court of Appeal then proceeded to decide that Spain had lost immunity in respect of the Arbitration Claims by reason of s. 9 SIA. At [64] the Court said:

'Against that background the issue which now arises in relation to the application of section 9 to the section 18 Application can be resolved quite shortly. It depends simply on whether the dispute raised by the new Arbitration Claims falls within the scope of the disputes which Spain agreed to arbitrate by asserting the Article 117 Claim in the Spanish proceedings and the registration of the Spanish Judgment. Given that it has already been determined 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. The only distinction between the two disputes lies in the form of relief: that which was referred to Mr Schaff concerned the existence of rights and obligations; that which is to be referred to Sir Peter Gross is for injunctive relief to enforce the same rights, and for monetary compensation for breach of the same obligations, whose existence Mr Schaff had jurisdiction to determine because under the conditional benefit principle Spain agreed he should do so. To draw a distinction in this respect between a claim for a declaration and a claim for coercive relief, which in each case relies upon identical rights and obligations would involve absurd hair-splitting…'

29. Shortly after the rendering by the Court of Appeal of its decision in *The Prestige (Nos. 3 & 4)*, namely on 30 November 2021, the Court of Appeal heard an appeal by the Club against my order making a Preliminary Reference to the CJEU. The Club had originally, in its Grounds of Appeal, sought to appeal the order for a Reference on two grounds, namely (1) that the points referred were so clear that a Reference was inappropriate, and (2) that a Reference had not been 'necessary' because the answers to the questions referred could not be seen to be conclusive or substantially determinative of the appeal until there had been a decision on the human rights ground, which there had not been at the time the Reference was made. By the time the matter reached the Court of Appeal, the first of those two grounds had been dropped, and it was only the second which was argued in front of the Court of Appeal.

30. Before the Court of Appeal gave its judgment on that appeal, the Grand Chamber of the CJEU had, on 31 January 2022, held an oral hearing of the Reference. On 1 March 2022 the Court of Appeal handed down its judgment in the appeal against my order for a Reference, holding that the Reference had not been necessary because at the point it was made I had not resolved the human rights ground against the Club. The Court of Appeal set aside the order making the reference to the CJEU. The Court of Appeal referred to me, pursuant to CPR r. 52.20(2)(b), the question of whether, in the light of

the Court of Appeal's judgment, the Reference to the CJEU should be withdrawn by me.

31. At paragraph [57] of Phillips LJ's judgment appears the following:

'[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 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 further 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.'

32. In light of the Court of Appeal's decision, and of paragraph 26 of the CJEU's 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings', on 18 March 2022 I sent a letter, the text of which had helpfully been agreed by the parties, to the CJEU, notifying it of the Court of Appeal's decision and attaching a copy of the judgment. The letter also informed the CJEU that a hearing had been fixed before me for the week commencing 25 April 2022 to hear the parties' submissions on whether the Reference should be withdrawn.

33. On 21 March 2022, Spain issued an application to the Supreme Court seeking permission to appeal against the order of the Court of Appeal setting aside the order for a Reference, and asking the Supreme Court to give urgent consideration to the application and the expedition of any appeal if permission should be granted. On 31 March 2022, the Supreme Court granted permission to Spain to appeal. It also ordered expedition of the appeal and listed a one-day hearing on 22 June 2022. A request was also conveyed to me that the hearing fixed for the week commencing 25 April 2022 should be vacated pending the hearing before the Supreme Court; and, with the agreement of the parties, I made an order to this effect. I informed the CJEU of these developments by letter of 26 April 2022. The letter which, again, had been agreed by the parties, concluded:

'I intend to keep the Registry informed of the status of the proceedings and any further developments that are relevant to the Reference as soon as I am aware of them, including once the Supreme Court has handed down its judgment after the appeal hearing on 22 June 2022.'

34. On 5 May 2022, Advocate General Collins delivered his Opinion on the Reference. On 13 June 2022, the CJEU gave notice that it would deliver its judgment the following week. The Club contends that the normal period of such notice is of 6-8 weeks. The CJEU handed down its judgment ('the CJEU Judgment') on Monday 20 June 2022. As I will examine in more detail below, part of the CJEU Judgment (in paragraphs [54]-[73]) was to the effect that a s. 66 AA 1996 judgment could not constitute a judgment within Article 34(3) of the Regulation if the award in the terms of which that judgment was entered was made in circumstances which would not have permitted the adoption

of, in compliance with the provisions of the Regulation, a judicial decision falling within the scope of the Regulation.

35. In light of the CJEU Judgment, Spain amended the grounds on which it sought permission to appeal from the decision of the Court of Appeal of 4 November 2021 upholding the order of Henshaw J of 29 September 2020. Spain now put forward as an argument said to be supported by the reasoning of the CJEU that the English courts had been obliged to decline jurisdiction to appoint an arbitrator under s. 18 AA 1996 on the basis that it was the courts of Spain which had exclusive jurisdiction in relation to any claim by the Club for compensation against Spain, pursuant to section 3 of the Regulation; that no other court should declare itself to have jurisdiction on the basis of an arbitration clause; and that the CJEU's reasoning was applicable not just to the stage of enforcement of the Spanish Judgment, but to earlier stages of the arbitration, 'most obviously at the stage of any s. 18 application.'

36. On 28 October 2022, the Registrar of the Supreme Court gave notice that Spain's application for permission had been refused 'because the application does not raise an arguable point of law.'

37. Hearings in front of Sir Peter Gross, as arbitrator, had taken place in September 2021 and January 2022. While Sir Peter Gross was preparing his award, the CJEU gave the judgment to which I have referred above. Spain sought that Sir Peter Gross should hear further submissions as to the impact of the CJEU Judgment on the matters referred to arbitration. Sir Peter Gross directed the exchange of written submissions; and further oral hearings took place on 1 September 2022 and 8 November 2022.

38. On 6 January 2023 Sir Peter Gross issued his First Partial Award ('the Gross First Award'). I will return to this in more detail below. In summary, however, the issues with which Sir Peter Gross was concerned, and the answers he gave to those issues were as follows:

(1) *Issue 1.* Whether the relief sought from Sir Peter Gross could and should have been sought from Mr Schaff, and whether, as Spain contended, it was now an abuse of process for the Club to pursue such claims in front of Sir Peter Gross. This was characterised by Spain as being a jurisdictional point. Sir Peter Gross found that there was no abuse of process in the Club's seeking the relevant relief from him, and that he had jurisdiction in respect of the dispute;

(2) *Issue 2.* As to whether the law governing the dispute between the parties was English or Spanish law. Sir Peter Gross found that the dispute was governed by English law;

(3) *Issue* 3. The effect of the CJEU Judgment. Sir Peter Gross found that the CJEU Judgment did not deprive him of jurisdiction, nor did it decide that Spain was not bound to arbitrate its disputes with the Club. Furthermore, the reasoning at paragraphs [54]-[73] of the CJEU Judgment would not bind the English Court and therefore could not bind him as the arbitral tribunal;

(4) *Issue 4.* Whether the tribunal could or should grant declaratory relief to the Club. Sir Peter Gross found that the Club was entitled to relief declaring that Spain had acted and continued to act in breach of its equitable obligation not to pursue the non-CLC claims against the Club otherwise than by way of London arbitration;

(5) *Issue 5.* Whether there could or should be an order for equitable compensation in favour of the Club. Sir Peter Gross found that the Club was entitled to compensation for Spain's breach of its equitable obligation to arbitrate;

(6) *Issue 6.* Whether the tribunal had jurisdiction to grant an injunction against Spain. Sir Peter Gross held that he had jurisdiction/power to grant an injunction. He decided, however, that he would not, as a matter of discretion, grant the injunctive relief sought by the Club;

(7) *Issue 7.* Whether the tribunal could or should grant damages in lieu of an injunction. Sir Peter Gross found that it would be appropriate to grant damages in lieu of an injunction pursuant to s. 50 SCA 1981.

39. After another hearing on 22 March 2023, Sir Peter Gross issued his Second Partial Award, which set out the formal terms of the relief granted. It was, in part, in the following terms:

'A) I AWARD AND DECLARE that:

1) The Respondent [ie Spain] has acted, by maintaining its direct civil claims brought against the Claimant [ie the Club] in Spain other than under the International Convention on Civil Liability for Oil Pollution Damage 1992 (the "Non-CLC Claims"), and by taking steps in Spain to enforce against the Claimant the judgment and order of the Provincial Court of La Coruña dated 15 November 2017 and 11 January 2018 and the judgment of the Spanish Supreme Court dated 19 December 2018, and is acting, by taking steps in England to enforce the order of the Provincial Court of La Coruña dated 1 March 2019 (the "Execution Order"), in breach of its obligations not to pursue such Non-CLC Claims other than by way of London arbitration;

2) if the Respondent takes any further steps, in Spain or England (other than by way of making submissions to the Honourable Mr Justice Butcher in Claim No. CL-2019-000518 or on any appeal thereon, and to the Supreme Court in Case No. UKSC 2022/0062), or elsewhere, to enforce the Execution Order, or any other order of the Spanish Courts upholding or enforcing its Non-CLC Claims, against the Claimant, the Respondent shall be in breach of its obligations not to pursue its Non-CLC Claims other than by way of London arbitration;

3) if and when the Respondent obtains a final monetary judgment, (or any enforcement or other order or determination to similar effect) against the Claimant in any jurisdiction outside Spain in respect of and determining the precise sums awarded to it in the Execution Order or any of the preceding judgments of the Spanish Courts (a "Further Execution Order"), the Respondent shall in that jurisdiction by way of a final monetary award pay, give credit for and indemnify the Claimant in respect of an equal and opposite amount to that of the Further Execution Order obtained in its favour;

4) if and when the Respondent obtains satisfaction (in whole or in part) in any country in respect of any amounts awarded to it by the Execution Order or any of the preceding judgments of the Spanish Courts, or any Further Execution Order which it may in future obtain, the Respondent shall pay to and indemnify the Claimant in an amount equal to the sum obtained; and

5) to the extent not otherwise recoverable under a final costs order made in respect of the proceedings in question, the Respondent shall pay to and indemnify the Claimant in respect of its costs of defending the Respondent's Non-CLC Claims in Spain and/or any proceedings taken by the Respondent to enforce the Execution Order or any of the preceding judgments of the Spanish Courts, such sums and any interest thereon to be determined in a subsequent award, if not agreed, and jurisdiction is reserved for that purpose.

B) I further AWARD AND DECLARE that:

1) the costs of the reference and of this Award shall be determined in a subsequent award and jurisdiction is reserved for that purpose;

2) the Award of the Tribunal in paragraph (A)(3) above is final as to the compensation and an indemnity to be paid in the amount of an equal and opposite sum to that of any Further Execution Order which the Respondent may obtain; and

3) the jurisdiction of the Tribunal is otherwise reserved generally.'

40. By an Arbitration Claim Form dated 3 February 2023, Spain brought a number of challenges against the Gross First Award under ss. 67, 68 and 69 AA 1996. These applications were as follows:

The s. 67 AA 1996 application

Spain applied for the Gross First Award to be set aside in its entirety pursuant to s. 67 AA 1996 on the grounds that Sir Peter Gross had misinterpreted and misapplied the CJEU Judgment, and that 'on a true interpretation of that judgment and/or EU law and/or English law' Spain was not bound to arbitrate the dispute in question.

Further, that the paragraphs of the Gross First Award dealing with an injunction or damages in lieu should be set aside, on the basis that Sir Peter Gross had no jurisdiction to award an injunction (or damages in lieu) against Spain, by reason of s. 13 SIA, read with s. 48(5) AA 1996.

The s. 68 AA 1996 application

Spain applied for the Award to be set aside in so far as Sir Peter Gross had held that he had power to grant an injunction or damages in lieu, on the ground that he had exceeded his powers.

The s. 69 AA 1996 application

Spain applied for permission to appeal and for the Gross First Award to be set aside or varied, on the grounds that Sir Peter Gross made a number of errors of law, and in particular:

(1) That he had misinterpreted what was said to be a binding determination of EU law in the CJEU Judgment. The application stated that the Court should determine the following question of law in Spain's favour: 'What is the proper interpretation and effect of the CJEU Judgment as a matter of EU and English law, in particular, as regards: (i) the jurisdiction of the arbitrator, (ii) Spain's alleged breach of its equitable

obligation to arbitrate its direct action claims against the Club, and (iii) Spain's alleged liability for equitable and/or statutory relief";

(2) That he had misdirected himself in law in deeming himself not bound by the CJEU's determination of EU law. The application stated that the Court should determine the following question of law in Spain's favour: 'Whether the Tribunal was bound (or the Court is bound) to give effect to the reasons and determinations of EU law in [53]-[74] (sic) of the CJEU Judgment?';

(3) That he had erred by holding that he had the jurisdiction and power to grant injunctive relief against Spain pursuant to s. 48(5) AA 1996 despite s. 13(2) SIA;

(4) That he had erred by holding that a remedy of 'equitable compensation' was available generally when the case fell outside the types of case established by authority and the power pursuant to s. 50 SCA 1981 is not available.

41. The parties were in agreement that Spain's arbitration applications should be heard by me. As a hearing had already been fixed for me to hear argument on the remaining points arising on the Club's Appeal from the Registration Order, it was further agreed that Spain's arbitration applications should be heard at that hearing, which was somewhat extended for that purpose.

42. I should record that the Club has issued an application seeking s. 66 AA 1996 relief in respect of Sir Peter Gross's Awards. It was agreed that that was a matter which would not form part of this hearing; but that it would need to be considered before a final order was made.

43. In that way the matters which I outlined at the beginning of this judgment came before me at a hearing over four days in May 2023.

The Reference, the Advocate General's Opinion and the CJEU Judgment

The Making of the Reference

44. As is apparent from the above account, the Reference made to the CJEU and the CJEU Judgment are said to be of central relevance both to the determination of the Club's Appeal and to Spain's applications under ss. 67 and 69 AA 1996. It is necessary, therefore, to set out, in some detail, the background to, reasons for and course of the Reference.

45. The basic legal framework for the Reference was as follows:

(1) Article 267 of the TFEU provides as follows:

'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the questions is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

…'

(2) Following the withdrawal of the UK from the EU, the position in relation to References and the status of decisions of the CJEU is governed by the EU-UK Withdrawal Agreement ('WA') and the European Union (Withdrawal) Act 2018 as amended ('EUWA'). Under these provisions:

(a) Although the UK formally left the EU in January 2020, the EU and the UK agreed a transition period in Part IV of the WA, ending on 31 December 2020. During this period, the WA preserved the operation of EU law under the Treaties (Article 127). These provisions of the WA were given domestic effect in the UK by s. 7A EUWA.

(b) After the transition period, UK courts and tribunals are no longer bound by, but may have regard to, judgments of the CJEU rendered after that date. S. 6(1)-(2) EUWA provides: '(1) A court or tribunal – (a) is not bound by any principles laid down, or any decisions made, on or after IP completion day [viz the end of the Implementation Period, 31 December 2020] by the European Court … (2) Subject to this and subsections (3) to (6), a court or tribunal may have regard to anything done on or after IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.'

(c) This was subject, under s. 6(6A) EUWA, to the provisions of the WA itself. In that regard, Articles 86 and 89 of WA made particular provision for the situation in which preliminary references were made from UK Courts before the end of the transition period.

(d) Thus, Article 86 WA provides:

'1. The Court of Justice of the European Union shall continue to have jurisdiction in any proceedings brought by or against the United Kingdom before the end of the transition period. …

2. The Court of Justice of the European Union 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.

3. For the purposes of this Chapter, proceedings shall be considered as having been brought before the Court of Justice of the European Union, and requests for preliminary rulings shall be considered as having been made, at the moment at which the document initiating the proceedings has been registered by the registry of the Court of Justice or the General Court, as the case may be.'

(e) Article 89 WA provides in part:

'1. Judgments and orders of the Court of Justice 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.

…'

46. As I have said above, prior to the hearing of the Club's Appeal in December 2020, Spain had, in early November, issued an application for a preliminary reference of six questions to the CJEU. Those questions were as follows:

'The Questions:
(1) When assessing whether a declaratory order given in Member State B is irreconcilable with an order for damages in Member State A, is it permissible to base a finding of irreconcilability on the reasoning of the judgment underlying the declaratory order or must the finding be based on the order alone?
(2) Is a judgment which converts an arbitration award into a court order a judgment for the purposes of Article 34(3) of [the Regulation]?
(3) If the Courts of Member State A are seised and a related dispute is later referred to arbitration resulting in mutually exclusive orders from the courts of Member State A and the arbitral tribunal, can recognition of the judgment of Member State A be refused in Member State B pursuant to Article 34(3) of [the Regulation], on the basis that the judgment is irreconcilable with a non Regulation judgment of Member State B converting the arbitration award into a court order and (thereby) falling under the arbitration exception in Article 1(2)(d)?
(4) Is an arbitral award, which limits the compensation for damages to which the injured party is entitled by virtue of a final judgment in another Member State in legal proceedings instituted prior to such proceedings, itself incompatible with Article 19 TEU and [the Regulation], given that the award, with the authorization of a court, may be enforced in the same way as a judgment?
(5) If a party ("Party A") is a 'beneficiary' of an insurance policy, or a person entitled to sue an insurer under a direct action in the capacity of an injured person, which contains an arbitration agreement, but is not a contracting party to the arbitration agreement or insurance policy, such that Party A can bring claims against the insurer in Member State A pursuant to Sections 2 or 3 of Chapter II of [the Regulation], would it be contrary to those Sections for the courts of Member State B to hold that Party A is nonetheless obliged to bring claims against the insurer in arbitration, applying the domestic conflict of laws rules of Member State B? If such a holding by a court of Member State B would be contrary to those Sections of [the Regulation] can the insurer rely on that judgment from the courts of Member State B to refuse recognition of the judgment granted in Member State A pursuant to Article 34(3) of [the Regulation]?
(6) Can the recognition or enforcement of a judgment issued by the courts of Member State A be refused by the courts of Member State B as being manifestly contrary to public policy on the ground that a previous related judgment issued by Member State A violated the human rights of a party or a third party in breach of the ECHR, EU Charter and the ICCPR where the human rights complaints raised by that third party regarding the previous related judgment have already been examined by the ECtHR and determined to be inadmissible and manifestly

ill-founded?'

47. At the hearing in December 2020, Spain added another question which it sought to have referred, namely whether a Regulation judgment of Member State A can be refused recognition and enforcement pursuant to Article 34(1) of the Regulation in Member State B on the grounds that it is contrary to public policy by reason of a *res judicata* arising from either the arbitration award or an order pursuant to s. 66 AA 1996 enforcing the award if Article 34(3) is inapplicable or, to put it another way, whether Article 34(3) deals comprehensively with the effect of *res judicata*.

48. Much of the hearing in December 2020 was occupied by evidence and argument in relation to the Club's human rights ground. In addition, Spain developed its arguments in relation to the Club's irreconcilability and *res judicata* grounds. The main arguments were as follows:

(1) That the English s. 66 Judgments were not irreconcilable with the Spanish Judgment (paragraphs 100-120 of Spain's written closing submissions).

(2) That the English s. 66 Judgments were not relevant judgments for the purposes of Article 34(3) of the Regulation, because they were not judgments in which the matters at issue were decided by the courts of a Member State themselves (paragraphs 121-127 of Spain's written closing submissions). This was called in argument 'the *Solo* point' after *Solo Kleinmotoren GmbH v Boch* [1994] ECR I-2237.

(3) That enforcement of the English s. 66 Judgments would be contrary to the principle of mutual trust between the courts of Member States, given that the Spanish courts were first seised (paragraphs 128-134 of Spain's written closing submissions).

(4) That the English s. 66 Judgments were not relevant judgments for the purposes of Article 34(3) of the Regulation, because they were 'non-Regulation judgments' as they fell outside its subject-matter scope being within the arbitration exception to the Regulation (paragraphs 108-116 of Spain's written opening submissions and paragraph 149 of Spain's written closing submissions). This has been called the 'material scope point'.

(5) That a judgment entered 'contrary to Section 3 of Chapter II' of the Regulation (namely the Insurance Section) cannot prevent enforcement of a Regulation Judgment (paragraphs 135-148 of Spain's written closing submissions). Spain argued that the courts of Spain had exclusive jurisdiction to determine the relevant claims under Section 3. In the context of this argument, Spain relied on an analogy to be drawn from *Assens Havn v Navigators Management (UK) Ltd* [2018] QB 463.

(6) That the public policy exception in Article 34(1) was not applicable because *res judicata* is not a rule of public policy for the purposes of the Regulation (paragraph 154(1) of Spain's written opening submissions and paragraphs 93-97 of Spain's written closing submissions).

(7) That the consequences of *res judicata* are exclusively dealt with by Article 34(3) (as well as Articles 34(4), 35 and 72) of the Regulation, and cannot be invoked as public

policy under Article 34(1) (paragraphs 83-89 of Spain's written closing submissions). This was sometimes referred to as the '*lex specialis* point'.

(8) That the Club could have asserted *res judicata* during the Spanish proceedings, had elected not to do so, and in the circumstances it would not be contrary to public policy for there to be enforcement of the Spanish Judgment (paragraphs 90-94 of Spain's written closing submissions).

49. After the evidence, on Days 7 and 8 of the hearing, there were oral closing submissions. I had previously indicated that I wished to hear argument as to the question of a preliminary reference. On the morning of Day 7 I indicated that there were three questions which I had it in mind to refer. I said that, without attempting at that juncture to formulate their precise terms, those questions were:

'… firstly, whether a judgment entered in terms of an award under Section 66 is a relevant home judgment for the purposes of Article 34(3) on the basis that the court has not decided relevant issues on its own authority. In other words, what has been called, but it is only a shorthand, the SOLO point.

The second is whether a judgment is a relevant judgment for the purposes of Article 34(3) if it does not fall within the material scope of the Regulation because it falls within the arbitration exception thereto.

That is closely related but it seems to me to be distinct from the first question …

The third issue is whether the fact that a foreign judgment may be inconsistent with an award or with a judgment of the home court may, even if Article 34(3) is not applicable, be a ground of public policy which can give rise to a valid non-recognition under Article 34(1).'

50. There was then argument as to whether there should be a reference of those questions, and on Day 8, 18 December 2020, I decided that there should be. I gave my reasons in a judgment which is [2020] EWHC 3540 (Comm) ('the Reference Judgment'). In the Reference Judgment, I set out, at [10]-[11] the questions which Spain had sought should be referred, and which I have quoted above at [46]. At [28] of the Reference Judgment I noted that the three issues I had decided to refer, which were those which I had canvassed with the parties, 'were only some of those suggested by Spain [for a reference] but were those which I consider[ed to] raise issues which are suitable for a reference.' At [36] I identified the three issues as follows:

'They are, without seeking finally to formulate the questions at this stage: (1) whether a judgment entered in the terms of an award, such as a judgment under Section 66 of the Arbitration Act 1996, is a relevant "home" judgment for the purposes of Article 34(3); (2) whether in order to be a relevant "home" judgment for the purposes of Article 34(3) it has to be one which does not fall outside the material scope of the Regulation by reason of its falling within the arbitration exception thereto; and (3) whether the fact that a foreign judgment may be inconsistent with an award or with a judgment of the "home" court may, even if Article 34(3) is not applicable, be a ground of public policy which can give rise to valid non-recognition under Article 34(1).'

51. I invited the parties to collaborate in the formulation of a Reference to the CJEU. This they did in the ensuing days. One matter which occurred during this process was that the parties did not agree on the inclusion in the draft of some matters in a paragraph which dealt with the bases on which Spain had resisted the Club's Appeal. Specifically, Spain's counsel had suggested text which identified the points Spain had taken as including: (1) that the judgments were not irreconcilable; (2) that a relevant judgment for the purposes of Article 34(3) should be one which did not impair the practical effectiveness of the objectives of the Regulation, which the English s. 66 Judgments did in circumstances where the Spanish Court 'had been first seised'; and (3) that a relevant judgment for the purposes of Article 34(3) 'must be a judgment which does not conflict with Section 3 of Chapter II of [the Regulation]'. Mention of these matters was objected to by the Club's counsel on the basis that these arguments '[did] not relate to the issues being referred', and that its 'position is that Spain's arguments which do not relate to the questions being referred are irrelevant to the reference and should not be included in this document.' Spain's counsel's comment was that 'Spain consider[s] it relevant to set out the full scope of the arguments at this stage. It is only by doing so that the CJEU can see precisely what issues Mr Justice Butcher made references in relation to and which he did not.' I indicated that I considered that the contested paragraphs should not be included, and asked for further comments on a version which did not include them. There were no further material comments.

52. The formal Request to the CJEU for a Preliminary Ruling, which appeared in the Schedule to an Order dated 21 December 2020 contained, at paragraphs [6]-[39], a summary of the subject matter of the dispute and the facts on which the questions were based; at paragraphs [44]-[46] a summary of the relevant EU law (namely Articles 1, 2 and 34 of the Regulation), and of relevant national law (namely s. 66 AA 1996 and national cases relating to it); and at [47]-[54] 'the Reasons for the Reference'. This last section included the following:

'[48] As to the first question, the issue was whether the requirements described in C-414/92 *Solo Kleinmotoren GmbH v Boch Case* [1994] ECR I-2237 that the decision in question must emanate from a judicial body of the relevant Member State and must decide issues between the parties meant that a s. 66 judgment is not a "judgment" for the purposes of Article 34(3) of Regulation No. 44/2001. In particular, the question is whether a s. 66 judgment qualifies as a "judgment" where the national court has determined certain disputed issues between the parties but has not itself heard all the substantive merits of the dispute, which had been heard by the arbitration tribunal. There is no decision of the CJEU which has expressly decided this precise point. Mr Justice Butcher considered that he could not be completely confident of the answer which the CJEU would give to this point because of (a) the principle that the exceptions to enforcement of judgments of member states are to be strictly construed; (b) the apparent width of the formula stated in the English version of *Solo Kleinmotoren GmbH v Boch* which could possibly be interpreted to exclude s. 66 judgments; and (c) the fact that different views have been expressed by academic writers.

[49] As to the second question, the issue was whether a judgment falling outside the material scope of Regulation No 44/2001 by reason of the Article 1(2)(d) arbitration exception (such as a s. 66 judgment) can prevent recognition and enforcement of a Regulation judgment from another Member State pursuant to Article 34(3) of the Regulation. It was argued on behalf of the Club that this point was either *acte clair* or

acte éclairé, including by reason of Case 145/89 *Hoffmann v Krieg* [1988] ECR 645, where the ECJ held that a divorce decree granted in the Netherlands (which was a judgment falling outside the material scope of the Brussels Convention) prevented enforcement of a maintenance order between spouses granted in Germany (which was, at that time, a judgment falling within the material scope of the Brussels Convention). Mr Justice Butcher did not accept that the point was *acte clair* or *acte éclairé* because: (a) *Hoffmann v Krieg* did not concern the arbitration exception and was concerned with the status of natural persons; and (b) different views have been expressed by academic writers as to whether a judgment falling under the arbitration exception can or cannot be relied upon to prevent recognition and enforcement pursuant to Article 34(3) of Regulation No. 44/2001.

[50] Mr Justice Butcher also considered that it was difficult to separate questions one and two. Further, academic writers have considered that the issues are both open and important.

[51] As to the third question, the issue was whether, on the hypothesis that Article 34(3) of Regulation No. 44/2001 does not apply, it was permissible to rely on Article 34(1) as a ground for refusing recognition or enforcement of a judgment of another Member State on the basis that it violated 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. In particular, the question is whether it is permissible to refer to Article 34(1) in these circumstances or whether Articles 34(3) and (4) are "*exhaustive*" of the grounds on which recognition or enforcement can be refused on the basis of *res judicata* and/or irreconcilability. Mr Justice Butcher stated that it was accepted by the Club that the question of whether conflict with *res judicata* arising from a judgment can be relied upon as a ground for preventing recognition and enforcement pursuant to Article 34(1), where Article 34(3) does not apply, was not *acte clair* in favour of the Club, in the light of *Hoffmann v Krieg*. As to *res judicata* arising from an award, Mr Justice Butcher considered that there was an argument to the effect that, if it was contrary to Regulation No. 44/2001 to rely on *res judicata* created by a judgment giving effect to an arbitral award under Article 34(1), it would also be contrary to the Regulation to rely on *res judicata* created by the award itself.'

53. The Request concluded with the Questions actually referred, which were 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 Arbitration Act 1996, 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) of EC Regulation No. 44/2001?

(2) Given that a judgment entered in the terms of an award, such as a judgment under Section 66 of the Arbitration Act 1996, is a judgment falling outside the material scope of Regulation No. 44/2001 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) of the Regulation?

(3) On the hypothesis that Article 34(3) of Regulation No. 44/2001 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) of Regulation No. 44/2001 as a ground for refusing recognition or enforcement or do Articles 34(3) and (4) of the Regulation provide the exhaustive grounds by which *res judicata* and/or irreconcilability can prevent recognition and enforcement of a Regulation judgment?'

54. The Request was transmitted by the Senior Master to the CJEU on 22 December 2020, with a copy of the Reference Judgment. On about 12 February 2021 the CJEU notified the parties of the Reference and of the right to submit written observations. These observations were required to be filed to the same deadline. Between 21 and 31 May 2021 a number of parties entitled to participate in the Reference filed written observations with the CJEU, namely: the Commission, the Club, Spain, the French State, Germany, Poland, Switzerland and the UK. No party had sight of the others' written observations prior to filing.

55. No party made an admissibility challenge to any of the three questions.

56. On 3 August 2021 the CJEU circulated the various written observations to the parties. The CJEU's procedure does not permit responsive submissions to the written observations filed with the court. What did happen was that on 23 August 2021 the Club wrote to the CJEU requesting an oral hearing. Part of that letter was in these terms:

'e. Some Written Observations seek to raise issues which have **not** been referred, such as the question of whether the Spanish Judgment and the English judgment are, in any event, 'irreconcilable' and whether Case C-368/16 *Assens Havn* has any bearing on those issues. Given that these points were not raised by the questions referred, the [Club] has not yet had the opportunity to make submissions on them and respectfully submits that it should be given the opportunity to address the Court as to why these issues are irrelevant to the questions referred and, if necessary, explain why, in any event, they are misconceived.' (emphasis in original)

57. On 22 November 2021, the CJEU informed the parties that there would be an oral hearing on 31 January 2022. The CJEU Administrator said that the time for the Club's oral submissions would, unless extended, be 15 minutes. The letter also requested the parties, in preparation for the hearing, to take into account the measures of organisation decided on by the CJEU, which were set out in a document which was attached. Those measures of organisation were as follows:

'**ANNEX I**

Request for oral submissions to concentrate on particular issues

'In their replies to the first and second questions, the interveners at the hearing are requested to focus their arguments on whether the objectives underlying Regulation No. 44/2001 require an order of a national court to be excluded from the scope of that regulation merely because, in substance, it is entered in the terms of an arbitration award.'

ANNEX II

Questions requiring an oral answer

'The London Steam-Ship Owners' Mutual Insurance Association is requested to state whether it participated in the Spanish court proceedings which gave rise to the decision the recognition and enforcement of which is sought and/or whether it challenged the jurisdiction of the Spanish courts.

The Spanish Government is requested to explain the statement made in its written observations that 'the arbitration proceedings were artificially constructed'. The Spanish Government is also requested to state whether it considers that the procedure provided for in sections 66 to 73 of the 1996 Arbitration Act does not allow the legitimacy of the use of arbitration proceedings to be challenged.

Lastly, both parties are requested to take a position on the line of argument made in paragraphs 12 to 29 of the French Government's observations to the effect that the Spanish court decision at issue in the main proceedings cannot be regarded as being irreconcilable, within the meaning of Article 34(3) of Regulation No. 44/2001, with the English judgment entered in the terms of the arbitration award.'

58. The oral hearing took place in Luxembourg on 31 January 2022. The parties, the Commission, Switzerland, as well as the Member States who had submitted written observations, attended. No other Member or EFTA State attended. The parties had 15 minutes each, other than the Club which had 25 minutes, to make oral presentations as well as the opportunity to respond briefly to other parties' submissions and certain questions from the Court. The CJEU does not permit access to the transcript of its hearings. Mr De La Mare KC told me, however, that the Club's submissions had commenced by pointing out that the issue raised by France as to the judgments not being irreconcilable had not been referred; and pointed to paragraphs 10 and 28 of the Reference Judgment and the *Touring Tours* line of jurisprudence (to which I will return). The Club also answered that point on the substance. It then proceeded to answer questions 1 and 2. It said nothing orally about question 3.

The Advocate General's Opinion

59. Advocate General Collins delivered his Opinion on 5 May 2022. After an 'Introduction', a description of the 'Legal Framework' and a summary of the facts, the Advocate General, at [26] set out the questions referred. He then referred to the 'Procedure' before the CJEU. His section V was his 'Legal assessment'. This commenced with two preliminary observations. These were as follows:

'31. First, at the hearing some of the parties sought to call into question issues that have already been determined by the referring court. Those include findings that the Spanish State's claims against the Club under Article 117 of the Spanish Criminal Code were to be characterised under English law as claims to enforce obligations under that provision, rather than independent rights derived from Spanish statues; that those English law obligations could be enforced only in accordance with their terms, that is, by way of arbitration and subject to the 'pay to be paid clause'; and that the claims were capable of being adjudicated upon by way of arbitration.

32. In proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. It is not for the Court to rule on the interpretation of provisions of national law or to decide whether the referring court's interpretation of them is correct. It follows that, in the exercise of the jurisdiction conferred upon it, the Court cannot entertain the arguments described in the preceding point of the present Opinion.

33. Second, the French Government submits that the Spanish Judgment and the section 66 judgment are not irreconcilable. The fact that a national court has jurisdiction does not necessarily preclude, in absolute terms and in particular in the context of an action for damages, another national court, or an arbitration tribunal, from asserting that it has jurisdiction and vice versa. It observes that the Club did not consider it necessary to participate in the Spanish proceedings and that, under Spanish law or international law, a court does not have to raise of its own motion an objection of a lack of jurisdiction based on the existence of an arbitration clause. It was thus manifestly in view of the fact that its jurisdiction had not been challenged by reason of the existence of such a clause that the Spanish court accepted jurisdiction over the dispute. That the section 66 judgment finds that the arbitral tribunal seised by the Club has jurisdiction on the basis of an arbitration clause in the insurance contract thus does not make it irreconcilable with the Spanish Judgment.

34. The French Government also submits that the fact that the arbitral tribunal held that the 'pay to be paid' clause was enforceable against third parties having suffered damage caused by the insured in the absence of prior payment does not preclude a national court from not applying that clause, all the more so where – as in this case – the interested party neither invoked it nor relied upon the absence of any prior payment before that court. A party cannot assert that a judgment is irreconcilable with a judgment made in another Member State due to the failure of that party to appear before the court that delivered the second judgment, the recognition of which is sought in the Member State in which the first judgment was delivered.

35. The French Government's arguments are incorrect for the following two reasons.

36. First, as the United Kingdom observed at the hearing and as the French Government itself points out in its written observations, the questions referred for a preliminary ruling are based on the premiss that the Spanish Judgment and the section 66 judgment are irreconcilable. What is more, as the United Kingdom also observed at the hearing, it is apparent from the referring court's judgment of 18 December 2020, in which it decided on the questions to be submitted for a preliminary ruling, that it refused the Spanish State's express invitation to refer any question of irreconcilability to the Court. It is sufficient to recall that it is for the referring court alone to determine and formulate the questions to be referred for a preliminary ruling concerning the interpretation of EU law which are necessary in order to resolve the dispute in the main proceedings. Whilst the referring court is at liberty to request the parties before it to suggest suitable wording for the question to be referred, it is for that court alone to decide both its form and its content. The Court's case-law also makes it clear that, where the referring court expressly states in its order for reference that it did not consider it necessary to ask a question or if it implicitly refuses to submit to the Court a question raised by one of the parties, the Court may not answer that question or take it into account in the reference for a preliminary ruling. [footnote reference to Case C-412/17 *Touring Tours und*

Travel and Sociedad de Transportes and the case law cited]. In the light of the foregoing, the French Government's arguments concerning the issue of irreconcilability are patently inadmissible.

37. Second, those arguments are, in any event, ineffective. In *Hoffmann*, the Court ruled that the irreconcilability of two judgments is to be ascertained by asking whether they entail mutually exclusive legal consequences. Irreconcilability is, thus, determined by reference to the effects that judgments produce; it is neither concerned with the legal reasoning on which they are based nor with the procedural steps that led to their adoption. Nor does the irreconcilability of judgments depend upon the parties' conduct, as the French Government suggests. In the present case, the judgments at issue have diametrically opposed legal consequences, at least as concerns the Club: whilst the Spanish Judgment held the Club liable, the section 66 judgment declared that the Club was not liable by reason of the 'pay to be paid' clause.'

60. The Advocate General then proceeded to consider the first two questions referred together. He dismissed the UK's suggestion that the Court should decline to answer them. He considered the reasons for and scope of the exclusion of arbitration from the scope of the Regulation. He then gave his opinion that 'a judgment made under section 66 of the Arbitration Act 1996 plainly qualifies as a "judgment" in the requested State for the purposes of Article 34(3)' of the Regulation (at [52]). His reasons may be summarised as follows: (1) that the concept of 'judgment' is defined by Article 32 in very broad terms (at [53]); (2) that a judgment under s. 66 AA 1996 satisfied the conditions set out in *Solo Kleinmotoren*: it was not an automatic or rubber-stamping exercise (at [54]-[58]); (3) that the fact that the subject matter of such a judgment would not fall within the material scope of the Regulation did not mean that it was not a relevant judgment for the purposes of Article 34(3), a conclusion supported by *Hoffmann v Krieg* (at [59]-[65]); and (4) that if national court decisions giving effect to arbitral awards were considered as falling outside the scope of Article 34(3) this would produce anomalies, including that non-domestic arbitral awards would be in a superior position in the legal order of the Member State in which recognition is sought compared with domestic arbitral awards. At para [70] the Advocate General said:

'I therefore propose that the Court should answer the first and second questions by holding that a judgment entered in the terms of an arbitral award pursuant to section 66(2) of the Arbitration Act 1996 is capable of constituting a relevant "judgment" of the Member State in which recognition is sought for the purposes of Article 34(3) of Regulation No. 44/2001, notwithstanding that such a judgment falls outside the scope of that regulation by reason of Article 1(2)(d) thereof.'

61. The Advocate General then addressed the third question referred. He said that, in view of his proposed answers to the first two questions, this question did not need to be answered; but he would address it briefly (at [72]). He then referred to the need for Article 34(1) to be construed strictly (at [73]). After referring to previous jurisprudence, including in *Hoffmann v Krieg*, he said (at [77]-[78]):

'[77] I therefore agree with the French Government's observation that the EU legislature intended to regulate exhaustively the issue of *res judicata* and/or irreconcilability by means of Article 34(3) and (4) of Regulation No. 44/2001, thereby excluding the possibility of recourse to the concept of public policy in that context. …

[78] Should the Court find that Article 34(3) of Regulation No. 44/2001 does not apply to the circumstances of this reference for preliminary ruling, I therefore suggest that it hold that the referring court cannot rely on Article 34(1) thereof 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 made by a court of the Member State in which recognition is sought and that Article 34(3) and (4) of Regulation No. 44/2001 exhausts the grounds upon which recognition or enforcement may be refused by reason of *res judicata* and/or irreconcilability.'

The CJEU Judgment

62. As I have said, the CJEU delivered its judgment on 20 June 2022.

63. After setting out the Legal Framework and a summary of the facts, the CJEU turned, at [41], to address the first and second questions together. At [44]-[47] the Court noted that the arbitration exception in Article 1(2)(d) of the Regulation excluded arbitration in its entirety and that a judgment entered in the terms of an award cannot enjoy mutual recognition between Member States in accordance with the Regulation. However, as the Court said at [48]-[53], such a judgment was capable of being regarded as a 'judgment' within the meaning of Article 34(3). The Court said that this followed from the broad definition of 'judgment' set out in Article 32 of the Regulation, and from the purpose of Article 34(3) which was 'to protect the integrity of a Member State's legal order and ensure that its rule of law is not disturbed by the obligation to recognise a judgment from another Member State which is inconsistent with a decision given in a dispute between the same parties by its own courts' (at [50]). *Solo Kleinmotoren* was said to provide an analogy. Secondly, the fact that the exclusion of a matter from the scope of the Regulation did not preclude a judgment relating to that matter from coming within the scope of Article 34(3). The Court referred to *Hoffmann v Krieg*. At [53] the Court said:

'Accordingly, 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) of Regulation No. 44/2001, 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.'

64. At paragraphs [54]-[73] there followed reasoning which had no counterpart in the Advocate General's Opinion, and whose status has been the subject of debate and to which I will return below.

65. The reasoning was as follows. In [54] the Court said:

'However, the position is 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.'

At [55]-[58] the Court referred to the need to look at the objectives of the Regulation and the principle of mutual trust, and the right to an effective remedy. At [59] the Court continued:

'In the present case, it should be noted that the content of the arbitral award at issue in the main proceedings could not have been the subject of a judicial decision falling within the scope of Regulation No 44/2001 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*.'

66. At [60] the Court referred to *Assens Havn* and the fact that a jurisdiction clause in an insurance contract could not be invoked against a victim of insured damage, and to the 'relative effect' of an arbitration clause in such a contract. At [61] it was said:

'It follows that, to avoid the right of the victim being undermined, a court other than that already seised of that direct action should not declare itself to have jurisdiction on the basis of such an arbitration clause, the aim being to guarantee the objective pursued by Regulation No. 44/2001, namely the protection of injured parties vis-à-vis the insurer concerned.'

67. At [64]-[71] the Court then made a point about *lis pendens* in which it was said that as at the date on which the arbitration proceedings were commenced, the Spanish proceedings were already extant, and that (at [69]) '[s]uch circumstances amount to a situation of *lis pendens* in which, in accordance with Article 27 of Regulation No. 44/2001, any court other than the court first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised has been established and then, where the jurisdiction of the court first seised is established, decline jurisdiction in favour of that court.'

68. The Court then said this, at [71]-[73]:

'[71] It is for the court seised with a view to entering judgment in the terms of an arbitral award to verify that the provisions and fundamental objectives of Regulation No. 44/2001 have been complied with, in order to prevent a circumvention of those provisions and objectives, such as a circumvention consisting in the completion of arbitration proceedings in disregard of both the relative effect of an arbitration clause included in an insurance contract and the rules on *lis pendens* laid down in Article 27 of that regulation. In the present case, it is apparent from the documents before the Court and from the hearing that no such verification took place either before the High Court of Justice (England and Wales), Queen's Bench Division (Commercial Court), or before the Court of Appeal (England and Wales) (Civil Division) and, moreover, that neither of those two courts made a reference to the Court for a preliminary ruling under Article 267 TFEU.

[72] In such circumstances, a judgment entered in the terms of an arbitral award, such as that at issue in the main proceedings, cannot prevent, under Article 34(3) of Regulation No. 44/2001, the recognition of a judgment from another Member State.

[73] In the light of the foregoing, the answer to the first and second questions is that Article 34(3) of Regulation No. 44/2001 must be interpreted as meaning that a judgment entered by a court of a Member State in the terms of an arbitral award does not constitute

a 'judgment', within the meaning of that provision, 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 that regulation, in particular as regards the relative effect of an arbitration clause included in an insurance contract and the rules on *lis pendens* contained in Article 27 of that regulation, and that, in that situation, the judgment in question cannot prevent, in that Member State, the recognition of a judgment given by a court in another Member State.'

69. At [74]-[80] the Court addressed the third question, and concluded, in [80]

'In the light of the foregoing, the answer to the third question is that Article 34(1) of Regulation No 44/2001 must be interpreted as meaning that, in the event that Article 34(3) of that regulation does not apply to a judgment entered in the terms of an arbitral award, the recognition or enforcement of a judgment from another Member State cannot be refused as being contrary to public policy on the ground that it would disregard the force of *res judicata* acquired by the judgment entered in the terms of an arbitral award.'

70. The Court then gave rulings in essentially the terms of paragraphs [73] and [80] of its judgment.

The Gross First Award and the CJEU Judgment

71. I have already summarised the issues addressed by Sir Peter Gross in the Gross First Award, and the answers he gave to them.

72. It is helpful here, for the purposes of exposition, to refer to the reasoning of Sir Peter Gross in relation to the third of the issues referred to him (as summarised above), in relation to the effect of the CJEU Judgment.

73. At [95]-[107] Sir Peter Gross summarised the effect of the CJEU Judgment. At [108]-[120] he summarised the rival contentions. On the part of Spain, these were that the CJEU Judgment (a) meant that he had no jurisdiction, and (b) was in any event a complete answer to the Club's claim in the arbitration because it meant that Spain had not had an obligation to arbitrate the dispute. As to (a), the Club contended that the arbitrator's jurisdiction had been determined in *The Prestige (Nos. 3 and 4)*. As to (b), the CJEU had made no decision to that effect; and that had it done so, it had no jurisdiction to do so. In this connexion the Club argued that the CJEU: had gone outside the questions referred to it; had purported to answer questions of fact or of the application of law to the facts, which were matters only for the national court; had adopted an unfair process; and insofar as it had answered the wrong questions had given answers which were not binding because of Brexit.

74. At [121]-[122] Sir Peter Gross summarised the nature of a reference to the CJEU, on which he said that there had been relatively little serious disagreement. His summary involved the following propositions:

(1) That the purpose of a reference by national courts to the CJEU for a preliminary ruling is to obtain assistance on the interpretation of EU law to facilitate a decision by a national court of the dispute before it. In some cases a preliminary ruling might be

decisive; in others it might comprise only part of the material to be considered by the national court.

(2) References to the CJEU for preliminary rulings involve a system of '… direct cooperation between the Court of Justice and the national courts by way of a non-contentious procedure … completely independent of any initiative by the parties, who are merely invited to state their case within the legal limits laid down by the national court' (*Palmisani v INPS* Case C-261/95 at [31]).

(3) It is for the referring (national) court alone '… to determine and formulate the questions to be referred for a preliminary ruling concerning the interpretation of EU law which are necessary … to resolve the dispute in the main proceedings…' (*Touring Tours* Case C-412/17 at [39]). This has ramifications for the parties and for the CJEU. As regards the parties, while they may suggest wording for the questions to be referred, it is for the national court alone to decide on the form and content of those questions; and as regards the CJEU, '… if the referring court expressly stated in its order for reference that it did not consider it necessary to ask a question or if it implicitly refused to submit to the Court of Justice a question raised by one of the parties, the Court of Justice may not answer that question or take it into account in the reference for a preliminary ruling…' (ibid, at [41]). It is not open to the CJEU to extend the scope of the questions asked (ibid, at [42]). Sir Peter Gross added: 'As it seems to me and though a national court would not lightly do so, if the CJEU purported to answer a question not, or falling outside, those referred to it, the national court is not bound to follow any such purported answer.'

(4) Article 267 TFEU is based on a clear separation of functions between national courts and the CJEU. It is for the CJEU to give preliminary rulings on EU law but only on the facts placed before it by the national court. The CJEU's analysis of the legal issues is binding on national courts. Contrastingly, the evaluation of the facts of the case and the application of EU law to the facts, come within the province of the national courts.

(5) Though it is for the national court alone to formulate the questions to be referred to the CJEU for a preliminary ruling, the CJEU has and must have the power to reformulate those questions where necessary for the purpose of giving its decision. That said, it is incumbent on the CJEU, if reformulating the wording, neither to expand the scope of the questions referred to it, nor to seek to apply the law to the facts or to delve into questions of fact. The case of *Worten v Autoridade* Case C-342/12 was not one where the CJEU answered a different question to that referred; it answered the question referred but had regard to other provisions of the regulation involved because the question had referred to the wrong article of the directive.

75. At [123]-[141] Sir Peter Gross set out his analysis and conclusions.

76. At [123] he said that, in commercial law 'certainty and predictability are interests of the first importance'; and that, 'with such criteria in mind and with great respect, the CJEU Judgment is deeply troubling'. He referred to the fact that it had been the subject of 'excoriating criticism' by Professor Adrian Briggs KC. He said:

'A particular curiosity of the CJEU Judgment is that while not appearing to cast doubt upon its own well-established previous decisions entrenching and embodying the arbitration exception to the Regulation (*Marc Rich* and *Gazprom* …), let alone seeking

to overrule them, the Judgment also appears to ride roughshod over that exception and, in so doing, eliding arbitration and court proceedings, together with settled distinctions between arbitration and jurisdiction clauses.'

Sir Peter Gross identified paragraphs [54]-[73] of the CJEU Judgment as 'Part 2 of the Judgment', and said that that part 'risks undermining confidence in arbitration within the jurisdiction of the CJEU – a most unfortunate development internationally … The focus on *lis alibi pendens* in the context of an arbitration clause is itself of grave concern, threatening to subvert arbitration proceedings and derail enforcement…'

77. At [126] Sir Peter Gross considered whether the CJEU Judgment had any bearing on his jurisdiction as an arbitrator. He concluded that, whatever its ambit in other respects, the CJEU Judgment said nothing at all about his jurisdiction; and that he entertained no doubt at all about his having jurisdiction.

78. At [127]-[132] Sir Peter Gross considered whether the CJEU Judgment had decided that Spain had not been obliged to arbitrate its dispute with the Club and hence was not in breach of any equitable obligation by pursuing its Article 117 claims and seeking to enforce the Spanish Judgment. The Arbitrator found that the CJEU Judgment did not contain any such decision. He said (at [130]) that 'Part 2' of the CJEU Judgment went to the status of English court judgments, not whether Spain was in breach of its obligation to arbitrate. He said (at [131]) that the CJEU Judgment had said nothing about whether Spain had been obliged to pursue its dispute in arbitration, and that he could see no proper basis for reading in any such decision.

79. At [133] Sir Peter Gross said that, tempting though it was to leave matters with his conclusion that the CJEU Judgment did not decide that Spain was not bound to arbitrate its dispute with the Club, he did not think he should avoid the question of whether Part 2 of the CJEU Judgment was binding on the English courts (or him), 'unwelcome and invidious though it is'. He said that his task was to consider whether any part of the CJEU Judgment fell outside the questions in the Reference or purported to apply the law to the facts.

80. At [134] Sir Peter Gross said:

'With great respect and after anxious consideration, should this question arise for decision, I am unable to accept that the CJEU Judgment, at [54]-[73] (ie, Part 2 of the Judgment), binds me. That is not a conclusion I reach lightly but it is one to which I come without any real hesitation.'

81. Sir Peter Gross continued, at [135], to say that the exercise engaged in by the CJEU in 'Part 2' of the CJEU Judgment 'went far and plainly beyond reformulating the Questions referred to it by the English Court'. He then said, at [136], that 'Part 2' of the CJEU Judgment was 'plainly based on Questions which had not only <u>not</u> been referred by the national court but which the national court had refused to refer.' Furthermore, at [137], that whatever the position in relation to the *lis alibi pendens* and *Assens Havn*/insurance provisions points, 'it is in my view indisputable that Questions 1-3 comprising the Reference did not include any question as to whether Spain was in breach of its quasi-contractual obligation to arbitrate.'

82. Thus Sir Peter Gross concluded, at [141], that the CJEU Judgment did not deprive him of jurisdiction; did not decide that Spain was not bound to arbitrate its dispute with the Club; and that 'Part 2' was not binding on him, both because it purported to apply the law to the facts and because it dealt with questions not included in the Reference.

The Club's Appeal

83. With that introduction I can turn to consider the remaining issues in the Club's Appeal against the Registration Order.

84. To recap, the remaining grounds were:

(1) The Club's argument that the Spanish Judgment should not be enforced by reason of irreconcilability within Article 34(3) of the Regulation; and

(2) The Club's argument that the Spanish Judgment should not be enforced by reason of the public policy ground under Article 34(1) of the Regulation, on the basis that it would be contrary to the rule of *res judicata*.

85. It may also be helpful to reiterate the principal terms of the Regulation which are germane. They are as follows:

'Article 32
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.

Article 33
1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

…

Article 34
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.

Article 35

1. 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.

…

Article 38

The court or authority before which a judgment given in another Member State is invoked may suspend the proceedings, in whole or in part, if:

(a) the judgment is challenged in the Member State of origin; or

(b) an application has been submitted for a decision that there are no grounds for refusal of recognition as referred to in Article 45 or for a decision that the recognition is to be refused on the basis of one of those grounds.

The Irreconcilability Ground: Article 34(3)

86. In relation to the first main ground relied on by the Club, irreconcilability with the English s. 66 Judgments, the Club contends:

(1) That the English s. 66 Judgments were 'judgments' given in the Member State in which recognition is sought;
(2) That they were given in a dispute between the same parties; and
(3) That the Spanish Judgment and the English Judgments entail legal consequences that are mutually exclusive and are therefore 'irreconcilable'.

Accordingly the Club argues that Article 34(3) is applicable.

87. Spain disputes that Article 34(3) applies in this case. It contends that the English s. 66 Judgments do not qualify as a relevant 'local' judgment for the purposes of Article 34(3) and/or are not such as to have the effect of precluding recognition and enforcement of the Spanish Judgment. At the hearing in December 2020 Spain contended that this was because:

(1) The English s. 66 Judgments were (and are) not 'irreconcilable' with the Spanish Judgment;
(2) In any event:
    (i) The English s. 66 Judgments did not decide any, or any relevant, issues between the parties but were instead a remedy by which the terms and/or the decision of the Schaff Award were reproduced in a judgment;
    (ii) The English s. 66 Judgments, because given in arbitration proceedings, fell outside the material scope of the Regulation, and were therefore 'non-Regulation' judgments, and Article 34(3) does not apply in relation to non-Regulation judgments;
    (iii) The English s. 66 Judgments were contrary to the principle of mutual trust and impaired the practical effectiveness and objectives of the Regulation;
    (iv) The English s. 66 Judgments conflicted with the mandatory jurisdiction provisions dealing with insurance claims contained in Section 3 of Chapter II of the Regulation.

88. I did not understand that, in light of the CJEU Judgment, Spain had abandoned any of the arguments summarised in (2). However, Spain's arguments came to be founded, and reformulated, on the basis of paragraphs [54]-[73] of the CJEU Judgment.

Are the Judgments irreconcilable?

89. I turn first to consider Spain's argument that the English s. 66 Judgments were and are not 'irreconcilable' with the Spanish Judgment. That was not an issue which was referred to the CJEU, and I did not understand there to be any contention that it had been decided by the CJEU Judgment.

The Parties' Positions

90. Spain's argument involved the following contentions:

(1) The exception to recognition contained in Article 34(3), like other exceptions to recognition, must be strictly interpreted and applied.

(2) There will only be irreconcilability if the judgments entail legal consequences which are necessarily mutually exclusive.

(3) The English s. 66 Judgments are not impossible to reconcile with the Spanish Judgment. The English s. 66 Judgments were declarations that a cause of action under the Club Rules had not accrued under English law as at the time of the declaration, in the absence of payment by the Owners, and were not general, definitive or absolute declarations of non-liability. The Spanish Judgment simply ordered the Club to pay sums to Spain, subject to the limitation of liability in the Club Rules, and was silent as to the precise factual and analytical basis by which the Club was held liable to Spain. There was nothing in the Spanish Judgment to indicate that a cause of action under the Club Rules had not *by then* accrued. This, Spain argued, could, hypothetically, have occurred in a number of ways. To seek to contradict that possible reading would involve looking at the substance of the judgments which had preceded the formal orders (including in particular the Spanish Judgment), but that was impermissible.

(4) Even if the point in (3) is not correct, the legal effect of the English s. 66 Judgments was not inconsistent with the Spanish Judgment because: (a) the English s. 66 Judgments, being declarations, could only prevent the Spanish Judgment from arising and the Club being held liable in circumstances where the Club had elected to rely on them in Spain, which it had not; and (b) the English s. 66 Judgments were only declarations as to the legal state of affairs appertaining at the time. In relation to (b), the declarations did not purport to declare the legal position if the Club should enter an appearance in the Spanish Courts; the Club had in fact entered an appearance before the Spanish Courts, as recorded in the Spanish Judgment; and therefore the declarations were simply inapplicable.

(5) In any event, the Spanish Judgment was reconcilable with the English s. 66 Judgments on the facts, because the declarations in the English s. 66 Judgments were consistent with the Club's being held liable in Spain in circumstances in which the Club had taken steps in the Spanish proceedings but had not relied on the

defences which it might have done. The Club had submitted to the jurisdiction of the Spanish Courts by entering an appearance at the quantum stage.

91. The Club's answers to these contentions involved the following:

(1) The essential test as to irreconcilability is set out in *Hoffmann v Krieg* [1988] ECR 645. That involves an investigation of whether the legal consequences of the two judgments are mutually exclusive. It is not necessary for the common issue, in relation to which the irreconcilability arises, to have been expressly decided upon in both judgments, and irreconcilability can be found in relation to findings which are presupposed in, implicit in or the premise of the judgments.

(2) The English s. 66 Judgments declared that, pursuant to the 'pay to be paid' clause and in the absence of prior payment, the Club was not liable to Spain. No prior payment had been made, nor, logically, could it have been made for otherwise the direct action against the Club in Spain could not have succeeded as Spain would have been compensated. Accordingly, the English s. 66 Judgments and the Spanish Judgment necessarily involved mutually exclusive legal consequences and effects.

(3) Spain's contention that the court has to consider only the terms of the formal orders of the two courts in isolation and ask whether their wording was inconsistent and whether there is a possible legal reason, even if unexpressed in the orders, as to how the orders could be consistent, is not what is required by the test in *Hoffmann v Krieg*. In any event, the terms of the orders were inconsistent, and it is Spain which is suggesting that the court should go behind the terms of the orders and conceive of unexpressed reasons as to how they might be compatible.

(4) The declaration in the English s. 66 Judgments as to the Club's non-liability was not contingent on the Club's not entering an appearance in the quantum stage at some point in the future. In any event, the Club had not entered an appearance in the Spanish proceedings in relation to the liability stage, but only at the quantum stage. It was the finding of liability which underlies the Spanish Judgment and is the basis of the irreconcilability with the English s. 66 Judgments. Any appearance thereafter is by the by.

Discussion

92. The test of irreconcilability was elucidated by the ECJ in the decision in *Hoffmann v Krieg*. In that case, there had been an order of a German court in 1979 ordering Mr Hoffmann to pay maintenance to Mrs Krieg as a separated spouse. In 1980, a Dutch court dissolved the marriage. The issue arose as to whether the maintenance order should be recognised and enforced in the Netherlands courts. One of the questions referred to the ECJ was:

'In a case such as this, is it possible to plead that the German maintenance order is irreconcilable with the subsequent Netherlands decree of divorce or to plead public policy (Article 27(1) and (3) of the Brussels Convention)?'

93. In answering that question the ECJ reasoned as follows:

'[20] The provisions to be interpreted set out the grounds for not recognizing foreign judgments. …

[21] As far as the second part of the third question is concerned, it should be noted that, according to the scheme of the Convention, use of the public-policy clause, which 'ought to operate only in exceptional cases' (Jenard Report … at p. 44) is in any event precluded when, as here, the issue is whether a foreign judgment is compatible with a national judgment; the issue must be resolved on the basis of the specific provision under Article 27(3), which envisages cases in which the foreign judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which enforcement is sought.

[22] In order to ascertain whether the two judgments are irreconcilable within the meaning of Article 27(3), it should be examined whether they entail legal consequences that are mutually exclusive.

[23] It is apparent from the documents before the Court that, in the present case, the order for enforcement of the foreign maintenance order was issued at a time when the national decree of divorce had already been granted and had acquired the force of *res judicata*, and that the main proceedings are concerned with the period following the divorce.

[24] That being so, the judgments at issue have legal consequences which are mutually exclusive. The foreign judgment, which necessarily presupposes the existence of the matrimonial relationship, would have to be enforced although that relationship has been dissolved by a judgment given in a dispute between the same parties in the State in which enforcement is sought.

[25] The answer to be given to the third question submitted by the national court is therefore that a foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her is irreconcilable within the meaning of Article 27(3) of the Convention with a national judgment pronouncing the divorce of the spouses.'

94. Further relevant guidance is provided by the case of *Italian Leather SpA v WECO Polstermöbel GmbH* [2002] ECR I-4995. That case concerned two applications for interim relief restraining the defendant from marketing products under a particular brand name, one made in Germany and one in Italy. The German court had refused the application; the Italian court had shortly afterwards granted a similar application. The question arose as to whether the Italian order could be enforced in Germany, or whether enforcement was precluded because it was irreconcilable with the earlier German order. The ECJ held that it was not significant for the purposes of the application of Article 27(3) of the Brussels Convention that what was involved were decisions on interim measures. It was also immaterial that the reason for the divergence of result might have been due to differences in the rules governing admissibility and procedure in the two courts: what was significant was whether the effect of the judgments was irreconcilable (para. [44]).

95. The ECJ further answered the question of whether the enforcing court was entitled to refuse recognition 'only insofar as it finds that the coexistence of two conflicting

decisions would cause real and appreciable disruption to the rule of law in the State where recognition is sought', in paragraphs [48]-[52] as follows:

'[48] As regards the second part of the first question, concerning the consequences which result where a foreign judgment and a judgment of a court of the State in which recognition is sought are irreconcilable, it should be noted first of all that, as stated in the Jenard Report on the Brussels Convention (OJ 1979 C 59 p. 1 at p. 45), "there can be no doubt that the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments".

[49] Next, it must be remembered that Article 27(3) of the Brussels Convention provides that a judgment is not to be recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought.

[50] Article 27(3) of the Brussels Convention therefore sets out a ground for refusing to recognise judgments which is mandatory …

[51] Finally, it would be contrary to the principle of legal certainty which the Court has repeatedly held to be one of the objectives of the Brussels Convention … to interpret Article 27(3) as conferring on the court of the State in which recognition is sought the power to authorise recognition of a foreign judgment when it is irreconcilable with a judgment given in that Contracting State.

[52] In view of the foregoing, the answer to the second part of the first question must be that, where a court of the State in which recognition is sought finds that a judgment of a court of another Contracting State is irreconcilable with a judgment given by a court of the former State in a dispute between the same parties, it is required to refuse to recognise the foreign judgment.'

96. Applying the test as to irreconcilability indicated in *Hoffmann v Krieg* and further considered in *Italian Leather*, I consider that the Spanish Judgment is irreconcilable with the English s. 66 Judgments. The English s. 66 Judgments declared that, pursuant to the 'pay to be paid clause' and in the absence of prior payment by the Owners, the Club was not liable to Spain. The Spanish Judgment holds that the Club is liable to Spain. There is no doubt that there has not in fact been prior payment by the Owners, and it is impossible to see how, if there had been, the Spanish Judgment could have been rendered against the Club in the way and amount it was, because Spain would already have been compensated.

97. Testing the matter by reference to their legal consequences or effects I regard the English s. 66 Judgments and the Spanish Judgment as mutually exclusive. As Owners have not paid Spain, under the English s. 66 Judgments the Club is not liable to Spain. By contrast, the Spanish Judgment holds that the Club is liable to Spain. Those two positions cannot co-exist in the English legal order. Accordingly the judgments are irreconcilable.

98. I do not consider that reaching this conclusion by reference to the fact that there has not been a prior payment by the Owners involves any departure from the guidance provided in the two ECJ cases to which I have referred. Neither establishes that it is permissible only to look at the terms of the formal Orders themselves. On the contrary, in *Hoffmann v Krieg* there was consideration of whether one of the orders 'necessarily presupposed'

a further finding. I consider that the Spanish Judgment against the Club necessarily presupposes that there has not been payment by the Owners (in which case Spain would have been compensated) but proceeds on the basis that the Club could be liable notwithstanding the absence of such prior payment. That is inconsistent with the English s. 66 Judgments.

99. Equally, neither case establishes that it is impermissible to look at the judgments lying behind the relevant orders for the purposes of seeing what was in fact decided or the legal consequences of what was decided. Accordingly I can see nothing contrary to those authorities in having regard to the previous judgments in the Spanish proceedings which culminated in the Spanish Judgment. If regard is had to these matters, it is clear that the Club has been found liable without regard to the issue of whether there was prior payment by the Owners.

100. I also do not accept Spain's contention that the declarations in the Schaff Award, subsequently embodied in the English s. 66 Judgments, were contingent on the Club's not entering an appearance in the Spanish proceedings. The sentence in the preamble to the Schaff Award which refers to the fact that the Club had not appeared in the Spanish proceedings was in my judgment simply a recitation of the position which pertained at the time of making the Schaff Award. It appears from paragraph 23 of the Reasons that it was included as part of the background to the question of whether the arbitrator had jurisdiction. It was not intended to be a contingency; and certainly I do not see how it can be read as having the effect that any appearance, even in post-liability quantum proceedings, would render inapplicable the declaration of non-liability.

101. Similarly, I do not consider that it can be said that the declarations in the English s. 66 Judgments were consistent with the Spanish Judgment 'on the facts'. Spain's argument was that they were consistent with the Club's being found liable after it had entered an appearance but not taken the defences which were available to it. But the Club's appearance in the Spanish proceedings was not at the liability stage, and when made at the quantum stage it was subject to a reservation of rights in relation to the arbitration and to Spain's failure to abide by its obligations under the contract of insurance, the Schaff Award and the English s. 66 Judgments. Thus, the Club's letters of 18 April 2017 stated that the Club would participate in the quantum proceedings because it had no choice but to seek to mitigate the losses which might flow from Spain's breaches, but was doing so without prejudice to its rights to have disputes under the insurance determined in arbitration, or to its other accrued rights, and on the basis that it was not waiving or abandoning any of its rights. I do not see how the declarations were consistent with a judgment given in the Spanish proceedings in such circumstances.

102. Accordingly I conclude that the Spanish Judgment is irreconcilable with the English s. 66 Judgments.

103. I note that the Advocate General's Opinion in the Reference, while (if I may say so with respect) correctly recognising that the issue of whether the judgments were irreconcilable had not been referred, expressed the view (at [37]) that they were irreconcilable. That, as appears above, is the view which I myself have reached.

If the Judgments are irreconcilable, does Article 34(3) apply to prevent recognition of the Spanish Judgment?

104. As I have already set out, at the time of the hearing in December 2020, Spain advanced four arguments to resist the conclusion that, if the English and Spanish Judgments were irreconcilable, Article 34(3) prevented recognition of the Spanish Judgment. After the CJEU Judgment, Spain's arguments have been modified to place reliance on that judgment, which, it contends, provides the answer that Article 34(3) is not applicable in this case. It is nevertheless helpful, before turning to consider the CJEU Judgment and its effect, to examine the four arguments which were advanced at the December 2020 hearing.

(1) The 'Solo Point'

105. The first was the argument that the English s.66 Judgments were not relevant 'local' judgments for the purposes of Article 34(3) because they were not judgments of 'a judicial body of a Contracting State deciding on its own authority on the issues between the parties'. That is language taken from the ECJ decision in in *Solo Kleinmotoren GmbH v Emilio Boch* [1994] ECR I-2237.

The parties' contentions on the *Solo* point in December 2020

106. Spain's arguments on the *Solo* point at the December 2020 hearing can be summarised as follows:

(1) The exception to recognition and enforcement in Article 34(3) is justified only by the gravity involved in a case in which the 'local' judgment is one where the court has itself determined the relevant issues between the parties.

(2) This is what was decided by the ECJ in *Solo Kleinmotoren*. Spain relied in particular on paragraphs [17]-[21] of the Judgment of the Court.

(3) An order under s. 66 AA 1996 is materially equivalent to the court-approved settlement considered in *Solo Kleinmotoren*, which was held not to constitute a relevant 'local' judgment. This is because, in each case, the relevant order is not determined by the court but by the parties' contractual agreement: directly in the case of the settlement, and indirectly in the case of an arbitrator appointed pursuant to an arbitration agreement.

(4) Accordingly, it does not matter that, in the present case, there was significant argument on the hearing of the s. 66 AA 1996 application, both at first instance and on appeal. The argument was on matters going, in particular, to issues as to the arbitrator's jurisdiction. It was not addressed to the issue of whether the Club was entitled to be granted a declaration in relation to the 'pay to be paid' clause, as that issue had been determined by the arbitrator.

(5) There is support for Spain's interpretation of *Solo Kleinmotoren*, and for the conclusion it draws in relation to an order embodying an arbitration award under s. 66 AA 1996 from a number of commentators, and in particular in Wilhelmsen, *International Commercial Arbitration and the Brussels I Regulation* (at 7.12) and Illmer, 'West Tankers reloaded – enforcement of a declaratory award to prevent enforcement of a future decision of a foreign court', *IPRax* 2012, 32, 264-72, at [270].

107. For its part, the Club contended as follows:

(1) The decision in *Solo Kleinmotoren* is not relevant to a case involving an order under s. 66 AA 1996.

(2) The decision in *Solo Kleinmotoren* may be confined to the special case of court-approved settlements and other authentic instruments, because they were specifically governed by a separate regime under Article 51 of the Convention, for which Article 50 provided a more limited basis to refuse recognition.

(3) Insofar as a more general principle can be drawn from *Solo Kleinmotoren*, it is that Article 34(3) will not be engaged when the court is performing an essentially passive function of embodying the intentions of the parties. It does not apply when the court has exercised a power of assessment.

(4) There is no basis for saying that the court-approved settlement in *Solo Kleinmotoren* involved the court in exercising any supervisory function or that it could have exercised a discretion in relation to its enforcement.

(5) In cases where the court does exercise a power of assessment, including cases of consent orders and court approvals of schemes of arrangement, they will count as relevant judgments for the purposes of Article 34(3).

(6) It is not necessary that the court should decide on the substantive merits of the claim in order for its decision to count as a relevant judgment if it decides on 'an' issue or on some issues between the parties.

(7) The overarching purpose of Article 34(3) is to protect the integrity of a Member State's internal legal order and to ensure that its rule of law is not disturbed by its being forced to recognise a foreign judgment which is inconsistent with a decision of its own courts.

(8) On a s. 66 AA 1996 application the court decides issues between the parties of its own authority; and has a decision-making role which is not confined to a rubber-stamping exercise.

(9) It has been held or assumed in a number of English cases that an English judgment enforcing an award under s. 66 AA 1996 is a relevant 'local' 'judgment' within the meaning of Article 34(3).

108. There is no dispute that this is one of the issues which was the subject of the Reference to the CJEU. I will set out what would have been my reasoning and conclusions on the point in the absence of the CJEU decision, and then turn to the nature and effect of the CJEU Judgment on it.

Conclusions on '*Solo* point' without consideration of the CJEU Judgment

109. In *Solo Kleinmotoren* the issue which arose was as to whether a court settlement reached 'before the [Oberlandesgericht Stuttgart] and at its suggestion' (see para. 3 of the

Opinion of Advocate General Gulmann) was a bar to having enforced in Germany a judgment delivered in Italy.

110. In holding that it was not, the ECJ reasoned as follows:

'[15] The very wording of Article 25 shows that the definitions of 'judgment' given in that provision refers, for the purposes of the application of the various provisions of the Convention in which the term is used, solely to judicial decisions actually given by a court or tribunal of a Contracting State.

[16] As is explained in the Report of the Committee of Experts on the Convention (OJ 1979 C 59, at the foot of p. 42), Article 25 expressly treats the determination of costs by an officer of the court as a judgment since, under the German Code of Civil Procedure which makes provision for this, the registrar acts as an officer of the court which decided on the substance of the matter and, in the event of a challenge to the registrar's decision, the court decides the issue.

[17] It follows from the foregoing that in order to be a 'judgment' for the purposes of the Convention the decision must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties.

[18] That condition is not fulfilled in the case of a settlement, even if it was reached in a court of a Contracting State and brings legal proceedings to an end. Settlements in court are essentially contractual in that their terms depend first and foremost on the parties' intention, as the Experts' Report explains (op. cit., p. 56).

[19] Moreover, a different construction cannot be entertained where the application of Article 27(3) of the Convention is concerned.

[20] As has already been stated in paragraph 15 of this judgment, the definition of 'judgment' given in Article 25 applies to all the provisions of the Convention in which that term is used. Moreover, Article 27 constitutes an obstacle to the achievement of one of the fundamental objectives of the Convention, which is to facilitate, to the greatest extent possible, the free movement of judgments by providing for a simple and rapid enforcement procedure. Article 27 must therefore be interpreted strictly, which precludes treating a court settlement as a judgment given by a court or tribunal.

[21] The Report of the Committee of Experts states elsewhere (op. cit., p. 45), with regard to the ground for refusing recognition set out in Article 27(3) of the Convention, that 'the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments'. Such a risk of disturbance only assumes the gravity required to justify, under the Convention, refusal of recognition and enforcement of a judgment given in another Contracting State, whose irreconcilability with a judgment given between the same parties in the State where recognition is sought is pleaded, if the latter decision is a judgment of a court which itself determines a matter at issue between the parties.'

111. The ECJ proceeded, at paragraphs [22]–[24] to consider the fact that court settlements were governed by Article 51 of the Convention. I did not, however, consider that the decision in *Solo Kleinmotoren* was based solely on the fact that there was distinct

provision in relation to court settlements and other authentic instruments. The reasoning which I have quoted above is of more general application.

112. As the ECJ said (in paragraph [20]) Article 27 of the Convention (ie the equivalent of Article 34 of the Regulation), is an exception to the free movement of judgments and has to be interpreted strictly. However, sub-paragraph (3) (ie Article 34(3) of the Regulation) has its own principled rationale. This is to ensure that the rule of law in a Member State is not disturbed by the enforceability in that Member State of two conflicting judgments. That rationale is of sufficient importance that, as emphasised in *Italian Leather*, the Article 34(3) exception is mandatory.

113. Were Article 34(3) not to apply in the case of an order made pursuant to s. 66 AA 1996 there would be a significant disturbance to the rule of law in England and Wales. This is because an order under s. 66 AA 1996 is one made by the court, and in the making of which the court does have a decision-making role and is not simply passive. Under s. 66(1) AA 1996, the court has to make a judicial determination as to whether to exercise its discretion to permit the award to be enforced in the same manner as a judgment; and under s. 66(2) whether to permit judgment to be entered in the terms of the award. Each can involve questions as to the jurisdiction of the arbitration tribunal (as reflected in s. 66(3)), as well as consideration of the practicability and usefulness of granting the order, arbitrability, issues of public policy and the interests of third parties (see *West Tankers (No. 6)* [2012] EWCA Civ 27, [2012] 1 Lloyd's Rep 398 at [38]; *Sterling v Rand* [2019] EWHC 2560 (Ch), especially paras. [66]-[70]). As Toulson LJ said in *West Tankers (No. 6)* at [38], the jurisdiction under s. 66 AA 1996 does not involve an administrative rubber-stamping exercise.

114. Equally, an order under s. 66 AA 1996 cannot be said to be 'essentially contractual'. The submission to arbitration is contractual, but the outcome of the arbitration and the contents of the award are not and, as already stated, an order under s. 66 AA 1996 involves a judicial consideration of whether it is appropriate for it to be made.

115. What making an order under s. 66 AA 1996 involves is thus significantly different from what I understand to have been involved in the court settlement considered in *Solo Kleinmotoren*. It is the case that the court will not, on an application under s. 66 AA 1996 itself decide on the merits of the dispute which is the subject of the award but it will have made a judicial decision on the issues to which I have referred above. In my understanding of the *Solo Kleinmotoren* case, that is sufficient to qualify as a judgment of a court which itself determines '**a matter at issue** between the parties' (emphasis added), as referred to in paragraph [21] of the ECJ's judgment in *Solo Kleinmotoren*. I do not understand the reference in paragraph [17] of the judgment, in the English translation, to a judicial body deciding on its own authority 'on **the issues** between the parties' to be intending something different from the corresponding phrase in paragraph [21] or to be imposing a requirement that the court should itself have determined all the issues between the parties which arose and whose resolution is embodied in the judgment. The inclusion of the definite article in the English translation of the relevant phrase in paragraph [17] does not seem to be reflected in the other language versions I have been shown.

116. Furthermore, that *Solo Kleinmotoren* was not deciding that, for there to be a relevant judgment, the court must itself have undertaken a substantive examination of the merits of the claims which are the subject of the order which eventuates is indicated by the

Opinion of Advocate General Kokott and by the decision of the ECJ in *Gambazzi v DaimlerChrysler Canada Inc* [2010] QB 388. That case involved a default judgment of the High Court. At paragraphs [25]-[27] of her Opinion the Advocate General said this:

'[25] Classification of the judgment in question as a judgment within the meaning of article 25 of the Convention might also be doubtful for another reason, however. Some writers in legal literature generally answer this question in the negative in the case of an English default judgment [citations omitted] They claim that in the case of a default judgment the court does not examine the sufficiency of the pleadings at all before delivering the judgment. Judicial examination of the sufficiency of the pleadings is necessary, however, for the purposes of a judgment within the meaning of article 25. The ground for this view is the ruling of the Court of Justice in *Solo Kleinmotoren GmbH v Boch* …

[26] In my opinion, however, the judgment in that case does not necessarily lead to that conclusion. In that ruling, the Court of Justice found that, to be a judgment for the purposes of the Convention, the decision had to emanate from a judicial body of a contracting state "deciding on its own authority on the issues between the parties": *Solo Kleinmotoren v Boch*, para. 17. That condition is not fulfilled in the case of a settlement merely recorded by the court, as it is essentially contractual and therefore depends on the intention of the parties and not of the court.

[27] On the other hand, a default judgment in which, before delivering the judgment, the court does not undertake a substantive examination as to whether the applicant's claims are well founded certainly has the character of a judgment. The fact that the content of the judgment is determined by the applicant's claims as a legal consequence of the default does not suggest that the default judgment is the mere recording of the parties' intention. Rather, the content of the judgment depends on the court's intention since, where the requirements for a default judgment are satisfied, although the court does not examine the sufficiency of the pleadings, in examining those requirements it alone determines whether the applicant's claim should be upheld in that way.'

117. At paragraph [25] of its judgment in that case the ECJ said:

'[25] As the Advocate General noted in para. 24 of her opinion, the High Court decisions took the form of a judgment and an order given in default of appearance in civil proceedings which, as a rule, adhere to the adversarial principle. The fact that the court entered judgment as if the defendant, who had entered appearance, was in default, cannot suffice to call into question the categorisation of those decisions as judgments. …'

118. Applying the reasoning of Advocate General Kokott in *Gambazzi*, an order under s. 66 AA 1996 does not constitute 'the mere recording of the parties' intention', but does depend on the court's intention and its assessment of the appropriateness of an order under that section.

119. The view that an order under s. 66 AA 1996 is a relevant judgment for the purposes of Article 34(3) is consistent with English authority, albeit none which is binding on me. Three cases in particular suggest this: *The Wadi Sudr* [2010] 1 Lloyd's Rep 193, esp at [63]; *West Tankers (No. 5)* [2011] 2 Lloyd's Rep 117, see esp paras. [30]-[31]; and

African Fertilizers and Chemicals Nig Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG [2011] 2 Lloyd's Rep 531, see esp at paragraph [28].

120. For all these reasons, my conclusion, prior to the decision of the CJEU, would have been that an order under s. 66 AA 1996 is not excluded from being a relevant judgment for the purposes of Article 34(3) on the basis that it did not decide any, or any relevant, issues between the parties.

The Decision of the CJEU relating to the *Solo* point

121. The decision of the CJEU in relation to the '*Solo* point', in my judgment, confirms that the above conclusion is correct.

122. As I have already set out, above, in his Opinion Advocate General Collins said at [52]-[58] that a judgment under s. 66 AA 'plainly qualifies as a 'judgment' in the requested state for the purposes of Article 34(3); that such a judgment meets the conditions prescribed in para. [17] of the ECJ's judgment in *Solo Kleinmotoren* 'in full' for the reasons given in his paragraphs [55-56]; and that the fact that a judgment under s. 66 AA does not address every issue before the arbitral tribunal does not prevent it from being a 'judgment' for the purposes of Article 34(3) (paras. [57-58]).

123. In the judgment of the CJEU, at paras. [48-50], the CJEU said that a judgment entered in terms of an arbitral award was capable of being regarded as a 'judgment' within the meaning of Article 34(3). In that regard, the CJEU pointed out at para. [49] that the concept of a 'judgment' set out in Article 32 was a broad one and 'covers any judgment given by a court of a Member State, without its being necessary to draw a distinction according to the content of the judgment in question, provided that it has been, or has been capable of being, the subject, in the Member State of origin and under various procedures, of an inquiry in adversarial proceedings'. At para. [50] the CJEU said that this interpretation of the concept of 'judgment' in Article 34(3) was supported by the purpose of the provision, which was to protect the integrity of a Member State's internal legal order. At para. [53] the CJEU said that, 'a judgment entered into in the terms of an arbitral award is capable of constituting a 'judgment' within the meaning of Article 34(3)…'.

124. This confirms that the nature of a judgment under s. 66 AA, as being one which is in the terms of an arbitral award, does not take it outside the ambit of 'judgments' which may, pursuant to Article 34(3), prevent the recognition, in a Member State, of a judgment given by a court in another Member State if those two judgments are irreconcilable.

125. Thus, the '*Solo* point' is incorrect.

(2) The Material Scope point

126. The second argument which Spain raised at the hearing in December 2020 as to why, even if the English s.66 and Spanish Judgments were irreconcilable, Article 34(3) was not applicable was that the English s. 66 Judgments are non-Regulation judgments. This was said to be because – subject to Spain's argument in relation to Section 3 of Chapter II of the Regulation, to which I will come - the whole of the English proceedings, and the resulting English s. 66 Judgments, fell within the arbitration exception to the

applicability of the Regulation enshrined in Article 1(2)(d). Spain's contention was that a non-Regulation judgment, or at least a judgment which is a non-Regulation judgment because it falls within the arbitration exception, did not count as a relevant 'home' judgment for the purposes of Article 34(3).

The Parties' Contentions at the hearing in December 2020

127. The argument which Spain made in this regard can be summarised in more detail as follows:

(1) The scheme of the Regulation, and in particular Article 34(3) is concerned only with the reconcilability of 'Regulation judgments', ie judgments falling within the material scope of the Regulation. This is justifiable because the Regulation is founded on the principle of mutual trust, and the facilitation of the free movement of judgments. The promotion of those objectives takes precedence over any concern as to legal disharmony in the legal order of a Member State which results from reasons falling outside the scope of the Regulation.

(2) References to 'judgments' in Chapter III of the Regulation are to judgments which fall within the material scope of the Regulation. Articles 33(1) and 38(1) provide for the recognition and enforcement of 'a judgment' without qualification. There can be no doubt that only judgments which fall within the scope of the Regulation set out in Article 1 count as 'judgments' for the purposes of those provisions. Accordingly, when in Chapter III there is a reference to 'a judgment' without more, it is a reference to a Regulation judgment.

(3) In Article 34(3) (taken, as it must be, with the first six words of the Article), what is provided for is that 'a judgment' shall not be recognised if it is irreconcilable with 'a judgment' given in a dispute between the same parties in the Member State in which recognition is sought. The first use of 'judgment' must mean a Regulation judgment. The second use of the term must have the same sense.

(4) The terms of Article 34(4) do not contradict this approach. The words 'given in another Member State or in a third State' expressly permit reference to judgments which might not count as 'judgments' within that term as it is used, without more, in Chapter III. In any event, there is a distinction between the territorial scope of the Regulation and its subject-matter scope. A judgment given in a non-Member State can be said to be a non-Regulation judgment in respect of territorial scope, but could fall within the Regulation's subject-matter scope. Indeed, the reference to the earlier judgment having to involve the same cause of action and to be between the same parties as the judgment sought to be enforced indicates that it is envisaged that the subject-matter of the 'earlier' judgment would be one that falls within the scope of Article 1.

(5) While the Club had referred to *Hoffmann v Krieg* in this context, the present point is not the subject of discussion in the ECJ's judgment; and in any event, that was a case dealing with a domestic judgment on marriage status, which raises issues entirely and obviously distinct from those in the present case.

128. The Club argued in response:

(1) That there are good reasons of principle why Article 34(3) should apply to any local judgment, even if arises in non-Regulation proceedings. This is because the purpose of Article 34(3) is to protect the integrity of a Member State's internal legal order. Many matters fall outside the material scope of the Regulation. It would be perverse if a Member State's courts were obliged to ignore their own judgments on any such matters in favour of a foreign, perhaps subsequent, Member State judgment which might deal with some of the same issues.

(2) Article 34(3), in referring simply to 'a judgment given in a dispute', means what it says, and should not be glossed. Furthermore, that it can apply to non-Regulation judgments is supported by Article 34(4), because third state judgments would necessarily be non-Regulation judgments, thus demonstrating that 'judgment' means any judgment whether given within or outside Regulation proceedings.

(3) Any other interpretation would lead to absurd results. In particular if a judgment in s. 66 AA 1996 proceedings does not qualify as a 'local' judgment for the purposes of Article 34(3), then by reason of Article 34(4) a judgment of a third state would have a superior position in the legal order of the Member State in which enforcement is sought than a judgment of the Member State itself; and a foreign arbitral award, entitled to recognition under the New York Convention, would be in a superior position in that legal order to a domestic arbitral award which had been enforced by the courts of that Member State.

(4) The ECJ in *Hoffmann v Krieg* decided that a Dutch divorce order, which was outside the material scope of the Convention, was a judgment which involved the application of (the equivalent of) Article 34(3) to prevent enforcement of a German maintenance order which at that time was within the subject matter scope of the Convention. There is no reason why a judgment falling outside the material scope of the Regulation for a different reason should be regarded any differently.

(5) English cases have assumed that the non-Regulation nature of a s. 66 AA 1996 judgment would not be a reason for Article 34(3) not to apply. There is also academic commentary to the same effect.

129. Again, there is no dispute that this is one of the issues which was the subject of the reference to the CJEU. As in the case of the '*Solo* point' I will set out what would have been my views on the point in the absence of the CJEU decision, and then turn to the nature and effect of the CJEU decision on this point.

Conclusions on the material scope point without consideration of the CJEU Judgment

130. As a matter of a textual examination of the Regulation, Spain's case had something to be said for it. The term 'judgment' in Article 33(1), and in Article 38(1), must mean a judgment falling within the subject matter scope of the Regulation in accordance with Article 1. That must also be intended by 'judgment' where it appears as the second word of Article 34. It might be expected that where the same word appears again in Article 34(3) it had the same meaning. I did not consider that the Club gained much support for its case from the fact that Article 34(3) uses the phrase 'judgment given in a dispute between the same parties'. That phrase still uses the same word, 'judgment',

which in the opening words of the Article must have the same meaning as it has in the opening words of Article 33(1).

131. Nor did I consider that there was clear support for the Club's position from the terms of Article 34(4). It is true that Article 34(4) refers to a 'judgment' in a third State, and that this cannot be 'a Regulation judgment' in the sense that it will not be one to which the main provisions of the Regulation apply, and will not fall within the definition contained in Article 32. Nevertheless it does not necessarily follow from this that judgments from third States were intended to count as 'judgments' even if they fell outside the subject-matter scope of the Regulation; and the fact that such judgments, to be relevant for the purposes of Article 34(4), must involve the same cause of action as that involved in the judgment sought to be recognised can be said to indicate that what is contemplated is judgments which themselves fall within the subject matter scope of the Regulation.

132. Nevertheless I considered that the Club's position, that the 'home' judgment referred to in Article 34(3) need not be one within the subject-matter scope of the Regulation, was correct, for the following five reasons.

133. In the first place, that it accorded with the principle which underlies Article 34(3) of avoiding a disturbance of the rule of law in the State in which enforcement is sought. A judgment may have been given in that State, in proceedings in which its courts had jurisdiction, and that judgment may have given rise to a *res judicata*, but it may not have been given in proceedings falling within the subject matter scope of the Regulation. It would give rise to significant disturbance of the rule of law if there had to be enforcement of an irreconcilable judgment given in another Member State. It does not appear to me to be an answer to this point to say that the promotion of the objectives of the Regulation prevails over reasons deriving from disputes outside the Regulation. The purpose of the Regulation was not to provide that civil and commercial matters falling within its scope are more important than matters excluded from its scope so that judgments on the former should prevail over inconsistent 'local' judgments relating to the latter.

134. In the second place, it avoids the absurd and, I would consider, clearly unintended consequence that a foreign arbitral award would be in a superior position within the legal order of the Member State in which enforcement is sought to a domestic arbitral award which had been enforced by the courts of that State. I accept the Club's contention that, in the case of the former, a foreign Regulation judgment could not be enforced if it contradicted a foreign award entitled to recognition under the New York Convention. This appears clear from Article 73(2) of the Recast Regulation (Reg (EU) 1215/2012), and I do not consider that the Regulation should be interpreted to different effect (see Briggs: *Private International Law in English Courts* (2015), paras. 6.36, 6.40). But in the case of a domestic award, the award would not have the status of a New York Convention award (as Article 1 of that Convention limits its application to foreign arbitral awards), nor, on Spain's case, would the local judgment enforcing it give protection under Article 34(3). That discrepancy would be a surprising and, as I have said, surely unintended result of the provisions of the Regulation.

135. Thirdly, the decision in *Hoffmann v Krieg* proceeds on the basis that a judgment which fell outside the subject matter scope of the Convention (namely the Dutch divorce) was a relevant 'home' judgment for the purposes of Article 27(3) of the Convention (now

Article 34(3) of the Regulation). The ECJ made reference to the fact that the decree of divorce fell outside the scope of the Convention at paragraph [4], but nevertheless held that the German maintenance order should not be enforced, pursuant to Article 27(3) of the Convention, because it was irreconcilable with it. Thus, though it is fair to say that there was no explicit discussion of the textual points on which Spain relies in this case, the ECJ was aware of the difference between the two judgments with which it was concerned as to whether they fell within the scope of the Convention.

136. It is also fair to say: (i) that the reason why the Dutch divorce did not fall within the subject matter scope of the Convention was that it related to the status or legal capacity of natural persons; (ii) that the ECJ made the point, at paragraphs [15]-[16], that the aim of the Convention was not to derogate from the rules of the domestic law of the court before which the action is brought 'as far as the status of natural persons is concerned'; and (iii) that there was no consideration of the position which might obtain if the 'home' judgment did not fall within the subject matter scope of the Convention for another reason, and in particular that it related to arbitration. On the other hand, there is no indication in the judgment that the position would be different if the 'home' judgment was not within the scope of the Convention for another reason. In his Opinion in *Marc Rich and Co AG v Società Italiana Impianti PA* (Case C-190/89) [1991] ECR I-3855, Advocate General Darmon referred to *Hoffmann v Krieg* as a case which had considered cases of irreconcilability between judgments covered by the Convention and judgments outside its scope, and summarised that case without suggesting that the particular reason why the 'home' judgment in *Hoffmann v Krieg* fell outside the scope of the Convention was significant (paragraph [102]). I consider that that is the correct interpretation of the judgment in *Hoffmann v Krieg*.

137. Fourthly, in a number of English judgments it has been assumed, or has been held to be arguable that, a s. 66 AA 1996 order will be a relevant 'home' judgment for the purposes of Article 34(3), including *The Wadi Sudr*, *West Tankers (No. 5)* and *African Fertilizers*, referred to above. There was also held to be a real prospect of establishing that the English s.66 Judgments would fall within Article 34(3) in the Club's own s. 66 AA 1996 application in this matter: *The Prestige (No. 2)* at paragraphs [187]-[194] of Hamblen J's judgment. None of these decisions is binding on me, nor does any contain any significant discussion of the present point, but they are consistent with the Club's case.

138. Fifthly, there was also support for the Club's case, and for the interpretation of the decision in *Hoffmann v Krieg* which I have outlined above, in a number of academic commentaries, and in particular in *Hartley on Civil Jurisdiction and Judgments in Europe* (2017) paras. 18-54 - 18-56, 24.52; *Cheshire and North & Fawcett on Private International Law* (15th ed), p. 639, 646; *Merkin and Flannery on the Arbitration Act* (6th ed) at para. 66.15.2; *Merkin on Arbitration Law* at para. 19.14.1; and Schlosser, 'Conflits entre jugement judiciaire et arbitrage', *Rev. Arb.* 1981, No. 3, (at p. 14 of translation).

139. For these reasons I would, in the absence of the CJEU Judgment, have concluded that Spain's case to the effect that the English s.66 Judgments are not relevant 'home' judgments because they are outside the subject-matter scope of the Regulation was incorrect.

<u>The decision of the CJEU relating to the 'material scope' point</u>

140. Again, I consider that this conclusion in relation to the material scope point is confirmed by the decision of the CJEU.

141. The Opinion of Advocate General Collins was that: '… Article 34(3) … applies to any irreconcilable judgment given in a dispute between the same parties in the Member State in which recognition is sought, regardless of whether its subject matter comes within the material scope of Regulation No. 44/2001' (paragraph [59]) The Advocate General set out his reasons for this opinion at paragraphs 60-68. In essence:

(1) Article 1(2) of the Regulation cannot be determinative as to whether a judgment comes within the scope of Article 34(3), for the simple reason that those provisions were enacted for different purposes and pursue different objectives, the former being to determine what judgments can benefit from mutual recognition and thus 'travel', the latter being to protect the integrity of a Member State's internal legal order (paragraphs [60-63]).

(2) The ECJ's decision in *Hoffmann v Krieg* also makes it clear that a judgment handed down by a court of the State in which recognition is sought should be afforded due deference notwithstanding that the subject matter falls outside the scope of the Regulation (paragraphs [64-65]).

(3) Were the position otherwise, there would be at least two anomalies: (a) that it would mean that an earlier judgment given in a third State, which would by definition fall outside the scope of the Regulation, might, under Article 34(4), preclude recognition of a later judgment given in a Member State other than the one in which recognition is sought, but an inconsistent judgment given in a Member State, the subject matter of which was deemed to fall outside the material scope of the Regulation would not; and (b) it would mean that a non-domestic arbitral award recognisable under the New York Convention would be in 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 that Member State's Courts.

142. On the specific issue of whether a judgment outside the material scope of the Regulation may be a relevant judgment for the purposes of Article 34(3), the CJEU Judgment was to like effect. In that regard, the Court's reference, at para. [50], to the purpose of Article 34(3) as being the protection of the integrity of a Member State's legal order is relevant to this point as it is to the '*Solo*' point. Further at paras [51-52], the CJEU said that it was 'apparent from the Court's case-law that the exclusion of a matter from the scope of Regulation No.44/2001 does not preclude a judgment relating to that matter from coming within the scope of Article 34(3) of that regulation and, accordingly, preventing the recognition of a judgment given in another Member State with which it is irreconcilable', and made reference to *Hoffmann v Krieg*.

143. Accordingly, I conclude that the material scope point, as it has been called, and as it was argued before me, is incorrect.

(3) Mutual Trust

144. The third argument which Spain addressed in December 2020 was an argument that the English s. 66 Judgments were contrary to the principle of mutual trust, and impaired

the effectiveness and objectives of the Regulation because they were 'an attempt to stymie the jurisdiction of another Member State.'

145. Spain's argument relied in particular on the decisions of the ECJ in *Turner v Grovit* and in *West Tankers*. It contended that those cases established that it is not in accordance with EU law for a Member State court to issue a judgment which, inter alia, interfered with the jurisdiction of a foreign court, implied an assessment of the appropriateness of bringing proceedings before a court of another Member State, contravened the principle that every court seised should itself determine whether it had jurisdiction to determine the dispute before it, or prevented another Court from exercising the jurisdiction conferred upon it by the Regulation.

146. Spain's argument was that the English s. 66 Judgments contravened these principles, on the basis that: their 'express purpose would be to create a judgment which the Club hoped could be relied upon to prevent enforcement of a lawful Spanish judgment'; that 'the declarations expressly assessed the appropriateness of bringing proceedings before the Spanish Court … contrary to the principle that every court seised itself [determine], under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it'; and that this would run counter to the principle of mutual trust, and undermine the effectiveness of the Regulation.

Conclusions on third argument without consideration of CJEU Judgment

147. The view which I had formed, before the decision of the CJEU, is that there was here no independent ground on which to say that the English s. 66 Judgments do not preclude recognition and enforcement of the Spanish Judgment. I considered that such arguments might have been deployed, and indeed some of these arguments were deployed (unsuccessfully) before Hamblen J, to urge the court not to enter a s. 66 AA 1996 judgment in the first place (see *The Prestige (No. 2)* at paragraphs [189]-[194]). However, in circumstances where the English s. 66 Judgments were in fact made, and where, on the basis of the two points already considered, they constitute irreconcilable 'home' judgments within the meaning of Article 34(3), then I considered that there was no separate basis in this argument on which Spain could succeed. Every 'home' judgment used to block recognition of a judgment from another Member State under Article 34(3) can, in a sense, be said to prevent the rapid and simple execution of Regulation judgments. That, however, is inherent in the nature of Article 34(3) as an exception to recognition. If it is applicable, then the Regulation provides that a foreign judgment 'shall not be recognised'.

148. In any event, I did not consider that Spain's argument here was well-founded. The essence of its contention was that an order having the effect that the Club contends the English s.66 Judgments have undermines the objectives of the Regulation by preventing the attainment of the objectives of the unification of the rules of conflicts of jurisdiction in civil and commercial matters and the free movement of decisions in those matters, and that it is impermissible for an English Court to have made orders having such an effect. Spain contended that the principle of mutual trust, emphasised in *Turner v Grovit* [2004] ECR I-3565 and *West Tankers (No. 4)* [2009] E.C.R. I-663 meant that the English Court could not, consistently with the Regulation, issue a judgment which interfered with the jurisdiction of the Spanish Court, by assessing the appropriateness of Spain's having brought proceedings before the Spanish Court as opposed to in

arbitration, and by seeking to 'stymie' the Spanish Judgment by making a declaration in relation to the Club's liabilities to Spain.

149. The Regulation, however, does not prohibit all judicial activity which might create or involve a risk of creating a judgment inconsistent with judgments from other Member States. The possibility of conflicting judgments is inherent in the existence of the subject matter limitations of the Regulation; and in particular the possibility of conflicting judgments is inherent in the fact that arbitration is excluded from the Regulation. This is a point recognised in the Opinion of Advocate General Darmon in *Marc Rich* at paragraphs [101]-[103]. Consistently with this, a range of judicial remedies which might lead to or create the risk of a judgment inconsistent with a judgment from a Member State have been considered permissible and not to be contrary to the principle of mutual trust. These include: declarations that there is a binding arbitration agreement (see *Toyota Tsucho Sugar Trading Ltd v Prolat SRL* [2014] EWHC 3649 (Comm) [2015] Lloyd's Rep. Plus 9, [15]-[17]); court judgments recognising an anti-suit injunction granted by an arbitral tribunal (see *Proceedings concerning Gazprom OAO* [2015] 1 WLR 4937, *Nori Holding v Otkritie* [2018] 2 Lloyd's Rep 80, at [83] per Males J); and a s. 66 AA 1996 judgment on an award on the merits (*Sovarex v Romero Alvarez* [2011] 2 Lloyd's Rep 320 at [58]-[59] per Hamblen J).

150. Spain's argument before me was, as I have said, primarily based on the decisions of the ECJ in *Turner v Grovit* and in *West Tankers (No. 4)* in relation to anti-suit injunctions. However, I considered that the essential basis of those decisions was that orders which prevent the courts of another Member State from deciding on and exercising their jurisdiction under the Regulation or bar the applicant from access to such courts are inconsistent with mutual trust (see in particular, *West Tankers (No. 4)* at paragraphs [28], [30]-[31]). In my judgment, however, an order under s. 66 AA 1996 of the sort involved in the present case does not prevent or obstruct the courts of another Member State from determining for themselves or from exercising their jurisdiction under the Regulation, nor does it bar any party from access to another Member State's courts. The English s.66 Judgments did not deprive the Spanish Court of the power to rule on its own jurisdiction; nor did they bar Spain from access to the Spanish Courts. Spain had such access and the Spanish courts exercised the jurisdiction which they considered that they had. Nor, in my judgment, did the English s.66 Judgments constitute a review of another Member State's assumption or assessment of its jurisdiction. The English s. 66 Judgments did not amount to an assessment of the appropriateness of Spain having brought proceedings in the Spanish Courts; they constituted an assessment, by the English court, as the court of the seat, as to whether the arbitration agreement was binding.

151. In those circumstances, I considered that the making of an order under s. 66 AA 1996 did not constitute a breach of the principle of mutual trust.

(4) Argument based on the insurance provisions in Section 3 of Chapter II

152. Spain made a fourth argument in relation to Article 34(3) at the hearing in December 2020. It contended that the English s. 66 Judgments are not an irreconcilable judgment within Article 34(3) because their making conflicted with the special insurance provisions in Section 3 of Chapter II of the Regulation.

The Parties' Contentions

153. The essence of Spain's argument was that the English s. 66 Judgments are not relevant local judgments because the English court did not have jurisdiction, whereas the Spanish courts had exclusive jurisdiction in respect of the claims under the insurance provisions in Section 3 of Chapter II of the Regulation. Article 35 of the Regulation provides that a judgment is not to be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II. Spain argued that a necessary corollary of that is that a judgment which conflicts with Sections 3, 4 or 6 of Chapter II cannot be relied upon for the purposes of preventing recognition of a Regulation judgment under Article 34(3). An exclusive jurisdiction provision in the insurance could not oust the protection provided by Section 3 of Chapter II to a victim of insured damage (*Assens Havn v Navigators Management (UK) Ltd* [2018] QB 463), and an arbitration clause should be no different. Spain also argued that the arbitration exception in Article 1(2)(d) is not applicable to an obligation to arbitrate created by the English law conditional benefit principle.

154. The Club contended that these arguments were misconceived for four principal reasons.

(1) The English s. 66 Judgments are valid and binding judgments in this jurisdiction (England and Wales). Under Article 34(3) of the Regulation, it is neither necessary or appropriate for the enforcing court (ie, here, the English court) to review whether the English s. 66 Judgments were correctly given at the time they were rendered or to consider whether some other court might have had jurisdiction under the Regulation's insurance provisions.

(2) There was no conflict with the Regulation's insurance provisions because the s. 66 AA 1996 proceedings were arbitration proceedings that fell outside the Regulation.

(3) In any event, Spain had submitted to the s. 66 AA 1996 proceedings, without invoking the Regulation's insurance provisions.

(4) Spain's arguments that there was not a relevant agreement to arbitrate are wrong.

Conclusions on fourth issue prior to CJEU Judgment

155. I considered that Spain's fourth argument was wrong. In the first place, I did not consider there to be any basis for saying that, in deciding whether a judgment qualifies as a relevant 'local' judgment under Article 34(3), it is necessary or permissible to review whether the local court had jurisdiction or whether another Member State had jurisdiction under the Regulation's insurance provisions. I did not consider that Spain's argument had any basis in the terms of the Regulation. Article 34(3) provides simply that an 'incoming' judgment is not to be recognised if it is irreconcilable with 'a judgment' in the Member State in which recognition is sought. The English s. 66 Judgments were given. The question in the present case is whether they constituted 'a judgment'. The Regulation does not suggest that the question of whether they were properly given is a relevant consideration for the enforcing court.

156. It is not a necessary corollary of Article 35 that the enforcing court should undertake an examination of whether the local court's jurisdiction had been consistent with the insurance provisions of the Regulation. Article 35 is a basis on which an incoming

judgment may be unenforceable if it contravened Sections 3, 4 or 5 of Chapter II of the Regulation. But different considerations apply to a judgment which has already been made in the enforcing State. Were it permissible or necessary to examine, *ex post facto*, whether that judgment had been given in accordance with the Regulation's rules, it would entail a significant interference with the principle of finality of judgments and of *res judicata* within the 'home' (here the English) legal order, for it would require the enforcing court to re-open the question of whether the 'local' judgment was correctly rendered.

157. In the second place, there is no conflict between the English s. 66 Judgments and the insurance provisions of the Regulation, because the s. 66 AA 1996 proceedings were arbitration proceedings which fell within the exclusion of arbitration in Article 1(2)(d). Arbitration is excluded 'in its entirety, including proceedings brought before national courts': *Marc Rich*, at [18]. In the Jenard Report it is stated (at p. 13):

'The Brussels Convention does not apply to the recognition and enforcement of arbitral awards …; it does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration – for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings.'

158. The Schlosser Report is even more specific, saying (at para. 65(c)):

'(c) Nor does the 1968 Convention cover proceedings and decisions concerning applications for the recognition and enforcement of arbitration awards. This also applies to court decisions incorporating arbitration awards – a common method of recognition under United Kingdom law. …'

159. Thirdly, Spain submitted to the earlier s. 66 AA 1996 proceedings. This was expressly found by the Court of Appeal in *The Prestige (No 2)* at paras. [50]-[51], [53] and [83] in the context of arguments as to state immunity, where it was noted that Spain had brought its own cross-applications to set aside the Schaff Award under ss. 67 and 72 AA 1996. Thus, even if, contrary to my view, the Regulation's insurance provisions were relevant to the s. 66 AA 1996 proceedings, Spain submitted to them, and the English courts therefore had jurisdiction pursuant to Article 24 of the Regulation. On that basis, even if it were necessary or permissible for the court to investigate whether the court had had jurisdiction under the Regulation to render the English s. 66 Judgments, the conclusion would be that it had.

160. Fourthly, Spain's argument to the effect that by reason of the Regulation's insurance provisions an arbitration agreement could not be invoked against a victim of insured damage who sought to bring a direct action was, in my judgment, incorrect. The argument was based on the decision of the CJEU in *Assens Havn.* That case, however, was concerned with a jurisdiction agreement, to which Article 13 of the Regulation was applicable. It was not concerned with an arbitration agreement. As arbitration is excluded from the Regulation in its entirety, the Regulation's insurance provisions did not apply to the arbitration agreement in the present case. In any event, as I have already said, Spain submitted to the s. 66 AA 1996 proceedings. Even if the insurance provisions of the Regulation were applicable, and even if the arbitration agreement did not mean that the English courts could exercise jurisdiction because of Article 1(2)(d), Spain's submission would mean that the English courts had had jurisdiction under the

Regulation. As the ECJ decided in *Vienna Insurance v Bilas* [2010] Lloyd's Rep IR 734, Article 24 'provides for a rule of jurisdiction based on the entering of an appearance by the defendant in respect of all disputes where the jurisdiction is not derived from other provisions of that regulation' (para. [21]); 'That provision applies also in cases where the court has been seised in breach of the provisions of that regulation and implies that the entering of an appearance by the defendant may be considered to be a tacit acceptance of the jurisdiction of the court seised and thus a prorogation of that court's jurisdiction' (ibid); and that this is the case even where the otherwise applicable jurisdictional rules under the Regulation would be those in Chapter II, section 3 (as was the case in *Vienna Insurance v Bilas* itself).

161. As to Spain's argument that the Regulation did not contemplate or permit an arbitration agreement which is binding by reason of English law's 'conditional benefit' principle to be one which can fall within the arbitration exception to the Regulation, I considered this to be misconceived. The Regulation does not apply to arbitration and does not regulate the content of arbitration agreements. It does not establish an autonomous definition of arbitration agreements.

Spain's Case in relation to the CJEU Judgment

162. Spain contended at the hearing in May 2023 that the decision of the CJEU on the Reference which I had made in December 2020 was a binding determination to the effect that Article 34(3) wieas not applicable in circumstances such as those of the present case. It relied on paragraphs [54] to [73] of the CJEU Judgment. It contended, in particular, that the CJEU had found that, while a judgment on an arbitration award might fall within Article 34(3), this was only when a judgment on the same terms could have been entered by the enforcing court, and that the CJEU had then continued to provide 'guidance as to how that test should be applied to the facts presented to the CJEU in this case.' This 'guidance' was that 'the content of the arbitral award at issue in the main proceedings could not have been the subject of a judicial decision falling within the scope of Regulation No. 44/2001 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*.' Further, it was not simply for the court seised with the enforcement application under the Regulation to consider and apply these principles, but the court seised with the application to enter the judgment in the terms of the arbitral award.' The CJEU, Spain said, had 'criticised' the High Court and Court of Appeal in failing to apply these principles or to make a Reference to the CJEU in the s. 66 proceedings (i.e. in 2013-15).

163. The Club disputed that paragraphs [54] to [73] of the CJEU Judgment were binding, or were determinative of the Club's Appeal, for one or more of four reasons (and a fifth relating to Article 34(1), which I will consider at a later stage). Those four reasons were:

(1) That the CJEU Judgment was based on the core holding that the English s. 66 Judgments could not and should not have been given. However, 'that conclusion rests on considerations which are simply too late to be relied upon'. The English Courts have already ruled that the English s. 66 Judgments could and should be given and as a matter of English law the earlier judgments are binding as between the Club and Spain: the matter was *res judicata* and could not be displaced by a subsequent decision of the CJEU. This was and will be referred to as the Club's *res judicata* ground.

(2) That in paragraphs [54] to [73] of the CJEU Judgment the CJEU exceeded its jurisdiction or competence in one or more fundamental respects, namely in answering questions which were not referred to it, in applying the law to the facts, or basing its reasoning on a miscomprehension of the facts, and exceeding the competence of the EU. This was called the Club's jurisdiction ground.

(3) That the Club was not provided with fair notice of nor the opportunity to address the CJEU upon the lines of argument which it adopted in paragraphs [54] to [73] of the CJEU Judgment. This was called the Club's procedural fairness ground.

(4) That in circumstances where the Court of Appeal had set aside the Order for Reference, the CJEU Judgment delivered before the Reference could be withdrawn was not binding under the WA. This was referred to as the Club's invalid Reference ground.

164. In its oral submissions, the Club focused its attention on the first and second of these points: the *res judicata* and jurisdiction grounds. I will consider each of the four, but for reasons which will appear, will likewise focus on the first two grounds.

The Club's *res judicata* ground

The Parties' contentions

165. In somewhat more detail, the parties' contentions on this issue were as follows.

166. The Club contended that, as a matter of English law, there was a cause of action estoppel, alternatively an issue estoppel, which prevented Spain from contending that the English s. 66 Judgments should not have been entered. EU law was clearly to the effect that a later judgment of the CJEU does not affect the legal position between two parties between whom there is an extant and prior decision which is *res judicata* under national law.

167. The *res judicata* in this case arose from the decisions of Hamblen J in 2013 and the Court of Appeal in 2015 that a s. 66 Judgment should be rendered. Specifically, Hamblen J had rejected the argument that it was relevant to his decision as to entering a s. 66 judgment whether the English Court could itself have rendered judgment on the claims.

168. Accordingly, Spain could not rely on a judgment of the CJEU based on the premise that the English s. 66 Judgments were not properly given, nor based on the fact that the English court could not itself have rendered those Judgments under the Regulation. As the Club put it: 'The time for determining that question was in 2013-15 and the Club was successful on it.'

169. For Spain, it was contended that there was no inconsistency between the English s. 66 Judgments and the CJEU Judgment, as the latter presupposed the existence of the former. Furthermore, the English Court had not determined, during the proceedings leading to the entry of the English s. 66 Judgments, that it was not relevant as to whether the English court could, itself, have rendered judgment on Spain's claims.

170. Further Spain contended that EU law required the referring court to give effect to the decision of the CJEU irrespective of whether that decision contradicted an earlier decision which is *res judicata* as between the parties under national law.

171. In any event, there were exceptions under English law to the principles of *res judicata*, which should be applied if (contrary to Spain's primary case) there would otherwise be a relevant estoppel.

Discussion

172. The right place to start, in my view, is with what was decided in 2013-2015, and whether it gives rise, as a matter of English law, to a relevant *res judicata*.

173. The Club's contention was that, before Hamblen J, Spain had raised two particular arguments against the grant of s. 66 relief. One was that a s. 66 judgment would be of no utility, because, at the enforcement stage, a judgment rendered in 'non-Regulation proceedings', ie in proceedings outside the material scope of the Regulation, could not be relied upon as a defence to enforcement of a judgment of another Member State under the Regulation. There was therefore no point in granting such a judgment. The second point had been that even if there was utility in rendering s. 66 relief because the order was capable of precluding enforcement of an inconsistent Spanish Judgment under Article 34(3), it would be wrong for the English Court to take that step, because it would subvert the scheme of the Regulation. Hamblen J had, the Club said, decided both points in its favour; and, particularly, he had decided the second point in its favour. Spain had abandoned an appeal in relation to this point, and had not sought a reference to the CJEU in relation to it. It was accordingly *res judicata* that the English s. 66 Judgments were properly given, even if it meant that the judgments were given in circumstances where the English court could not itself have given judgment under the Regulation.

174. Spain's contention was that Hamblen J had decided only that there was arguable utility to the Club in entering a s. 66 Judgment. He had not decided that it was irrelevant that the English Court could not, under the Regulation, have entered judgment on Spain's claims. And in the Court of Appeal, Spain had reserved a challenge to Hamblen J's decision on the issue of utility, and in particular the significance of the fact that a s. 66 judgment would fall outside the material scope of the Regulation, pending there being a Spanish judgment which was said to be enforceable under the Regulation.

175. In my judgment, the Club is largely correct in its analysis of what occurred and as to its legal consequences. In its submissions before Hamblen J, Spain put forward two arguments. As Spain's Skeleton Argument for the hearing of 14 October 2013 (especially paragraphs 188-189 and 195) and the transcript of that hearing (especially at pages 15-21) make clear, Spain was contending that either a s. 66 judgment would not be a relevant 'home' judgment for the purposes of Article 34(3), in which case there would be no utility in granting it, or it would be a relevant judgment for Article 34(3) purposes. On the hypothesis that it was the latter, then it would be contrary to 'regulation principles' for the Club to seek, and the English Court to grant, a s. 66 judgment. Specifically, to grant such a judgment would disregard the scheme of the Regulation both as to 'the lis pendens provision in Article 27 and the direct action provision in Article 11.'

176. Hamblen J dealt with these points at paragraphs [181]-[194] of his judgment of 22 October 2013. At paragraphs [185]-[189], Hamblen J concluded that there was sufficient utility in granting a s. 66 judgment if there was a real prospect that it would achieve primacy over an incoming judgment. At paras. [190]-[193], Hamblen J considered the other aspect of Spain's argument, namely that if a s. 66 judgment would be (or there was a realistic prospect that it would be) a relevant 'home' judgment, then it would be inappropriate to enter such a judgment because that 'would subvert the Regulation jurisdictional regime', and in particular the provisions as to *lis pendens* in Article 27(1) and the direct action provision in Article 11. At paragraph [193], Hamblen J addressed this aspect, and said:

'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 coordination 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?'

Then in paragraph [194] Hamblen J said, summarising his conclusions as to both aspects of Spain's case, that:

'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'.

177. In my view 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.

178. I should also clarify that, while Hamblen J's decision to enter the s. 66 judgment had a discretionary element to it, his decision in relation to the point at issue was not the exercise of a discretion: it was a decision that the jurisdictional provisions of the Regulation were no reason for not entering a s. 66 judgment. This was notwithstanding that, depending on the material scope point, the existence of such a judgment would be a reason for not recognising a subsequent Spanish judgment.

179. Spain included both the aspects I have referred to as part of Ground 3 of its Grounds of Appeal from Hamblen J's decision. I think it is clear that the first aspect was the subject

of paragraphs 3(a) and (b), and the second of paragraphs 3(c) and (d) of those Grounds. In relation to the first Spain complained that the Judge had been wrong not to decide the issue, viz. whether a s. 66 judgment would have 'primacy' as being a relevant 'home' judgment. No similar complaint was made as to the Judge having been wrong not to decide the issue relevant to the second aspect. That, in my view, is because the Judge had decided that the alleged inconsistency with the Regulation's jurisdictional regime was not a valid reason for not entering the s. 66 Judgment.

180. On the second day of Spain's appeal from Hamblen J's judgment, Spain handed a note to the Court of Appeal, which stated that it was not pursuing Ground 3 of its Grounds of Appeal. It said that this was on the basis of time constraints, and on the basis that the matter was not straightforward, and it would be appropriate to wait and see whether there was a Spanish judgment. The note focused on the issue of utility. Equally, when the matter was raised orally with the Court, Spain's counsel focused on the utility issue, and the Court was told that Ground 3 was not being pursued for the reasons set out in the note. Moore-Bick LJ said, in response, that Spain was going 'to fight another day' and that that seemed sensible.

181. Though what had occurred on the appeal was relied upon by Mr Young KC, I did not consider that it assisted Spain. Whatever was said in its note as to the reasons why it was not pursuing Ground 3, the fact is that it did not pursue the whole of Ground 3. While the Court was told that Ground 3 was not pursued because Spain was content to fight another day, that does not establish that it was open to it to fight all the points in Ground 3 another day if it did not pursue its appeal on them. In the case of the 'utility' point, which Hamblen J had dealt with on the basis that there was at least a real prospect of utility, there was no dispute before me that Spain had been able to reserve matters for another day, in particular the question of whether the s. 66 Judgment was a relevant judgment even though outside the material scope of the Regulation. But as to the other aspect of Hamblen J's decision, that was not one which it was open to Spain to 'fight another day', because the s. 66 Judgment had been entered on the basis that the Regulation jurisdictional regime was not applicable. The effect of Spain's not pursuing its appeal in relation to that point left Hamblen J's decision on it undisturbed.

182. In my judgment, that undisturbed decision did have *res judicata* effect. While the Club contended that it had established a cause of action estoppel, I doubted that this was the case. The claim in the s. 66 proceedings was for the entry of a s. 66 judgment in terms of the Schaff Award. Spain's claim in the present proceedings is for recognition and enforcement of the Spanish Judgment, and the Club's Appeal is against the recognition of that judgment. I am not persuaded that these can be said to constitute identical causes of action.

183. On the other hand, I do consider that Hamblen J's decision gives rise to an issue estoppel. As I have said, Hamblen J decided that a s. 66 judgment [or the s.66 Judgment] should be entered and that it was not relevant that the Court could not have heard the claims in the Spanish proceedings by reason of the Regulation's jurisdictional allocations, including its *lis pendens* and direct action provisions, because the Regulation did not apply to arbitration.

184. I turn to consider Spain's further arguments as to why the Club's *res judicata* ground provides no reason for failing to give effect to the reasoning in paragraphs [54]-[73] of the CJEU Judgment.

185. The first such argument is that there is no inconsistency between the 2013/15 decisions of the English Courts and the CJEU's decision because the CJEU's reasoning presupposes that the English s. 66 Judgments exist. I agree with the Club, however, that the inconsistency does not arise, or does not only arise, because of the existence of the English s. 66 Judgments, but from what Hamblen J decided in giving such a judgment. As I have said, he decided that the jurisdictional scheme of the Regulation was not a reason for the s. 66 Judgment not to be given, because the Regulation was not applicable to arbitration, and that a Regulation which did not concern arbitration could not prevent the Club from having the full benefit of an arbitration award, including any primacy over an inconsistent judgment which would result from a judgment in terms of the award.

186. In my view, that reasoning is plainly inconsistent with the reasoning of the CJEU. The CJEU's reasoning was that a judgment in terms of the Schaff Award should not have been entered because (as is said in [59]), 'the content of the arbitral award at issue in the main proceedings could not have been the subject of a judicial decision falling within the scope of [the 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*.' But, to my mind, it is apparent that Hamblen J had already, in 2013, decided that the entry of a judgment in terms of the Schaff Award did not contravene the scheme of the Regulation.

187. The inconsistency is starkly revealed by paragraph [71] of the CJEU Judgment. As I have already set out, it is there said that it was an obligation on the court seised with a view to entering a judgment in the terms of an arbitral award 'to verify that the provisions and fundamental objectives of [the Regulation] have been complied with…'; and that 'it is apparent from the documents before the Court … that no such verification took place either before the High Court of Justice [i.e. before Hamblen J] … or before the Court of Appeal …' In my judgment, what had in fact happened is that this matter had been considered and it had been decided that there was no inconsistency with the Regulation. Even though that decision does not accord with what the CJEU has indicated, in its Judgment, should have been the result, this does not alter the fact that the decisions were made, and are *res judicata*. The CJEU was not hearing an appeal from those decisions, which became final and unappealable a considerable time ago.

188. Spain's next argument which it is convenient to consider is that there are exceptions in relation the English law as to *res judicata*, which are applicable here, and which mean that there is no relevant estoppel or other preclusive effect arising from the decisions of 2013/15.

189. I have already said that, in my judgment, the relevant principles are those of issue estoppel, rather than cause of action estoppel. In relation to issue estoppel, there was no dispute that except in special circumstances where it would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully; and that if the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised: *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at [22] per Lord Sumption JSC.

190. Spain contended that it could not with reasonable diligence, and prior to the CJEU decisions in *Assens Havn* and this case, have advanced the arguments as to the 'relative effect' of an arbitration agreement. I do not accept that this brings the exception to issue estoppel into play. In 2013/15 Spain was able to advance, and did advance, an argument which was very similar to that adopted by the CJEU, based on both the *lis pendens* provisions and the direct action provisions in Article 11 of the Regulation, and on the contention that for the Court to enter judgment would be to disregard the scheme of the Regulation in an impermissible manner (Defendants' Skeleton Argument of 27 September 2013, para. 188; Judgment of Hamblen J, para. [191]). That it did not have the CJEU authorities which came later does not mean that it was unable to pursue substantially the same line of argument which was adopted by the CJEU in paragraphs [54] to [73] of the CJEU Judgment. Furthermore, I accept the Club's point that Spain could have sought a reference to the CJEU from Hamblen J or the Court of Appeal, but did not do so.

191. Nor do I accept that there are special circumstances in the present case which require or justify the disapplication of an issue estoppel. A change in the law, assuming that that can be said to be what has occurred here, is not of itself usually sufficient to lead to the disapplication of an issue estoppel: see *Re Waring; Westminster Bank v Burton-Butler* [1948] 1 Ch 221, 227; *Watt (formerly Carter) v Ahsan* [2007] UKHL 51, [2008] 1 AC 696, at [33]-[35] per Lord Hoffmann. Nor does it appear to me that the present case is one where there are special circumstances of the kind envisaged in *Arnold v National Westminster Bank plc* [1991] 2 AC 93. The circumstances in that case included the fact that there was a continuing relationship of landlord and tenant, and therefore the incorrect decision as to a past rent review would affect future rent reviews until the end of the term; and that the decision of Walton J had not been subject to appeal. In the present case, there is no continuing relationship between the parties such that the decisions of 2013/15 will continue to affect subsequently-arising aspects of that relationship; and the decision of Hamblen J was capable of being appealed, and was appealed.

192. Spain also contended that as a matter of EU law the Court has an obligation to give effect to the CJEU Judgment, whether or not there was an estoppel binding Spain. Spain relied in particular on the decision in *Elchinov v Natsionalna zdravnoosiguritalna kasa (*Case C-173/09). Further, Spain contended, by reference to the decision in *Fallimento v Olimpiclub* (Case C/2/08), that *res judicata* should not be applied when it is limited to points of fact or law arising in separate proceedings between the same parties.

193. In my judgment this argument lacks foundation. Subject to the principles of equivalence and effectiveness, to which I will come, EU law respects principles of national law relating to *res judicata*, and does not require national courts to ignore, or fail to give effect to, what are under national law prior binding decisions. This is so, even if the earlier decision was made without a point of EU law being raised or, if raised, being misapplied.

194. In *Kapferer v Schlank & Schick GmbH* (Case C/234/04) it was held that a judicial decision on jurisdiction under the consumer provisions of Brussels I Regulation was final, even if wrong. In the Court's judgment, the following was said:

'[19] By Question 1(a), the referring court asks essentially whether, and, where relevant, in what conditions, the principle of cooperation arising from Article 10 EC

imposes on a national court an obligation to review and set aside a final judicial decision if that decision should infringe Community law.

[20] In this regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of *res judicata*. In order to ensure the stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question …

[21] Therefore, Community law does not require a national court to disapply rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue (see, to that effect, Case C-126/97 *Eco Swiss*…)'

195. *Kapferer* referred to and applied the approach which the Court had adopted in *Eco Swiss China Time Ltd v Benetton International NV* (Case C-126/97) (especially paragraphs [46]-[48]) where it had been held that an arbitration award was final even if competition rules under the Treaties had not been considered. This approach was again applied in *Asturcom Telecommunicaciones SL v Rodriguez Nogueira* (Case C/40/08) (especially paragraphs [28]-[59]). In that case, the Court, at para. [38], made it clear that the rules as to *res judicata* are those of national law. Thus it was said:

'[38] In the absence of Community legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence); nor must they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness)…'

196. The approach in these cases was also adopted in *Telecom Italia SpA v Ministero dello Sviluppo Economico* (Case C/34/19). This is undoubtedly a strong case, in that it establishes that EU law does not require a decision to be re-opened even where, during the same litigation between the same parties, the national court has misapplied the CJEU's judgment on an earlier reference in those proceedings.

197. The principle applied in *Elchinov*, a case relied on by Spain, is, in my judgment, a different one. That principle is that EU law precludes a lower national court from being bound, as a matter of *stare decisis*, by a decision of a court higher in the judicial hierarchy which was inconsistent with EU law as laid down in a reference in those proceedings. The case did not involve issues of *res judicata*, and what has been called the '*Kapferer* principle', which is applied in the cases I have referred to above, was not discussed, and did not arise because the proceedings had been remitted back to the lower court and had not concluded.

198. Equally, I do not consider that the case of *Fallimento* supports Spain's contention that EU law requires that what otherwise would be treated as incapable of being revisited as *res judicata* should not be so treated in a case such as the present. The issue in that case was as to whether judicial decisions in relation to certain tax years were binding in relation to the incidence of VAT in relation to different tax years. The CJEU's

judgment was to the effect that though the '*Kapferer* principle' generally applied (paragraphs [22]-[25]), national rules as to *res judicata* were not, as had been said in other cases, to be applied if they contravened the principles of equivalence or effectiveness. Application of *res judicata* in that case would have contravened the principle of effectiveness, because it would have meant that earlier incorrect decisions would fall to be applied in every subsequent tax assessment, and that constituted too extensive an obstacle to the effective application of Community rules on VAT (paragraphs [26]-[31]).

199. The present case is not of that kind. Here, there is an issue estoppel from an earlier stage of the dispute which falls to be applied in relation to the same dispute; it is not a case of the repeated application of an estoppel to further disputes between the parties in relation to different years.

200. In my judgment, this is clearly not a case in which an application of the relevant principle of *res judicata* under English law would contravene either the principle of equivalence or that of effectiveness. There is no question of the rule being applied in a different way to a claim based on EU law as opposed to one based on domestic law. Nor do I consider that the application of the ordinary rules of *res judicata* prevents the effective application of EU law. Spain had the opportunity of addressing Hamblen J with its arguments as to the effect of the scheme of the Regulation, and did so. It had the opportunity of appealing Hamblen J's decision, which it took, but then decided not to pursue part of its appeal. It could have sought, but did not seek, a reference to the CJEU during the 2013/15 proceedings. An issue estoppel arising from what then occurred does not affect any continuing relationship between the parties (such as those under a lease or future taxable transactions) and nor does it affect the application of EU law to other parties or other factual situations. Applying the test referred to in *Târşia v Statul Român and Serviciul* (Case C-69/14) (paragraphs [36]-[38]) and in *SC Avios Lucos SRL v Agenţia de Plaţi şi Intervenţie pentru Agriculturã* (Case C-116/20) (at paragraph [101]) as to whether the application of EU law was made 'impossible or excessively difficult', having regard to the role of the national rules of *res judicata* as a whole in the context of the basic principles of the domestic judicial system including the principle of legal certainty, I am firmly of the view that it was not. Instead, the application of those rules would appear to me to fall within the type of case in which, in accordance with the '*Kapferer* principle', EU law does not require the national courts to disapply domestic rules of *res judicata*.

201. I should finally refer to an argument made by Spain, founded on the case of *SC Avios Lucos SRL*, especially at paragraph [96], that national courts should apply domestic rules of *res judicata* restrictively in order to give effect to EU law. As to this, what was said in that case was:

> '… it is appropriate to recall that it is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of EU law.'

202. The decision in *SC Avios Lucas* is on any view not binding on this Court, as it post-dates IP completion date. In any event, what I understand to be indicated by that passage is that national courts should apply any exceptions available under national law to a rule of *res judicata* in order to permit the implementation of EU law. Given that I have found that there is no relevant exception available under national rules relating to

res judicata, that does not assist Spain. What that authority does not suggest is that the national court must devise new exceptions to *res judicata* rules in order to give a privileged position to claims based on EU law.

203. I therefore conclude that there is an issue estoppel to the effect that the jurisdiction-allocation provisions of the Regulation, and in particular its *lis pendens* and insurance provisions, were no good reason for the English s. 66 Judgments not to have been entered because the Regulation is not applicable to arbitration, and this prevents Spain from contending to the contrary. Furthermore, in line with the authorities I have referred to, this Court can and should give effect to that issue estoppel, notwithstanding what may have been suggested in paragraphs [54]-[73] of the CJEU Judgment. On that basis, the decision in the relevant part of the CJEU Judgment cannot be binding. Moreover, the CJEU does not have jurisdiction to give rulings in circumstances where the national court will not be bound by an interpretation it may give, see *Kleinwort Benson Ltd v Glasgow City Council* Case C-346/93 [1996] QB 57, esp at [23]-[24].

The Club's Jurisdiction Ground

Introduction

204. I turn to consider the Club's second ground for contending that the decision of the CJEU is not determinative or not binding in relation to whether the English s. 66 Judgments are relevant 'home' judgments for the purposes of Article 34(3). This is the argument that the CJEU, in paragraphs [54]-[73] of its Judgment, decided or purported to decide on matters which had not been the subject of the Reference, and/or to apply the law to the facts.

205. As will be apparent from my account of the background, this aspect of the case is one where Sir Peter Gross heard very similar arguments, and has expressed his conclusions, and where those conclusions are subject to challenge by Spain in its application under ss. 67 and 69 AA 1996. Although at the present point in this judgment I am considering the Club's Appeal, it will nevertheless help to shorten this judgment if I make reference to the Gross First Award in relation to this area of the case. I have, I should make clear, reached my own conclusions on it independently of Sir Peter Gross's reasoning and conclusions in that Award.

206. Like Sir Peter Gross, I regard the analysis which is called for as 'unwelcome and invidious'. Like him, I have given it anxious consideration. But like him, and with respect to the CJEU, I have reached the conclusion, not lightly but clearly, that the CJEU in paragraphs [54]-[73] did go outside the questions which had been referred, and also purported to apply the law to the facts.

Preliminary References: Purpose, Nature and Limitations

207. I have already set out the legal framework, under Article 267 of TFEU, and under the WA, relating to the jurisdiction of the CJEU to give preliminary rulings, and to the status of CJEU rulings after IP completion date.

208. The summary of the law relating to Preliminary References to the CJEU given by Sir Peter Gross, at paragraphs [121]-[122] of the Gross First Award, and which I have set

out at paragraph [74] above is, in my judgment and having heard argument on this in May 2023, accurate. Specifically:

(1) The preliminary reference procedure is intended to be based on a judicial 'dialogue' between the national court and the CJEU and to function as an 'instrument of cooperation between' them: *MAS v MB* (Case C-42/17) paras [22]-[23].

(2) The procedure involves a 'division of responsibilities'. In this division of responsibilities:

'… it is for the national court alone to define the subject-matter of the questions which it proposes to refer to the Court. According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court…' (*Trasporti Castelletti Spedizioni Internazionali SpA* (Case C-159/97) at [14]).

(3) It is also for the referring court to formulate the questions to be referred. As was said in *Touring Tours und Travel GmbH v Sociedad de Transportes SA* (Cases C-412/17 and C-474/17), at paragraphs [39]-[40]:

'[39] In that regard, it should be recalled that it is for the referring court alone to determine and formulate the questions to be referred for a preliminary ruling concerning the interpretation of EU law which are necessary in order to resolve the dispute in the main proceedings …

[40] Thus, although the referring court is at liberty to request the parties to the dispute before it to suggest wording suitable for the question to be referred, the fact remains that it is for the court alone ultimately to decide both its form and content…'

(4) In answering the question(s) referred, the CJEU may do so by reference to additional or different provisions of EU law, and may reformulate the questions posed in order to answer them and to assist the national court. This is said in *Worten v Autoridade* (Case C-342/12) at [29]-[31]. Examples of the CJEU answering the questions posed by reference to additional or different provisions of EU law are to be found in *Wolf* (Case C-229/08) and *De Groot en Slot Allium and Bejo Zaden* (Case C-147/04). The CJEU may, in order to answer the question referred, answer a logically anterior question which is a necessary step in the reasoning in order to answer the question referred.

(5) These principles do not permit the CJEU to answer questions which are in substance different from those referred. Specifically, the CJEU may not answer questions which the referring court has expressly or implicitly refused to refer. As was put in *Touring Tours*:

'[41] It is also clear from the case-law of the Court of Justice that, if the referring court expressly stated in its order for reference that it did not consider it necessary to ask a question or if it implicitly refused to submit to the Court of Justice a question raised by one of the parties, the Court of Justice may not answer that question or take it into account in the reference for a preliminary ruling…

[42] In those circumstances, the Court of Justice may not, in the present case, extend the scope of the questions asked by examining them in the light, not only of Articles 20 and 21 of Regulation No. 562/2006, but also of the provisions of Directive 2002/90, Framework Decision 2002/946 and Directive 2001/51.'

(6) The need for the CJEU to limit itself to the questions referred and not to alter the substance of the questions referred is reinforced by the need to safeguard the rights of interested persons who may wish to invoke their right to make observations to the Court. Thus in *Phytheron International SA v Jean Bourdon SA* (Case C-352/95) it was said (at [14]):

'Finally, to alter the substance of questions referred for a preliminary ruling would be incompatible with the Court's function under Article 177 of the Treaty and with its duty to ensure that the Governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 20 of the EC Statute of the Court, bearing in mind that, under that provision, only the order of the referring court is notified to the interested parties …'

(7) It is for the national court to determine the facts and to apply the law to those facts. This is stated in *AC-ATEL Electronics Vertriebs GmbH* (Case C-30/93) as follows (at [16]-[17]):

'[16] On that point, it should be borne in mind that Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, so that, when ruling on the interpretation or validity of Community provisions, the latter is empowered to do so only on the basis of the facts which the national court puts before it…

[17] It is not for the Court of Justice, but for the national court, to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver…'

209. I have also reached the conclusion (as did Sir Peter Gross at paragraph [122(3)] of the Gross First Award) that, if the CJEU purported to answer a question not or falling outside those referred to it, the national court would not be bound to follow any such purported answer, though it would not lightly so hold. This appears to me to be the corollary of the limited jurisdiction established by Article 267 of the TFEU. The conclusion appears to me to be supported by authority in this jurisdiction, including in: *R v Secretary of State for Transport ex parte Factortame (No. 5)* [2000] 1 AC 524, where at [550] A-C Lord Hope (with whom Lord Nicholls and Lord Hoffmann agreed) said that he would not place weight on certain expressions of opinion by the European Court because the national courts had sole jurisdiction to find the facts; *Arsenal FC v Reed* [2003] 3 All ER 865 (CA) at [25] (to like effect); and in *HMRC v Aimia* [2013] UKSC 15 at [55]-[56] per Lord Reed JSC (with whom Lords Hope and Walker agreed). In the last of these cases, Lord Reed said (at [56]:

'… 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 [VAT 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 …. 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 on an incomplete evaluation of the facts found by the tribunal or addressed questions which failed fully to reflect those arguments…'
>
> Lord Reed then continued to say that the court had to reach its conclusion in the light of such guidance as to the law which could be derived from the European Court's ruling; but that was not, I consider, dealing with guidance in answer to questions which had not been posed.

210. In those cases, therefore, it was held that a national court would not be bound by expressions of view by the CJEU as to the facts, or as to matters which did not in fact reflect the facts and arguments in the case. I consider that the same must be the case where the Court has answered questions which it was not asked to decide, not least because (as in my view is the case here) such questions may depend on facts which were not or not fully put before the CJEU.

211. Furthermore, even if that had not been the case before the end of the IP, I consider that it is the case under the WA. If the CJEU gave a ruling on a matter which was not within the ambit of the preliminary ruling 'requested' by this Court, then, in my judgment, the CJEU had no jurisdiction to give it under Article 86 WA, and it would not be binding under Article 89, but would be a matter to which this Court could have regard under s.6(1)(a) EUWA.

212. Spain relied on the decision in *Wünsche Handelsgesellschaft GmbH v Federal Republic of Germany* (Case 69/85) ('*Wünsche 2*'), as authority for the proposition that once the CJEU has determined that it has jurisdiction to answer a question and does so, that decision has binding effect and is unappealable and unimpeachable. I do not consider that *Wünsche 2* is authority for a proposition of that width, nor that it requires modification of any of the foregoing summary of the legal position. *Wünsche 2* was not a case in which the ECJ had exceeded its jurisdiction, or answered a question other than that referred, and there is nothing in the case which said that a national court was bound by a judgment of the European Court given in excess of its jurisdiction.

213. *Wünsche 2* is, however, of some significance in that it is there stated (at paragraph [15]) that a national court can always make a fresh reference in a case where it encounters difficulties in understanding or applying a judgment given on a reference, or to refer a fresh question of law or to submit new considerations which might lead the Court to give a different answer to a question submitted earlier, provided that further questions are not submitted to the court as a means of contesting the validity of the earlier decision. That possibility, which has doubtless in practice been used to resolve many problems arising from answers to references, does not exist in the present case because of the UK's withdrawal from the EU. As a result, this case raises clearly the issue of whether the CJEU has exceeded its jurisdiction and the consequences if it has.

Analysis and conclusions on Jurisdiction Ground

214. Applying the principles set out above, in my judgment the CJEU, in paragraphs [54] to [73] of its Judgment, gave answers to questions which had not been referred to it, and which this Court had refused to refer. In doing so, it trespassed on the facts of the case.

215. Thus, the first two questions referred to the CJEU in relation to Article 34(3) raised clearly defined issues of EU law. They asked whether a s. 66 judgment was capable of falling within Article 34(3) in light of two specific points, the '*Solo* point', and the material scope point. The nature of the questions and the reasons why they were asked were set out both in the Reference Judgment, and very clearly in the Reasons for the Reference section of the Order for Reference.

216. There was no question aimed at whether there were other reasons why Article 34(3) might be inapplicable, and specifically no question directed at whether Article 34(3) might be inapplicable because the English s. 66 Judgments had been entered in circumstances where the English Court could not have entertained the claim which was the subject of the Spanish proceedings. That, in my view, raised different questions (including but certainly not limited to different questions of EU law).

217. I do not consider that there was any ambiguity as to the ambit of the questions referred. That this is so is confirmed, in my view, by the way in which the Advocate General dealt with them in his Opinion.

218. Furthermore, the Court had refused to refer questions which might have involved at least part of the line of argument adopted by the CJEU. I have already set out what occurred. Spain had asked in its application for a reference for a number of points to be referred. I agree with the Club that the drafting of those questions had been somewhat obscure and overlapping, but it is apparent that they raised issues as to the '*Solo*' and material scope points (question 2), questions 3 and 4 raised issues related to *lis pendens* and question 5 related to the insurance provisions. At the trial in December 2020, the questions on which Spain was seeking a reference were reflected in the parties' written submissions, which more clearly identified Spain's arguments as falling into the four points on Article 34(3) which I have identified above (in paragraph [87] and subsequently).

219. 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 Regulation.

220. I consider this is clear simply from a comparison of the issues which Spain had sought should be the subject of a reference with the questions which were referred. But, in addition, I stated in the Reference Judgment, at paragraph [28], that there were only three particular issues which I considered suitable for a reference, which were identified in paragraph [36] (two relating to Article 34(3) and one to Article 34(1)). As I said in paragraph [28], these were only some of the issues which had been suggested by Spain, but were 'the three' which I considered to raise issues suitable for a reference. That 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 Judgment, 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 and if it had what the relevance of that might be.

221. That regard could be had to the Reference Judgment as to what matters were and were not referred is confirmed by the fact that the Advocate General referred to it (in paragraph [36] of his Opinion) for just this purpose.

222. In those circumstances, and for the purposes of the test in para. [41] of *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.

223. I should add that, although this point is certainly by no means determinative, I am in no doubt that those representing the parties, including Spain, at the December 2020 hearing, were under no misapprehensions as to what issues had and had not been referred. This appears to me to be borne out by the communications referred to at paragraph [51] above. Spain's counsel suggested the addition of a mention, not in the formulation of the points referred, but in a paragraph relating to a summary of the points on which Spain had resisted the Club's Appeal, to the three arguments I have set out in paragraph [51]. The basis on which this was proposed was that this would help identify which issues had and which had not been referred. The suggestion was opposed by the Club on the basis that if matters had not been referred they should not be included in the document. When I said that I considered that they should be omitted, Spain made no further submission. Spain did not suggest, for example, that they might form part of the issues referred, and that it was necessary to refer to them for that reason. This was, in my view, because Spain's representatives were not in doubt that the three matters had not been referred.

224. In addition to going beyond the questions referred, I also consider that paragraphs [54]-[73] of the CJEU Judgment sought to apply the law to the facts based on an incomplete understanding of those facts, including in relation to the course of the earlier proceedings which had resulted in the English s. 66 Judgments. Specifically, the CJEU did not take into account that because of the issues which had been raised and decided in the earlier proceedings there might be *res judicatae* relevant to the line of reasoning which it adopted. This is not surprising, because the Order for Reference had not sought to include all the matters relevant to this question, including the arguments before Hamblen J and the Court of Appeal which are discussed above. The Reference was not intended to refer issues to which those facts were of significant importance.

225. In the result, the CJEU's statement of the factual position in paragraph [71] of the CJEU Judgment was, in my view, incomplete and paragraphs [54]-[73] proceed on a basis which does not take account of the *res judicatae*.

226. I should specifically consider four arguments which were made by Spain as to why paragraphs [54]-[73] of the CJEU Judgment must be binding on this Court.

227. The first was that the CJEU has the power to reformulate questions and to refer to provisions different from those referred to in the reference in order that the answer which it gives enables the national court correctly to decide the case, and that the CJEU here did nothing which went beyond those powers. But in my view, which is the same as Sir Peter Gross's, the CJEU went 'far and plainly beyond' reformulating the questions asked, and addressed what were in substance different questions.

228. The second was that what the CJEU had done in paragraphs [54]-[73] of the Judgement was to give a qualification to the answer in relation to the first two questions; and that it must have been able to do that, for otherwise it would have given an answer to those questions which it did not consider to be correct. I do not accept this. The jurisdiction of the CJEU, under the TFEU, does not extend to providing, by way of qualifications in the answer to a question referred, the answer to a substantially different question not referred. The preliminary reference procedure is not designed to allow the CJEU to comment on aspects of the case which have not been referred to it. For it to do so would not be consonant with there being a cooperative dialogue, which the procedure is intended to represent.

229. Nor do I accept that for the CJEU not to have included paragraphs [54]-[73] would have meant that it would have had to give an answer to the questions referred which was inaccurate. The questions were specific: as to whether the '*Solo* point' or the material scope point meant that a s. 66 judgment did not qualify as a relevant judgment within Article 34(3). An answer that those points did not, of themselves, have that consequence would have been accurate, as shown by both the Advocate General's Opinion and paragraphs [41]-[53] of the CJEU Judgment. That would have left as yet undecided further questions as to whether other circumstances relating to the entry of the English s. 66 Judgments meant that they did not count as relevant judgments for the purposes of Article 34(3). Those would have fallen to be decided, in the usual way, by a decision of this Court on the remaining points in the Club's Appeal, which decision would itself have been subject to possible appeals to higher courts. In the absence of the UK's withdrawal from the EU, and to the extent that points of EU law were involved, there might have been the possibility of a further reference to the CJEU. But the fact that there is now no such possibility is not a justification for the CJEU short-circuiting what would have been the ordinary course.

230. The third argument was that the CJEU Judgment in this case must be binding in full on this Court because it would be binding on other national courts of the EU, which might not be in a position to determine whether or not the CJEU answered a question which had not been referred. I do not consider that this argument has force. A decision of the CJEU on a preliminary reference from one national court is not necessarily conclusive of a different dispute before another national court, even on the same point of law. The EU does not have a system of precedent in the same sense as exists in some national legal systems. It would be open to other national courts to make a reference to the CJEU even on a point which is the subject of existing ECJ/CJEU authority, on a number of grounds, including that there are other considerations which have not been addressed in the judgment. This is stated, for example, in *Consorzio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* (Case C-561/19) at [37] ('… even when there is case-law of the Court resolving the point of law at issue, national courts and tribunals retain the broadest power to bring a matter before the Court if they consider it appropriate to do so, and the fact that the provisions whose interpretation is sought have already been interpreted by the Court does not deprive the Court of jurisdiction to give a further ruling…').

231. The fourth argument was a suggestion that the Club had not raised an issue during the course of the Reference as to the admissibility of points in relation to *lis pendens* or the insurance provisions. This argument appeared to me to be unfounded. Insofar as any issue of *admissibility* could have been raised in the course of the written observations,

it could only have been as to the admissibility of the questions posed by this Court. No party raised any issue as to the admissibility of those questions. While certain parties made written observations which went outside the scope of those questions, this fact was only known to the other parties on the simultaneous exchange of written observations. In particular, Spain made observations about the effect of the insurance provisions of the Regulation (including in relation to *Assens Havn*). Spain did not mention an issue about *lis pendens*. Also, France raised an issue about (lack of) irreconcilability of the English s.66 Judgments and the Spanish Judgment. In light of this, the Club wrote the letter of 23 August 2021, which I have referred to above, which contended that the issues of irreconcilability and the significance of *Assens Havn* were not matters which had been referred. The CJEU indicated that it wished to be addressed on one of those points, namely the irreconcilability point; and I am told that the Club did so in its oral submissions.

232. In light of that sequence of events, I do not see how it can be said that the Club failed to object to lines of argument which fell outside the questions referred.

233. For those reasons, I do not consider that this Court is bound by paragraphs [54]-[73] of the CJEU Judgment.

Consequences

234. I should then add what I consider the position to be if I am not so bound.

235. In relation to the points which were argued before me in December 2020 (and in particular what I have described as the third and fourth points on Article 34(3)), my views are as I have set them out above, and are not changed by paragraphs [54]-[73] of the CJEU Judgment, assuming that those paragraphs are not binding.

236. Further, while I am clearly entitled to have regard to the reasoning of the CJEU in those paragraphs, if I am not bound by them I would not follow them. In my judgment they fail to give effect to the exclusion of arbitration from the Regulation, and they fail to have regard to the jurisprudence of the ECJ/CJEU which has recognised that the arbitration exception is effective to exclude arbitration in its entirety, including proceedings in national courts the subject matter of which is arbitration, in particular the decisions in *Marc Rich & Co AG v Società Italiana Impianti PA (The 'Atlantic Emperor')* (Case C-190/89), and *Proceedings Concerning Gazprom OAO* (Case C-536/13).

237. Instead I would follow, and may be bound by, the reasoning of the Court of Appeal in *The Prestige (Nos. 3 and 4)*, in relation to an argument which was raised there with reference to *Assens Havn*, to the effect that an analogy with that case indicated that the Award Claims there under consideration did not fall within the 'arbitration exception' to the Regulation. The argument of the States was that the reasoning in *Assens Havn*, which was to do with an exclusive jurisdiction clause in a liability insurance policy, was 'equally applicable to an arbitration clause'. At [79]-[84] the Court of Appeal said this:

'[79] For this purpose we are prepared to assume that, if the Regulation applies to the Award Claims, they would constitute a matter relating to insurance so as to fall within Section 3. We would accept that, where the Recast Regulation applies, article 15 sets

> out the only circumstances in which the parties may contract out of Section 3. … We accept also that *Assens Havn* means that an exclusive jurisdiction obligation applicable under the conditional benefit analysis in English law cannot be invoked by a liability insurer facing a claim by an injured party bringing a direct action when that is permitted under the national law of the court concerned.
>
> [80] However, before any question as to the effect of Section 3 can arise, a necessary prior question is whether the Regulation applies at all. As arbitration in its entirety is excluded from the Regulation, there can be no question of Section 3 having any effect in a case to which the "arbitration" exception in article 1(2)(d) applies. Section 3 can only apply to matters within the scope of the Regulation and does not apply to arbitration which is excluded from the Regulation by the exception. Whereas exclusive jurisdiction clauses are within the scope of the Regulation, arbitration clauses are not.
>
> …
>
> [83] If *Assens Havn* meant that an injured party making a direct claim against a liability insurer was not bound by an arbitration clause in the contract of insurance, the effect would be that no stay of such a claim could be made in accordance with a state's national law under the New York Convention….
>
> [84] For these reasons we hold that the reasoning in *Assens Havn* cannot apply to an arbitration clause. We note that this is also the view of Professor Briggs (*Civil Jurisdiction and Judgments*, 7th ed (2021), para. 9.05). Accordingly the "arbitration" exception applies to the Award Claims and jurisdiction must be determined in accordance with domestic law principles.'

238. The Court of Appeal has also, since the withdrawal of the UK from the EU, and since the CJEU Judgment in this case, reaffirmed the primacy of the arbitration exception to the Regulation and its application to legal proceedings whose essential subject matter is arbitration or where the relief can be said to be integral rather than ancillary to the arbitration process. In *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297, the Court of Appeal confirmed that the arbitration exception took precedence ahead of the provisions of Chapter 2 of the Regulation, including Section 4, which was the section at issue in that case: see in particular paragraphs [60]-[88] in the judgment of Popplewell LJ. At para. [90] Popplewell LJ referred to the CJEU Judgment in this case, and said:

> '… If para. 60 [of the CJEU Judgment] is to be read as assimilating arbitration clauses with exclusive jurisdiction clauses, a similar argument was advanced to this court in *The Prestige Nos. 3 & 4*. It was rejected for the detailed reasons set out at paras 76-84. The CJEU judgment does not address the difficulties with the reasoning identified in *The Prestige Nos. 3 & 4*. Following IP Completion day we are not bound by this decision … On the other hand we are bound by the decision of this court in *The Prestige Nos. 3 & 4*, whose reasoning and conclusion on this point I, in any event, prefer. I do not therefore treat the CJEU *Prestige* judgment as undermining the conclusion I have reached.'

239. On that basis, because the Regulation was not applicable to the proceedings which led to the English s. 66 Judgments, the fact that Spain's claim could not have been heard in the courts of England and Wales was beside the point. The Regulation was not

applicable to the English proceedings, and the jurisdiction-allocation provisions of a Regulation which was not applicable to them cannot undermine the effectiveness of a judgment entered in them.

The Club's Procedural Fairness Ground

240. The Club's third argument, or procedural fairness ground, is to the effect that the decision of the CJEU was reached in breach of the requirements of natural justice, in that the Club had not had proper notice of, or opportunity to deal with, the point(s) embodied in paragraphs [54]-[73].

241. Had I decided that those paragraphs were binding on me, this argument might have had considerable merit and importance. As it is, it is not necessary to decide on it, and I do not consider that I need say more about it.

The Club's Invalid Reference Ground

242. The Club's fourth argument was based on the fact that the Court of Appeal had set aside the Order for Reference.

243. Given that I have decided that there is an operative issue estoppel and that paragraphs [54]-[73] of the CJEU Judgment are not binding, it is not strictly necessary for me to reach a conclusion in relation to this point.

244. For my own part, I would have been reluctant to express a view in relation to it, in particular given that Spain's appeal to the Supreme Court against the decision of the Court of Appeal setting aside the Order for Reference is still pending. The parties agreed, however, that I should deal with it, now, and on the assumption that Spain's appeal to the Supreme Court will fail, on the basis that if I agreed with Spain 'that the Court of Appeal's decision has no bearing on the issues at hand', the parties could remove from the Supreme Court the burden of hearing the appeal, at least subject to a successful appeal by the Club against any such decision by me.

245. On this basis, I will express my views on the point as briefly as possible.

The Parties' Contentions

246. As the Club said, 'at the heart of [its] submission under this head is an understandable and legitimate complaint. How can it be that the Club is to lose its Appeal by a decision of the Court of Justice on a reference which the Court of Appeal has held should not have been made, merely because for reasons of timing that Court has, despite being informed of the developments and timings in England, handed it down before the Reference could be withdrawn?'

247. The Club further submitted that in a case in which the Court of Appeal has said that the Reference should not have been made, the CJEU Judgment was not made in proceedings on a 'request' from a UK Court for the purposes of Article 86 WA, because the request was not a valid request. That provision had to be interpreted in light of the features of the preliminary reference procedure under Article 267 TFEU, which include that a decision to refer is subject to national appeal procedures and may be set aside on

appeal, and on the assumption that that procedure would be operated in good faith by both the CJEU and the UK.

248. For Spain it was contended that the position was simple. Under Article 100 of the CJEU procedural rules, the CJEU 'shall remain seised of a request for a preliminary ruling for as long as it is not withdrawn by the court or tribunal which made that request to the Court'. A withdrawal of a request might be taken into account 'until notice of the date of delivery of the judgment has been served on the interested persons…' Here, the CJEU had given such notice before this Court had withdrawn the request, and it had then been impossible for the Reference to be withdrawn irrespective of the Court of Appeal's decision.

Conclusion on the Invalid Reference Ground

249. I have sympathy with the Club's complaint that the outcome of its Appeal should not depend on the fact that the CJEU gave notice of the date of delivery of its judgment before the Supreme Court had considered the appeal from the Court of Appeal, and before this Court had had the opportunity to consider whether the Reference should be withdrawn in light of the Court of Appeal's decision, assuming that this had been upheld by the Supreme Court.

250. I do not, however, see how such sympathy for the Club's complaint translates into any legally cogent objection to the binding force of the CJEU Judgment (assuming that it otherwise has such force). The Order of the Court of Appeal was that the issue of whether, in the light of the Court of Appeal's judgment of 1 March 2022, the Reference should be withdrawn was referred for determination by me. I had not heard that argument and had not made such a withdrawal by the time the CJEU gave notice of the date of delivery of its judgment.

251. I do not, in particular, consider that the reference to a 'request' for a preliminary reference in Article 86 WA can be read as confined to valid requests, in the sense of requests where there has not been a decision of an appellate court setting aside the order for reference. I consider that there will have been a 'request' if this Court has made a request, unless and until that request is withdrawn by this Court. As I have said, that did not happen.

The Public Policy (*Res Judicata*) Ground: Article 34(1)

252. The Club relied, in addition or in the alternative to Article 34(3), upon Article 34(1). It contended that it would be manifestly contrary to English public policy to recognise and enforce the Spanish Judgment and that Article 34(1) applies. At the hearing in December 2020 this was advanced on two bases. It was said that enforcement would be contrary to English public policy because it would be contrary to (1) the rule as to *res judicata*, and (2) fundamental human rights.

253. In my judgment of 12 May 2021 I dealt with the second of these grounds (the human rights ground). I have here, therefore, only to deal with the first (*res judicata*).

254. My judgment of 12 May 2021 also set out, at paras. [41]-[49] certain basic features of the legal framework applicable to Article 34(1), which I will not set out again here, but which this judgment should be regarded as including.

The Contentions of the Parties

255. The Club's argument was as follows:

(1) A violation of the principle of *res judicata* amounts to a violation of a rule of English public policy within the meaning of Article 34(1). The principle of *res judicata* is one which is fundamental and essential to the domestic legal order.

(2) The Schaff Award, and also the English s.66 Judgments, have decided that the Club is not liable to Spain. Those decisions give rise to a *res judicata*.

(3) It is no answer for Spain to contend, as it has, that the Club could have prevented the irreconcilability by invoking the Schaff Award or the English s. 66 Judgments in Spain, because it could not have done so.

(4) It is also not correct that protection of the principle of *res judicata* is governed exclusively by Article 34(3) (and 34(4), 35 and 72), and not by Article 34(1). That, the Club said, is a misinterpretation of dicta in the ECJ's decision in *Hoffmann v Krieg*. Further, even if Article 34(3) could be regarded as exclusively regulating irreconcilability between judgments it does not regulate irreconcilability with arbitral awards, and a prior irreconcilable arbitral award is a clear basis on which to refuse recognition under Article 34(1) which is not touched on by *Hoffmann v Krieg*.

(5) It is also not correct to say that there is anything inconsistent with the scheme of the Regulation in recognising the public policy of *res judicata* as preventing recognition.

256. Spain's argument was as follows:

(1) That the principle of *res judicata* is not a rule of English public policy as defined in the Regulation. It is instead a domestic rule of evidence.

(2) In any event, the Club could have relied on the Schaff Award or the English s. 66 Judgments in Spain and have prevented any irreconcilability from arising. A party's not raising a *res judicata* is not a breach or offence against public policy, it is simply that party's choice.

(3) Article 34(3) regulates the consequences of *res judicata* and the effect of *res judicata* is exclusively dealt with by Articles 34(3), 34(4), 35 and 72 of the Regulation. *Res judicata* cannot be relied upon for the purposes of Article 34(1) if Article 34(3) does not preclude recognition.

(4) The position is the same in relation to arbitral awards. If the Regulation had intended to allow awards to prevent enforcement, that would have been provided for in Article 34(4). Spain contends that there are a number of authorities which support this contention.

Discussion

257. One of the points raised by these arguments on Article 34(1), namely what has been termed the *lex specialis* point, was the subject of the Reference to the CJEU.

258. As in relation to Article 34(3), however, I will set out what my conclusions would have been in relation to each of the parties' contentions in the absence of the CJEU Judgment, and then say what my conclusions are in the light of that Judgment.

Is *Res Judicata* a Matter of Public Policy?

259. The first aspect to consider is whether the principle of *res judicata* is a matter of public policy in England and Wales for the purposes of Article 34(1). That raises two issues. The first is whether the principle can be said to be a matter of public policy in the English legal order. The second is, if it is, whether it qualifies as a relevant public policy for the purposes of Article 34(1) of the Regulation.

260. In relation to the first of those issues, I am in no doubt that the rule as to *res judicata* is a matter of public policy. The fact that it has historically been given effect to by way of an estoppel does not mean that it is not justified by and is not an aspect of public policy. Moreover, though it may operate by way of an estoppel it represents a rule of substantive law.

261. In *Carl Zeiss Stiftung v Rayner & Keeler* [1967] 1 AC 853 at [933] Lord Guest spoke of the rule of estoppel by *res judicata* as being a rule of evidence. But he also stated that:

> 'The doctrine of estoppel per rem judicatam is reflected in two Latin maxims, (1) interest rei publicae ut sit finis litium, and (2) nemo debet bis vexari pro una et eadem causa. The former is public policy and the latter is private justice.'

262. Similarly in *AEGIS Ltd v European Re* [2003] 1 WLR 1041, Lord Hobhouse, giving the advice of the Privy Council, stated that estoppels 'can be described as rules of evidence or as rules of public policy to stop the abuse of process by relitigation' (at para. [14]).

263. In *Virgin Atlantic v Zodiac* [2014] AC 160 at para. [25] Lord Sumption, with whom the other members of the UK Supreme Court agreed, said:

> '… Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 110G, "estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process"'.

264. The doctrine of *res judicata* is an aspect of the broader principle of legal certainty, which itself represents public policy. In *JSC 'Aeroflot-Russian Airlines' v Berezovsky*

[2014] 1 CLC 53, Arden LJ referred to the finality principle (at [20]-[21]), and its importance in creating legal certainty which, she said (at [22]):

'… means the element of security that results from legal decisions becoming final and legal rules coming into force. Legal certainty is important because it smoothes the way for social and commercial interaction.'

265. At paragraph [25] she continued:

'25. The finality principle is also part of English public policy. English law has developed the finality principle beyond the basic principle described [in *Varnienė v Lithuania*]. In particular, English law recognises:

- Issue estoppel, that is, that an earlier final and binding decision will prevent any re-litigation not only of the same cause of action but also of any issue decided in it;
- The *Henderson v Henderson* principle that, if it is unjust for him to do so, a party may not raise by fresh proceedings claims which he could have raised in the earlier proceedings (*Henderson v Henderson* (1843) 3 Hare 100; *Johnson v Gore Wood* [2002] 2 AC 1; [and]
- The principle of election between remedies.'

266. Thus *res judicata*, though it may operate via an estoppel, is a rule of substantive law, which is concerned with the prevention of duplicative litigation and the abuse of the process of the court, and ensuring legal certainty. In my view, those objectives are, as far as the English legal order is concerned, matters of public policy.

267. There remains the further question of whether, even if the doctrine of *res judicata* is a matter of public policy according to 'national conceptions', it is to be treated as public policy for the purposes of Article 34(1) of the Regulation. Putting aside the issue, to which I will return, as to whether it is not to be so treated because issues of irreconcilability are exclusively governed by Articles 34(3) (and 34(4), 35 and 72), the answer to the question depends on whether it is 'a rule of law regarded as essential in the legal order of the state in which recognition is sought' (ie England and Wales) (see *Diageo Brands BV v Simiranda-04 OOD* (C-681/13) at [44], and *The London Steam-Ship Mutual Insurance Association v The Kingdom of Spain* [2021] EWHC 1247 (Comm) at [43]).

268. In my judgment, it is. It is a very ancient principle, which is fundamental to the functioning of the legal system. It is a doctrine whose roots go back at least to the thirteenth century. Bracton refers to it: see *Bracton on the Law and Customs of England* (trans. S.E. Thorne, 1977), vol. 3, 296-7 *('… quia cadit assisa propter exceptionem rei iudicatae…*'). It was described in *Re May* (1885) 28 Ch D 516, at 518 per Brett MR as 'one of the most fundamental doctrines of all courts, that there must be an end of litigation'. In *The Ampthill Peerage Case* [1977] AC 547 Lord Wilberforce said, at 569, 'English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or reopen disputes', this being 'in the interest of peace, certainty and security'. In the same case, Lord Simon of Glaisdale referred, at 575, to the need for

finality as 'a fundamental principle', and one which was most characteristically recognised by 'our law – by every system of law', in the finality of judgments. In *Aeroflot v Berezovsky*, Arden LJ described the principle of finality, by which decisions become *res judicata*, as being 'fundamental to the rule of law' (paragraph [20]).

269. Furthermore, I consider that this is so as much in relation to a *res judicata* arising from an arbitral award as one arising from a judgment. The importance of finality, and the application of the doctrine of *res judicata*, apply to decisions of arbitral tribunals, as summarised in *Spencer Bower and Handley on Res Judicata* (5th ed), 2.54, 4.17, 8.27, 17.07. The principle of finality is enacted in s. 58 AA 1996. That cause of action and issue estoppels arise out of final and binding awards is established by decisions of high authority: see *Fidelitas Shipping Co. Ltd v V/O Exportchleb* [1966] 1 QB 630, esp at 641F-649 per Diplock LJ; *AEGIS v European Reinsurance Co* esp at [12]-[15]. Observance of the need for finality as a result of arbitral awards was described in *Mustill & Boyd on Commercial Arbitration* (2nd ed), 410 as 'essential to the orderly administration of justice'.

270. Thus I conclude that *res judicata* is a relevant public policy for the purposes of Article 34(1). This is not a matter which was subject to the Reference or on which the CJEU opined.

Can Article 34(1) be invoked if Article 34(3) is inapplicable?

271. Spain contended that, even if it is correct to say that principle of *res judicata* is a matter of public policy which is fundamental to the legal order in England and Wales, nevertheless Article 34(1) was not engaged. This was so, Spain argued, because the consequences of *res judicata* and the effect of *res judicata* are exclusively dealt with by Article 34(3) (as well as Articles 34(4), 35 and 72) of the Regulation, and an alleged interference with principles of *res judicata* cannot be invoked as public policy under Article 34(1). As I have said, this has sometimes been referred to in this case as the '*lex specialis*' point.

272. In support of this contention, Spain relied on what was said by the ECJ in *Hoffmann v Krieg* at paragraph [21], as follows:

> 'As far as the second part of the third question is concerned, it should be noted that, according to the scheme of the Convention, use of the public-policy clause, which "ought to operate only in exceptional circumstances" (Jenard Report … at p. 44) is in any event precluded when, as here, the issue is whether a foreign judgment is compatible with a national judgment; the issue must be resolved on the basis of the specific provision under Article 27(3) [ie the equivalent of 34(3) of the Regulation], which envisages cases in which the foreign judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which enforcement is sought.'

273. Spain referred to the fact that in the Jenard Report, at p. 45, it is stated that the question of irreconcilability with judgments in the courts of the State where enforcement is sought had been considered by the Committee involved in formulating the Convention which had decided that 'to treat this as a matter of public policy would involve the danger that the concept of public policy would be interpreted too widely'; and also referred to the fact that under some national laws, issues of irreconcilability were not considered to be within the scope of public policy.

274. Spain also referred to the commentary in *Briggs on Civil Jurisdiction and Judgments*, which it said accurately stated the law, as follows (para. [7.12])

> '… an objection that a foreign judgment is not compatible with a local judgment must be dealt with within the objection for irreconcilable judgments stated in Article 34(3) alone, and cannot be repackaged and dealt with under the head of public policy in Article 34(1): the consequence is that if Article 34(3) does not lead to its non-recognition, recognition must follow.'

275. The Club's primary answer to this case was that, while what the ECJ was saying in paragraph [21] of *Hoffmann v Krieg* is 'somewhat elliptical' and that it is 'far from clear' what was intended, it is properly to be understood as saying that if Article 34(3) is satisfied, then Article 34(1) does not apply; and that it was not excluding the possibility that if a case did not fall within Article 34(3) there might nevertheless be a ground of public policy within Article 34(1). The Club contended that the effect of the Regulation for which Spain contends on the basis of paragraph [21] of *Hoffmann v Krieg* has no support in the text or in the objects of the Regulation, and is inconsistent with a number of authorities and commentaries.

276. Even without the benefit of the CJEU Judgment I would not have accepted the Club's contention that all that was being said in paragraph [21] of *Hoffmann v Krieg* was that if Article 34(3) was satisfied, Article 34(1) was not applicable. What the ECJ said in paragraph [21] of *Hoffmann v Krieg* was that where 'the issue' is whether a foreign judgment is compatible with a national judgment, 'the issue must be **resolved** on the basis of the specific provision under Article 27(3) [of the Convention]' (my emphasis). That, I considered, is saying that if there is an issue of compatibility with a national judgment, the question of whether there is any bar to enforceability under the Regulation is to be resolved, ie is to be decided one way or the other, by reference to whether Article 27(3) applies, and that reference to Article 27(1) of the Convention (Article 34(1) of the Regulation) is not then permissible and is 'precluded'.

277. I also considered that Article 34(1)'s not being available when an issue falls within the scope of Article 34(3), even in some circumstances where Article 34(3) does not apply to prevent enforcement, is consistent with the general approach to the Regulation of construing the exceptions to enforcement within Article 34 restrictively in order to facilitate the free movement of judgments, and with confining Article 34(1) to genuinely exceptional cases.

278. Although the Club cited the decision in *Hendrikman v Magenta Druck & Verlag GmbH* [1997] QB 426 as supporting its contentions that the prohibition on reference to Article 34(1) applies only when it is found that another ground under Article 34 applies, I did not consider that that case lent any support to the Club's argument. In that case, it was found that Article 27(2) of the Convention applied to prevent enforcement, and so Article 27(1) did not need to be considered. There was no consideration of whether, if Article 27(2) had not applied Article 27(1) would have been available, and there was no discussion of Article 27(3) at all. There was equally no consideration of Article 27(3) of the Convention (ie Article 34(3) of the Regulation) in the other ECJ case referred to by the Club in this connexion, *Bamberski v Krombach* [2001] QB 709, and for that reason I do not regard it as affecting what the ECJ said in the specific context of irreconcilability of judgments in *Hoffmann v Krieg*.

279. At least in relation to court judgments (I will consider the question of the *res judicata* effect of arbitral awards below), the Reference has established that Spain is correct on this point.

280. Thus, in his Opinion, Advocate General Collins:

(1) said that Article 34(1) needed to be interpreted strictly (paragraph [73]);

(2) said that *Hoffmann v Krieg* decides that reliance on the concept of public policy is precluded when the issue concerns the compatibility of a foreign judgment with a national judgment, which is an issue which is dealt with by Article 34(3) (paragraph [74]);

(3) made reference to the passage of the Jenard Report (p. 45) referred to above (paragraph [75]);

(4) referred to the Opinion of Advocate General Wahl in *Salzgitter Mannesmann Handel* (C-157/12) that Article 34(2), (3) and (4) are a *lex specialis* in relation to Article 34(1) (paragraph [76]);

(5) said that the EU legislature intended to regulate exhaustively the issue of *res judicata* and/or irreconcilability by means of Articles 34(3) and (4) 'thereby precluding the possibility of recourse to the concept of public policy in that context' (paragraph 77);

(6) concluded therefore that if Article 34(3) was inapplicable, Article 34(1) could not be relied on (paragraph [78]).

281. The CJEU, at paragraphs [75]-[76] of the CJEU Judgment, said that in light of its answer to the first two questions (including in paragraphs [54]-[73]), 'it cannot be considered that the alleged disregard of that judgment [i.e. the English s. 66 Judgments] by the enforcement order of 1 March 2019 … which was made in proceedings which that judgment itself failed to take into account, could constitute a breach of public policy in the United Kingdom.' As to those paragraphs, in my view they are founded on the part of the CJEU's judgment which is not binding, for reasons which I have given; and address a question (namely whether there was a contravention of the public policy in the UK) which had not been referred and was not itself a matter of EU law (albeit the boundaries of what might be relevant public policy for the purposes of Article 34(1) would be).

282. Be that as it may, in paragraphs [77]-[79] the CJEU gave essentially the same reasons why Article 34(3) and (4) exhaustively regulated the issue of the force of *res judicata* acquired by a judgment previously given, thereby excluding the possibility of reliance on the public policy exception in Article 34(1), as had been given by the Advocate General. I consider that reasoning to be binding on me.

283. The Club however also contended in December 2020, and in May 2023, that even if Article 34(3) and (4) are exhaustive of the issue of the force of *res judicata* of a domestic judgment, they are not in relation to the effect of an arbitral award.

284. The conclusion which I had reached prior to the conclusion of the Reference, was that the Club was correct in relation to this. I did not consider that the principle in paragraph [21] of *Hoffmann v Krieg* could extend to precluding an argument that it would be against the public policy of *res judicata* to permit enforcement of an incoming judgment which is inconsistent with an existing arbitration award, at least where that award was on the merits and had created a *res judicata* between the parties. Whatever the precise scope of the term 'judgment' in Article 34(3), it embraces only decisions given by courts or tribunals of the justice system of a state (*Solo* para. [15]), and does not extend to awards in consensual arbitrations. The Regulation does not apply to arbitration, and is not seeking to regulate issues of reconcilability with arbitral awards. Given these matters, the fact that irreconcilability with an arbitral award does not bring Article 34(3) into play is no reason why Article 34(1) cannot be engaged.

285. As I have already said, under the Recast Regulation, it is explicit that it does not affect the application of the New York Convention (Article 73(2)). This must entail that the Recast Regulation does not require enforcement of the judgment of the courts of another Member State which is inconsistent with an award which is to be enforced under the New York Convention. I consider that that must also be the position under the Regulation. To recognise that a foreign judgment should not be enforced if inconsistent with a domestic arbitration award which has created a *res judicata*, by application of Article 34(1), would avoid an inconsistency between the effect of New York Convention and domestic awards.

286. Equally, not all Member States have the concept of s. 66 proceedings or their equivalent. In some legal systems in the EU/EEA there is no mechanism for exequatur of a domestic award. If an award did not give rise to the possibility of non-enforcement of a foreign judgment under Article 34(1), there would be no means in such jurisdictions for a domestic award to preclude recognition of an incoming Member State judgment, putting such systems at a disadvantage compared to those which did have an exequatur or s. 66-type procedure.

287. I did not consider compelling the authorities which Spain cited in support of its contention that arbitral awards cannot have the effect of preventing recognition and enforcement of a Regulation judgment. One was the decision of the French Cour de Cassation in *Republic of Congo v Groupe Antoine Tabet* [2007] Rev Crit DIP 822. There the Cour de Cassation, as I understand it, decided that a domestic arbitration award, even though it had been made enforceable by exequatur, did not constitute a ground for denying recognition to a foreign judgment under Article 27(3) of (the then text of) the Lugano Convention (ie the equivalent of Article 34(3) of the Regulation), on the basis that arbitration matters (including the award and its exequatur) fell outside the scope of the Convention. There does not appear to have been consideration as to whether enforcement of the foreign judgment would have been capable of being resisted by reason of the public policy exception in Article 27(1) of the Lugano Convention.

288. Spain also relied on the *obiter* consideration in *The Wadi Sudr* of the issue of whether it would be contrary to public policy to recognise a foreign judgment given in circumstances where the English court had already granted a declaration that the parties were bound to arbitrate the relevant dispute. Waller LJ doubted (at [65]) whether the recognition of the foreign judgment would, in those circumstances, infringe a fundamental principle of the English legal order. That was not, however, a case of a

conflict of the foreign judgment with an arbitration award on the merits, creating a *res judicata*, and was thus significantly different from the present.

289. It is the case that in his article 'West Tankers Reloaded – enforcement of a declaratory award to prevent enforcement of a future decision by a foreign court' *IPRax* 2012, 264-272, Dr Martin Illmer, at [269]-[70], considers that the existence of an arbitration award, even one which has been declared enforceable, does not constitute a bar to the enforcement of an inconsistent foreign judgment by reason of the public policy exception in Article 34(1). One of the reasons he gives is that Article 34(1) is not applicable if the issue is about the compatibility of two conflicting decisions, and where therefore it is Articles 34(3) and (4) which are relevant, 'even if [their] requirements are not met in the specific case'. I note that Dr Illmer's overall view is that it would be 'highly unsatisfactory' (p. 270) if an arbitration award were subject to a contradictory decision by a court of a Member State'. In my judgment the reasons which he gives as to why the Article 34(1) route to avoid this unsatisfactory result, assuming Article 34(3) is not applicable, is not available, are not persuasive, and in particular he does not consider the public policy of finality in litigation. I find more persuasive the view expressed in *Raphael: The Anti- Suit Injunction* (2nd ed), para. [15.14], that 'the prior award on the merits should still justify refusal of enforcement as a matter of public policy'.

290. Accordingly I considered that the Club could rely on the public policy of *res judicata* to resist enforcement of the Spanish Judgment as being inconsistent with the Award.

291. In the Reference, the Advocate General's Opinion, at para. [78], included the view that, if Article 34(3) is inapplicable, 'the referring court cannot 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…' By contrast, in the CJEU Judgment, in paragraph [80], and in the second ruling, the matter was expressed as follows: '… in the event that Article 34(3) of that regulation does not apply to a judgment entered in the terms of an arbitral award, the recognition or enforcement of a judgment from another Member State cannot be refused as being contrary to public policy on the ground that it would disregard the force of *res judicata* acquired by the judgment entered in the terms of an arbitral award.' That therefore, unlike the Opinion of the Advocate General, does not state that Article 34(1) would be inapplicable to *res judicata* arising from the award itself.

292. The Advocate General's Opinion does not consider the points which I have set out above as to why Article 34(1) should be applicable even if Article 34(3) is not, to prevent enforcement of a judgment inconsistent with a domestic arbitration award, and in particular that that would avoid an inconsistency between the effect of a New York Convention and a domestic award, although the incoherence of such an inconsistency is recognised by the Advocate General in the context of Article 34(3) (paragraph [68]). Given that the CJEU Judgment does not deal in terms with awards in relation to the third question, and also does not give any answers to those points I have set out above, I am of the view that the CJEU Judgment does not provide any binding determination of this point. My conclusion, which is reached with some hesitation in light of the Advocate General's Opinion, is that Article 34(1) may apply on the basis of *res judicata* arising from an award, even if Article 34(3) is not applicable; and that in the present case this means that, if Article 34(3) is not applicable, Article 34(1) is, by reason of the *res judicata* arising from the Schaff Award.

Did the Club fail to assert *res judicata* in the Spanish proceedings?

293. The final argument made by Spain which needs consideration in this context is its contention that if there was any *res judicata* arising out of the Schaff Award or the English s. 66 Judgments, it was available to the Club to seek to assert it in the Spanish courts; that it was for the election of the Club as the party armed with the *res judicata* to decide if, when and how to rely on it; and the fact that the Club chose not to rely on it in the Spanish courts meant that there was no question of an infringement of UK public policy if there was now an enforcement here of the Spanish Judgment.

294. This was a matter on which there was evidence at the hearing in December 2020. In my judgment the point fell away in light of that expert evidence, which demonstrated that the Club could not have invoked the Schaff Award or the English s. 66 Judgments in Spain. Specifically, the evidence of Mr Ureña, who was called by the Club, was that the Schaff Award and English s. 66 Judgments would not have been recognised in Spain, and thus would not have been considered as establishing a relevant *res judicata*, for two particular reasons: (1) that because the Spanish proceedings had been commenced before the arbitration, and before the s. 66 AA 1996 proceedings, it would have been contrary to Spanish public policy to have recognised either the Schaff Award or the English s. 66 Judgments; and (2) that a plea of *res judicata* could only have been raised at the start of the Provincial Court trial in late 2012/early 2013, by which time the Schaff Award and Hamblen J's order had not been made, and that the Schaff Award and the English s. 66 Judgments could not have been relied upon in the later cassation and enforcement proceedings.

295. Spain had served expert evidence from Professor Pulido-Begines, and he and Mr Ureña had produced a Joint Expert Statement. Professor Pulido-Begines' report had said that he agreed with most of Mr Ureña's reasoning on this issue, and did not say that he specifically disagreed with the points which I have just referred to. Professor Pulido-Begines had given two different reasons why recognition of the Schaff Award and English s. 66 Judgments would have been refused in Spain, namely that: (1) a direct action claim under Article 117 is a matter of public order and cannot be submitted to arbitration; and (2) that there was in his view no *res judicata* on the facts as the substantive requirements for *res judicata* in Spanish law were not met.

296. In the event, Spain chose not to call Professor Pulido-Begines. Even had it done so, it is clear that the experts would have agreed that, for at least one of several reasons, the Schaff Award and English s. 66 Judgments would not have been recognised in Spain. As it was, I accepted Mr Ureña's evidence, which I have summarised above, which was not relevantly challenged in cross-examination.

Spain's applications under the Arbitration Act

297. As I have already set out, Spain makes a number of challenges to the Gross First Award.

Section 67

298. The first which needs to be considered is Spain's application under s. 67 AA 1996. This has two parts: one seeking the setting of the Gross First Award aside in its entirety, the other dealing with that part of the award which deals with the grant of an injunction or damages in lieu. At this stage I will deal only with the first of those aspects. I will

return to the second, which is a complaint also brought under ss. 68 and 69, in due course.

299. Spain's contention here is that, in light of the CJEU Judgment, Spain was entitled to bring its direct action claims in Spain, and that this precluded Sir Peter Gross from having jurisdiction on the bases that: (i) there was no obligation on Spain to arbitrate as it was entitled to bring its direct action claims in Spain and the Club had been obliged to bring any counterclaims in Spain; and (ii) it was not unconscionable for Spain to bring its action in Spain, and accordingly there was no jurisdiction for equity to intervene and oblige Spain to arbitrate those claims.

300. Sir Peter Gross considered the issue of his own jurisdiction in light of the CJEU Judgment and said that he entertained no doubt whatever that he had jurisdiction (paragraph [126]).

301. I too have no doubt that he had jurisdiction to entertain the claims referred to him (subject to the arguments as to his power to grant an injunction to which I will return).

302. In my judgment an argument that Sir Peter Gross did not have jurisdiction is not open to Spain. It has been finally determined that he had, and Spain cannot go behind that determination. Specifically, this was determined by the Court of Appeal in *The Prestige Nos 3 & 4* in paragraphs [59] and [60]-[69], which was a finding made expressly to avoid a s. 67 application (paragraph [59]).

303. The CJEU Judgment does not deal with the issue of the arbitrator's jurisdiction, and it is clear that, whatever else was or was not referred, that was not a question which was referred. Nevertheless, Spain sought to raise an argument as to the jurisdiction of the arbitrator by reference to the CJEU Judgment in its amended grounds of appeal to the Supreme Court. The Supreme Court refused permission on the basis, simply, that there was no arguable point of law. That left the decision of the Court of Appeal intact.

304. In those circumstances it is to my mind clear that this aspect of Spain's s. 67 application must be dismissed.

Section 69: Points in relation to the CJEU Judgment

305. As I have said, Spain seeks permission to appeal in relation to four points, and if permission is granted, for the Award to be set aside or varied.

306. The first two of those points are based on the Judgment of the CJEU. It is those two points which I will consider at this stage.

307. While I heard argument on the merits of these points, I did so without determination of the question of whether there should be permission to appeal, which I said would be dealt with in this judgment.

308. The first issue, therefore, is whether there should be permission to appeal in relation to these points. The test under s. 69 is familiar. For present purposes it can be stated thus: there must be a question of law arising out of the award, the determination of which will substantially affect the rights of one or more of the parties, and which the tribunal

was asked to determine, and on which the decision of the tribunal was obviously wrong, or was on a question of general public importance and is at least open to serious doubt.

309. I have already set out the questions which Spain says arise from the Award and in respect of which it says it should have permission to appeal, but to recap they are:

(1) What is the proper interpretation and effect of the CJEU Judgment as a matter of EU and English law, in particular, as regards (i) the jurisdiction of the arbitrator, (ii) Spain's alleged breach of its equitable obligation to arbitrate its direct actions against the Club, and (iii) Spain's alleged liability for equitable and/or statutory relief?

(2) Whether the Tribunal was bound (or the Court is bound) to give effect to the reasons and determinations of EU law in [53]-[74] (sic) of the CJEU Judgment?

310. These are said to be questions which arise from Sir Peter Gross's determination (paragraphs [126]-[141]) that the CJEU Judgment (i) did not deprive him of jurisdiction, (ii) did not decide that Spain was not bound to arbitrate its dispute with the Club, and (iii) was not binding on him. Spain contends that these were questions of general public importance and at least open to serious doubt.

311. The Club by contrast contends that the questions arising from the Gross First Award are one off points. In light of the fact that the UK has withdrawn from the EU, they will not arise again. In any event, the Club contends that Sir Peter Gross's decision were neither obviously wrong, nor open to serious doubt.

312. If the test were whether Sir Peter Gross was obviously wrong in his relevant conclusions, I would have had no hesitation in saying that he was not, or in refusing permission to appeal on these Grounds. I have, however, been persuaded that the points involved here can be said to be ones of general public importance. True it is that the UK has left the EU, but I am prepared to accept that the issues of the effect and implications of the CJEU Judgment are of general public importance, bearing in mind the sums involved, and what Sir Peter Gross called (in paragraph [1] of the Gross First Award) the 'competing interests of the first importance' involved in the dispute, on the one hand the interests of sovereign states grappling with pollution incidents, and on the other the need to protect and preserve the international arbitration process and private law rights and duties. With the exception I will now mention, I am also persuaded that Sir Peter Gross's conclusions can be said to be 'open to serious doubt'.

313. The exception is that part of Ground 1 which raises the question of whether the CJEU Judgment has any relevant effect on whether Sir Peter Gross had jurisdiction in this case. I do not regard Sir Peter Gross's conclusion on this as being open to serious doubt, for reasons which I have already given in the context of Spain's s. 67 application. I will accordingly refuse permission to appeal in relation to that aspect of the questions identified by Spain; but otherwise give permission on Grounds 1 and 2.

314. Though I give permission to appeal, I will dismiss the appeal. My reasons for that will be apparent from what appears above in this judgment, and can be briefly summarised here as follows:

(1) The CJEU Judgment does not decide anything to do with whether Spain was bound to arbitrate, or can be said to have acted unconscionably in bringing proceedings.

(2) It has been found, in *The Prestige Nos 3 & 4* that the insurance provisions of the Regulation did not mean that Sir Peter Gross lacked jurisdiction, because arbitration clauses are outside the scope of the Regulation, and are not to be assimilated with jurisdiction clauses. The same position must have applied in relation to Mr Schaff's jurisdiction. That jurisdiction arose on the basis that there was a binding equitable obligation on the part of Spain to arbitrate any claim it might seek to make against the Club, and the provisions of a Regulation which did not apply to arbitration did not affect that.

(3) In any event, even if the CJEU Judgment, in paragraphs [54]-[73], can be read, contrary to my view, as saying anything about Spain's obligation to arbitrate, I consider, for reasons which I have expressed at length in the earlier part of this judgment, that those paragraphs are not binding because they address questions not referred and/or purport to apply the law to the facts, and if not binding I would not follow them.

Spain's applications relating to the arbitrator's power to award an injunction and equitable compensation

315. To understand the nature of Spain's challenges to the Gross First Award on these points it is necessary to say something more about the nature of the arguments in front of him.

316. It was the Club's case that the arbitrator had power to order equitable compensation for breach of Spain's equitable obligation to arbitrate and not to pursue the non-CLC claims against the Club otherwise than by way of London arbitration. Further, the Club submitted that the arbitrator could and should grant an injunction to restrain Spain from seeking enforcement of a judgment it had obtained in Spain in breach of its equitable obligation to arbitrate, or if he did not grant such an injunction should grant damages in lieu, pursuant to s. 50 SCA 1981.

317. Spain's contention was that the arbitrator could not award equitable compensation. Equitable compensation was available only in limited cases, broadly breach of a fiduciary duty. Outside that sphere there was no monetary remedy for breach of a purely equitable obligation, other than by way of damages in lieu of an injunction pursuant to 'Lord Cairns' Act' (now s. 50 SCA 1981). But in this case, the arbitrator had no power to grant an injunction against Spain, because it is a sovereign state and because of the provisions of s. 13(2) SIA.

318. Sir Peter Gross concluded, as I have said: (1) that he had power to order equitable compensation for Spain's breach of its equitable obligation, and that the Club was entitled to such compensation, (2) that in any event, he had jurisdiction / power to grant an injunction, though he would in his discretion not do so, and (3) that it would be appropriate to grant damages in lieu of an injunction.

319. Spain seeks to challenge finding (1) under s. 69 AA. The Club does not resist permission to appeal in relation to this issue, as it accepts that the point is one of general public importance and that the arbitrator's conclusion is at least open to serious doubt. For the sake of good order, I record that I give permission. I will deal with the merits of the appeal below.

320. Spain seeks to challenge (2) insofar as the Arbitrator found that he had jurisdiction/power to grant an injunction, under each of ss. 67, 68 and 69 AA 1996. The Club contended that this was not a challenge which could be properly brought under either s. 67 or s. 68, and could be brought only under s. 69. It stated, however, that in order to avoid debate it would address the point on the merits. The Club accepted, therefore, that permission to appeal on this point should be given. Once again, I record that permission is given, and the point is addressed below. In light of the position taken by the parties, I do not deal with that aspect of the s. 67 application or the s. 68 application in this judgment, and I propose, with the agreement of the parties, simply to adjourn them.

321. Spain does not separately seek to challenge (3). Its case was that if it is right in relation to (2), then Sir Peter Gross will not have had power to award damages in lieu of an injunction.

322. While in its s. 69 application, Spain put first its challenge to (2), I consider that the convenient order in which to address these points is to consider, first, Spain's challenge to (1), and then its challenge to (2). If equitable compensation was available as a remedy irrespective of whether the arbitrator had power to award an injunction, then issue (2) does not matter.

Equitable compensation

323. The arguments in relation to this in front of me tracked very closely the arguments on the subject made to Sir Peter Gross.

324. It is helpful therefore to summarise the nature of Sir Peter Gross's consideration and conclusions on this issue.

325. As Sir Peter Gross recorded, the Club's contention was that there was no reason why compensation should not be payable for breach of an obligation which is equivalent to contract where damages would be payable for a breach of contract; and that the availability of compensation should not hinge upon the availability of an injunction, nor should remedies stop at a declaration, which might be ineffective. Spain's argument was that the claim for equitable compensation outside of Lord Cairns' Act was a novel contention and unfounded. Equitable compensation was simply not available outside a fiduciary context. (Gross First Award, paras. [151]-[152])

326. Sir Peter Gross considered the authorities which had been cited to him. He said that the high point of Spain's case had been the decision in *Auden v McKenzie* [2020] BCC 316, and in particular the following passage in the lead judgment of David Richards LJ:

> '[31] 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.'

Spain relied on this formulation in support of the proposition that equitable compensation was not available outside a fiduciary context. (Gross First Award paras 153-154).

327. Sir Peter Gross then considered a number of other authorities. He considered the decision in *The Front Comor* [2012] EWHC 854 (Comm). In that case, Flaux J had held that the arbitral tribunal had not been deprived, by European law, of the jurisdiction to award equitable damages for breach of the obligation to arbitrate. Sir Peter Gross commented that 'at first blush, *The Front Comor* lends some support to [the Club's submissions] in not ruling out a claim for equitable damages for breach of the obligation to arbitrate'. However, as Sir Peter Gross further remarked, it was fair to say that there had been no real analysis (for which there was no call) of the scope of equitable compensation, and all the observations concerning damages were strictly *obiter*. (Gross First Award paras [156]-[159]).

328. At para. [160] Sir Peter Gross referred to the decision of Arnold J in *Force India Formula One Team Ltd v Malaysia Racing Team* [2012] EWHC 616 (Ch), esp paras [392]-[393], as indicating that monetary relief can be awarded to a claimant who has suffered financial loss as a result of a defendant's breach of an equitable obligation of confidence. He considered (at para. [161]-[163]) the decisions of the Court of Appeal in *Airbus SAS v Generali Italia SpA* [2019] EWCA Civ 805, of Henshaw J in *The Prestige No. 3* and of the Court of Appeal in *The Prestige Nos. 3 & 4* and found, essentially, that they provided some but modest support for the Club's position.

329. At paras. [164]-[171], Sir Peter Gross considered, in detail, the decision of Sir Michael Burton GBE in *Argos Pereira España S.L. v Athenian Marine Ltd (The* '*Frio Dolphin')* [2021] 2 Lloyd's Rep 387, 'perhaps the high point of [the Club's] case on authority.' Sir Michael Burton had there been concerned, as one of the questions for which s. 69 AA permission to appeal had been given, with the issue of whether an assignee of cargo claims under bills of lading could be held liable to pay equitable compensation to the carrier if, in breach of an equitable obligation to arbitrate those claims, the assignee brought proceedings in respect of those claims in a foreign court against a party other than the carrier. Sir Peter Gross set out a summary of the facts of the case. Sir Peter Gross then summarised the detailed submissions which each side had made to Sir Michael Burton in *The Frio Dolphin*. These submissions had used the terminology of a 'Derived Rights Obligation' (or 'DRO'), an expression used to mean the type of equitable obligation which arises when a party having a right derived under a contract, eg by way of assignment, subrogation or a direct rights statute, wishes to exercise that right, but is obligated to do so in accordance with the forum clause set out in the contract from which its rights are derived. Sir Peter Gross then set out Sir Michael Burton's conclusion on this issue, which was, at [19]:

'… unless I am prevented from concluding that there should be equitable compensation for breach of a DRO … irrespective of and additional to the remedies of injunction or declaration, I would so conclude. I am satisfied that for all the reasons [given by counsel for the Owners] … logic and equity reach the same conclusion and there is no authority which deters me from it.'

330. Sir Peter Gross then referred to certain text book authorities. He made specific mention of three. First, he referred to Briggs, *Civil Jurisdiction and Judgments* (7th ed), at para. [29.08], as follows:

'Where the complaint is that the institution of litigation overseas does not violate a legal right, but is unconscionable or otherwise an equitable wrong, it would seem obvious that the basis for compensation would take the form of damages or equitable compensation in lieu of an injunction. Once again, the authority to show that such a claim for relief would be well founded is not yet to hand, but reason to doubt its availability is hard to formulate, probably because there is no reason to doubt it.'

331. Secondly he referred to Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed), at p. 520, as follows:

'Lest the point be lost, one should interject … that all these technical distinctions between common law damages, equitable compensation, and equitable damages bring no credit to the legal system. They are the irrational historic residue of an unfused system that should be swept away.'

332. Thirdly he referred to *McGregor on Damages* (21st ed) at para. 1-016, and quoted the following observation:

'But the traditional view has far less traction today. It is commonly recognised that it is more coherent to treat, and understand, common law and equity together as in the vast majority of cases both are concerned with compensation. This more open view is to be preferred. We should not allow in any corner of our legal system a characterisation of substance to be ruled by historic jurisdictional divides.'

333. At paragraphs [176]-[185] of the Gross First Award, Sir Peter Gross then gave his conclusions on this issue. They may be summarised as follows:

(1) That *Auden* did not determine the issue in Spain's favour. David Richards LJ was not purporting to give an exhaustive categorisation. The categories of case in which equitable compensation is available should not be regarded as closed, but what was said *Auden* is a useful reminder of the origins of the remedy, and that it is necessary to proceed incrementally and with caution.

(2) Logic and principle suggested that equitable compensation ought to be available. '[I]t would be curious if monetary compensation was *not* available for a breach of the equitable obligation to arbitrate. The equitable obligation is treated in the authorities … as the equivalent of the common law obligation between the original parties to an agreement to arbitrate. There is no doubt that breach of that common law obligation sounds in damages – and it is difficult to think of a principled justification for refusing monetary compensation in the event of a breach of the equitable obligation to arbitrate. As it seems to me, refusing monetary compensation in a case such as the present must depend on historical grounds – the very basis cogently criticised … by Professor Briggs QC, Lord Burrows and *McGregor on Damages*. For my part, I would regard the historical origins and confines (such as they may be) of the remedy of equitable compensation as an inadequate basis for denying its applicability here'.

(3) A decision that equitable compensation is available in such a case is not an open-ended development. 'It is tied to the specific relationship between Spain and the Club arising from the pre-existing DRO.'

(4) It is not a sufficient reason to deny relief because in very many cases there would be jurisdiction to injunct a third party from proceeding in breach of the arbitration clause, so that damages could be awarded under s. 50 SCA. The availability of monetary relief ought not to hinge upon the jurisdiction to grant an injunction.

(5) Sir Peter Gross said that he was attracted to and agreed with Sir Michael Burton's balancing of the relevant considerations in *The 'Frio Dolphin'* and the conclusion to which Sir Michael had come. 'With respect, I am persuaded that Sir Michael's conclusion reflects the way the tide is flowing – and ought to be flowing – in this area of the law.'

334. Unsurprisingly, and as I have already said, the arguments addressed to me on this point were very similar to those which had been addressed to Sir Peter Gross. All the authorities which were cited to Sir Peter Gross were cited to me.

335. In his submissions to me, Mr Young KC emphasised a number of points. In particular:

(1) That Lord Cairns' Act was passed, and has been re-enacted, to remedy a recognised and acknowledged gap in the power of the courts to award monetary relief. If there were an unconfined power to award compensation whenever there is a breach of an equitable obligation, 'then the Act was totally misconceived'.

(2) If one looks at the cases before and after 1858, there is no suggestion that the courts of equity could grant compensatory relief for breaches of equitable obligations which arose outside the sphere of fiduciary relationships. Mr Young referred to *Eastwood v Lever* (1863) 4 De GL & Sm 114, *Ferguson v Wilson* (1866) L.R. 2 Ch. App. 77, and *Nocton v Lord Ashburton* [1914] AC 932.

(3) The re-enactment of Lord Cairns' Act has shown that Parliament considers that there is the same lacuna as existed when Lord Cairns' Act was first enacted. There would be no such lacuna if there was a much broader power to award equitable compensation, such as that contended for by the Club.

336. I have reached the same conclusion as Sir Peter Gross, for very much the same reasons. I can express them briefly:

(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* 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 *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.

337. For these reasons, I will dismiss the appeal on this aspect of the Gross First Award.

Could the arbitrator grant an injunction?

338. As stated above, if I am right in relation to the issue of the availability of equitable compensation, this issue does not matter in this case. On that basis there can be a monetary remedy irrespective of the availability of an injunction; and Sir Peter Gross did not actually grant an injunction.

339. The point has, however, been fully argued, and I should address it. Furthermore, the same point has also been argued by the French State in relation to the awards of Dame Elizabeth Gloster DBE, which are the subject of a separate judgment. Mr Young KC adopted, on behalf of Spain, those of Ms Dilnot KC's arguments for the French State on this point which were additional to those which he had already made on behalf of Spain himself. Despite or perhaps because of the helpful arguments on each side, I have not found the point an easy one.

340. The issue is whether, in the absence of written consent by the State to its doing so, an arbitral tribunal may grant an injunction against a State. The issue arises because the AA 1996 makes provision for the powers of an arbitral tribunal as follows:

'48. (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.' (emphasis added)

341. Section 13 of the SIA is, insofar as germane, in these terms:

'(2) Subject to subsections (3) and (4) below –

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; **but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection**.

(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.' (emphasis added)

342. It was common ground that Spain had not provided written consent to the grant of an injunction. Spain's case was that, in the circumstances, the court could not have granted an injunction against it, and neither could the arbitrator who would have only 'the same powers' as the court.

343. The Club's argument, by contrast, was that the restriction contained in the SIA as to the power of a court to grant an injunction against a State was because sovereign immunity is based on the principle *par in parem non habet imperium*. An arbitral tribunal is not a court or other organ of the state. The SIA restriction does not apply to arbitrators. The reference in s. 48(5) AA 1996 to 'the same powers as the court' is simply a descriptive phrase referring to the types of remedy, developed in the courts of equity, referred to in that sub-section.

344. The Club referred to the decision of Henshaw J in *The Prestige (No. 3)*. In that case, the issue arose in the context of a challenge to service out of a s. 18 AA 1996 application. Henshaw J considered that the issue went to the merits, rather than to the jurisdiction of the arbitrator, and so that the relevant question was whether the Club's argument that an arbitrator had the power to grant an injunction was 'obviously wrong such as to make it pointless to appoint an arbitrator'; but had also considered whether the Club had a good arguable case on it (para. [178]). At [188] Henshaw J said:

'[188] I consider the better view to be that SIA 1978, section 13 governs the exercise but not the existence of the court's power to grant an injunction, and that AA 1996, section 48 permits an arbitrator to grant an injunction against a state. There is no cogent policy argument in favour of such an approach. An injunction granted by a court against another state impinges on the par in parem principle by purporting to set up an organ of one state in a position of authority vis-à-vis another state. Such considerations apply with much less force, if at all, to arbitration, since it is founded on consent (whether actual or, as in the present case, imputed.'

345. Essentially the same arguments were addressed to Sir Peter Gross as have been addressed to me.

346. His analysis and conclusions can be summarised as follows:

(1) He was wary as to the policy argument with which Henshaw J's analysis (quoted above) had concluded. A State's consent to court proceedings does not equate to consent to the grant of injunctive relief against it.

(2) He was also sceptical as to the strength of an argument based on an analogy with the position under the Brussels-Lugano regime. Under that regime a court could not grant an anti-suit injunction in respect of proceedings before the courts of another Member State, but arbitrators could. There was, however, a 'simple but compelling' reason for that, namely that arbitration falls outside the Brussels-Lugano regime.

(3) But he considered that there was 'an altogether more formidable argument' which persuaded him that the combination of s. 13(2) SIA and s. 48(5) AA 1996 did not preclude arbitrators from injuncting a sovereign State. In particular this was because the focus of s. 48(5) is on the general nature of the court's power or type of power in question. The court had a general power to grant injunctions under s. 37(1) SCA. It is that general power which is relevant to the application of s. 48(5). The limitations contained in s. 13(2) SIA apply only to courts. The mischief at which the relevant provisions of the SIA is directed is potential damage to comity arising from a court of one sovereign State purporting to injunct another sovereign State.

(4) On that basis, Sir Peter Gross reached the same conclusion as Henshaw J, albeit by a slightly different route, which concentrated not on the distinction between a limitation on the court's power and the exercise of that power, but on the fact that the limits contained in s. 13(2) SIA are irrelevant to arbitration tribunals and therefore inapplicable. Sir Peter Gross said, however, that if he was wrong in that regard, he adopted the approach favoured by Henshaw J.

347. I have come to the opposite conclusion. My reasons follow.

348. The starting point is that there is no suggestion that in this case (or in the case of the arbitration involving the French State before Dame Elizabeth Gloster), the arbitrator had any power to award an injunction otherwise than by virtue of s. 48(5) AA 1996. There is, in particular, no suggestion that any such power was conferred by any agreement between the parties within s. 48(1) AA 1996. Had there been such an agreement, it is likely that it would have fallen within the exception to s. 13(2) SIA recognised in s. 13(3) SIA.

349. The short question is, therefore, whether s. 48(5) AA 1996 confers the power to grant an injunction against a State, in the absence of consent of the State, given that a court may not do so by reason of s. 13(2) SIA.

350. In my judgment, the effect of s. 13 SIA is that the court does not have jurisdiction, and thus does not have the 'power', to grant an injunction against a State in the absence of its consent. Parliament has specifically provided that the court shall not do so, and the effect of that section is that it does not have the power to do so. What otherwise would have been the general powers of the court under s. 37 SCA are limited. As a result no power to grant an injunction against a State in the absence of its consent is conferred on an arbitrator by virtue of s. 48(5) AA 1996.

351. The view that s. 13 SIA limits the jurisdiction of the court, and, in that sense, restricts its 'powers' is supported by the way in which Saville J treated the section in *A Co Ltd v Republic of X* [1990] 2 Lloyd's Rep 520 at [525], where he said:

> '… when a State seeks to discharge a *Mareva* injunction on the grounds that it is immune from the jurisdiction of the Courts of the United Kingdom, the Court cannot allow the injunction to continue on the basis that the plaintiff has a good arguable case that immunity does not exist, **for if in truth immunity does exist then the Court simply has no power to continue the injunction**.
>
> To my mind, the same reasoning applies when the Court is asked to grant the relief or order the processes referred to in s. 13(2)(a) and (b) of the [SIA], and the State or other entity claiming such privileges or immunities seeks to rely on those subsections to say that the Court has no power to do what it is being asked to do. **If those subsections do apply, then the Court again has no jurisdiction to grant such relief or order such processes.**' (emphasis added).

352. To like effect is the treatment of the effect of s. 13 SIA in *Gee on Commercial Injunctions* (7th ed., para. [14-028]), where it is said:

> 'Section 50 [Senior Courts Act 1981] will not include cases where an injunction is not available *as a matter of jurisdiction* against as state because of s. 13(2)(a) of the State Immunity Act 1978'. (emphasis added)

353. I am not persuaded that the court should be regarded as having a 'power' to grant an injunction against a State, but that s. 13(2) SIA simply constrains its exercise. I consider that it is both more natural and consistent with how it was treated by Savile J in *A Co. v Republic of X*, to regard s. 13(2) SIA as meaning that the court lacks the jurisdiction and, in that sense, does not have 'power' to grant an injunction against a State in the absence of its consent.

354. I also do not consider that s. 48(5) AA 1996 can be read as referring only to the types or classes of powers that the court has, and thus as omitting limitations on the circumstances in which the court has jurisdiction to exercise such powers. The subsection does not refer to types or classes of powers. Instead, in my view, it is referring to the actual powers of the court. This is reinforced by another aspect of the language of the subsection. Under s. 48(5)(a) the relevant power which is conferred on arbitrators is the court's power to order 'a party' to do or refrain from doing something. As I see it, this refers to the actual powers which the court would have in relation to litigants before it. In my view, if the court lacks a power to make an order against a party to court proceedings because of an immunity which that party and other entities of its nature has, then s. 48(5) AA 1996 confers no power on an arbitrator to make such an order against such a party.

355. The Club relied on the fact that, under the Brussels I Regulation, as considered in *West Tankers* and *Gazprom*, a court could not grant an anti-suit injunction in respect of proceedings within the Brussels-Lugano zone, but arbitrators could, to suggest that s. 48(5) AA 1996 can confer powers on arbitrators which the court is prevented from itself exercising. There appears to me, however, to be a significant difference between the nature of the restriction on a court's granting an anti-suit injunction in a Brussels I case, on the one hand, which results from judicial decisions based on the principle of mutual

trust, and, on the other, the express statutory limitation on what the English court may do contained in s. 13(2) SIA. Furthermore, the reason why, in *Gazprom*, the arbitral tribunal could make an award of an anti-suit injunction, and why such an award was potentially enforceable in other member states, was that the Brussels Regulation expressly excluded arbitration from its scope. As long as the tribunal had a power to grant injunctive relief by its terms of reference or institutional rules, it was free to do so, and the Brussels Regulation, as inapplicable to arbitration, did not prevent this or the enforcement of an award of such relief. This is not persuasive as to what the position should be under s. 48(5) AA 1996 in which the only basis on which the arbitrator could have had the power to grant an injunction was if it could be said to be the exercise of 'the same powers as the court' had to do so, and where there is a limitation on the powers of the court.

356. The point which Sir Peter Gross found most cogent was that the considerations which mean that a court should not be able to injunct a sovereign State and which underlie s. 13(2) SIA, namely the *par in parem* principle, do not apply to arbitrators. I am unable to place the same weight on this point as he did. It does not in my view answer the textual points as to s.48(5) AA 1996 which I have mentioned above. Furthermore, in my view, in ascertaining the legislative intention of s. 48(5) it is necessary to consider not only the words used but the other provisions of the AA 1996 and, insofar as it is possible to identify it, its purpose. This exercise must involve, in the present case, a consideration of why s. 48(5) is expressed differently from subs 48(3) and 48(4), and of how the subsection relates to the powers of the court to enforce arbitral awards, including in particular under s. 66 AA 1996.

357. In my view, s. 48(5) takes the form it does in order to seek to ensure that there is parity between the type of awards arbitrators can make and those that the court can make. Furthermore, a purpose of this is, I think, to ensure that awards made pursuant to the power granted shall be of a nature which is capable of enforcement by the court. A reason why s. 48(5) is expressed differently from subss (3) and (4) is that in relation to the types of relief dealt with in subs 48(5) particular issues may arise because of restrictions on what relief a court can grant, and thus there would be difficulties of enforcement if an arbitrator had wider powers.

358. In the present context I consider that this supports the interpretation of s. 48(5) which I favour. In my view, the court would be precluded from enforcing an award by arbitrators against a State without its consent by reason of s. 13(2) SIA. To interpret s. 48(5) as providing for a default power on arbitrators nevertheless to grant such an injunction would produce disparity between courts and arbitrators, which that subsection is surely designed to avoid.

359. Furthermore, the issue arises as to what purpose there would be in an arbitral tribunal having the power to make an award of an injunction which could not be enforced by the court. I put on one side the argument as to the relevance of such a power to the availability of damages under s. 50 SCA, which appears an implausible purpose for the grant of power to injunct, especially if I am right as to the availability of equitable compensation in cases such as this. That argument apart, the power to grant such unenforceable relief would appear to add little or nothing of utility to the other remedies an arbitrator could grant, including a declaration. There is little reason to think that a State which will not abide by a declaration will conform to an unenforceable injunction.

360. One point which was raised by the Club as a potential answer to this was that the power might be of use because an injunctive award might be capable of being enforced in other jurisdictions. There is, however, no indication that the possible position in other countries was relevant to Parliament's enactment of s. 48(5) AA 1996. Furthermore, given that Parliament has enacted s. 13(2) SIA, which must have its origin in the significance it attaches to the *par in parem* principle, there seems to me to be no good reason for attributing to Parliament a legislative intention, by s. 48(5) AA 1996, to confer a power on arbitrators which will lead to the enforcement, in other countries, of injunctions against States.

361. For these reasons, and subject to the point I am about to mention, I conclude that Sir Peter Gross was wrong to consider that he had the power to grant an injunction against Spain.

362. The Club has a further point, however. It argues that the prohibition on the grant of injunctions in relation to commercial acts of a State was a gratuitous privilege extended to States in the SIA which has no, or no tenable, basis in an international obligation of the UK under customary international law. It is, on this argument, a denial of the right of access to court, and necessarily disproportionate, in violation of Art 6 of ECHR, and should be read down under Human Rights Act 1998, s 3. This argument is rooted in the reasoning of the Supreme Court in *Benkharbouche.*

363. This same argument has arisen in proceedings between different parties, and has been the subject of the judgment of Sir Ross Cranston in *UK P&I Club N.V. v Republica Bolivariana de Venezuela (The 'Resolute')* [2022] 1 WLR 4856. Sir Ross Cranston decided that s. 13 SIA was not to be read down, and that the requirements of Article 6 ECHR were met. That decision is the subject of an appeal, which is due to be heard by the Court of Appeal in December of this year. The Club submitted that, as there was not time to argue this point properly on this occasion, if this point were to be decisive of this aspect of the case, I should defer my final decision in relation to it, until the decision of the Court of Appeal, while giving judgment on the remaining issues. That is what I propose to do. If for some reason the appeal in the *Resolute* case does not proceed in accordance with current expectations, the parties can apply to the court for the matter to be dealt with anyway.

Consequence if the arbitrator could not grant an injunction

364. The Club contended that whatever the restriction on courts or tribunals pursuant to s. 13(2) SIA, nothing inhibits a court (and therefore a tribunal) from granting equitable damages in lieu under Lord Cairns' Act (or rather its equivalent in s. 50 SCA) against a State. That was an argument raised in the arbitration but which Sir Peter Gross did not need to consider.

365. I do not consider this argument to be correct. In my judgment, the correct view is that, given that s. 13(2) SIA precludes the court from granting an injunction against a State in the absence of its consent, for the purposes of s. 50 SCA the court does not have 'jurisdiction to entertain an application for an injunction.' As I have already said, s. 13(2) SIA can be said, and has been analysed, as going to the jurisdiction of the court; and if the court has no jurisdiction to grant an injunction, I consider it incorrect and artificial to suggest that it has jurisdiction to entertain an application for one. On the contrary, it would appear to me that the court could quite properly say, if faced with an

application for an injunction against a State which had not agreed to such relief, 'I cannot entertain this application because of s. 13(2) SIA.' It would not be a case of an application being entertained and then dismissed on discretionary grounds.

366. I consider that this approach is consistent with Millett LJ's summary of the law in relation to s. 50 SCA in *Jaggard v Sawyer* [1995] 1 WLR 269, at [285]. What he there said was that the relevant question will be 'whether, at the date of the writ, the court could have granted an injunction, not whether it would have done…' In a case such as the present it can be said, in the case of a State which has not given a written consent within s. 13(3) SIA, that the court 'could not', rather than 'would not', grant an injunction.

367. I accordingly conclude that a court could not in the present case grant damages in lieu of an injunction under s. 50 SCA. That being English law, it follows that an arbitrator, who has no power to grant an injunction, equally cannot grant damages in lieu of an injunction. That conclusion, I should add, simply confirms me in my view that equitable compensation should be available, and that its availability should not depend on whether an injunction can be granted.

Overall Conclusions

368. For the reasons I have given:

(1) The Club's Appeal against the Registration Order in Claim No. CL-2019-000518 succeeds, on the grounds (1) that the Spanish Judgment is irreconcilable with the English s. 66 Judgments, and (2) if that were wrong, recognition of the Spanish Judgment would be contrary to principles of English public policy relating to *res judicata* by reason of the prior Schaff Award;

(2)The first aspect of Spain's challenge to the Gross First Award under s. 67 AA 1996 is dismissed;

(3) With the exception of that part of ground 1 which raises the issue of the effect of the CJEU Judgment on the jurisdiction of Sir Peter Gross as arbitrator, on which it is refused, permission under s 69 AA 1996 is granted for Spain to appeal on the four grounds set out in paragraph [40] above.

(4) The appeal under s. 69 AA 1996 on grounds (1) and (2) (relating to the CJEU Judgment) and (4) (relating to equitable compensation) is dismissed.

(5) Subject to the '*Resolute*' point, on which, subject to further order, I will defer my decision until after the decision of the Court of Appeal in that case, I conclude in relation to Spain's s. 69 AA 1996 ground (3), that Sir Peter Gross did not have jurisdiction to grant an injunction against Spain, and could not grant damages in lieu of an injunction. I will adjourn the second aspect of Spain's AA 1996 application and its s. 68 AA 1996 application.

369. In the absence of agreement, I will receive submissions on the form of the order which should be drawn up to embody these conclusions.