



Neutral Citation Number: [2020] EWHC 3540 (Comm)

Case No: CL-2019-000518

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/12/2020

**Before :**

**THE HONOURABLE MR JUSTICE BUTCHER**

-----  
**Between :**

<b>The London Steam-Ship Owners' Mutual Insurance</b>	<b><u>Claimant</u></b>
<b>Appellant/ Respondent to Part 23 Application</b>	
<b>- and -</b>	
<b>The Kingdom of Spain</b>	<b><u>Defendant</u></b>
<b>Respondent / Applicant in Part 23 Application</b>	

-----  
**Christopher Hancock QC and Alexander Thompson** (instructed by **Ince Gordon Dadds**  
**LLP**) for the **Claimant**

**Timothy Young QC and Jamie Hamblen** (instructed by **Squire Patton Boggs (UK)**  
**LLP**) for the **Defendant**

Hearing dates: 18th December 2020  
-----

**Judgment Approved by the court  
for handing down**

**M/T “PRESTIGE”**

**TRANSCRIPT OF APPROVED JUDGMENT**

**(12.15 pm)**

**Judgment (as approved)**

**MR JUSTICE BUTCHER:**

1. The issue arises as to whether I should make a reference to the CJEU, pursuant to Article 267 on the Treaty on European Union (“TEU”).

2. The terms of Article 267 are 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 question 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."

3. I will explain briefly the circumstances in which this issue arises.

4. I have been hearing the trial of an appeal by the Appellant (“The Club”) against the ex parte registration order of Master Cook, dated 28 May 2019, in relation to

an order of the Provincial Court of La Coruña, dated 1 March 2019, made following criminal and civil proceedings in which the Spanish courts found The Club liable for damages up to a US \$1 billion global policy limit arising from pollution following the loss of the M/T Prestige off the coast of Spain in November 2002.

5. The Club contends that recognition and enforcement of that Spanish judgment should be refused and the registration order set aside, for the two broad reasons summarised in paragraph 4 of its opening skeleton, namely:
  - (1) that under Article 34(3) of Regulation (EC) 44/2001 - which I interpose is applicable given that legal proceedings were instituted before 10 January 2015, and which I will call "the Regulation" - the Spanish judgment is irreconcilable with a prior order of Hamblen J, dated 22 October 2013, as upheld on appeal, which enforced an arbitration award, dated 13 February 2013, pursuant to which The Club was held not liable to the Spanish State (which I will call "Spain"); and
  - (2) that under Article 34(1) of the Regulation, recognition of the Spanish judgment would entail a manifest breach of English public policy in respect of (a) the rule of res judicata and / or (b) human and fundamental rights.
7. There has already been a considerable amount of litigation in relation to the dispute between The Club and Spain. Most of the relevant facts, save to some extent in relation to points going to whether there has been a breach of human and fundamental rights in the course of the Spanish proceedings, are not in any dispute.
8. At the beginning of November of this year, Spain issued an application for a reference to the CJEU of six questions on the interpretation of the Regulation. The question of whether there should be a reference has been argued during the

course of this trial.

9. A matter which forms, as Spain says, a relevant consideration is the timing of this argument, the point being that the Transition Period in relation to the UK's exit from the EU ends on 31 December 2020. After that date, there cannot be references to the CJEU. Spain has accordingly pressed the Court, if it is able to do so, to make a decision on whether there should be a reference before that cut off. I will consider below what relevance, if any, the ending of the Transition Period has to the decision which I am going to make.

10. The points which Spain identified in its application for a preliminary reference were as follows:

"The Questions to be Referred:

...

"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?"

11. Spain has since added at least one further issue which it says should be 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 Section 66 of the Arbitration Act 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.
12. The parties have argued, over the last two days, a number of points as to the approach which it is appropriate that I should adopt in assessing whether to make a reference. I will deal with one of those points at the outset. That is the question of whether, in light of the imminent end of the Transition Period and the fact that should there be an appeal from my judgment, the Court of Appeal or the Supreme Court would not be able to make a reference to the CJEU, this court counts as a court or tribunal against whose decisions there is no judicial remedy under national law for the purposes of Article 267 of the TEU, or at least that I should treat myself as being in that position.
13. I do not consider that I am or should regard myself as being in the position of a court or tribunal against whose decision there is no judicial remedy under national law, because of the availability of an appeal from my decisions in the ordinary way. Accordingly, I consider that the last paragraph of Article 267 is not applicable and

there is no obligation on me under that paragraph to make a reference. The question is instead to be dealt with under the preceding paragraph of Article 267, whereby a court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

15. There has also been a debate as to the jurisdictional threshold laid down by Article 267 as to what matters can be referred. In that regard, I consider that it is necessary to distinguish between what is laid down by Article 267 itself, which is a matter of EU law, and authorities of the English courts bearing on the circumstances under which a court should make a reference to the CJEU.
16. As far as Article 267 itself is concerned, I consider that the jurisdictional threshold is that the national court considers that there is an issue relating to the interpretation of the treaties, or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, which it is necessary for the national court to decide in order for it (i.e. the national court) to give judgment. Article 267 does not, in my judgment, lay down a requirement that a decision of the CJEU should be necessary in order to allow the national court to give judgment.
17. That is, in my view, what the Article says, because a “decision” on the question is distinguished from a “ruling” of the CJEU thereon. It is also, in my judgment, what is indicated by the decision in Rheinmühlen-Düsseldorf v Einfuhr und Vorratsstelle für Getreide und Futtermittel [1974] ECR 33, which has been referred to in subsequent cases, where the European Court said this:  
  
"3. The provisions of Article 177 are absolutely binding on the national judge and, insofar as the second paragraph is concerned, enable him to refer a case to the Court of Justice for a preliminary ruling on interpretation or validity. This Article

gives national courts the power and, where appropriate, imposes on them the obligation to refer a case for a preliminary ruling, as soon as the judge perceives, either of his own motion or at the request of the parties, that the litigation depends on a point referred to in the first paragraph of Article 177.

"4. It follows that national courts have the widest discretion in referring matters to the Court of Justice if they consider that a case pending before them raises questions involving interpretation or consideration of the validity of provisions of Community law, necessitating a decision **on their part.**" (emphasis added)

20. It is also the interpretation indicated by CILFIT v Minister of Health [1983] 1 CMLR 472. There the European Court said, at paragraphs 10 to 11:

"10. Secondly, it follows from the relationship between paragraphs 2 and 3 of Article 177 that the courts or tribunals referred to in paragraph 3 have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment.

Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.

"11. If, however, those courts or tribunals consider that recourse to Community law is necessary to enable **them to decide a case**, Article 177 imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise." (emphasis added)

21. That interpretation is also, in my judgment, supported by the consideration of this point in Trent Taverns Limited v Sykes [1999] EU LR 492, where Chadwick LJ



said this:

"The first question, as it seems to me, is whether a decision on some question of Community law is necessary in order to enable this court to give judgment in the appeal that is before it. In my judgment, that question must be answered in the affirmative. In order to give judgment in the present appeal, it is necessary to decide whether or not a party to an agreement prohibited by Article 85(1) is a person to whom Community law gives a right to be compensated in damages. Accordingly, the pre-condition to a reference is satisfied. Further, it is relevant, in my view, to note that the requirement in [what was then] Article 177 is that a decision on the question is necessary to enable this court to give judgment; not that a ruling from the Court of Justice is necessary to enable this court to reach a decision on the question. There is no double threshold of necessity to be surmounted before this court can seek a ruling from the Court of Justice. Once it is clear that the question has to be decided by this court, whether or not to seek the assistance of the Court of Justice is matter of discretion."

22. As to the requisite degree of materiality which, as a matter of the terms of Article 267 and the jurisprudence of the CJEU, the question to be referred must have to the case, guidance was given in Case C-62/93 BP Supergas [1995] ECR I -1883 at paragraph 10. What was there said was:

"In that regard, the court has consistently held that it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the court.

A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or the subject matter of the action." (citations omitted)

23. There is similar learning in the case of Enderby v Frenchay Health Authority ECR 1993 I 05535 in the ECJ's judgment at paragraph 12.
24. The issues on which I consider that there may be a case for a reference, which have been canvassed with the parties over the last two days and which I will shortly identify, are, in my judgment, all questions which it is necessary for me to decide in order to give judgment. By that, I mean that each of those questions is one which is in issue between the parties, which has been debated before me, and which I will have to decide as part of the process of giving a properly reasoned judgment on this appeal. Furthermore, they are certainly not points where it is quite obvious that those questions bear no relation to the actual nature of the case or the subject matter of the action. Accordingly I consider that the jurisdictional threshold of Article 267 is met.
26. On that basis, the issue is whether I should make a reference, taking into account the guidance of the English courts in relation to that matter. There are a number of matters which fall for consideration in that regard, as part of what is necessarily an evaluative judgment.
27. The first, and one on which Mr Hancock QC for The Club strongly relied, relates to the importance of the question to the decision in the case. Mr Hancock QC submitted that the point had to be substantially conclusive, in the sense of the court was able to say that the answer to the point effectively determined the answer to the

case. His submission, as I understood it, was that there can only be a reference if it is known that the question of which party won and which lost substantially depends on the question to be referred.

28. In concrete terms here, there are three particular issues which have been canvassed as possible subjects of a reference. These are only some of those which were suggested by Spain, but they are the three which I consider raise issues which are suitable for a reference. Two of them relate to the issue under Article 34(3); one of them relates to the res judicata aspect of the issue under Article 34(1). What Mr Hancock says is that, if those are the only issues which raise questions which might be suitable for a reference, then the court should not make a reference because it is possible that I may decide that The Club should succeed on its human rights argument in relation to Article 34(1). That would mean, he submitted, that the issues under Article 34(3), and the res judicata issue under Article 34(1) were not necessary to be decided. Given that the court is not in a position to say now that The Club will not succeed in its human rights argument under Article 34(1), it is impossible to say now that it is necessary to answer the questions in relation to Article 34(3), or the question relating to the res judicata aspect of The Club's Article 34(1) case.
29. Mr Hancock referred me in particular to the decision in Bulmer (HP) Ltd v Bollinger SA [1974] Ch 401. In that case, Lord Denning MR propounded a test that the point must be conclusive, in the sense that the judge must be in a position to say that if it is answered one way there will be judgment for the claimant, if the other there will be judgment for the defendant.
30. As The Club itself accepts in its skeleton argument, however, that test has been

modified or explained in subsequent authorities. It accepts that the EU law issue does not have to be determinative taken alone, if it is a necessary step to the conclusion. In Commissioners of Customs and Excise v Samex ApS [1983] 3 CMLR 194, Bingham J used the phrase "substantially determinative" (at [26]). In R v International Stock Exchange Ex parte Else (1982) Ltd, Sir Thomas Bingham MR expressed the question as to whether the point was "critical" for the court's decision (at 545).

31. The question appears to me to be whether the question, or questions, is or are critical for the purposes of my giving judgment on the issues before me. I am in no doubt that the three questions in issue are critical to that process. The two issues in relation to Article 34(3) would, if decided against The Club, determine that issue against it. A decision on those points would be a necessary step in a decision against Spain in relation to Article 34(3).
32. While it is true that The Club could win only by reference to the human rights aspect of Article 34(1), a point which I have not yet decided and I am not today in a position to decide, it is quite clear to me now that, even if that were the decision I reached on that aspect of the Article 34(1) point, I will have to decide and give judgment on the Article 34(3) point. It has been fully argued and is relied on by The Club as an independent basis on which it says it should succeed.
33. Furthermore, if I were to decide the case in The Club's favour on the basis of the Article 34(1) point as to human rights, there would almost inevitably be an appeal by Spain. As part of that appeal, The Club would wish to raise, by way of respondent's notice, the Article 34(3) point as an additional or alternative ground on which the appeal should fail. That seems to me to be a further factor indicating that

the point should be regarded by me now as critical to my making a proper decision.

34. The second aspect which the English authorities indicate must be considered in determining whether to make a reference is the degree to which the point of EU law is open to doubt. The correct approach in this regard I take to be that propounded by Sir Thomas Bingham MR in ex parte Else, as follows (at 545):

"I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer."

35. What is entailed in assessing whether the court can, with complete confidence, resolve the issue itself is or involves a question of whether the court is completely confident of how the CJEU would decide the matter: see the approach of Rose LJ in AB Volvo v Ryder Limited [2020] EWCA Civ 1475 at paragraphs 87 to 88.
36. I do not have that degree of confidence, namely complete or entire confidence, as to what the CJEU would rule the position to be in relation to three issues between the parties. Those issues are the ones which I have already alluded to. 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).

37. Mr Hancock submitted that I should be in no doubt as to how the first two of these points will be answered. He submitted that they are entirely clear. While of course I appreciate the force of the points which Mr Hancock makes in relation to each of these questions, they do not lead me to the entire confidence which I have mentioned.
38. In brief, in relation to the first question, which is intended to embrace what has in this hearing been referred to as the “SOLO point”, after the case of C-414/92 SOLO Kleinmotoren v Boch, Mr Young for Spain has called attention to (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 in SOLO of a decision by the court “deciding on its own authority on the issues between the parties”; and (c) the views of Louise Hauberg Wilhelmsen in International Commercial Arbitration and the Brussels I Regulation (at 7.12) and of Dr Martin Illmer in “West Tankers reloaded – enforcement of a declaratory award to prevent enforcement of a future decision by a foreign court” in *IPRax* 2012, volume 32,

264-272, at page 270.

39. In relation to the second point, Mr Young relies again on the objectives of the Regulation and its foundation in mutual trust as indicating that a judgment giving effect to an arbitration award should not count as a relevant judgment for the purposes of Article 34(3). He points to the commentaries of Professor Briggs in Civil Jurisdictions and Judgments (6<sup>th</sup> ed.) (paragraph 7.22); of Professor Burkhard Hess in his article, "Arbitral Jurisdiction and European Civil Procedural Law" in *Juristenzeitung* 69, 538-545 (at pages 6 to 7 of the translation); and of Jennifer Lavelle in her article, "The Availability of Declaratory Relief" in *Arbitration Law Monthly* (2 March 2010). I took into account Mr Hancock's argument that the point was acte éclairé, or at least acte clair, by reason of the decision of the ECJ in Case 145/86 Hoffmann v Krieg, but the decision of the ECJ in that case did not concern the arbitration exception and the reasoning of the Court emphasised that what was involved in that case was a question of the status of natural persons.
40. More generally, I consider that it is difficult entirely to separate these two points on Article 34(3). The treatment of one might have a bearing on the treatment of the other. I also take into account the fact that there is a clear indication, in various of the commentaries which I have been shown, that these are issues which are both open and important. They raise what Merkin and Flannery in The Arbitration Act 1996 (Sixth Edition) call "the great unanswered question in *West Tankers*", being one which, as the authors put it is a "simple issue, and one that has plagued the English courts for nearly three decades (and which, even after *West Tankers*, and *Gazprom*, is still unclear)." See paragraph 66.15 and see also the extended treatment of the issues in the subsequent pages.

42. The Report on the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03) (the “Heidelberg report”) is also consistent with the view of these questions as being difficult and as yet unanswered, or not finally answered (see para. 115 et seq).
43. As to the third point, Mr Hancock himself accepted that, insofar as it concerned court judgments, this was an issue which was not *acte clair* in his client's favour. This is because of the decision in Hoffmann v Krieg, especially at paragraph 21.
44. Mr Hancock argued that, by contrast, in relation to an award there was no issue of EU law involved at all. I consider that there is clearly a serious argument to the contrary. The field of operation of domestic public policy is subject to scrutiny as to whether it unduly impedes the free movement of judgments, see Case C681/13 Diageo Brands BV v Simiramida-04 EOOD. There is an argument that, if it is contrary to the intention, terms and effect of the Regulation in a case in which Article 34(3) is not engaged, to rely on the public policy of *res judicata* arising from a domestic judgment giving effect to an award as a reason for non-enforcement of a judgment from another Member State, that it would also be contrary to that intention and effect to rely on the public policy of *res judicata* arising from the award itself.
46. I turn to consider the other matters relevant to the assessment of whether to make a reference. The facts relevant to the three questions identified are not in dispute. I regard all of these matters as plainly ones which are important, as indeed the commentaries indicate. Mr Hancock suggested that they might not be important because, after the end of the year, with the UK no longer being a Member State for the purposes of the Brussels Regulation, it would not be of great significance in the



jurisprudence relating to the Regulation, or for the legal order of the EU, as to whether a judgment under Section 66 of the Arbitration Act could be invoked to prevent the enforcement of a judgment from a Member State. I do not, however, accept that similar questions could not arise in relation to any other legal system of a continuing Member State. Further, as Mr Young submitted, these issues will remain germane for parties to the Lugano Convention if the UK accedes to it in its own right.

47. I have considered the countervailing logistical issues and, in particular, the time and expense involved in a reference. I do not regard these as being weighty factors against a reference in this case. It is a dispute which involves a very significant sum of money, the parties have been engaged in extensive litigation for a considerable time, and there is considerable further litigation and arbitration outstanding between them, much of it instigated by The Club, in respect of which various appeals can be expected. The Club has left no stone unturned in its litigation and arbitration response to Spain's judgment. That is not a criticism, it is entirely entitled to do what it has done, but it blunts the force of its objections to a reference on the grounds of time and expense.
48. Furthermore, as Mr Young submitted, delay in this enforcement appeal is, in one respect, in accordance with what The Club has been seeking to achieve, which is to permit what it refers to as counterclaims for breach of Spain's obligations to obey the award and the Section 66 judgment to progress in order to facilitate there being set off against Spain's Spanish judgment.
49. I have considered the views of the parties, recognising that they are not determinative. Here, of course, Spain wants a reference; the Club does not.

Accordingly, this is not a matter on which the views of the parties can be said to weigh heavily on either side.

50. More generally, I have considered whether my making a reference would prejudice either party. Putting aside issues of time and cost, which I have already dealt with, I do not consider that it would. If, for some reason, it became apparent that a reference was not or was no longer necessary, the reference could, as I understand the position, be withdrawn: see Broberg and Fenger, Preliminary References to the European Court of Justice (Second Edition), pages 163 and 165.
51. I have recognised the need for a measure of judicial restraint in relation to the making of references but, given the nature of the issues and all of the circumstances, there is, in my judgment, a compelling case for the making of a reference in this case.
52. I add this: in reaching that conclusion, I have not taken into account as being a factor in favour of making a reference that, unless this court makes a reference, no appellate court will be able to because of the imminent end of the Transition Period and the consequences of that. There is, however, authority which indicates that that is a factor which counts in favour of making a reference at this stage. That is Eli Lilly v Genentech Inc. [2019] EWHC 388 (Pat), where Arnold J, notwithstanding that he had found all claims of the patent defended by Genentech to be invalid, made a reference to the CJEU of two questions relating to the supplementary certificate regulation which would have arisen had the patent been valid. Arnold J accepted that it was a factor in favour of his making a reference that, if there were a successful appeal against his patent judgment, the issues in relation to the supplementary certificate regulation would no longer be academic

but that, at that stage, the Court of Appeal would not be able to make a reference.

If that approach is right, it is an additional factor indicating that it is appropriate for me to make a reference now.

53. I should also add that I was not persuaded that the other question as formulated by Spain in relation to the Article 34(1) human rights point was necessary or suitable for a reference. The issue is primarily one of English public policy and that is how it was dealt with in the case of Smith v Huertas [2015] EWHC 3745 (Comm), to which Mr Young referred me. The issue of the extent to which English public policy in this area might extend beyond what is permissible under Article 34(1), if it arises at all, appears to me to be too fact sensitive to admit of a useful answer or guidance from the CJEU.

54. Accordingly, for all of those reasons, I am going to make a reference to the CJEU. Consideration will need to be given to the formulation of the reference. A draft has previously been supplied by Spain, but I trust that the parties will now collaborate in its formulation and ensure its compliance with the requirements of CPR Part 68 and 68 PD. If and to the extent that there are differences, I will of course have to resolve them myself. This is not, however, a case in which I intend to give a brief view of the answer to the questions referred at this juncture.

**(12.48 pm)**