



Neutral Citation Number: [2021] EWHC 1247 (Comm)

Case No: CL-2019-000518

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

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

Date: 12/05/2021

Before :

The Honourable Mr Justice Butcher

Between :

**THE LONDON STEAM-SHIP MUTUAL INSURANCE
ASSOCIATION LIMITED**

-and-

THE KINGDOM OF SPAIN

Appellant

Respondent

M/T 'PRESTIGE'

Christopher Hancock QC, Charlotte Tan, Tatyana Eatwell and Alexander Thompson
(instructed by **Ince Gordon Dadds LLP**) for the **Appellant**
Timothy Young QC, Naina Patel and Jamie Hamblen (instructed
by **Squire Patton Boggs**) for the **Respondent**

Hearing dates: 2-3, 7-10, 17-18 December 2020
Further submissions: 22 January, 12 February 2021

Approved Judgment

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

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THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher:

Introduction

1. This judgment relates to an appeal by the London Steam-Ship Owners' Mutual Insurance Association Ltd ('the Club'), against the *ex parte* registration order of Master Cook dated 28 May 2019 ('the Registration Order'), made pursuant to Article 43 of Regulation (EC) No. 44/2001 ('the Regulation'). The Regulation, rather than Regulation (EU) 1215/2012, is applicable because the proceedings out of which the judgment registered arose were commenced prior to 10 January 2015.
2. The Registration Order relates to an order of the Provincial Court of La Coruña ('the Provincial Court') dated 1 March 2019 ('the Spanish Judgment'). The Spanish Judgment was made following criminal and civil proceedings in which the Spanish courts found the Club liable, up to a USD 1 billion global policy limit, for damages arising out of pollution following the total loss of the M/T 'Prestige' ('the Vessel') off the coast of Spain in November 2002.
3. The Club is a mutual insurance association providing Protection and Indemnity ('P&I') and Freight, Demurrage and Defence ('FD&D') insurance to its members. At the material time, namely the year commencing on 20 February 2002, the Club provided such P&I and FD&D cover to Mare Shipping Inc. ('Owners') and Universe Maritime Limited ('Managers'), who respectively owned and managed the Vessel.
4. The Kingdom of Spain, which I will call 'the Spanish State' or 'Spain', is a sovereign state. It was a claimant in the Spanish proceedings to which I have referred.

The Factual Background

5. The contract of insurance in respect of the P&I cover for the Vessel was evidenced by a Certificate of Entry whereby the Club agreed to provide P&I cover for the Owners and Managers of the Vessel in respect, *inter alia*, of pollution liabilities up to a maximum aggregate amount of USD 1 billion any one occurrence. This contract of insurance was subject to the Club's Rules of Class 5 – Protecting and Indemnity (the 'Rules'), which contained a 'pay to be paid' clause in the following terms (Rule 3.1):

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

6. The Rules also contained an English law and London arbitration clause as follows:
 '43.2 ... if any difference or dispute shall arise between a Member and the Association out of or in connection with these Rules, or out of any contract between the Member and the Association, or as to the rights or obligations of the Association

or the Member thereunder, or in connection therewith, or as to any other matter whatsoever, such difference or dispute shall be referred to Arbitration in London before a sole legal Arbitrator and the submission to Arbitration and all the proceedings thereunder shall be subject to the provisions of the Arbitration Acts 1950, 1979 and 1996 and any Statutory modification or re-enactment thereof, and to English law. ...’

7. In addition, the Club acted as the Owners’ insurer in respect of the Owners’ liabilities under the International Convention on Civil Liability for Oil Pollution Damage 1969 (as amended by the 1992 Protocol) (the ‘CLC’).
8. In November 2002, the Vessel was on a voyage from St Petersburg to the Far East carrying 70,000 mt of fuel oil. She suffered damage from a storm surge and began to list significantly. A distress call was sent to the Spanish authorities, but salvage attempts over the following days were unsuccessful. On 19 November 2002, the Vessel broke in two and sank. The resulting oil spillage caused significant pollution damage to the Spanish and French coastlines.
9. In late 2002, criminal proceedings were commenced in Spain against the Master of the Vessel, Apostolos Mangouras, as well as against its Chief Officer and Chief Engineer, and against Mr Lopez Sors, the Spanish official who was responsible for handling the immediate aftermath of the casualty and who ultimately ordered the Vessel to sail away from the coast, which was alleged to have resulted in more widespread damage to coastal areas than would otherwise have been the case.
10. The first stage of Spanish criminal proceedings is the *fase de instrucción* [investigation stage], which in this case took place before the Corcubión Investigation Court No. 1. During the investigation stage, the Spanish State undertook various underwater investigations of the wreck of the Vessel, which are the subject of dispute between the parties and to which I will return.
11. In 2010, at the conclusion of the investigation stage, the case proceeded to the oral proceedings phase before the Provincial Court. The Master was charged, *inter alia*, with the offence of serious negligence against the environment under Arts. 325 and 331 of the Spanish Penal Code 1995 (the ‘CP’) and the offence of disobedience to the authorities. Civil claims were also brought by various parties, including the Spanish State, against the Master and crew, the Owners, the Managers and the Club. The civil and criminal actions were tried together.
12. By the end of the trial, the quantum of the claims brought by the State Lawyer and the Public Prosecutor on behalf of the Spanish State against the Club was in excess of EUR 4 billion. There were two types of claim brought against the Club. First, there were claims pursuant to the terms of the CLC. The CLC claims were not the subject of the Award or the English Judgments to which I will refer and are not of direct relevance for present purposes. Secondly, claims were made pursuant to Art. 117 CP, which gives a third-party victim certain rights of direct action against the liability insurer of the wrongdoing insured (the ‘non-CLC claims’). It is these non-CLC claims which were the subject of the Award and English Judgments.

13. The Club's position was (and is) that the non-CLC direct action claims against the Club in the Spanish Proceedings are in substance claims to enforce the terms of the contract of insurance between the Club as insurer and the Owners/Managers as the insureds. Accordingly, so the Club contends, insofar as the Spanish State is entitled to recover from the Club, it is bound by the terms of the contract of insurance. Specifically, the Club's position was (and is) that pursuant to the London arbitration and English law clause the parties were bound to submit the non-CLC claims to London arbitration governed by English law, and that the parties were bound by any contractual defences available to the Club, including any defence based on the 'pay to be paid' clause. The Club has always contended that upon the proper application of the 'pay to be paid' clause, it has no liability to the Spanish State. The Club has also always maintained, and this has been generally accepted, that the parties are bound by the financial limit contained within the policy, ie USD 1 billion, and that insofar as there is any liability it is so limited.
14. Consistently with this, in January 2012, the Club commenced London arbitration proceedings seeking declarations that the Spanish State was bound by the arbitration clause and that, in accordance with the contract of insurance, the Club was not liable. Mr Alistair Schaff QC was appointed sole arbitrator in the reference. The Spanish State was invited to participate, but did not take part.
15. By an Award dated 13 February 2013, with Reasons, (the 'Award'), Mr Schaff QC upheld many of the Club's claims for negative declaratory relief in respect of non-CLC liability, granting relief in the following terms:

'A) I AWARD AND DECLARE that, as regards all claims arising out of the loss of the M/T PRESTIGE and the resulting loss and damage which are currently brought in Spain by the Respondent [Spain] against the Claimant [the Club] by way of alleged direct public liability under the Spanish Penal Code:

 - 1) The Respondent is bound by the arbitration clause contained in Rule 43.2 of the Club Rules and such claims must be referred to arbitration in London;
 - 2) (i) actual payment to the Respondent of the full amount of any insured liability by the Owners and/or Managers (out of monies belonging to them absolutely and not by way of loan or otherwise) is a condition precedent to any direct liability of the Claimant to the Respondent in consequence of the 'pay as may be paid clause' contained in Rule 3.1; and accordingly
(ii) pursuant to the 'pay as may be paid clause', and in the absence of any such prior payment, the Claimant is not liable to the Respondent in respect of such claims,
 - 3) The Claimant's liability to the Respondent shall, in any event, not exceed the amount of US\$1,000,000,000 (US Dollars One Billion).

B) ... the Respondent shall bear and pay the Claimant's costs of this reference and the Tribunal's costs of this reference and this Award, and shall reimburse the Claimant for the Tribunal's costs if they have been borne in the first instance by the Claimant.'
16. By an arbitration claim form issued in March 2013, the Club sought permission pursuant to s. 66 Arbitration Act 1996 ('the AA 1996') to enforce the Award as a judgment and/or to have judgment entered in its terms. The Spanish State resisted enforcement under s. 66, on the basis that the arbitrator had lacked jurisdiction and it

sought relief from the court in the form of orders setting aside the Award and/or declaring the Award of no effect pursuant to ss. 67 and/or 72 of the AA 1996. Spain also claimed state immunity from the Court's processes in relation to the s. 66 application.

17. The ss. 66/67/72 AA 1996 applications were heard by Hamblen J over the course of a seven-day hearing in October 2013. On 22 October 2013 Hamblen J handed down judgment on the applications (The Prestige (No. 2) [2014] 1 Lloyd's Rep 309). Hamblen J granted the s. 66 relief and rejected the ss. 67/72 applications. He also held that Spain was not immune by reason of s. 9 of the State Immunity Act 1978, but rejected the Club's argument that Spain had lost immunity by submitting to the English Courts. By an Order and Judgment of the same date, the Court declared:

'3. Pursuant to section 66(1) of the Arbitration Act 1996 the Claimant shall have leave to enforce the Award in the same manner as a judgment or order of the court to the same effect.

4. Pursuant to section 66(2) of the Arbitration Act 1996, judgment shall be entered against the Defendant in the terms of the Award, namely: [the Court set out the terms of the Award]'

18. Hamblen J gave Spain permission to appeal on certain issues.

19. On 13 November 2013, following a lengthy trial, the Provincial Court handed down its judgment. In summary, the Provincial Court acquitted the Master of the offence of serious negligence against the environment but found him guilty of the offence of disobedience. As to civil liability, the Provincial Court held that the Master's disobedience had not caused the loss, and accordingly civil liability could not be imposed on the Master or, it followed, on the Owners or the Club. The Provincial Court acquitted the other defendants of all charges.

20. In 2014, the Master appealed against his conviction for disobedience, by way of a *recurso de casación* [cassation appeal] before the Spanish Supreme Court (Criminal Chamber). A number of parties, including the Spanish State, appealed against the acquittal of the Master for the other alleged offences.

21. Between 20 and 22 January 2015, the Court of Appeal heard the appeals from Hamblen J in relation to the ss. 66/67/72 applications. The appeals were fully contested. On 1 April 2015, the Court of Appeal upheld the order of Hamblen J (The Prestige (No. 2) [2015] 2 Lloyd's Rep 33). The Court of Appeal concluded, in addition to the points found by Hamblen J, that Spain had lost state immunity because it had submitted to the English court's jurisdiction. I will refer, for the sake of convenience, to Hamblen J's Order of 22 October 2013, and the Court of Appeal's Order of 1 April 2015, together, as 'the English Judgments'.

22. On 29 September 2015, the Spanish Supreme Court ('the Supreme Court') heard the various appeals against the Provincial Court's decision. On 26 January 2016, the Supreme Court handed down judgment (which was dated 14 January 2016). By way of summary:

- (1) In relation to criminal liability, the Supreme Court reversed the Provincial Court and convicted the Master of the offence of serious negligence against the environment under Articles 325 and 331 CP. The offence was classified as aggravated under Article 326(e) CP on the grounds that the Master had generated a risk of pollution which exceeded the merely serious level required by the basic offence. The Master was acquitted of the offence of disobedience.
 - (2) In relation to civil liability, the Supreme Court imposed liability for the total loss on the Master, the Owners (vicariously), and on the Club subject to the USD 1 billion limit in its contract of insurance.
23. On 19 February 2016, the Master lodged a nullity petition with the Supreme Court which challenged the legality of the Supreme Court's decision on the basis that it was in breach of his constitutional or fundamental rights under the Spanish Constitution and Article 6 and Article 1 of the First Protocol ('A1P1') to the European Convention on Human Rights (the 'ECHR'). On 11 April 2016, the Supreme Court dismissed the nullity petition.
 24. On 20 May 2016, the Master lodged an *amparo* application to the Spanish Constitutional Court, alleging a breach of his fair trial rights, including under Article 6 of the ECHR, and of his rights under A1P1 of the ECHR. On 2 March 2017, the Spanish Constitutional Court issued a notification dated 22 February 2017 stating that it had examined the appeal and declared it non-admissible, on the basis that it did not display the special constitutional importance which was required as a condition for its admittance.
 25. In the meantime, following the Supreme Court's judgment on the cassation appeal, the civil claims returned to the Provincial Court for a determination of quantum in respect of the liability of the Master, the Owners and the Club. The Club served writs in these quantum proceedings. It contends that it did so without prejudice to and reserving all its rights relating to the arbitration agreement, any rights already established and any future rights and for the purpose only of mitigating its losses flowing from Spain's failure, as it says, to adhere to its obligations under the contract of insurance, the Award and the English Judgments.
 26. On 28 July 2017, the Master filed an application with the European Court of Human Rights ('the ECtHR'), claiming that Spain had breached his human rights. In summary, the Master argued that the Spanish courts had acted in violation of Article 6 ECHR by the Supreme Court's overturning his acquittal and reaching new factual findings without hearing from him and/or the many other witnesses in the case and/or by the Spanish courts' having refused to allow him to participate in certain investigations and/or refusing to disclose the results to him and/or having acted in violation of A1P1 to the ECHR by declaring him civilly liable for the loss.
 27. 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. It accepted that, pursuant to the Supreme Court's first appeal judgment, the Club's liability was subject to the global limit of USD 1 billion. The quantum judgment was appealed to the Spanish Supreme Court. On 19

December 2018, the Supreme Court substantially upheld the award of damages in favour of the Spanish State, subject to a EUR 128,100,029 reduction (reducing the total amount of the judgment to EUR 1,357,133,778.91). The Club's USD 1 billion limit of liability was not affected. On 21 January 2019, the Supreme Court issued a rectification order amending its quantum judgment in certain minor respects.

28. In the meantime, on 18 January 2018, the ECtHR wrote to the Master's representatives informing them that a single judge (proposed by Andorra) had declared the Master's application inadmissible. The letter enclosed a decision letter which stated:

'... the matters complained of do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or the Protocols thereto. Accordingly, these complaints are manifestly ill-founded within the meaning of Article 35§3(a).'

29. On 5 February 2018, the Master's representatives wrote to the ECtHR seeking to challenge the inadmissibility decision on the bases that: (a) it was an obvious mistake, as there were numerous cases in which the ECtHR had made findings of violations by Spain in materially identical circumstances; and (b) the Andorran judge should not have considered the admissibility application, given the close links between Spain, France and Andorra, which gave rise to an obvious risk of bias or appearance of bias or conflict of interest. On 26 March 2018, a lawyer at the ECtHR wrote to the Master's representatives stating that the ECtHR does not provide any appeal against a decision on inadmissibility and that the decision to declare the application inadmissible was final.
30. On 8/14 November 2018, the Master lodged a Complaint against Spain with the UN Human Rights Committee ('the UNHRC'), alleging that Spain had violated its international treaty obligations under the International Covenant on Civil and Political Rights (the 'ICCPR'). The Complaint was that the Master's fair trial rights had been breached by the Supreme Court's finding the Master guilty without the possibility of a full review of that conviction on appeal, as well as raising similar arguments to those which had been made in the Strasbourg application. On 28 September 2020 the UNHRC issued its decision on the admissibility of the Master's application. The UNHRC held that the Article 14(5) ICCPR complaint was admissible, but that the complaints corresponding to the matters that had been the subject of the Strasbourg application were inadmissible. The UNHRC made the latter decision on the basis of its jurisprudence that it is required to declare an application inadmissible if the ECtHR has found a similar application inadmissible for reasons that involved a consideration of the merits.
31. On 1 March 2019, the Provincial Court issued the Spanish Judgment, setting out the amounts the claimants were entitled to enforce against the defendants in the proceedings. The Court ordered that the Spanish State was entitled to seek enforcement up to EUR 2,355,015,655.69, subject in the case of the Club to the insurance policy limit of USD 1 billion, which the Court declared to be a global limit in the sum of EUR 855,493,575.65 (being the Euro equivalent of USD 1 billion, less EUR 22,777,986 being the value of the CLC Fund deposited by the Club on 29 May 2003).

32. On 26 March 2019, Spain issued a Part 23 application seeking to enforce the Spanish Judgment against the Club pursuant to the Regulation. On 28 May 2019, Master Cook granted the Registration Order *ex parte*. On 26 June 2019, the Club issued the current appeal proceedings seeking to set aside the Registration Order pursuant to the appeal procedure mandated by Article 43 of the Regulation.
33. On 25 October 2019, this appeal was transferred, by consent, to the Commercial Court. Between March and October 2020, the parties exchanged factual and expert evidence in relation to the appeal. On 3 November 2020, Spain filed an application seeking references to the CJEU on a number of issues which fell to be determined at the hearing of the appeal.

The Principal Provisions of the Regulation

34. It is convenient here to set out the most relevant terms of the Regulation.

‘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 36

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

The Issues in Overview

35. The Club's case on this appeal was that recognition and enforcement of the Spanish Judgment should be refused and that the Registration Order should be set aside for one or both of two main reasons, namely:

- (1) That the Spanish Judgment is irreconcilable with the English Judgments, ie the order of Hamblen J dated 23 October 2013 as upheld on appeal, enforcing the Award, and that accordingly the exception in Article 34(3) of the Regulation is applicable;
- (2) That 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, and that accordingly the exception in Article 34(1) of the Regulation is applicable.

The Reference to the CJEU

36. For reasons which I gave in my judgment on 18 December 2020, at the conclusion of the hearing, I consider that it is necessary for the purposes of giving a concluded judgment in this appeal to decide certain questions relating to the interpretation and effect of the Regulation on which it is expedient that there should be rulings from the CJEU. I accordingly made a reference to the CJEU of the following questions:

- (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 of 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?

37. By order of Males LJ of 5 March 2021, the Club has been given permission to appeal against my order making a reference of these points to the CJEU.
38. I did not, however, make a reference of a question relating to the Club's argument that recognition would be contrary to English public policy because the Spanish Judgment involved a breach of human and fundamental rights. The determination of that question will not be affected by answers given on the questions which are the subject of the reference, if a reference proceeds, or by any determination of the Court of Appeal on the issue of whether there should be a reference. I consider that it is appropriate and desirable that I should deliver judgment in relation to that issue. That is accordingly the subject of this judgment.

Article 34(1): the Human Rights Public Policy Ground

Overview

39. The Club contends that it would be manifestly contrary to English public policy to recognise and enforce the Spanish Judgment and that Article 34(1) of the Regulation applies because it would be contrary to fundamental human rights.

Article 34(1)

40. Before I deal with this point in detail, it is helpful to recall the way in which the public policy exception arises in the Regulation, and the guidance which has been given on its application by the CJEU.
41. Article 34(1) provides:
- ‘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.’
42. It is also necessary to recall the terms of Article 36, which are as follows:
- ‘Under no circumstances may a foreign judgment be reviewed as to its substance.’
43. The main principles applicable to the application of the Article 34(1) exception were summarised by the CJEU in Diageo Brands BV v Simiramida-04 EOOD [2016] Ch 147, at paras. 41-68. The following statements of those principles are of importance:
- (1) Para 41: ‘In that system, article 34 of Regulation No 44/2001, which sets out the grounds on which the recognition of a judgment may be opposed, must be interpreted strictly, in as much as it constitutes an obstacle to the attainment of one

of the fundamental objectives of that Regulation. With regard, more specifically, to the public policy clause in article 34(1) of the Regulation, it may be relied on only in exceptional cases’.

- (2) Para 42: ‘In accordance with the court’s settled case law, while the member states remain free, by virtue of the proviso in [art 34(1)] to determine, according to their own national conceptions, what the requirements of their public policy are, the limits of that concept are a matter for interpretation of that Regulation. Consequently, while it is not for the court to define the content of the public policy of a member state, it is none the less required to review the limits within which the courts of a member state may have recourse to that concept...’.
- (3) Para 43: ‘In that connection, it should be observed that, by disallowing any review of a judgment delivered in another member state as to its substance, article 36 of Regulation No 44/2001 prohibits the court of the state in which recognition is sought from refusing to recognise that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the state of origin and that which would have been applied by the court of the state in which recognition is sought had it been seised of the dispute. Similarly, the court of the state in which recognition is sought may not review the accuracy of the findings of law or fact made by the court of the state of origin’.
- (4) Para 44: ‘Recourse to the public policy clause in [art 34(1)] may therefore be envisaged only where recognition of the judgment given in another member state would be at variance to an unacceptable degree with the legal order of the state in which recognition is sought, in as much as it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a judgment of another member state to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which recognition is sought or of a right recognised as being fundamental within that legal order’.
- (5) Para 49: ‘It must next be recalled that the court of the state in which recognition is sought may not, without challenging the aim of Regulation No 44/2001, refuse recognition of a judgment emanating from another member state solely on the ground that it considers that national or EU law was misapplied in that judgment. On the contrary, it must be considered that, in such cases, the system of legal remedies established in every member state, together with the preliminary ruling procedure provided for in article 267 [T]FEU, affords a sufficient guarantee to individuals’.
- (6) Para 50: ‘Consequently, the public policy clause would apply only where that error of law means that the recognition of the judgment concerned in the state in which recognition is sought would result in the manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that member state’.
- (7) Para 64: ‘Regulation No 44/2001 must be interpreted as being based on the fundamental idea that individuals are required, in principle, to use all the legal remedies made available by the law of the member state of origin. As Advocate General Szpunar has observed in point 64 of his opinion, save where specific

circumstances make it too difficult or impossible to make use of the legal remedies in the member state of origin, the individuals concerned must avail themselves of all the legal remedies available in that member state with a view to preventing a breach of public policy before it occurs. That rule is all the more justified where the alleged breach of public policy stems, as in the main proceedings, from an alleged infringement of EU law.’

44. As those statements make clear, Article 34(1) has to be interpreted strictly, and it is a provision which will only be applicable in exceptional circumstances. It is further made clear that, while the content of public policy is a matter of domestic law, EU law (and thus the CJEU) sets the limits of public policy which are capable of being relevant for the purposes of Article 34(1). The test is whether recognition would ‘constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which recognition is sought or of a right recognised as being fundamental within that legal order.’ There may not be a review of the substance of a decision of a court of another Member State. It is also clear that a party is expected, in principle, to seek to use all the legal remedies available to it in the court of origin, save where circumstances render it too difficult or impossible to do so.

45. The ECJ has further made it clear that amongst the fundamental rights breach of which might constitute a ground of public policy capable of bringing Article 34(1) into operation are certain human rights and fundamental freedoms. In Bamburski v Krombach [2001] QB 709, the Court said at [25]-[27]:

‘25. The court has consistently held that fundamental rights form an integral part of the general principles of law whose observance the court ensures: see, in particular *Opinion No. 2/94* [1996] ECR I-1759, 1789, para. 33. For that purpose, the court draws inspiration from the constitutional traditions common to the member states and from the guidelines supplied by international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories. In that regard, the European Convention on the Protection of Human Rights and Fundamental Freedoms has particular significance: see, inter alia, *Johnson v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] QB 129, 147, para 18.

26. The court has thus expressly recognised the general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights: *Baustahlgewebe GmbH v Commission of the European Communities* (Case C-185/95P) [1998] ECR I-8417, 8496, paras 20 and 21, and *Kingdom of the Netherlands v Commission of the European Communities* (Cases C-174 and 189/98P) [2000] ECR I-1, 61-62, para. 17.

27. Article F(2) of the Treaty on European Union ... embodies that case law. It provides:

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community law.”

46. One aspect of the general approach to issues under Article 34(1) which was the subject of some debate before me was as to what is meant by the requirement that any breach should be **manifestly** contrary to public policy.
47. The word ‘manifestly’ was deliberately added in the Regulation to what had been the text in the Brussels Convention. This was explained in the Opinion of AG Szpunar in Diageo (at para. 42), where he said:
- ‘... although public policy is a national concept, the court does, however, subject that concept to close scrutiny and interpret it strictly. ... Indeed, the adverb ‘manifestly’, added in the course of transformation of the Convention into the Regulation, gives concrete expression, in the Regulation, to the expectation of a manifest conflict between the recognition of judgments and public policy. As is clear from the explanatory memorandum in relation to article 41 of the proposal for a Council Regulation, that change was intended to underscore the “exceptional nature of the public policy ground” with a view to “improv[ing] the free movement of judgments.”’
48. Spain argued that the word ‘manifestly’ entailed that the breach must be ‘obvious, unmistakable and indisputable’. The Club disputed that the breach must be ‘obvious’ in the sense that argument or analysis is not required. It submitted that the word emphasised the gravity and importance of the breach; it did not rule out analysis. The Club suggested that there might well be cases where considerable investigation was necessary, which once undertaken revealed a grave violation of public policy: for example judgments procured by bribery or corruption.
49. I accept the Club’s argument that the word ‘manifestly’ cannot rule out a sufficient investigation of the facts to understand the nature of the violation of public policy contended for. But what ‘manifestly’ does emphasise is that, when there has been such investigation, it must be apparent that the judgment is ‘plainly or obviously contrary to public policy’ (as it was put by Patterson J in Laserpoint Ltd v Prime Minister of Malta [2016] EWHC 1820 (QB) at [60]), or that it must be ‘obvious that public policy dictates refusal [of enforcement]’ (as it was put by Cooke J in Smith v Huertas [2015] EWHC 3745 (Comm) at [16]). If there is room for serious argument as to whether public policy was contravened (either because it was seriously debatable as to what public policy was or as to whether the judgment contravened it) then it would be most improbable that it could be said that enforcement was manifestly contrary to public policy.

Fundamental Rights

50. The Club contends that there were violations of fundamental rights of the Master, of the Owners and of the Club in four respects, as follows:
- (1) A contravention of Article 14(5) of the ICCPR;
 - (2) A breach of fundamental rights in the Master being convicted on the basis of new factual findings made by the Supreme Court;
 - (3) An inequality of arms; and
 - (4) A contravention of A1P1.

I will consider these four grounds in turn.

Ground 1: Article 14(5) ICCPR

51. The first violation contended for by the Club is a contravention of Article 14(5) of the ICCPR, which provides:

‘Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.’

52. The ICCPR, though signed by the United Kingdom, has not been incorporated into the UK’s domestic legislation. The UK is not a signatory to the Optional Protocol to the ICCPR, according to which States recognise the competence of the UNHRC to receive and consider complaints from individuals.

53. The Club refers to the fact that the Master was convicted of a crime against the environment for the first time in the Supreme Court proceedings. It submits that his only ways of challenging that conviction were either a nullity application to the Supreme Court, which was not a higher tribunal, or an *amparo* appeal to the Constitutional Court which was limited to alleging breaches of constitutional rights and was in any event subject to an admissibility test as to whether an issue of special constitutional importance or relevance arose. In the event, the Master’s *amparo* application was dismissed without consideration of the merits because the Constitutional Court considered that the case did not raise any issue of sufficient constitutional importance. The Club contends that the present case is therefore indistinguishable from earlier cases in which Spain has been found by the UNHRC to be in breach of Article 14(5) of the ICCPR, including Gomariz Valera v Spain (Communication No. 1095/2002), and Moreno v Spain (Communication No. 1381/2005).

54. In my judgment the alleged contravention of Article 14(5) ICCPR is not a basis for refusal of enforcement of the Spanish Judgment. I have reached this conclusion for three reasons.

55. In the first place, I do not consider that Article 14(5) represents a right recognised as fundamental within the English legal order, such that it would be contrary to public policy to enforce any judgment based on a conviction rendered in contravention of its terms.

56. The starting point is that Article 14(5) is not part of English law. In Higgs v Minister of National Security [2000] 2 AC 228, giving the judgment of the majority of the Board of the Privy Council, Lord Hoffmann explained the position of international law in domestic courts (at 241):

‘In the law of England and The Bahamas, the right to enter into treaties is one of the surviving prerogative powers of the Crown. Her Majesty does not require the advice or consent of the legislature or any part thereof to authorise the signature or ratification of a treaty. The Crown may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government.’

But the corollary of this unrestricted treaty-making power is that treaties form no part of domestic law unless enacted by the legislature. This has two consequences. The first is that the domestic courts have no jurisdiction to construe or apply a treaty: see *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 1 AC 418. ...

The second consequence is that unincorporated treaties cannot change the law of the land. They have no effect upon the rights and duties of citizens in common or statute law ...’

57. In Belhaj v Straw [2017] AC 964 at [123] Lord Neuberger said:

‘... It is also part of this third rule that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts.’

Further, in the same case, Lord Sumption said, at [252]:

‘... English law has always held to the dualist theory of international law. In principle, judges applying the common law are not at liberty to create, abrogate or modify municipal law rights or obligations in accordance with unincorporated norms derived from international law, whether customary or Treaty-based. But, as Lord Bingham pointed out in *R v Lyons* [2003] 1 AC 976, para. 13, international law may none the less affect the interpretation of ambiguous statutory provisions, guide the exercise of judicial or executive discretions and influence the development of the common law.’

At [257] Lord Sumption said further:

‘... Recognition of the influence of international law does not mean that every rule of international law must be adopted as a principle of English public policy, even if it is recognised as a peremptory norm (*ius cogens*) at an international level. For my part, I would adopt the cautious observations of Le Bel J, delivering the judgment of the Supreme Court of Canada in *Kazemi Estate v Islamic Republic of Iran* 3 SCR 176, paras. 150-151. The issue before the court in that case was whether to recognise a public policy exception to state immunity in cases where this would conflict with the values protected by the Canadian Charter of Rights and Freedoms. Le Bel J pointed out that:

“not all commitments in international agreements amount to principles of fundamental justice. Their nature is diverse. International law is ever changing. The interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy. The mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be destroying Canada’s dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy.”

58. In accordance with these principles, it does not follow from the fact that the UK has entered into commitments in the ICCPR that there is a principle of fundamental justice which forms part of English public policy in the terms of Article 14(5) thereof. Equally, the English court cannot construe Article 14(5) of the ICCPR, or use it to create domestic rights, for example a right not to have a foreign judgment enforced. While Article 14(5) is no doubt part of the material which may influence the content of English public policy, it does not itself constitute it. Here the Club pointed to no basis on which a rule in the precise terms of Article 14(5) could be said to be a fundamental principle other than the fact that the UK has acceded to the ICCPR.
59. It is true that in English domestic law, there cannot be convictions on appeal in criminal matters. But that equally does not establish that there is here a fundamental rule of public policy which means that no conviction anywhere should be recognised if it was made on an appeal. In this context it is significant that Article 6 of the ECHR does not itself require Contracting States to have courts of appeal or of cassation even for criminal matters. It might therefore be the case that a conviction in a foreign court was given in compliance with Article 6, but where there was no right of appeal. I do not consider that it would necessarily offend English public policy to recognise a judgment based on such a conviction.
60. The point is thrown into sharp focus in this case by the fact that Article 2 to the Seventh Protocol to the ECHR is not in the same terms as Article 14(5) of the ICCPR. It provides:
- ‘Article 2 – Right of appeal in criminal matters
1 Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2 This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.’
61. Thus, under the Seventh Protocol there is an express provision for an exception to a right to a review when there is a conviction following an appeal against acquittal. Spain has both signed and ratified the Seventh Protocol, as have many other States. I find it impossible to accept that it would be contrary to English public policy to allow the recognition and enforcement of a judgment which was based on a conviction in the courts of a State party to the Seventh Protocol, and in full compliance with it and Article 6, simply on the basis that there was no compliance with Article 14(5) of the ICCPR.
62. Moreover, even if it could be said that Article 14(5) formed a fundamental part of English public policy, I do not consider that it would qualify as a relevant public policy for the purposes of Article 34(1) of the Regulation in that it would not be regarded for the purposes of the CJEU jurisprudence, which I have summarised above by reference to Diageo, as falling inside the limits within which the member states may have recourse to the public policy exception. In the situation hypothesised, it would be regarded in English courts as a fundamental matter of public policy that there should be compliance with Article 14(5) of the ICCPR while many other

countries in the EU accepted the qualification of a right to review specified in Article 2(2) of the Seventh Protocol to the ECHR promulgated by the Council of Europe. It would appear to me to be contrary to the principle of mutual trust, which as the CJEU stated in paragraph 40 of Diageo entails that all member states are, save in exceptional circumstances, ‘to consider all the other member states to be complying with EU law and particularly with the fundamental rights recognised by EU law’, for the UK courts to refuse recognition of judgments which comply with a formulation of the relevant fundamental rights which is recognised by many members of the EU. I consider that in such circumstances it would be held that the judgment given in the other member state was not at variance ‘to an unacceptable degree’ with the legal order of the UK.

63. The second reason relates to the fact that the Club’s complaint is of breaches of a right or safeguard conferred on someone convicted of a criminal offence. In the present case, that is a right of the Master, not of the Club. The Club was not charged with a criminal offence, and it was only a civil liability which was established against it by the decision of the Supreme Court. Even if it were right that it is manifestly contrary to English public policy to recognise and give effect to a criminal conviction which arose when there had been non-compliance with Article 14(5) of the ICCPR, I do not consider that the same would apply to a civil liability on an insurer such as that found by the Supreme Court.
64. The Club was involved in the Spanish proceedings as a ‘civilly liable person’. Spanish law has a procedure whereby two separate actions stemming from criminal conduct can be brought together, namely the criminal and the civil, and they will be allocated to the criminal court which has competence to hear the criminal charges. This is ‘for reasons of procedural economy (and only for this reason)’ (Ureña 3rd report, paragraph 10). As explained by Mr Ureña in his first expert report, the civil action in criminal proceedings is governed by civil laws (paragraph 27). Further, any civil liability ‘does not arise from the criminal offence, but from the damage caused by the said offence (if an offence does not cause damage, there will be no finding of civil liability, so that not all offences necessarily give rise to civil liability)’ (paragraph 29). The basis on which the Club was found liable was that the Master, because his conduct was found to have been seriously negligent, was, in addition to being criminally liable, civilly liable because that conduct was civilly unlawful; the Owners were ‘subsidiarily’ (or vicariously) civilly liable for the Master; and the Club was civilly liable as the Owners’ insurer (paragraphs 33-35).
65. The Supreme Court emphasised in its judgment (p. 130 of the translation):
- ‘Civil actions do not lose their own nature by the fact of being exercised in the criminal jurisdiction and their content and extent will also have to be calibrated in accordance with the applicable civil law, except where there exists a special criminal rule which modifies its regime.’
66. In my judgment, it has not been shown to be manifestly contrary to English public policy to enforce a judgment for a civil liability where that liability is established for the first time on an appeal, even if there were no appeal available from that finding. I was shown no material which indicated that it is a fundamental feature of English public policy that there must be an appeal from a finding of civil liability, and it is not

hard to contemplate situations in the English legal system where a finding of civil liability is first made on an appeal from which there is no possibility of an appeal.

67. The Club's argument based on Article 14(5) of the ICCPR arises only because, under the Spanish system, the criminal and civil cases were dealt with together. It appears to me, however, that it would have been possible under other systems for the question of whether there was civil liability on the part of insurers of Owners for the negligence of their servant to have been dealt with in separate civil proceedings, and for there to have been a finding of such liability on appeal. Given that, it does not seem to me possible to say that it is manifestly incompatible with English public policy to permit the enforcement of the Spanish Judgment by reason of any non-compliance with Article 14(5) of the ICCPR as regards the Master's criminal conviction.
68. Thirdly, the Club did not appear in the Spanish proceedings at the liability stage. It accordingly neither contested the civil liability which it was found to be under by the Supreme Court, nor sought to avail itself of any remedies available to it to challenge any breaches of its **own** rights which that finding may have involved.¹ In those circumstances I consider that the Club cannot be said to have availed itself of all the legal remedies made available in the member state of origin to prevent the relevant liability. There is no material which would rebut the strong presumption, which flows from the principle of mutual trust, that the Spanish courts' process in adjudging on civil liability such as the Club's, complied with the Club's human and fundamental rights. In consequence Article 34(1) of the Regulation is not available as a reason for refusal of enforcement, in accordance with the principle expressed in Diageo paragraph 64.

Ground 2: Conviction on basis of new factual findings on appeal

69. The Club's second main basis for contending that there was a violation of fundamental rights was a contention that the Master's conviction on appeal was on the basis of new findings of fact by the Supreme Court, made without hearing from the Master or relevant witnesses.
70. The fundamental rights which the Club contends were violated in this way are rights under Article 14(1) and (3) of the ICCPR, Article 6 of the ECHR and Article 47 of the EU Charter, for an accused to be heard and to put forward a defence. An aspect of those rights is that an accused must be heard in any case where the court is considering matters of fact in deciding whether to convict the accused. The Club referred in particular to the Strasbourg jurisprudence in relation to Article 6 of the ECHR which has held that in appeals against acquittals, where an appellate court is called upon to examine a case as to the facts and the law, and to assess the applicant's guilt or innocence, it cannot properly determine those issues without a direct assessment of the evidence of the accused, and possibly of other witnesses, given in person. The Club made reference to Ekbatani v Sweden No. 10563/83; Lacadena Calero v Spain No. 23002/07; and Gomez Olmeda v Spain No. 61112/12. The Club also referred to Suuripää v Finland No. 43151/02 as showing that the facts and their legal interpretation can be intertwined to an extent that makes it difficult to separate

¹ Which are referred to in Prof. Ortiz's comments in the Urena/Ortiz Joint Memo, para. 8.1a.

them, and that in such circumstances there can be a violation of Article 6 ECHR if the appeal court has made its own assessment of the facts for the purposes of deciding whether there is a sufficient basis for convicting the applicant. Further, the Club pointed to Strasbourg jurisprudence where these principles had been applied in cases where an appeal court reverses a lower court's findings as to whether or not an accused was guilty of negligence: Botten v Norway No. 16206/90.

71. There was no dispute that Spanish law is intended to protect these fair trial rights. The *Constitución Española de 1978* (Spanish Constitution of 1978, or 'CE') sets out a catalogue of fundamental rights, and provides that they shall be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on those matters which have been ratified by Spain. Article 24 of CE establishes a constitutional right to effective judicial protection and due process, including to a public trial without undue delays and with full guarantees. Consistently with this, on the only type of appeal which was, at the time, available in respect of the judgment of the Provincial Court of 13 November 2013, namely a *recurso de casación*, the only grounds which could be raised were procedural irregularity or error of law at first instance, or an infringement of a constitutional principle (Articles 847 to 906 of the *Ley de Enjuiciamiento Criminal* (Criminal Procedure Act). On whichever of these grounds an appeal might be brought, the appeal court was required to adhere to the facts established by the judgment appealed against. If the evidence presented at first instance were evaluated *de novo* by a higher court which had not heard that evidence and which therefore lacked the benefits of '*inmediación*' (immediacy), '*oralidad*' (orality) and '*contradicción*' (contradiction), this would contravene the Article 24 CE right to due process. Equally, if a higher court reviewed the facts in order to convict when there had been an acquittal at first instance, that would be a contravention of Article 6 of the ECHR, and Spanish courts have said on numerous occasions that this is not permissible.

72. These limits on the ambit of a permissible review on appeal, including the effect of the Strasbourg jurisprudence, were emphasised by the Supreme Court itself in the decision of 14 January 2016 of which complaint is made in this case: Legal Grounds 1-6. The Supreme Court stated, in part:

'Constitutional Court Judgments 154/2011; 49/2009; 30/2010 or 46/2011, among others insist that the Court which is to hear an appeal against an acquittal pronounced by another, must hear the person acquitted in person and directly in a public hearing in which the adversarial principle is respected, establishing as the sole exception one that deals exclusively with a point of law which, scrupulously respecting the proven facts, does not require re-evaluation of the evidence or persons in the strict sense nor other evidence that the court concerned deems necessary. In other words, it is not necessary to re-evaluate the objective and subjective elements of the crime, because the matter to be discussed is merely one of subsumption in law of some accepted facts. [citations omitted]

The case law of the Constitutional Court has been evolving since STS 167/2002, as has that of this Chamber, and both, following the ECHR in this respect, have established severe restrictions on the possibility of rectifying on appeal the factual elements of acquittal orders to produce a new account of proven facts to serve as the basis for convicting the person who was acquitted in the lower court....'

73. The Club contends that, despite these statements, the Supreme Court did not comply with the limitations which it had set out, but in fact made new factual findings in relation to a number of matters. In particular it arrived at a different conclusion in relation to whether there was serious negligence, which, the Club says, required a reassessment of matters which were not purely legal; and also re-evaluated findings on causation, which involved factual issues. The Club points specifically to what it contends were new factual findings as to: (i) the alleged slight overdraught of the Vessel; (ii) the defect in the Vessel's automatic control system; (iii) the defect in the Vessel's heating coils; (iv) the causal relevance of the Master's disobedience; (v) the causal relevance of the delay in evacuating the Vessel; and (vi) whether or not the casualty was foreseeable.
74. Despite the elaborate argument, and extensive expert evidence devoted to this issue by the Club, I consider it clear that these complaints do not found a ground for refusal of enforcement of the Spanish Judgment under Article 34(1) of the Regulation. My reasons are as follows.
75. In the first place, as with the previous ground, what the Club is seeking to rely on is alleged violations of rights conferred on a defendant to a criminal charge, and specifically on the rights of the Master. It is not relying on its own rights, nor does it point to the rights of a party to civil proceedings, or to a contravention of its own rights in the Spanish proceedings. The rule as to not making new factual findings on appeal does not apply to civil proceedings in Spain.² No basis has been put forward on which it can be said to be manifestly contrary to English public policy to enforce a civil judgment where, on appeal, there has been a reassessment of the facts without hearing from the defendant again. Furthermore, the Club did not assert any rights it had itself, and it took no steps to seek redress for contravention of any such rights in Spain. For those reasons alone I consider that the Club fails to show that the points made under this heading show that it would be contrary to public policy to enforce the civil judgment against the Club.
76. Secondly, the complaints now made have already been considered and rejected, including by the ECtHR. I consider that this precludes successful reliance on them for the purposes of resisting enforcement under Article 34(1). In order to explain this it is necessary to say more about the challenges which have already been made.
77. Thus, the complaints about the making of new findings on appeal were raised in the Master's nullity petition to the Supreme Court, which was lodged on 19 February 2016. It set out the ECHR jurisprudence and raised all the grounds which the Club now points to as new factual findings or evaluations by the Supreme Court. The Supreme Court rejected that petition, on the basis that there had not been new factual findings. The Master's *amparo* application to the Spanish Constitutional Court raised the same points, and was declared inadmissible. Significantly, thereafter, the Master filed an application to the ECtHR which raised the same points as to new findings of fact having been made on appeal. The application was made by the same firm of Spanish lawyers as have represented the Club in the Spanish proceedings since 2017. The application was declared inadmissible, as not disclosing any appearance of a violation of the rights and freedoms set out in the ECHR or the Protocols thereto, by

² Day 6/p.22.

Judge Vilanova on 11 January 2018. The lawyers representing the Master protested that that decision was obviously wrong, and that Judge Vilanova, because Andorran, should have recused himself given the risk of bias or the appearance of bias. The ECtHR responded that its decision was final. The Master's lawyers asked for this to be reconsidered. It was not.

78. The material before me includes a letter from the Registrar of the ECtHR to the Spanish Minister of Justice dated 15 May 2019 which explains the procedures in relation to single-judge decisions of the ECtHR. Part of that letter was as follows:

‘The decision in the present case, following the new practice introduced by the Court since June 2017, is a reasoned decision by Judge Pere Pastor Vilanova specifying the grounds of inadmissibility as “manifestly ill-founded” after a full analysis of the facts of the case within the meaning of Article 35(3)(a) of the Convention. The Court declares a complaint manifestly ill-founded for reasons relating to an examination on the *merits* of the complaint. The grounds for inadmissibility are therefore not procedural (for example, non-exhaustion of domestic remedies, non-compliance with the six-month time limit etc.) ... any application will be considered “manifestly ill-founded” if a preliminary examination of its substance does not disclose any appearance of a violation of the rights guaranteed by the Convention, with the result that it can be declared inadmissible at the outset without proceeding to a formal examination on the merits which would normally result in a judgment ... Accordingly, there has been a consideration of the merits of this case.

According to Article 26 §3 of the Convention, when sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected. Rule 28 of the Rules of Court sets out situations in which a judge may not take part in the consideration of a case (for example due to a personal interest in the case, having previously acted in the case, having publicly expressed opinions on the case). There was no reason for Judge Pere Pastor Vilanova to withdraw from the above case because, *inter alia*, Andorra is a neighbouring State to Spain or France.’

79. The Master also filed a communication with the UNHRC which alleged *inter alia* the same violations in relation to new findings of fact made on appeal. Again, the Master was represented by the firm of Spanish lawyers who represented the Club. The UNHRC has found those allegations which have been considered and dismissed by the ECtHR, including the allegations as to new findings on appeal, to be inadmissible, on the basis that there has been a consideration, albeit limited, of the merits of the case by the Strasbourg Court, such that in accordance with Article 5(2)(a) of the Optional Protocol to the ICCPR the UNHRC must therefore decline jurisdiction.
80. Thus exactly the same allegations of violation of the Master's fair trial rights have been the subject of examination by the Spanish Courts and by the ECtHR. The decision of the ECtHR is, specifically, one which the court has to take into account pursuant to s. 2(1)(a) of the Human Rights Act 1998 (the ‘HRA 1998’).
81. The position in this case is therefore materially the same as that considered in Smith v Huertas [2015] EWHC 3745 (Comm), where Cooke J was dealing with an objection to enforcement based on Article 34(1) of the Regulation by reason of alleged breaches

of the applicant's Article 6 rights in France. At paragraph 19 Cooke J referred to Interdesco SA v Nullifire Ltd [1992] ILPr 97, and said that 'an English court should not normally entertain a challenge to a Convention judgment in circumstances in which it would not permit a challenge to an English judgment on the basis of *res judicata* or issue estoppel although principles of estoppel should be applied with care and in a flexible manner in relation to foreign proceedings.' He quoted with approval Phillips J's statement in Interdesco that if a foreign court has ruled on precisely the matters that a defendant seeks to raise when challenging a judgment on the ground of fraud, the Convention (ie now the Regulation) 'precludes the court from reviewing the conclusions of the foreign court'. At [20] Cooke J said that while Interdesco related to challenges on the basis that the original judgment had been obtained by fraud, the same principles 'will apply to allegations of judicial bias and a fortiori to other arguments of a less serious nature in relation to the course which the proceedings took in the foreign jurisdiction. They must apply to arguments about procedural fairness'.

At [21], Cooke J then said:

'Where the factors relied on as being contrary to public policy in England are factors which the court has already considered in the foreign jurisdiction or are factors which could have been raised by way of objection in that jurisdiction, it appears to me self-evident that the foreign jurisdiction must be treated as the best place for those arguments to be raised and determined. To do otherwise would be contrary to the spirit of the Convention and, where issues of unfairness are raised which are capable of being the subject of appeal in the foreign jurisdiction, the court in the enforcing jurisdiction would be much less able to assess them than the original court which was familiar with its own forms of procedure. It is plain that an enforcing court will have much more difficulty in understanding the overall foreign system and its procedures for ensuring that justice is done than the appeal court of the original jurisdiction itself.'

82. Applying the approach indicated by these paragraphs, at [34]-[35] Cooke J rejected a complaint as to unfairness by reason of the duration of the investigation and the proceedings because the French courts had grappled with this point themselves, and the ECtHR had rejected an application made on the self-same basis. As Cooke J put it, 'The point has been decided against [the applicant]'. At [36]-[37] Cooke J took the same approach in relation to a complaint that the juge d'instruction had not interviewed the applicant. The French courts and the ECtHR had decided this very point, and what the applicant was attempting to do in resisting enforcement was 'to challenge the substance of these decisions' (paragraph 37).
83. In the same way as in Smith v Huertas, I consider that the points which the Club seeks to make about violations of the Master's fair hearing rights by reason of new factual findings are ones which have already been decided, adversely to the Club; and that the Club is now seeking to challenge the substance of the decisions to reject those complaints. While it is the case that the challenges in Spain and the ECtHR were made in the name of the Master, it seems quite clear that the Club was involved in those challenges, and probably funded them. In any event, the Club's present complaint is that the Master's rights were violated. If it can effectively rely on those rights at all, which in my judgment it cannot as set out in my first reason under this

heading, it cannot avoid the consequences of the fact that these precise complaints have been raised and rejected by the courts which must be treated as the best place for them to have been raised and determined.

84. Thirdly, and in any event, I have considered the arguments made and expert evidence given as to whether new factual findings were made on appeal. It is clear to me that there is, at the least, a *bona fide* and significant argument that no new material factual findings were made by the Supreme Court. It is not a case where, on an examination of the case, it is plain or obvious that there has been a contravention of the Master's fair hearing rights not to have new factual findings made on appeal.
85. Necessarily, my consideration of this point was informed by the expert evidence of Spanish law which the parties adduced. The evidence of Prof. Ortiz, which was given with authority and conviction, was that when the judgments of the Provincial and Supreme Courts were properly understood in the context of the relevant Spanish criminal and procedural law, it could be seen that the Supreme Court's decision was not based on any new factual findings. That evidence, coming from a qualified expert, is itself of significance in considering whether there are any grounds for saying that the enforcement of the Spanish Judgment would be manifestly contrary to English public policy. Furthermore, Prof. Ortiz drew attention to a number of points to support his view, including the following:
- (1) That the crime of environmental negligence under Article 325 CP is one committed by the creation of a situation of hypothetical danger to the protected interest, here the environment. There is no need for a showing of causation of damage to the environment by the accused's negligence.
 - (2) In Spanish law, the establishment of negligence does not require the establishment of any specific mental state of the accused, and it is sufficient to establish that a reasonable person would have been aware of the risk and would have acted differently.
 - (3) The Provincial Court had made findings in relation to: (i) the overdraught of the Vessel and the fact that she was carrying 2150 mt more fuel than permitted (p. 133 of translation); (ii) the fact that the Vessel's automatic control system was not working (p. 166 of translation); (iii) the malfunctioning of the heating coils (pp. 166 and 172 of the translation); (iv) the Master's disobeying of the orders of the Spanish maritime authorities to take a tow (pp. 137, 209-10 of the translation); and (v) as to the evacuation of the Vessel (p. 140 of the translation).
 - (4) The Supreme Court's disagreement with the Provincial Court in relation to the finding of criminal liability had been in assessing whether, given the existence of these matters, it could be said that the Master was guilty of serious negligence in contributing to the risk to the environment. Given the nature of the offence, including in particular the matters referred to in (1) and (2), that was a different legal, not factual, evaluation.
 - (5) To the extent that it mattered, the Provincial Court had itself considered the Master to have been negligent, but had not considered him guilty of serious

negligence. This, Prof. Ortiz said, was the effect of page 172 of the translation of the judgment (page 129 of the Spanish), when properly understood. That had been the understanding of the Supreme Court of that passage, as set out in Legal Ground 34 of the Supreme Court's judgment, and it had been correct. What the Supreme Court decided, however, as a matter of a 'legal evaluation' was that the negligence was serious.

86. These points demonstrate a reality and cogency of argument to the effect that there were no new material factual findings as to make this a case a long way from one where it is plain and obvious that fundamental rights have been infringed and that it would be contrary to public policy to recognise the judgment.
87. I have reached this conclusion notwithstanding that Spain effectively conceded that in one respect the Supreme Court did go beyond the factual findings of the Provincial Court, namely that in Legal Ground 29 the Supreme Court said that the overloading of the vessel 'inevitably has an impact on the structure of the ship and its manoeuvrability'. I consider, however, that Spain is correct to say that the Supreme Court did not say, and it does not appear, that this 'impact' was regarded as critical to the court's reasoning. The Supreme Court was not directly concerned with the cause of the casualty and the spill but with the creation of risk. On any view I do not consider that there was here a plain and obvious denial of the Master's fair hearing rights.
88. I have also given careful consideration to the Club's contention that the present case is similar to that in Botten v Norway, where it was held that a conviction on appeal for negligence in the performance of the defendant's official duties was unfair, because there had been a reassessment by the appeal court of whether there had been carelessness without hearing the defendant. That was, however, a decision as to whether the particular proceedings were unfair. It is not easy to read across directly from that case to the present to conclude that there was a breach of the Master's Article 6 rights, and Spain can in this context again point to the decision of the ECtHR dismissing the Master's application as an indication that no breach was obvious to the ECtHR.

Ground 3: 'Inequality of Arms'

89. The third basis on which the Club contends that there was a violation of fundamental rights was that there had been an 'inequality of arms'. This case was based on what the Club contended had been a failure and refusal of the Spanish courts to allow the Master or his experts to participate in certain underwater investigations of the wreck of the Vessel, and on what it contended had been the non-disclosure of material evidence arising out of those investigations.

The Right relied on

90. The fundamental right that the Club contends was violated was that recognised in Article 14(3) of the ICCPR, Article 6 of ECHR and Article 47 of the EU Charter to an equality of arms, and of the defendant to have adequate facilities for the preparation of his or her defence. The Club pointed to the Strasbourg jurisprudence relating to

Article 6 of the ECHR. That establishes that in considering whether there had been a violation of the Article, the court needs to consider whether the proceedings as a whole were fair (Rowe and Davis v UK ECtHR Grand Chamber, App. No. 28901/95, 30 EHRR 1), including as to the way in which evidence was taken.

91. It is also established that violations of Article 6 may arise in relation to the non-disclosure of material evidence. The relevant principles here include:

- (1) In a criminal case both prosecution and defence must be given the opportunity to have knowledge and to comment on the observations filed and the evidence adduced by the other party (Leas v Estonia (ECtHR First Section, App. No. 59577/08), paragraph 77).
- (2) In addition, Article 6(1) requires the prosecution authorities to disclose to the defence all material evidence in their possession for or against the accused (Leas v Estonia paragraph 77).
- (3) ‘Material’ evidence is not confined to evidence considered relevant by the prosecution. It covers all material in the possession of the authorities with potential relevance (Rook v Germany ECtHR Fifth Section, App. No. 1586/15, paragraph 58). But the entitlement to such disclosure is not an absolute right, and in any criminal proceedings there may be competing interests. But only such measures restricting the rights of the defence as are strictly necessary are permissible within Article 6(1) (Rook v Germany at [59]).
- (4) Under Article 6(3) the accused has a right to ‘adequate time and facilities for the preparation of his defence’. ‘Facilities’ includes the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings (Jespers v Belgium Eur. Com. HR, App. No. 8403/78, para. [56]), but may be restricted to those which assist or may assist him in the preparation of his defence (Jespers at paragraph 57).
- (5) An accused may be expected to give specific reasons for a request to see documents or material, and the domestic courts are entitled to examine the validity of those reasons (Bendenoun v France ECtHR Grand Chamber, App. No. 12547/86, paragraph 52), CGP v Netherlands Eur Com. HR, App. No. 29835/96).
- (6) The principle of inequality of arms does not depend on a showing of ‘further, quantifiable unfairness flowing from a procedural inequality’ (Bulut v Austria App. No. 17358/90, (1997) 24 EHRR 84 at 104, paragraph 49).

The alleged violations

92. The violations which the Club contends occurred in the present case fall into two categories: (i) the failure by the State Administration and/or the prosecution authorities to disclose to the Master and his representatives, all material evidence arising out of underwater investigations of the wreck, and by the Spanish courts to

ensure proper disclosure of such evidence; and (ii) a failure to allow the Master to attend and participate in such underwater investigations.

93. In brief, there were two sets of expeditions to the wreck using the submersible SS 'Nautila'. Spain employed IFREMER, the French Research Institute for Management of the Sea, to conduct a first expedition between December 2002 and February 2003. The reported purpose of this mission was initially to inspect and observe any leaks of oil and to seal any apertures or openings in the hull from which oil might be leaking. At least some of the dives were attended by Mr Francisco Javier del Moral Hernandez, a naval architect retained by the Spanish government. There were 36 dives. The Spanish Investigating Judge was not informed of the fact that this mission would take place or had taken place. It became known in the Spanish proceedings later, and photographs and videos from the mission were made available to the Master's and Owners' representatives in October 2009. A second Nautila expedition took place between 24 May and 6 June 2003. Ten dives were carried out.
94. In the period between July 2003 and September 2004 the Spanish State conducted four sets of expeditions to the wreck using the dive support vessel 'Polar Prince'. On each of the expeditions remotely operative vehicles ('ROVs') were sent down. The main purpose of these expeditions was to remove the remaining oil from the wreck, but it was not in issue that various investigations of the wreck were conducted with the aim of attempting to determine the cause of the casualty. The first expedition was between 12 and 13 July 2003. The naval architect acting for Spain, Dr Charles Cushing, was in attendance, as were two other individuals on behalf of Spanish interests, Mr del Moral and Mr Francisco Alonso. The second expedition was between 19 and 23 August 2003, attended by Dr Cushing, Mr del Moral and Mr Alonso. A number of sample corrosion coupons were placed on the stern of the wreck, there were visual inspections of the wreck, ultrasonic thickness measurements ('UTM') were taken from 11 locations, further coupons were placed on the bow of the wreck, and sample strips were cut 'for chemical analysis'. The third expedition was between 18 and 29 October 2003. A colleague of Dr Cushing, Mr Zinger, attended, as well as Mr del Moral and Mr Alonso. On this occasion a representative of the Vessel's Classification Society, ABS, was present. Visual surveys were undertaken, some measurements taken, and a sample cut from the Vessel's hull plating. Between May and September 2004, the fourth expedition took place. The focus of this diving programme was to recover as much of the remaining oil as possible and mitigate against future releases of oil from the wreck.
95. The Club contends that a variety of pieces of evidence deriving from or relating to these expeditions was not disclosed in the Spanish proceedings, and to a large extent it was common ground that it had not been. Thus the Club pointed in particular to: (i) videos or photographs from the second Nautila expedition, (ii) videos from the first Polar Prince expedition, (iii) Dr Cushing's handwritten notes from the first Polar Prince expedition, (iv) Dr Cushing's handwritten notes from the second Polar Prince expedition, including records of his visual inspections and the results of ultrasonic thickness measurements from 11 locations, (v) notes taken by Mr Zinger on the third Polar Prince expedition and other documentation relating to it, (vi) results of UTM measurements taken by the oil contractors in deciding where to cut hot tapping locations during the fourth Polar Prince expedition, (vii) notes or reports from Mr del

Moral or Mr Alonso, and (viii) documents from the oil contractors or the Geographic Information System (GIS) database and ‘intervention map’.

96. It is the Club’s contention that the Spanish courts failed to remedy the violations of the Master’s rights constituted by these non-disclosures. The Master applied for disclosure of the results of the underwater investigations, but the applications were refused by the Provincial Court.

97. Furthermore, the Club contends that by reason of his not being informed of the Nautilic expeditions and, as to the Polar Prince expeditions, by reason of having been refused permission by the Spanish courts to attend, the Master had not been given a reasonable opportunity to present his case.

Conclusion as to ‘inequality of arms’

98. Again, I do not consider that these matters provide a reason to refuse enforcement pursuant to Article 34(1).

99. Here, again, the Club is seeking to rely on rights afforded a defendant to criminal proceedings. It is not relying on rights accorded to a party to civil proceedings, such as it was itself. While parties to civil proceedings do have certain ‘equality of arms’ rights under Article 6, as was stated in Dombo Beheer B.V. v Netherlands App. No. 14448/88, [1994] 18 EHRR 213, at [32]:

‘The requirements inherent in the concept of ‘fair hearing’ are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law, the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.’

100. As I have said, the Club’s case has not been put forward on this appeal as a breach of rights accorded in cases concerning the determination of civil rights and obligations, and no such breach has, accordingly, been established. Furthermore, as Spain has pointed out, the Club did not seek to assert or uphold any such rights in the Spanish proceedings, because it did not participate at the liability stage.

101. I thus do not consider that the Club has established any case of a breach of its own fundamental rights or those bestowed by Article 6 on an entity in its position. In those circumstances, English public policy is not, in my judgment, engaged by enforcement of the Spanish Judgment against it.

102. Secondly, once again, the alleged violations of the Master’s Article 6 rights that I have considered under this heading were raised both in the Spanish proceedings and in the application to the ECtHR, and dismissed. Thus, on 30 July 2012, the Master filed a writ asking the Provincial Court to annul the proceedings because of the violation of his fair trial rights by reason of his exclusion from the underwater investigations and the non-disclosure of material evidence. That petition was rejected

by the Provincial Court on 31 October 2012 on reasoned grounds which included that (i) the aim of the expeditions had not essentially been to collect evidence but to mitigate the disaster, and (ii) insofar as the expeditions had produced material which would be considered by the court, it could be examined and debated by the parties to the proceedings. The Provincial Court also admitted into evidence a report by Mr Delgado Macias, prepared on behalf of the Master, which analysed the images and video footage that he had seen from the underwater investigations, and emphasised that there were a ‘large number’ of measurements which had not been disclosed by the Spanish Administration, citing as examples measurements taken on the third Polar Prince expedition. Thus the complaints were rejected as ground for the nullity of the proceedings, but the alleged failure of the State to give the Master proper access to the underwater investigations was a matter which was before the court and was the subject of evidence during the trial. After the trial and the appeal to the Supreme Court, the complaints as to inequality of arms were raised in the Master’s application to the ECtHR (paras. 74-94). As set out above, that petition was rejected as manifestly ill-founded.

103. In line with the approach in Smith v Huertas these facts show that the current complaints have been considered by the courts best placed to evaluate them, and that it is not contrary to public policy to enforce a judgment where such complaints have been rejected by those courts.
104. Thirdly, and in case I am wrong as to the first two points, I have considered the complaints made to see whether there was here such a clear and serious contravention of fundamental principles of fairness in the Spanish proceedings that it can be said that English public policy dictates non-enforcement of the judgment because of that contravention. In performing this review, it seems to me necessary to consider not only the nature of the alleged breach of the principle of equality of arms, but also its materiality in terms of its importance to the outcome of the proceedings. While I recognise that it has been held in the Strasbourg jurisprudence that there may be found to be an infringement of fair trial rights without a showing of a quantifiable unfairness flowing from the irregularity, I do not consider that the question of whether Article 34(1) permits non-enforcement can be properly answered without an assessment of whether it has been shown that the alleged flaws in the procedure might well have made a difference to the result.
105. In my judgment, and with little doubt, none of the complaints made under this heading are such as to mean that Article 34(1) can be successfully invoked. I will deal in turn with the allegations as to non-disclosure of materials to the defence, and then with the complaint as to the Master not being permitted to participate in the underwater expeditions.
106. As to the former, the essential complaint is that more material from the underwater investigations and operations would have given a more complete picture as to the condition of the Vessel, and have allowed a more confident answer to be given as to Vessel’s structural conditions and state of maintenance. While the Club does not contend that any of the undisclosed evidence of which it is aware was in itself decisive, it says that an assessment of the state of the Vessel was an ‘iterative exercise of using building blocks to form an overall picture’, and that more material would have provided more building blocks. The Club emphasises that it cannot know

what was never disclosed to it. But it points to the undisclosed measurements made during the second Polar Prince expedition, about half of which produced reasonably consistent measurements showing no significant diminution in thickness, and the other half showed a wider range only to be expected of areas of pitting, as indicating the type of way in which more of this material might have been helpful to the defence. It could have supported the Master's primary expert case that the casualty was most likely caused by a giant wave, rather than by any failure to maintain the Vessel, and this would have formed an essential part of the background in the Provincial Court's assessment of whether the Master's actions constituted serious negligence.

107. Against this, however, are the following considerations.

- (1) There was considerable material dating from before the casualty which was available to the Provincial Court bearing on the structural condition and state of maintenance of the Vessel. This included the material from and relating to the last Special Survey of the Vessel in China in April and May 2001, the Annual Survey carried out in Dubai in May 2002, the P&I condition survey in Fujairah on 24 January 2002, a vetting inspection for Chevron in Karachi on 13 March 2002 and a Port State inspection by the Russian Federation on 28 October 2002. There was also material from the underwater expeditions, including at least some DVD video footage and 7 CD-ROMs of minifilms from the Nautilie dives, and a thickness reading and metallurgical analysis from a sample of the Vessel's structure taken on 23 October 2003.
- (2) The part of the Vessel which had failed on 13 November 2002 was in way of No. 3 Wing Tank Starboard, and the shell plating from that area on the starboard side had been lost and was not part of the wreck which was examined during any of the underwater investigations. Accordingly none of the information obtained during the underwater operations related directly to the part which failed. The expert opinion of Mr Squire was that 'what really is material is ... evidence in relation to the actual failure ... evidence of something in some other part of the ship is not likely to be material'.
- (3) The fact that material from the underwater dives was missing was a matter which was known to the defence, was emphasised by one of the Master's experts at the trial, Mr Bowman (paragraph 8.3 and Appendix 12 of his report of July 2012), and was the subject of the report of Mr Delgado Macias and of the nullity application to the Provincial Court to which I have already referred. It was accordingly a matter which the Provincial Court could take into account.

108. In view of the matters referred to in the preceding paragraph, I do not think it can be said that there was any plain and obvious contravention of the Master's Article 6 rights by reason of the Provincial Court's not having ensured that all the materials from the underwater operations and investigations were disclosed to the Master and his representatives. It was not a plainly irrational or unfair approach for the Court to consider that, given that the missing material was not itself of the part which failed, given the other evidence available to it, and given that it could take into account that such materials were 'known unknowns', it was not essential that it should be disclosed.

109. Moreover, it is doubtful that further disclosure of this material would have made any significant difference. This is not only because it did not directly relate to the area which failed, but also because the likelihood of deficient maintenance of the Vessel being causative of the casualty would inevitably have been considered by comparison with the likelihood of any other cause. The primary alternative cause put forward in the Master's experts' reports had been the theory of the giant wave. That theory was considered improbable by the Provincial Court for reasons which would not have been affected by the undisclosed material (namely that it was not seen by anyone, not recorded, and had only affected one Vessel). It is also doubtful because of the way in which the Provincial Court and Supreme Court decided the case as a matter of law. Thus, while the Provincial Court proceeded on the basis that the casualty came about because of the inadequate maintenance and conservation of the Vessel, it found that the Master was not aware of and could not have been aware of serious deficiencies in the maintenance of the Vessel. The Supreme Court was bound by the Provincial Court's findings of fact. Accordingly, as a matter of analysis, the state of maintenance of the Vessel was not directly relevant to the courts' conclusions as to guilt or innocence.

110. As to the complaints that the Master and his experts were not allowed to participate in the underwater expeditions, I do not consider that there was here a contravention of his Article 6 rights. The ECtHR cases cited by the Club in this context, in particular Stoimenov v Macedonia (App. No. 17995/02), Yvon v France App. No. 44962/98, (2005) 40 EHRR 41 and Mantovanelli v France 21497/93, (1997) 24 EHRR 370, arose from significantly different situations. In this context it is significant that these complaints were included in the Master's application to the ECtHR, which was dismissed, which can itself be taken as some indication that no breach of Article 6 was involved. In any event, it is far from clear, given the nature of the expeditions, which were not primarily forensic, that the presence of representatives of the Master would have meant that significantly more information was obtained, nor – for reasons I have already discussed – that more material from the underwater operations would have made any difference to the Provincial Court's or the Supreme Court's consideration of the case.

Ground 4: A1P1

111. The last head of contravention of fundamental rights on which the Club argues that it can rely as founding a reason why the Spanish Judgment should not be enforced pursuant to Article 34(1) is that it contends that the Master's, Owners' and Club's right to the peaceful enjoyment of their property, as protected by A1P1 of the ECHR, and Article 17 of the EU Charter, were infringed, or that the Spanish Judgment was arbitrary or manifestly unreasonable in violation of Article 6 of the ECHR and Article 47 of the EU Charter.

The Nature of the Right relied on

112. A1P1 provides as follows:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

113. The Club contends that A1P1 is violated if the deprivation of property arises out of an unfair procedure. It contends that in this case there was an unfair procedure, and relies on the various violations of the Master’s fair trial rights for which it contends. These have been considered above. As I have concluded that there is no basis for the Club to rely for the purposes of resisting enforcement on the alleged violations of the Master’s fair trial rights, this further way of relying on them is not successful either.
114. In addition, the Club contends that the civil liabilities of the various defendants (Master, Owners and Club) were based on decisions which were arbitrary, manifestly unreasonable, and amounted to unlawful expropriations of their property and a flagrant denial of justice.
115. In relation to this aspect, the Club contends that A1P1 and Article 6 of the ECHR are violated where the domestic court’s substantive ruling was arbitrary or manifestly unreasonable. The Club cited Anheuser-Busch Inc v Portugal App. No 73049/01, (2007) EHRR 36, paragraphs 83-86), and, in the context of Article 6, Bochan v Ukraine (No. 2) App. No. 22251/08. Spain did not contest that A1P1 and Article 6 may be engaged by arbitrary or manifestly unreasonable decisions, but stressed the stringent nature of the test involved. It pointed to what was said by the Grand Chamber in Bochan v Ukraine (No. 2), at para. 62, as follows:

‘... if the error of law or fact by the national court is so evident as to be characterised as a “manifest error” – that is to say, is an error that no reasonable court could ever have made – it may be such as to disturb the fairness of the proceedings. In Khamidov, the unreasonableness of the domestic courts’ conclusion as to the facts was “so striking and palpable on the face of it” that the Court held that the proceedings complained of had to be regarded as “grossly arbitrary” ... In Andelković, the Court found that the arbitrariness of the domestic court’s decision, which principally had had no legal basis in domestic law and had not contained any connection between the established facts, the applicable law and the outcome of the proceedings, amounted to a “denial of justice”.’

The relationship of the complaint made to Article 36 of Regulation

116. Spain referred to the fact that the context in which the question of violation of A1P1 arises is whether the Article 34(1) exception in the Regulation applies. It emphasises that the court has to consider the other provisions of the Regulation as well, and in particular Article 36, which provides that

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

A similar provision is contained in Article 45(2) of the Regulation.

117. The relationship between Article 34(1), and the provisions of Article 36 and 45(2) has been considered in a number of cases in the CJEU, including C-38/98 Renault v Maxicar and Formento [2000] E.C.R. I-2973, Bamberski v Krombach [2001] QB 709, especially at [37]-[38], Apostolides v Orams [2011] QB 519, especially at [60]-[61], and Meroni v Recoletos Ltd [2017] QB 85, especially at [41]-[42]. In Apostolides v Orams, at [60] what was said was:

‘[60] In that connection, the court of the State in which enforcement is sought cannot, without undermining the aim of [the Regulation], refuse recognition of a judgment emanating from another Member State solely on the ground that it considers that national or Community law was misapplied in that judgment. On the contrary, it must be considered that, in such cases, the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 234 EC, affords a sufficient guarantee to individuals ... The public-policy clause would apply in such cases only where that error of law means that the recognition or enforcement of the judgment in the State in which enforcement is sought would be regarded as a manifest breach of an essential rule of law in the legal order of that Member State.’

118. In Meroni v Recoletos Ltd, the CJEU said this:

‘[41] In that connection, it must be observed that, by not allowing any review of a foreign judgment as to its substance, articles 36 and 45(2) of [the Regulation] prohibit the court of the member state in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the state of origin and that which would have been applied by the court of the state in which enforcement is sought had it been seised of the dispute. Similarly, the court of the member state in which recognition is sought may not review the accuracy of the findings of law or fact made by the court of the member state of origin...

[42] Accordingly, recourse to the public policy exception provided for by article 34(1) of [the Regulation] can be envisaged only where recognition or enforcement of the judgment given in another member state would be at variance to an unacceptable degree with the legal order of the member state in which enforcement is sought in as much as it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a foreign judgment of another member state to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the member state in which recognition is sought or of a right recognised as being fundamental within that legal order...’

The alleged violation of A1P1

119. Against that legal background, I turn to consider in more detail the basis on which the Club contends that there was a contravention of A1P1 and Article 6 by reason of the alleged arbitrariness or manifest unreasonableness of the Spanish judgments.

120. The Club's case is that when the Supreme Court proceeded, having found the Master criminally guilty of serious negligence, to make findings of civil liability, it made arbitrary or irrational findings as to the application of the CLC. What the Club contends is as follows:
- (1) That the exemption or restriction of liability contained in Article III.4 and V.2 of the CLC may be set aside only in exceptional circumstances. The strictness of the test (personal acts or omissions committed 'with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result') is clear from a number of English or Privy Council authorities, including The MSC Rosa M [2000] 2 Lloyd's Rep 399 at paragraphs 12-14, The Leerort [2001] 2 Lloyd's Rep 291, at paragraphs 9-11, 13 and 19, The Cape Bari [2016] 2 Lloyd's Rep 469, at paragraph 14, and The Ocean Victory [2017] 1 WLR 1793, especially at paragraphs 69 and 76. These cases recognised that there was 'an almost indisputable', or 'virtually automatic' right to limit, which would only not apply in 'quite exceptional circumstances'.
 - (2) The CLC is an international treaty which has been ratified by Spain and is directly incorporated into the Spanish legal order. Within that legal order, according to the evidence of Mr Ureña, the test in the CLC was the practical equivalent of *dolo eventual*, a form of indirect intent and fundamentally different from negligence (including negligence where there is knowledge that damage might result (or *culpa consciente*)). That, the Club submitted, was in accordance with decisions of Spanish courts in relation to the Warsaw Convention and Article IV.5(e) of the Hague-Visby Rules, and a body of academic opinion.
 - (3) The Provincial Court had found not only that the Master was not aware but also that he could not have been aware of the maintenance deficiencies of the Vessel, and that his acts or omissions had not caused the failure of the Vessel; and had made no material findings about the Owners, either as to their knowledge or as to whether they had caused or contributed to the loss.
 - (4) The Supreme Court, having found the Master guilty of serious negligence at the stage of deciding on criminal responsibility, accepted that the CLC applied in principle to claims against the Master (Legal Ground 63). It then referred to the exception in III.4³, and found that the test was to be applied consistently with the 'system of which it forms part', which included the imposition of criminal sanctions for serious negligence (Legal Ground 64). As the Court had found the Master guilty of serious negligence, the test in III.4 was found to have been met.
 - (5) This was, the Club contends, wholly unjustified and perverse. It says: (i) that there was no basis to equate the Article III.4 test with *culpa consciente*, (ii) even if the standard were *culpa consciente* the Supreme Court did not apply that test, and (iii) the Supreme Court then made findings that the Master had caused the loss by his personal act or omission, which the Provincial Court had not made and for which there was no basis.

³ The reference in Legal Ground 64 to Article 5.3 is clearly a mistake.

(6) In relation to the Owners, the Supreme Court recognised that their liability had to be considered on the basis of the application of the CLC (Legal Ground 67). It then found that the Owners must have had knowledge of the structural condition of the Vessel and its state of repair, which was not a finding the Provincial Court had made and which the Supreme Court was not in a position to make. It also failed to apply a standard of *dolo eventual* which it should have applied, even on its own reasoning, in a civil context. And it proceeded to impose liability without making a finding of causation by the personal act or omission of the Owners.

Discussion

121. I do not consider that Article 34(1) applies or that enforcement is to be refused on the grounds of a contravention of A1P1 or Article 6 by reason of the Supreme Court's decision being manifestly unreasonable or arbitrary. This is for three reasons.
122. In the first place, I consider that the Club's complaints in this area are an attempt to invite the court to review the substance of the decision of the Spanish court, which is impermissible under Article 36 and Article 45(2) of the Regulation.
123. The uncertainty in this area derives from the fact that, in the CJEU decisions which have considered the relationship between Article 34(1) and Article 36, it is stated that Article 34(1) may be applicable when there is an infringement 'of a rule of law regarded as essential in the legal order of the member state in which recognition is sought or of a right recognised as fundamental within that legal order'. It can be said that A1P1, and the right under Article 6 not to be the subject of arbitrary or manifestly unreasonable decisions, constitute rights recognised as fundamental in England. That allows an argument, such as the one made by the Club here, that a foreign judgment should not be recognised because it was so badly wrong and lacking in basis that it was 'manifestly unreasonable'. But that opens the door to the type of assessment of the substance of the decision of the foreign court which the CJEU has confirmed that Article 36 is designed to prevent. An attack on a foreign judgment would simply have to be framed as being that it was 'manifestly unreasonable' or 'arbitrary' to compel the enforcing court to examine the quality of the reasoning and conclusions of the foreign court, and there would be a clear difficulty in identifying, and drawing consistently, the line between the 'manifestly unreasonable' decision, and that which is merely flawed but unreviewable because of Article 36.
124. The decisions of the CJEU have, however, given rather more specific guidance which helps resolve this difficulty, and how the matter should be decided in the present case. Specifically, in Meroni at paragraph 41, as I have set out, it is said that 'the court of the member state in which recognition is sought may not review **the accuracy of the findings of law or fact** made by the court of the member state of origin' (my emphasis). That approach does not mean that there can never be cases which are unenforceable because 'manifestly unreasonable' or 'arbitrary'. There might be cases, for example, where there is no attempt at legal reasoning, or the result is manifestly made to depend on a matter which has nothing to do with a view of the relevant law or facts. But if there is a process of fact finding and legal analysis, then the Meroni approach dictates that the enforcing court should not examine them to see whether they are right. Applying that approach here, it seems to me clear that the

Club's criticisms of the Spanish Judgment are indeed invitations to the court to review the accuracy of the Supreme Court's findings of law or fact.

- (1) In the case of the Master, the Club's complaints are essentially that the Supreme Court identified the wrong test in law (*culpa consciente* rather than *dolo eventual*), misapplied the test it had adopted to the facts, and made impermissible factual findings as to the Master having caused the loss by his personal act or omission. Each involves a criticism of the accuracy of findings of fact or law.
- (2) In the case of the Owners, the first complaint is that the Supreme Court made factual findings as to the Owners' knowledge for which there was no basis, and which had not been made by the Provincial Court. The latter aspect, namely that they had not been made by the Provincial Court, does not appear to be of independent significance in the present context because the only evidence at the trial before me indicated that there is no bar in civil proceedings in Spain to an appeal court making factual findings which had not been made at first instance. This complaint accordingly boils down to a case that the Supreme Court was wrong to make the factual findings it did, which is an invitation to the court to review the accuracy of findings of fact.
- (3) The second aspect of the Club's case in relation to the Owners is that the Supreme Court failed to apply the test of *dolo eventual* which it itself had said was applicable in commercial situations (p. 133 of translation). However, at p. 140, the Supreme Court said that the case was one of 'culpability or civil negligence attributable to [the Owners] of a degree which justifies the view that the company acted recklessly, with conscious and deliberate disregard for the serious risks involved in its action and in consequence, clear justification for setting aside the owner's right to limitation recognised by CLC...'. I consider that to be a finding of mixed fact and law, and the Club's criticism is either an attack on the test applied, or its application to the facts.
- (4) The third aspect of the Club's case in relation to the Owners is that the Supreme Court failed to make any findings as to the loss having been caused by the personal fault of the Owners. It appears to me, however, that the Supreme Court did make such a finding (at 139-140), in concluding that the Owners' decision to send the Vessel on its final voyage, knowing of its condition, showed the 'utmost lack of caution and care', and amounted to a deliberate taking of the risk of the Vessel succumbing to adverse weather. The Club's real complaint, once again, is that the findings which the Supreme Court made were ones which it was not entitled to reach on the basis of the material before it, and that, as I have said, I consider to be an impermissible invitation to review the substance of the decision.

125. The second reason is that I do not consider that the Club has overcome the strong presumption that the courts of the originating Member State, through 'the system of legal remedies' of that State, will have provided a procedure which is compliant with Article 6: Maronier v Larmer [2003] QB 620 at [23]-[26]. The Club has not shown what arguments or authorities were put before the Supreme Court. This court is accordingly not in a position to be able to make any informed assessment of how the Supreme Court's conclusions related to the submissions which were made to it.

126. Thirdly, the Club, which could, had it participated, have asserted its own rights in respect of a finding of civil liability, did not seek to assert any contravention of AIP1 or Article 6, even after it started to participate at the quantum stage of the Spanish proceedings. It has therefore not attempted to avail itself of any remedies in the Spanish courts to put right what it contends to have been the arbitrary nature of the liability decision. I am not persuaded that it is a sufficient answer to this for the Club to say that a nullity appeal to the Supreme Court would have been pointless because, as the Club contends, it ‘would never have changed its mind’. I am not prepared to make that assumption, if the Supreme Court’s decision was as lacking in any rational foundation as the Club contends it to have been.

Conclusion

127. For the reasons I have given, I reject the Club’s case that Article 34(1) is applicable on the basis of breaches of fundamental rights.

128. I will hear argument on the appropriate order which should be made to reflect this conclusion, and the fact that a determination on the other points argued must await a determination of the outcome of the Club’s appeal against the order for a reference to the CJEU, and the reference (if it continues after that appeal).