

2014

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Recommended Citation

Erika Dixon, *When Sovereign Nations are Forced to Arbitrate: Spain and France and the Prestige Oil Spill*, 6 *Y.B. Arb. & Mediation* 316 (2014).

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WHEN SOVEREIGN NATIONS ARE FORCED TO ARBITRATE: SPAIN AND FRANCE AND THE
PRESTIGE OIL SPILL

By
Erika Dixon *

I. INTRODUCTION

In *London Steam Ship Owners Mutual Insurance Association v. Kingdom of Spain* (“*London Steam Ship*”), the High Court of England and Wales (the “English Court”) forced Spain and France to arbitrate civil and criminal claims against a maritime insurance company following the “Prestige” oil spill.¹ In 2002, the Prestige oil tanker sank and spilled more than twenty-one million gallons of oil along the Spanish and French coastlines.² Spain and France subsequently filed claims in a Spanish court against the ship owner’s insurance company, but the insurer refused to attend those court proceedings, claiming that the parties should submit the dispute to arbitration.³ The arbitral tribunal ultimately ordered that Spain and France refer their claims to arbitration and issued an award in favor of the insurance company, which the High Court of England and Wales confirmed in *London Steam Ship*.⁴ The English Court held that the claims were arbitrable because they were contract claims and that the insurance company had the right to make Spain and France arbitrate in England, even though Spain and France are sovereign nations.⁵ The English Court’s decision, therefore, limited the national sovereignty of two of the most powerful European nations.

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¹ *London Steam Ship Owners Mutual Insurance Association Ltd v Kingdom of Spain* [2013] EWHC (Comm) 3188 [1] (Eng. and Wales) (stating that, in November 2002, the “Prestige” was on a voyage from St Petersburg to the Far East carrying 21 million gallons of oil) [hereinafter *London Steam Ship Owners*].

² *See id.*

³ *See id.* at [4]-[5] (stating that, in Spain, parties can file criminal and civil claims in the same court.); *see also id.* at [8]. “The [Steam Ship Insurance] has accordingly played no part in the Spanish proceedings . . . Neither Spain nor France participated in the arbitrations.”

⁴ *See id.* at [9]. “In awards dated 13 February 2013 (Spain) and 3 July 2013 (France), the Tribunal upheld most of the [Steam Ship Insurance]’s claims for negative declaratory relief in respect of any non-CLC liability. Declarations were granted that Spain/France were bound by the arbitration clause in the [Steam Ship Insurance]’s Rules to refer the civil claims being brought in Spain to arbitration.”

⁵ *See id.* at [11] (stating that Spain and France resisted the arbitration application as a matter of jurisdiction, on the grounds that they have state immunity, and as a matter of discretion).

II. FACTUAL BACKGROUND

The Prestige oil tanker sank in 2002 while it was traveling to East Asia carrying twenty-one million gallons of heavy fuel oil.⁶ On November 13, 2002, the Prestige sailed into a storm near Finisterre, located along the northwest coast of Spain. Strong winds and high waves damaged the ship and cracked the ship's hull, spilling oil along the coast. Spain and Portugal refused to tow the ship to their ports to protect their shores from being covered in oil. A salvage company used tugboats to drag the ship southwest and away from land, but their efforts could not prevent the oil from accumulating along the Spanish and French coastlines.

Nearly a week after the initial damage from the storm, the ship tilted up to a forty-five degree angle and split into two pieces.⁷ The Spanish government began criminal proceedings in a Spanish court against the ship's primary officers in late 2002.⁸ Nearly eight years later, the Spanish and French governments also filed civil claims in the same Spanish court against the ship's owner, Mare Shipping Inc. ("the Owner") and its liability insurer, London Steam Ship Owners Mutual Insurance Association ("Steam Ship Insurance").⁹ Steam Ship Insurance responded by initiating arbitration proceedings in London seeking an order requiring Spain and France to cease all of the Spanish court proceedings and submit the dispute to arbitration.¹⁰ Spain and France refused to participate in the arbitration, and the arbitral tribunal issued a jurisdictional award in favor of Steam Ship Insurance in 2013.¹¹

In October 2013, Steam Ship Insurance asked the English Court to confirm the arbitration award. Steam Ship Insurance also requested an expedited procedure, hoping

⁶ London Steam Ship Owners, [2013] EWHC 3188 at [1] (stating in November 2002, the "Prestige" was on a voyage from St. Petersburg to East Asia carrying 700,000 metric tons or 21 million gallons of fuel oil).

⁷ *Prestige Oil Spill, How it Happened*, GUARDIAN.CO.UK, <http://www.theguardian.com/flash/0,5860,843370,00.html> (last visited Feb. 3, 2014).

⁸ London Steam Ship Owners, [2013] EWHC 3188 at [23]. "The primary officers included the Master, Chief Officer, and Chief Engineer of the vessel."

⁹ *See id.* at [4]. "In or about June 2010, at the conclusion of the investigatory stage of the criminal proceedings, civil claims were brought against the Owners of the vessel, Mare Shipping Inc. ("the Owners"), on the grounds of its vicarious liability, and also against the Owners' protection and indemnity ("P&I") insurers, the London Steamship Owners Mutual Insurance Association Limited ("the [Steam Ship Insurance]"). These claims were brought under Article 117 of the Spanish Penal Code 1995 ("the Penal Code") (which provides an injured party with a direct right of action against an insurer in certain circumstances) and the Convention on Civil Liability ("CLC") in respect of the damage caused by the loss of the vessel."

¹⁰ *See id.* at [18] (stating that the arbitration clause contained in the insurance contract between the ship's owner, Mare Shipping, and the Steam Ship Insurance stated that any dispute between the parties shall be referred to "Arbitration in London" before a "sole legal Arbitrator").

¹¹ *See id.* at [43] (stating that the English Court granted relief to the Steam Ship Insurance and found that Spain and France were bound by the arbitration clause contained in the insurance contract between the ship's owner, Mare Shipping, and the Steam Ship Insurance).

to secure an English Court judgment before the Spanish Court issued a decision on the claims pending before the Spanish Court, which was expected in November 2013.¹² If the English Court confirmed the arbitral award before the Spanish Court issued a judgment, the arbitral award would take primacy under the Brussels Regulation.¹³ The English Court contemplated the exigency, confirming the award before the Spanish Court issued a judgment.¹⁴

The English Court's decision arguably infringes on the national sovereignty of Spain and France. To justify issuing its decision, the English Court relied on three rationales. First, the Court reasoned that all the claims Spain and France sought to adjudicate were subject to binding arbitration under a valid and enforceable insurance contract.¹⁵ Second, the Court reasoned that all of Spain's and France's claims were substantively arbitrable.¹⁶ Finally, the English Court reasoned that it was justified in

¹² London Steam Ship Owners, [2013] EWHC 3188 at [7]. "In relation to the non-CLC claims the [Steam Ship Insurance]'s position is that the civil claimants are bound by the terms of the contract of insurance contained in the [Steam Ship Insurance] Rules to bring those claims in arbitration and by the English law clause in those Rules. Further, they are bound by any contractual defenses available to the [Steam Ship Insurance], including the "pay to be paid" clause (Rule 3.1) and that upon the proper application of the "pay to be paid" clause, the [Steam Ship Insurance] has no liability."

¹³ See Christian Leathley & Hannah Ambrose, *English High Court Considers: Arbitrability of Civil Claims with a Criminal Aspect; Its Discretion to Enforce Awards under § 66 of the Arbitration Act 1996; and the Scope of the Arbitration Exception to Immunity under § 9 of the State Immunity Act 1978*, HERBERT SMITH FREEHILLS (Nov. 12, 2013), <http://www.lexology.com/library/detail.aspx?g=6472454b-2baf-49a3-bffb-bdda9e8ec8d0>. "The [Steam Ship Insurance] sought the Court's permission to enforce the awards as judgments (or have judgments entered in their terms) pursuant to § 66 of the [English Arbitration] Act, which gives the court discretion to permit such enforcement. The reason for seeking to enforce the awards as English judgments was the expectation that the judgments would take primacy over any inconsistent Spanish judgment under the Brussels Regulation. A Spanish judgment was anticipated in November 2013." See also Commission Regulation 44/2001, On the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 012) 15, 16, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0044:20100514:EN:PDF> (stating under the Brussels Regulation, a judgment will not be recognized by EU Member States if it is irreconcilable with a prior judgment in another EU Member State) [hereinafter *Commission Regulation 44/2001*].

¹⁴ London Steam Ship Owners, [2013] EWHC 3188 at [13]. "The trial of the Spanish proceedings took place between 16 October 2012 and 10 July 2013. Judgment is expected in November 2013 and the present applications have been brought on before the court on an expedited basis, at the [Steam Ship Insurance]'s behest."

¹⁵ As a general matter, criminal claims and matters of public policy, unlike civil claims, are usually inarbitrable. In *London Steam Ship*, Spain and France argued that their claims against the Steam Ship Insurance fell under a criminal statute and could only be resolved in a court of law. The court disagreed for several reasons, concluding that the claims at issue more closely resembled a civil, arbitrable dispute arising out of a contract. See *id.* [96]-[106].

¹⁶ London Steam Ship Owners, [2013] EWHC 3188 at [105]-[106]. "The Defendants accordingly submitted that the subject matter [or substance] of the Spanish and French Awards is inextricably linked with the alleged underlying criminal conduct and the role being fulfilled by Spain, the Public Prosecutor and France in pursuing redress for the damage caused to the natural environment of France and Spain and, as such, is not arbitrable. I am unable to accept these submissions. . . ."

precluding adjudication in any forum other than arbitration despite Spain's and France's status as sovereign nations.

III. THE ENGLISH COURT'S ANALYSIS OF THE SHIP'S INSURANCE CONTRACT

The English Court found that the claims pending in the Spanish Court were arbitrable, because they arose from a valid insurance contract between Mare Shipping Inc. and Steam Ship Insurance. The arbitration agreement stated, in relevant part, that clients of the insurance company shall resolve any disputes via "Arbitration in London before a sole legal Arbitrator." The contract further stated as follows:

In any such Arbitration, any matter decided or stated in any Judgment or Arbitration Award . . . relating to proceedings between the [client] and any third party shall be admissible in evidence. *No Member may bring or maintain any action, suit or other legal proceedings against the [London Steamship Insurance] Association in connection with any such difference or dispute unless he has first obtained an Arbitration Award in accordance with [the arbitration clause]* (emphasis added).¹⁷

Typically, since both Spain and France lacked contractual privity, neither nation would have standing against Steam Ship Insurance. Rather, as injured third parties, Spain and France could only bring their claims against the tortfeasor directly. Direct action statutes, however, allow injured third parties to sue a tortfeasor's insurance company where, as here, the tortfeasor is insolvent.¹⁸

The English Court analyzed the right of direct action under both English and Spanish law. The Court found that English law allowed direct actions to be characterized as either a contractual right or an independent right of recovery.¹⁹ The English Court

¹⁷ See *London Steam Ship Owners*, [2013] EWHC 3188 at [18] (outlining the relevant portions of the insurance contract at issue in the litigation).

¹⁸ *International Risk Management Institute Definition*, IRMI, <http://www.irmi.com/online/insurance-glossary/terms/d/direct-action.aspx> (last visited Jan. 24, 2014). "A lawsuit between an injured party and the tortfeasor's liability insurer for payment under a liability policy. Basic contract law provides that only parties that are in privity of contract have "standing," or the right, to file suit to have that contract enforced. In the insurance context, this means that only the policyholder has standing to enforce a liability policy issued by a liability insurer. If the policyholder injures a third party, that third party is not in privity of contract with the liability insurer, and at common law, the injured third party has no standing to file suit directly against the insurer to enforce the insurer's indemnity obligations. Because courts refused to allow injured parties to directly sue liability insurers, some state legislatures enacted special statutes, called "direct action" statutes, which authorize injured parties to directly sue a tortfeasor's liability insurer."

¹⁹ See *London Steam Ship Owners*, [2013] EWHC 3188 at [19] (stating, to begin its analysis, the Court first turned to English law set out in *Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Insurance Co (The Hari Bhum)*). In *Through Transport*, the English Court of Appeal observed that the right of direct action can be characterized as either contractual right or an independent right of recovery.

determined that Spain's right of direct action included a contractual right because the Spanish direct action statute caps the recovery in direct actions to the amount specified in the insurance contract.²⁰ Accordingly, the English Court concluded that France and Spain were free to exercise their claims against Steam Ship Insurance directly, but could only do so through a contractually prescribed arbitration procedure. Moreover, France and Spain could not recover damages in excess of Mare Shipping Inc.'s insurance policy.²¹

Spain and France maintain that the Court erred in characterizing the claims as contractual.²² The Court ridiculed this argument, noting that international treaties often give direct action rights to injured third parties that do not depend on a governing contract. One such treaty is the Convention on Civil Liability ("CLC"),²³ to which Spain and France are both signatories. The CLC seeks to compensate victims of maritime casualties, including victims of oil spills.²⁴ Unlike the Spanish direct action law, the CLC makes no reference to a tortfeasor's insurance contract, but it sets out statutory damages.²⁵ In this case, Spain and France claimed damages under both the CLC and damages based upon the Spanish direct action statute.²⁶ Steam Ship Insurance, therefore,

²⁰ *See id.* at [54]-[95] (stating the Court came to this conclusion after interviewing several experts on the Spanish law and dissecting the relevant statutory provisions governing the contract, namely the 1885 Commercial Code and the 1980 Insurance Contract Act).

²¹ *See* London Steam Ship Owners, [2013] EWHC 3188 at [66]. "The Madrid Judgment makes clear that the general rule and starting point is that the third party can only claim against the insurer if and to the extent that the assured would also have been able to claim against the insurer, subject to the specific exceptions laid down in Article 76 itself."

²² *See id.* at [91]. "The Defendants submitted that this reasoning is fallacious and amounts to no more than saying that there is an insurance contract and, therefore, the claim must be contractual. However, what matters is not merely the existence of the contract but the contents of the contract and the fact that the direct action right has essentially the same content. The third party's rights depend, primarily and substantially, on the terms of the contract."

²³ *International Convention on Civil Liability for Oil Pollution Damage (CLC)*, INT'L MARITIME ORG., <http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-%28CLC%29.aspx> (last visited Feb. 7, 2014) (stating parties to the CLC include 170 countries, including Spain, France, and England).

²⁴ *See id.*

²⁵ *See* London Steam Ship Owners, [2013] EWHC 3188 at [6] (stating that the CLC treaty imposes strict liability on the Owners of ships to compensate persons who suffer oil pollution damage). To ensure that a ship Owner is in a position to meet his obligations under the CLC he is obliged to arrange insurance up to his CLC limit. In this case, the [Steam Ship Insurance] was the Owners' CLC insurer. The CLC provides for direct action against the CLC insurer, but only up to the amount of the CLC Fund. The CLC Fund for this incident is €22,777,986. *See also* *International Convention on Civil Liability for Oil Pollution Damage (CLC)*, *supra* note 23.

²⁶ *See id.* at [6]-[7] (stating that the Club accepted CLC liability and disputed any non-CLC liability).

did not contest its liability under the CLC, so it was only the non-CLC claims that were at issue in the proceedings.²⁷

IV. THE ENGLISH COURT'S ANALYSIS OF ARBITRABILITY

A. Arbitrability of the Criminal Claims

Arbitrability questions are either procedural or substantive. Procedural arbitrability concerns issues such as whether certain procedures apply to a particular dispute, whether such procedures were followed, and whether unexcused failure to follow procedure avoids the duty to arbitrate. Procedural arbitrability encompasses questions such as delay, untimeliness, and statute of limitations questions.²⁸ Substantive arbitrability, however, refers to whether a dispute involves a subject matter which the parties have contracted to submit to arbitration and whether claims arise from a contract. Parties generally cannot contract to arbitrate criminal claims such as rape, assault, or murder.²⁹

In *London Seam Ship*, Spain and France argued that their claims against Steam Ship Insurance were substantively inarbitrable because the claims were criminal in nature. During the English Court proceedings, Spain and France argued that Mare Shipping Inc. and Steam Ship Insurance were criminally liable because the *Prestige* was in poor repair and should never have left port.³⁰ Further, Spain and France accused the ship's officers of negligently handling the ship.³¹ Spain and France argued that they

²⁷ *See id.*

²⁸ 1 DOMKE ON COM. ARB. § 15:4.

²⁹ *See id.* at [101]. “As pointed out by *Mustill & Boyd*, however, a distinction needs to be drawn between determinations of criminal liability and the imposition of criminal sanctions, and determinations of issues which may involve criminal liability. The latter are commonly the subject matter of arbitration, as, for example, in cases involving allegations of fraud.”

³⁰ *London Steam Ship Owners*, [2013] EWHC 3188 at [31]. “Various civil claims have been brought in the Spanish proceedings. In Spain, a party who is criminally liable will also be civilly liable for harm done by the criminal act, in accordance with the general (civil) principle that a party who does harm to another by a wrongful act is liable to compensate that other.”

³¹ *See id.* at [30]. “In broad terms, it is alleged in the Spanish proceedings that the loss was suffered because the vessel was unseaworthy; the Master, Chief Officer and Chief Engineer were deliberately obstructive and uncooperative with the Spanish authorities; the vessel was overloaded, and the Master was negligent in counter-flooding the wing tanks of the vessel in an attempt to correct the list. The Master and Owners deny these allegations. They further say that all but a fraction of the loss was caused by the decision of the Spanish authorities to start the vessel's engines and send her out to sea, rather than sending her to a port of refuge. If the vessel had not been sent out to sea, they say, the pollution damage would have been minimal (if there had been any at all).”

could not arbitrate because their claims were brought under both criminal and civil statutes.³²

The English Court flatly rejected the notion that Spain and France brought genuinely criminal claims for five reasons. First, it noted that the actual criminal charges applied neither to Mare Shipping Inc. nor Steam Ship Insurance, but to lower ranking members of the Prestige crew.³³ Accordingly, Steam Ship Insurance and Mare Shipping Inc. were several steps removed from the alleged criminal activity, rendering them vicariously liable for only civil claims arising from the Prestige disaster.³⁴ Second, although Spain and France brought their claims under a criminal statute, the criminal statute also contemplates civil liability.³⁵ Moreover, the Court labeled the relevant statutory provisions as “civil in nature,” because they only address liability to pay in

³² *See id.* at [104]. “The Defendants submitted that in relation to the Spanish proceedings, the following matters are of particular relevance and are subject to adjudication in that jurisdiction [because they are inextricably linked to criminal conduct]:

1) Whether the vessel officers are criminally responsible for the shipwreck pursuant to Article 325 and 326 of the Spanish Penal Code (sought by the prosecutor);

2) Whether any criminal actions damaged the ship and require remuneration arising from Article 109 and following of the Spanish Penal Code (sought by the prosecutor) which would cause civil liability to be predicated directly upon criminal liability. Similarly, whether there is civil liability under Article 1902 of the Spanish Civil Code;

3) Whether Mare Shipping is vicariously liable for crew errors;

4) Whether Spain and France, acting in the public interest, are entitled to bring environmental damage claims pursuant to Article 45 of the Spanish Constitution; and

5) Whether the Steam Ship Insurance is liable to Spain and France, in respect to the liability referred to above, pursuant to Article 117 of the Spanish Penal Code. Article 117 of the Spanish Penal Code refers to this sort of liability as “direct civil liability.”

³³ *See* London Steam Ship Owners, [2013] EWHC 3188 at [106]. “The [Steam Ship Insurance]’s alleged liability is fundamentally civil in nature (a liability to pay in accordance with the terms of the insurance) and arises at several steps removed from the criminality, namely as civil liability insurers of Owners who are, themselves, only vicariously liable (for the acts of its employees) and against whom no criminal allegations are made.”

³⁴ *See id.*

³⁵ *See id.* The provisions under which the criminal claims were brought were, in actuality, civil in nature and construed according to civil principles of law. The Court found, therefore, that the Steam Ship Insurance’s alleged liability was a civil liability and said that the forum in which it was asserted cannot alter that fact.

accordance with a contract.³⁶ Third, Spain and France sought only a civil remedy - monetary relief - from Steam Ship Insurance; neither country sought to impose fines or imprisonment.³⁷ Fourth, the Court found that the claims were identical to claims brought by private parties hoping to recover civil damages stemming from the alleged criminal conduct.³⁸ Finally, Spain and France failed to present a statute or rule of public policy prohibiting the arbitration of their claims.³⁹

Therefore, the English Court held that the claims pending in the Spanish Court were civil claims, which are presumed to be arbitrable. The Court feared that any other conclusion would result in countries advancing civil claims disguised as criminal claims to avoid arbitrating their disputes.⁴⁰

V. THE ENGLISH COURT'S ANALYSIS OF SOVEREIGN IMMUNITY

A. *State Immunity Act of 1978*

Spain and France argued that the State Immunity Act (“SIA”) protected them from causes of action in the United Kingdom. The SIA bars English entities from making claims against sovereign nations in English courts of law.⁴¹ In *London Steamship*, the Court denied this immunity because of the SIA’s arbitration exception.

The SIA’s arbitration exception states that if one country is a party to an English contract and agrees in writing to submit a dispute to arbitration, then it is bound by any subsequent English court proceedings arising from the arbitration.⁴² In this case, even

³⁶ *See id.* (stating that Spain and France only sought to enforce a contract).

³⁷ *See* *London Steam Ship Owners*, [2013] EWHC 3188 at [106] (stating that Spain and France only sought monetary relief).

³⁸ *See id.* “Even if the Defendants are fulfilling constitutional or domestic public functions of protecting the environment (or recovering civil damages flowing from criminal offences), the claims pursued are, fundamentally, civil claims which are no different from the claims brought by private parties in respect of the same acts (indeed some of Spain’s claims are in respect of losses suffered by private parties, which claims the State has been subrogated to). Further, although the Public Prosecutor has the right to bring claims (or request payment) on behalf of third parties, the claim remains that of the third party, so that any judgment would be rendered in favour of the third party.”

³⁹ *See* *London Steam Ship Owners*, [2013] EWHC 3188 at [106]. “Arbitrating such claims is not contrary to any identified English statute or English rule of public policy.”

⁴⁰ *Id.* at 107. “Further, it would be remarkable if civil claims advanced in criminal proceedings were inarbitrable, whereas if the same claims had been advanced in civil proceedings they would not have been, so that arbitrability would effectively be at the option of the claimant.”

⁴¹ State Immunity Act, 1978, c. 33, § 1, (UK).

⁴² *See id.* § 9. “Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.”

though Spain and France never signed an English contract, the Court held that the SIA did not require an express agreement in writing.⁴³ Instead, the Court held that the SIA only required Spain and France to make a claim under an English contract containing an arbitration clause. Therefore, both countries failed to qualify for SIA immunity.⁴⁴

B. Brussels Regulation

The English Court rejected Spain's and France's argument that the Court should not enforce the award as a matter of discretion. Spain and France argued that the Court should decline to enforce the award as a discretionary measure, stating that enforcing the award would contradict the Brussels Regulation ("the Regulation"). The Regulation governs the jurisdiction of courts in the European Union ("EU").⁴⁵ Under the Regulation, a judgment will not be recognized by the other EU Member States if it is irreconcilable with a prior judgment in another EU state. Under the Regulation, the first country to enter a judgment in the EU will prevail over another country that decides on that dispute later,⁴⁶ which is why Steam Ship Insurance asked the English Court to confirm the arbitration award. By confirming the arbitration award, the English Court decided that the award would prevail throughout the EU even if the Spanish Court issued an inconsistent judgment later.⁴⁷

Spain and France objected to the English Court's rushed judgment and claimed that seeking a judgment only to obtain primacy is of little utility because it is hypothetical that Spain will issue an inconsistent judgment.⁴⁸ The English Court disagreed, however,

⁴³ London Steam Ship Owners, [2013] EWHC 3188 at [136]-[42]. The SIA does not include a definition for "in writing," so the Court adopted the definition found in the English Arbitration Act. The definition in the Arbitration Act allowed for agreements "in writing" to be formed by other means. Therefore, the Court held the same applied to the "in writing" requirement of the SIA. The Court concluded it would be illogical for the definitions of "in writing" to differ between the SIA and the Arbitration Act because the SIA was written to conform with the Act.

⁴⁴ *See id.* at [157]. "The Defendants also made the general point that it would be surprising and unsatisfactory if a state was to lose its immunity by means of making a claim which it is entitled to do under its own law and in its own state. . . . You cannot seek to take the benefit of the insurance contract without accepting its incidents and limitations."

⁴⁵ *Member Countries of the European Union*, EUROPA, http://europa.eu/about-eu/countries/member-countries/index_en.htm (last visited Feb. 7, 2014) (stating the EU is composed of 28 European nations: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom).

⁴⁶ Commission Regulation 44/2001, *supra* note 13.

⁴⁷ *See id.*

⁴⁸ London Steam Ship Owners, [2013] EWHC 3188 at [189]. The Court agreed with Spain and France that "it would not be appropriate to decide that issue [of utility] in circumstances where any inconsistency is still hypothetical. . . ." The Court further stated, however, that "it is sufficient for there to be a real prospect of establishing primacy, as there clearly is on the current authorities."

reasoning that an inconsistent judgment from Spain was more than just hypothetical and stated that there is clear utility in confirming the award because confirmation of the award ultimately brings the winning party, Steam Ship Insurance, closer to realizing its award.⁴⁹

Spain and France further argued that upholding the award would subvert the Regulation, because, according to the Regulation, the English Court should stay the proceedings pending a decision in Spain.⁵⁰ The Court disagreed again, and held that the dispute fell outside the scope of the Regulation because the Regulation, like the SIA, does not apply to arbitrations.⁵¹

⁴⁹ *Id.* at [186]-[87]. In its analysis of utility, the Court relied on *West Tankers Inc. v Allianz SpA [2012] 1 Lloyd's Rep 398* and cited the following passage:

The purpose of § 66(1) and (2) [of the English Arbitration Act] is to provide a means by which the victorious party in an arbitration can obtain the material benefit of the award in his favour other than by suing on it. Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. In short, in such a case, the grant of leave will not facilitate the realisation of the benefit of the award. *Where, however, as here, the victorious party's objective in obtaining an order under s66(1) and (2) [of the English Arbitration Act] is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award* (emphasis added).

⁵⁰ *London Steam Ship Owners*, [2013] EWHC 3188 at [190]-[91]. Spain and France argued that “it would be an inappropriate exercise of the Court’s discretion [to grant leave for such a judgment to be entered] because it would serve to subvert the Regulation jurisdictional regime because: i) the subject matter of the proceedings in Spain mean that they fall within the scope of the Regulation (Article 1) and any resulting judgment will be a Regulation Judgment; ii) the subject matter of the enforcement proceedings in England is arbitration and thus outside the scope of the Regulation (Article 1(2)(d)); iii) the Spanish court was the court first seised for the purposes of Article 27(1) of the Regulation and were it not for the fact that [] [arbitration] proceedings fall outside of the Regulation the English Court would be obliged to stay its proceedings until such time as the jurisdiction of the court first seised was established; iv) *thus if the English Court were to grant a Regulation Judgment in non-Regulation proceedings in the present case, it would be declining to respect the lis pendens provision in Article 27 and the direct action provision in Article 11, which it would be obliged to respect if these proceedings fell within the Regulation and by so doing, allocating itself primacy for the purposes of Article 34 over the judgment of the Spanish court as that which was first seised*” (emphasis added).

⁵¹ Commission Regulation 44/2001, *supra* note 13 (stating in Ch. 1, Art. 1(2)(d) that the scope of the Regulation does not extend to arbitration.); *see also* *London Steam Ship Owners*, [2013] EWHC 3188 at [193]. “This argument assumes that the Court should treat the present application as if it was regulated by the Regulation. However, this is an arbitration application and arbitration falls outside the Regulation.”

VI. IMPLICATIONS OF THE ENGLISH COURT'S DECISION

The English Court's decision demonstrates a commitment to enforcing arbitration agreements, even where matters of contract privity and sovereign immunity might warrant a contrary analysis. In *London Steam Ship*, the English Court had ample opportunity to stay the proceedings pending a judgment in Spain. First, the English Court could have found that Spain and France were exercising an independent right of recovery because the right of direct action stemmed from statutory law rather than an insurance contract, thereby releasing Spain and France from the adjudication limitations enumerated in the insurance contract.⁵² Second, the English Court could have determined that the claims were too entangled in issues of criminal liability to be arbitrated because Spain and France made several criminal allegations against the ship's officers under a Spanish criminal statute. Third, the English Court chose to broadly apply the statutory arbitration exceptions codified in the SIA and the Brussels Regulation, even though Spain and France never signed a contract that contained an arbitration clause and never consented to be bound by a contract.⁵³ Finally, the Court also refused to issue a stay as a matter of discretion.⁵⁴

The English Court never acknowledged the effect that its decision may have on national sovereignty, even though, by forcing Spain and France to arbitrate, the Court essentially denied the countries the opportunity to litigate a legal action against Steam Ship Insurance. The concept of national sovereignty invests nations with supreme political authority over their land and grants nations complete authority to govern their territories and apply their laws.⁵⁵ Each nation has the exclusive power to determine what acts or omissions impose liability in damages within its borders, and future courts should consider the implications of their decisions on the rights of other nations.⁵⁶ This decision

⁵² *London Steam Ship Owners*, [2013] EWHC 3188 at [84] (stating Spain and France argued that the legal concept of direct action arises from the law, rather than a contract).

⁵³ *London Steam Ship Owners*, [2013] EWHC 3188 at [127] (stating Spain and France argued that they were not party to any agreement to arbitrate and that even if they were, the SIA required a state's written form of express consent).

⁵⁴ *See id.* at [198]. "For all these reasons I conclude that there is utility in granting the declarations sought, that no good reason has been shown why the Court should refuse to allow the Club to seek to realise the full benefit of the awards it has obtained, and that in the exercise of my discretion and in the interests of justice I should grant the [] application."

⁵⁵ 48 C.J.S. INTERNATIONAL LAW § 22. "Sovereignty is the supreme political authority of an independent state or nation, and the rights and incidents of sovereignty include exclusive jurisdiction of a nation within its territory and equality with other nations."

⁵⁶ *Hutchins v. Day*, 153 S.E.2d 132, 136 (N.C. 1967). "The only true doctrine is that each sovereignty, state or nation, has the exclusive power to finally determine and declare what act or omissions in the conduct of one to another – whether they be strangers, or sustain relations to each other which the law recognizes, as parent and child, husband and wife, master and servants, and the like – shall impose a liability in damages for the consequent injury, and the courts of no other sovereignty can impute a damnifying quality to an act or omission which afforded no cause of action where it transpired."

leaves countries wondering what impact, if any, their own laws have against foreign environmental hazards and what types of disputes are inarbitrable under the Regulation. Although arbitration is a form of private adjudication, it may be used to limit another country's national sovereignty, as seen in *London Steam Ship*.

The Court's decision also presents a number of interesting issues moving forward. First, practitioners should note the implications of the Regulation when representing a client who wants to petition a court for confirmation of an arbitral award. For example, if court proceedings are taking place in another EU Member State, then it would be in the best interest of the client for an attorney to expedite the confirmation of the award, as was the case in *London Steam Ship*. Second, although the English Court's decision may seem unfair on the surface because of its limiting effect on national sovereignty, the decision protects insurance companies from having to pay out large sums in damages to third parties. Effectively, shippers who purchase insurance will be protected from absorbing any costs associated with higher payouts. Finally, the decision begs other questions, such as whether states should implement less restrictive direct action statutes that favor independent rights to recovery rather than contractual rights to recovery. Direct action statutes that are less restrictive might allow states in the future to sue for damages from a private insurer in the event of an environmental catastrophe.

VII. CONCLUSION

Had the English Court decided any one of the issues differently, Spain and France could have brought claims in their own courts of law and recovered much more in damages. However, in *London Steam Ship*, the English Court outmaneuvered Spain and France to preserve arbitration and to protect the insurer at the expense of national sovereignty in both nations. The case leaves a number of questions unanswered and anticipates future challenges to governments in the event of future environmental disasters.