

The direct action against P&I Clubs in the latest judgements



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1. Introduction

1.1. The object of this thesis

The main purpose of this thesis is to collect and systematize the latest and more relevant cases on the direct action of the victim of a maritime accident against the company's liability insurer¹, with the aim to extract the most relevant conclusions.

The liability insurance provides protection against claims resulting from injuries and damage to people and/or property when they are caused by contractual assumed or legally imposed risks. It covers both legal costs and any legal payouts for which the insured would be responsible if found legally liable.

In the maritime industry, the liability insurance is generally provided by Protection and Indemnity Clubs (from now on, P&I Clubs). These clubs are an association of maritime players like shipowners and charterers which provide protection against risks inherent in industrial ship operation. Thus, the main particularity of these entities is that the members are at the same time insurers and insureds.

The direct action is the right of the injured third party to claim damages directly against the tortfeasor's liability insurer, usually a P&I Club.

This right is what entitles a third party without any contractual relationship with the Liability insurer to claim against him compensation for the damages caused by his insured, usually according to the risks covered in the contract and limited to the insured sum.²

¹ Cases studied: "The Prestige", "Yusuf Cepnioglu" and "Assens Havn".

² Yuan Hui & An Shouzhi, "Several Direct Action against P&I Clubs Issues", 24 August 2006, available at: http://www.wjnco.com/eng/articles_show.asp?Articles_id=31

The different legal approaches to the right of direct action, the economic magnitude of the matter and the frequency of these cases make this question worthy to study.

I will study this right in Europe. This scope responds to the fact that the biggest players on the P&I market are European and because the existence of a supra national legal framework (European Union) introduce an important and interesting element of complexity that is also crucial to understand the most recent developments on the matter.

In concrete, I will cover the Spanish, Danish, Turkish and British legal systems as far as they are the ones involved in the cases analyzed.

Before analyzing the cases that are object of this study, I will define the key concepts and present the more problematic aspects of the direct action. This is necessary in order to understand the arguments and conclusions offered by the parties and courts in the studied cases. In short, I will define (i) the nature of the P&I Clubs and their insurance contracts and (ii) the concepts of direct action and anti-suit injunction.

In the studied cases, the most relevant issues are (i) The characterization of the direct action as a contractual or statutory claim in nature and in consequence, the validity of the contractual clauses; (ii) The attribution of civil liability derived from a crime to the liability insurer; (iii) The arbitrability under English law of the direct action against the P&I Club when the liability claimed comes from a crime and when the claimants are States; (iv) The validity of anti-suit injunctions in the context of the direct action; (v) whether or not the forum clause of the insurance contract can be invoked against the third party when the Brussels Regulation is applicable; and finally, (vi) Problems of enforceability and conflicts of jurisdiction

As a result of the analysis of the cases presented, I will identify and discuss the key elements of the judgements, compare the different approach to this action in the different jurisdictions and give my opinion about how the future can look like from the solutions that the clubs are adopting or planning to adopt , taking Brexit into account.

Personally, I chose this topic because liability insurers are key players in the maritime market and have an important role in its configuration. The P&I clubs are especially important because of the liabilities they insure and are the most important insurers in big

and mediatic disasters like the “prestige” in Spain. Accordingly, I find very interesting to study the actual possibilities of recovery that the victims of these casualties have.

1.2. Structure of the report

This thesis is divided in five parts.

First, Chapter 1 constitutes an introduction where the aim of the thesis and the different legal issues studied are exposed to present the big picture of this work.

Second, Chapter 2 is a presentation of the relevant sources of law in the cases studied and their interaction.

Third, Chapter 3 contains the background on P&I insurers and direct action to approach the study of the relevant cases. In concrete, I present the essential concepts and the key legal issues.

Third, Chapter 4 contains a study of the latest and more relevant cases regarding the right of direct action. In concrete, I study “*The Prestige*”, “*The Yusuf Cepnioglu*”, and “*The Assens Havn*” cases.

Four, Chapters 6 and 7 constitute a reflection about the future. I expose some of the measures that P&I Clubs could adopt to keep a beneficiary position respect to the injured third party and what consequences the Brexit could have on this action.

Finally, Chapter 8 contain the conclusions of this thesis.

2. Sources of law

This chapter contains a presentation of the relevant sources of law and their interaction

2.1. The relevant sources of law

This thesis is based on several legal sources of different nature. The actual provisions analyzed on the thesis are included in the Annexes.

In the first place, the contract of insurance.

The contract of insurance between the member and the P&I club will always be the instrument that will define what concrete risks and liabilities are covered in every case and in what extend.

Due to the standardization of the insurance policies, the relevant clauses for this thesis are usually very similar. In Concrete, I will study (i) the pay to be paid clause and (ii) the clauses referring to the exclusive competent forum and exclusive applicable background law in the policies of The London Steamship Owners Mutual Insurance Association, The Ship-owner's Mutual Protection and Indemnity Association and the Navigators Management Limited since are the insurers involved in the studied cases.

In the second place, the national background law.

The studied cases deal with the relevant national provisions on direct action in four legal systems, the Spanish, Turkish, Danish and British ones.

In concrete, these provisions studied are the Spanish Maritime Navigation Act of 2014, Article 465, the Spanish Criminal Code, Articles 556, 109 and 120, the Spanish Commercial Code and the Spanish Insurance Contract Act article 76; The Turkish Commercial Code 6102, Article 1478; the Danish Insurance Contract Act, Article 9; and the English Third Party (Rights Against Insurers) Act from 1930 and 2010.

All these legal systems include an article conferring the right of direct action to the injured third party. However, these provisions refer to the insurance policy between the insured

and the insurer in regard of the risks covered and the limitation of liability according to the sum insured. The Spanish and Turkish legislation do not require that the insured is insolvent and the expressly exclude the effect of any “pay to be paid” clause on the insurance policy.

This link between the statutory right of direct action and some of the contractual terms has led to different interpretations of the right in different jurisdictions.

In the third place, the international background law.

There are the international conventions establishing the obligation to have liability insurance in determined contexts and approaching the right of direct action from injured third parties against liability insurers.

There are many international Conventions regarding liability insurance and recognizing the right of direct action against the insurer, like the Bunker Convention 2001, Article 10; The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substance 1996, Article 8 or The Nairobi International Convention on the Removal of Wrecks 2007, Article 10. However, the one who has played an important role in one of the cases studied, “The Prestige”, is the CLC Convention, which states in its Article 7: *“Any claim for compensation for damage may be brought directly against the insurer or other person providing financial security for the owner’s liability for damage.”*

These international conventions are not directly binding for the private parties, which means that they have to be ratified and incorporated to the national legislation by the relevant states to make them applicable.

In general terms, all these conventions and the CLC one in particular share the following features. First, there are not previous requirements to act against the P&I Club, like for example the insolvency of the tortfeasor. As seen, some of the national laws allowing the direct action of the injured party require insolvency of the tortfeasor. This requirement doesn’t exist under these conventions. Second, there is no requirement that the third party establishes and quantifies the liability of the insured shipowner before pursuing the

insurer. Finally, these provisions have to be interpreted in a sense that the insurer cannot rely on any of the policy defenses except for willful misconduct, what means that he cannot rely on the “pay to be paid” clause.³

In the fourth place, the European legislation on jurisdiction and applicable law

In concrete, the European Union’s provisions presented are The Brussels Regulation (Regulation (EC) 44/2001) articles 9, 10, 11, 13 and the entire Title III; the Rome I Convention (Regulation (EC) 593/2008) article 7 and the Rome II Convention (Regulation (EC) 864/2007) articles 4 and 18.

In the European Union’s legal system there are legal sources of different nature. These three instruments are European Regulations and thus, they become binding automatically throughout the EU on the date they enter into force.⁴ They do not need to be incorporated by EU countries into their legal systems.

However, Turkey is not an EU member state and these Regulations do not apply to it. Furthermore, Rome Regulations do not Apply to Denmark even though it is an EU member state due to the Protocol Annexed to the Amsterdam Treaty.

When these regulations are not applicable to the parties, the competent jurisdiction and the applicable law will be governed by bilateral/multilateral treaties or the national regulations regarding this matter. The concrete provisions used to establish the competent courts and the applicable law in the cases studied will be presented when presenting them.

³ Duncan Richmond, “Third Party Claims against P&I Clubs and the “pay to be paid” Rule” (Master thesis, Lund University, 2010), p. 38-40.

⁴ European Commission, “Applying EU Law”. Available at https://ec.europa.eu/info/law/law-making-process/applying-eu-law_en

2.2.The interaction between the contract and the applicable law

There are three sources of law of different nature that are relevant to the right of direct action. First, the contract of insurance between the P&I Insurer and the assured/member of the club. This contract will identify what liabilities are covered and as seen, will contain clauses that will constitute an impediment to the exercise of a direct action. Second, the national legal system of the relevant countries involved in the casualty. These set of rules can contain specific provisions permitting the direct action of the injured party. Third, the International Conventions that impose mandatory liability insurance and regulate the right of direct action, and the European legislation on competent jurisdiction and choice of background law, also have an impact on the matter.

Accordingly, it is necessary to study the relationship between the exposed clauses on the contract and the applicable background law to know its actual scope.

Some European countries' acts and International Conventions incorporated to national legal systems recognize the right of an injured party in a casualty (covered one by the P&I rules in this case) to claim directly against the insurer. These provisions are in apparent conflict with the "pay to be paid clause".

The extent of this conflict will depend on the interpretation of the national acts. When they are understood as a right of the third party to subrogate himself in the position of the insured, then both the right of direct action and the contractual clauses will be valid and applicable at the same time. When, on the other hand, the statutory provisions are interpreted as an independent right, the legal hierarchy of the statute will ban the application of the contractual clauses preventing the exercise of an effective direct action.

3. Background on P&I insurers and direct action

3.1. Which is the nature of the P&I Clubs and their insurance policies?

3.1.1. The P&I Clubs

Nowadays, the industrial operation of a ship is a complicated activity that requires multiple insurances like Hull & Machinery, loss of hire..., and one of those is the liability insurance. According to Hazelwood and Semark, *“A P&I Club is an association of commercial shipowners and charterers and other associated parties, which provides protection against a number of risks inherent in industrial ship operation. The essence of P&I Clubs is that they are mostly mutual associations, where the members are both insured and insurers. [...] the protection and indemnity insurance offered by P&I Clubs indemnifies an owner in respect of the discharge of legal liabilities he has incurred in operating his vessel”*⁵

Considering this definition, it is clear that P&I insurance has a particular nature with effects on the viability of a direct action.

As its own name indicates, the P&I Clubs are “Protection and Indemnity” insurers. *“The distinction between indemnity and liability policies is that payment by the assured is necessary under an indemnity insurance before the insurer is involved, whereas this is not required under liability insurance”*.⁶

Thus, because the P&I insurance is an indemnity insurance, the members of the club are meant to contribute and pay for the risks covered by the policy only when the claimant has paid the full compensation to the injured party.⁷

⁵ Hazelwood and Semark, *P&I Clubs law and practice*, 1.

⁶ Hazelwood and Semark, *P&I Clubs law and practice*, 335

⁷ Esteban Gaston Costas, “P&I cover in England and in Norway: A comparative Analysis of current problematic issues” (Master’s thesis, University of Oslo, 2011) p. 5

3.1.2. The insurance policy

Due to this mutual nature, the insurance policy is not easy to qualify from a legal perspective.⁸

Apart from the different legislative technics, I find a common understanding of the concept of contract of insurance. In all European legislations, the insurer will indemnify the damages suffered by the insured due to a covered risk against of a premium.

It has been not clear in the past if the contract between the members of the club and the club itself was a real contract of insurance or not. The doubt comes from the old view of the P&I Clubs, according to which the club is only an administrative body that is not insuring anything. This view of the clubs was described by Brett MR in a British case⁹ in the following terms: “*The contracts of insurance in such cases are really made between the members, and the society is only the machinery for collecting and paying the various amounts*”.

Nowadays, the conception of the clubs has changed and they are considered legal entities and insurers. In a British case considering a direct action from a third party,¹⁰ it was held that the contract between a member of the club and the club was an insurance contract despite there was no definition in that sense.

Furthermore, the nature of the risks insured by the P&I policies is clearly marine and the dangers that the assured faces come from a marine adventure. Accordingly, the P&I policy has to be qualified as a marine insurance contract.

⁸ Jhon Birds, Ben Lynch and Simon Milnes, McGillivray on Insurance Law, 13th ed. (London, Sweet and Maxwell U.K., September 2017), 39.

⁹ The Barrow-in-furness Mutual Ship Insurance Company Limited v Ashburner (1885)

¹⁰ In re Allborgia Steamship Corporation (The allborgia) [1979] 1 Lloyd’s Rep 190.

Thus, it is generally accepted nowadays **that P&I coverage is a type of marine insurance**¹¹ and, the mandatory general compulsory liability insurance requirement is satisfied with ordinary P&I Insurance offered by one of the members of the international group or another one with similar terms.¹²

3.2. What the P&I Clubs cover?¹³

Even though a complete and deep analysis of the covers offered by the P&I clubs is outside the scope of this thesis, I do consider necessary to offer a general overview of them because otherwise, the concept and main features of this players would be incomplete. Thus, the aim of this chapter is to give an enumeration of risks typically covered by P&I insurers to identify in what kind of cases are they present and accordingly, to understand when a direct action from an injured third party can arise.

In general terms, the P&I insurance covers third party liabilities and expenses arising from owning ships or operating them as principals. In concrete, some of the most important risks usually covered by these clubs are “Personal injury to or illness or loss of life of crew and members, Personal injury to or loss of life of stevedors, Personal injury to or illness or loss of life of passengers and others, Pollution, Loss of personal effects, life salvage, collision liabilities, loss or damage to property other than cargo and cargo liabilities”.¹⁴

¹¹ Case “*The Eurysthens*”, 1976, 2 Lloyd’s Rep 171 at p. 181, per Roskill LJ.

¹² Falkanger, Bull and Brautaset, *Scandinavian Maritime Law*, 682

¹³ Steven J. Hazelwood and David Semark, “Risks Covered”, in *P&I Clubs law and practice*, 4th ed. (London, Informa Law 2010).

¹⁴ UK P&I Club, Introductory guide to P&I Cover, published 21 March 2017, <https://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/generalP&Icover%20.pdf>

Even though this is just an enumeration of the different risks covered, we do not need further detail on the conditions of each cover to see that these insurers are covering the liability that the assured potentially has to third parties, like persons involved with the ship (stevedors, crew, passengers...) or victims of pollution.

The victims of this events are the potential claimants against the P&I insurer and thus, the drivers of a direct action.

It is worthy to mention that several international conventions, like the Liability Convention (CLC), the Bunker Convention or the HNS Conventions to name a few, include as a requirement that ships must have an insurance that covers the liability the owner may incur under the respective convention.

The European Union, through its Directive 2009/20/EC (art. 4(1)-(2)) on the insurance of shipowners for maritime claims, also requires each member state of the EU (i) to ensure that vessels flying its flag have insurance for maritime claims, and (ii) that foreign-flagged vessels calling at its ports are similarly insured.¹⁵

3.3. Which are the key contractual clauses?

The insurance policies contain two clauses that are especially relevant for the right of direct action.

¹⁵ Hazelwood and Semark, *P&I Clubs law and practice*, 8.

A) The “Pay to be Paid” Clause

The pay to be paid clause reflects the nature of the P&I Clubs as Protection and Indemnity insurers and ensures that the insurer (P&I Club) will only reimburse the liabilities that the assured has actually payed to the injured party. Thanks to this clause, if a member of the club is condemned to pay 1M USD but after executing all his assets he only has 0.8M USD, the Club will have to pay him back only 0.8M USD and not 1M USD.¹⁶

This clause does not always have the same extent. Some Clubs give the discretionary power to the “Directors” to satisfy liabilities directly to a third party¹⁷, others guarantee the payment to third parties in certain cases even when the insured is insolvent, like in cases of personal injury or death,¹⁸ and others give guarantees of payment directly to third parties.¹⁹

¹⁶ Hazelwood and Semark, *P&I Clubs law and practice*, 341

¹⁷ North of England P&I Club, *Rules 2018/2019*, Clause 20; Gard P&I Club, *Rules 2018*, Clause 87; Skuld P&I Club, *Rules 2018*, Clause 28

¹⁸ International Group of P&I Clubs, “Annual Review 2016/2017”, available at: https://static.mycoracle.com/igpi_website/media/adminfiles/IGPI_Annual_Review_16-17_nSXn9m4.pdf

¹⁹ Gard, “The shipowner’s hero – A club letter of undertaking”, 16 November 2016, access on 13 September 2018, available at: <http://www.gard.no/web/updates/content/22237832/the-shipowners-hero-a-club-letter-of-undertaking>

B) Forum and applicable law clauses

The clauses referring any dispute arising from the contract of insurance to arbitration under a concrete legal system will also be relevant for the right of direct action. As already stated, national legal systems play an important role here as far as some of them guarantee the direct action in a way that the claim will be successful despite any contractual clause.

Taking into account the importance of the applicable legal system and its interpretation, it is logical that P&I Clubs use arbitration and applicable law clauses to ensure that any dispute regarding this matter is dealt within a beneficial legal system, for instance the British one.

In practice, all the P&I clubs' rules include this kind of agreements with their members,²⁰ and it cannot be considered an uncommon practice in business.²¹

The validity of arbitration clauses in Europe is broadly accepted²² and accordingly, when the contract of insurance between the P&I Club and its member contains an arbitration clause, any dispute will have to be solved in arbitration.²³

A jurisdiction clause will have similar effects because it will imply a concrete understanding of the right of direct action that can have an important impact on the injured

²⁰ Gard P&I Club, *Rules 2018*, Clause 91; Skuld P&I Club, *Rules 2018, Clause 4*; The London P&I Club, *Rules 2018*, Clause 43; North of England P&I Club, *Rules 2018/2019*, Clause 49

²¹ Directorate General for Internal policies, "Legal instruments and practice of arbitration in the EU, published in 2014, http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU%282015%29509988_EN.pdf

²² Consumers are especially protected against abusive arbitration clauses in Europe and most of the legal limitations for these clauses are created to ban arbitration in this context.

²³ Garbielle Nater-Bass, *Class Arbitration: A New Challenge?* In "New developments in International Commercial Arbitration, 2008 ed. by Christoph Müller and Antonio Rigozzi.

third party's claim. This clause is less problematic because its validity is even more accepted.

If these clauses refer to a legal system where the direct action is granted, the practical and actual possibility of the injured party of getting a compensation from the P&I Club will depend on how the tribunals of this given system interpret it. Some relevant pronouncements understand legal provisions granting the direct action of the injured third party as a right to enforce the contract, including the pay to be paid clause. This view of the matter would suppose in practice the frustration of any claim.

3.4. What the direct action is?

When a marine casualty occurs, there are different parties involved: (i) the victim or victims, (ii) the liable company for the accident; and (iii) the P&I insurer of the liable company. In this context, **the direct action is the claim for damages that the injured party prosecutes directly against the tortfeasor's liability insurer, usually a P&I Club.**

From the injured party's point of view, the company responsible for the accident is the tortfeasor and there is obviously a right to claim the damages suffered in tort against him, and the tortfeasor has his respective contractual right to claim recovery from his P&I Club according to the insurance contract. However, because **it does not exist any relationship, contractual or not**, between the victim of the accident and the insurer of the liable company, it is necessary to find a statutory provision covering this action.

The practical importance of this action is out of doubt. It is clear that the direct action is especially relevant when the aggrieved party cannot seek compensation from the tortfeasor. Does this mean that in practice its validity does not make a difference? Not at all. When a major casualty occurs, the insured can easily be insolvent because of the magnitude of the claims he has to face or because of the internal economic implications of a major maritime casualty. This means that the direct action will be an important tool in cases where the damages and claims are huge. Thus, in the biggest cases where many

third parties are prejudiced and where the amount of the damages is huge is where the direct action will not only be an important tool but in many cases the only one for this third parties to seek recovery.

Allowing a party without any contractual relationship with the insurer to claim damages against him generates a conflict between two interests. On one hand, legal provisions allowing for direct action aim to protect the third parties injured in a casualty, but on the other hand they are entering in conflict with the principle of privity of contract. This is the reason why most of the legal systems include provisions in favor of this action but at the same time they establish different requirements and conditions.

3.5. What is an Anti-Suit Injunction?

An Anti-suit injunction is an extraordinary procedure where a court issues an order to the effect that proceedings in a second jurisdiction should not proceed. Anti-suit injunctions are considered necessary to prevent an irreparable miscarriage of justice.

In this thesis, the Anti-Suit Injunction is the object of study in the case “*Yusuf Cepnioglu*”, in which it was issued by the High Court of England and Scotland and used with success to prevent the charterer to continue with the proceedings started in Turkey, a clearly better jurisdiction for his interests.

The viability of this kind of procedure depends on the specific regulation in each legal system, and as far as in the “*Yusuf Cpnioğlu*” was issued by English courts, I will present its legal basis in English law.

Under English law, the judges can issue an order to cease proceedings in another jurisdiction “*always that it appears to the court fair and convenient*”²⁴. This power includes both precautionary measures and permanent orders. At least since 1817, judges have used this broad power to restrict the actions of some of the parties in other forums (the first cases limited processes within the United Kingdom, in Scotland).²⁵

It is necessary to clarify that these orders are directed to the party prosecuting a claim in a foreign court, and not to the foreign court. Not complying with the order would carry legal consequences for disobedience.

In the context of the European Union and the Lugano Convention, they have been declared of no effect²⁶ by the CJEU on the case *West Tankers*. However, and as it will be exposed in further detail when analyzing the cases “*Yusuf Cepnioglu*” and “*Assens Havn*”, the ECJ has declared that Brussels Regulation has no applicability in matter of anti-suit injunctions contained in arbitration awards.²⁷

²⁴ Senior Courts Act 1981 (c.54), s. 37

²⁵ Joakin Beltrán de Lubiano Sáez de Urbain, “Controlando al litigante rebelde: Las *Anti-Suit Injunctions*”, published in RJUAM n° 32 on 2015, p. 75-98.

²⁶ Luís de San Simón, “Actions against P&I Clubs”, International Law Office, December 9 of 2015.

²⁷ Chapter 4

4. The cases and their legal issues

This Chapter contains a presentation and analysis of the different relevant proceedings on the matter during the last 8 years as well as the conclusions extracted from their study. In concrete, **the studied cases are “*The Prestige*”, “*The Yusuf Cepnioglu*”, and “*The Assens Havn*”**. These cases have had an important impact on the understanding of the nature of the direct action of the injured party against the P&I Club and have shown the distinct points of view and understandings that the competent courts have in the studied jurisdictions.

The different approaches and understandings have a major impact in practice. As it will be exposed when analyzing the legal issues of these cases, the different perspectives in the studied jurisdictions will be the key element for the direct action to success.

In concrete, the relevant issues for the right of direct action against the liability insurer studied are (i) The characterization of the direct action as a contractual or statutory claim in nature and, in consequence, the opposability to the third injured party of the contractual clauses; (ii) The attribution of civil liability derived from a crime to the liability insurer; (iii) The arbitrability under English law of the direct action against the P&I Club when the liability claimed comes from a crime and when the claimants are States; (iv) The validity of anti-suit injunctions in the context of the direct action; (v) The opposability, when the Brussels Regulation is applicable, of the forum clause in the insurance contract to the third injured party; and finally, (vi) Problems of enforceability and conflicts of jurisdiction

These issues will be studied independently and based on the judgements analyzed.

4.1. The characterization of the direct action claims

The legal issue under study is whether a direct action claim based in a concrete statutory provision has to be understood as contractual or statutory in nature and the consequences of this qualification.

This is the most relevant issue because determines the applicability of the contractual clauses to the third party, including the forum election, the choice of law and the pay to be paid clause. In practice, the applicability or not of this clauses will be essential for the success of the direct action.

It is clear that the injured is not a party of the P&I insurance policy, and that his right to claim against the insurer does not come from the contract but from a statutory provision. However, the fact that his right of direct action comes from an Act does not necessarily mean that it is statutory in nature.

There are two of the studied cases where the characterization of the claim is a key legal issue, “*The Prestige*” and “*The Yusuf Cepnioglu*”.

4.1.1. The characterization of the claim in “The Prestige”

The “prestige” was an oil tanker vessel owned by the Greek shipowner UNIVERSE MARITIME LTD and insured from 30/09/2002 by The London Steamship Owners Mutual Insurance Association (from now on, **The London Club**). This ship was flying the flag of Bahamas and the competent authorities considered it in good conditions to sail. However, BP and Repsol had disqualified it to carry oil because it was below their own standards of quality and maintenance.

The vessel was loaded with a cargo of fuel oil in Saint Petersburg and was sailing to Gibraltar. When the vessel was 27,5 miles west from Finisterra (Galicia), the crew heard an explosion and the vessel engines stopped.

Since then, a complex operation of salvage for several days was carried out but the ship finally broke in two parts causing a major oil spill.

In 2002 criminal proceedings were instituted in Spain against the Master, Chief Officer, and Chief Engineer; and in 2010 claims were brought by several entities including the states of France and Spain against the vessel owners and the London Club alleging that

the owner and his Club were vicariously liable for the acts of the Master under the Spanish Penal Code.

The Court nº3 of Corcubión conducted the investigation of the case (Diligencias Previas nº 960/2002) and on 13th November 2013, the Provincial Audience of A Coruña, emitted its judgement nº 2641/2013.

After the judgement, the involved parties appealed to the Spanish Supreme Court, which emitted its judgement 865/2015 on 14th January 2016.

The Club did not attend the proceedings in Spain because did not consider the Spanish Supreme Court competent in relation to any disbursement according to the insurance contract. However, the Club did deposit the maximum liability amount according to the limits established on the CLC Convention.

At the same time, the London P&I Club started proceedings in England.

The London Club started arbitral proceedings in London according to the contract of insurance claiming in essence that (i) the arbitration panel was the only competent forum to hear the case, and that (ii) the Club was not directly liable for any civil liability towards any injured third party.

The arbitral award against Spain was issued on 13th February 2013 and against France on 9th July 2013. Both of them confirmed the exclusive competence of the arbitration panel in London and declining direct liability of the Club.

Immediately, the London P&I Club started proceedings in front of the High Court based on Section 66 of the Arbitration Act 1996 to enforce the content of the awards.

On 1st April 2015, the High Court emitted its judgement and held that the claims were arbitrable because they had contractual nature and thus, the insurance company had the right to make Spain and France arbitrate in England. Spain and France appealed the pronouncement but the Court of appeal confirmed the decision of the High Court on its judgement of 1st April 2015 EWCA Civ 333.

Neither Spain nor France attended the arbitral proceedings, but they attended the proceedings seeking the enforcement of the arbitration award in front of the High Court of England and Scotland.

In this case, both the Spanish Supreme Court and the English High Court characterized the direct action against the Club in opposed directions.

A) The characterization of the claim by the Spanish courts

The Spanish Supreme Court presented this issue by answering the question: is the right of direct action contained in the Commercial Code subsidiary or independent to the right of the shipowner?

Essentially, the Court studies under this question whether the right of direct action is a right to subrogate into the Shipowner's position into the insurance contract or if otherwise, it is a statutory right that has nothing to do with the Shipowner's contractual position and the actual terms of the policy of insurance.

Before analyzing the nature of the right of direct action under Spanish law, the Court has to establish its competence to hear the case. This is relevant here because the main impediment to affirm the Spanish courts competence is the arbitration clause in the insurance contract. Accordingly, to establish the competence, the Supreme Court had to decide if the arbitration clause in the insurance policy can be invoked against third parties?

Some years before, the Spanish Supreme Court established in its judgement of 3th July 2003 that these clauses were opposable to third parties and accordingly, it declined his competence to prosecute a direct action claim against a British P&I Club.

However, **the Supreme Court changes his criteria** in this judgement based on two arguments. First, the London Club did not attend the proceedings and thus, he did not present any argument or precedent, including the judgement from 2003 when declined its own competence in favor of arbitration in London; and Second, the damages were caused

in the Spanish territory where the Spanish courts are competent according to Spanish law and the Brussels Regulation.

These two elements were the ground used by the Court to change his previous criteria about the validity of the arbitration clause referring to London and establish a new precedent.

Once the competence has been established, the tribunal addresses the nature of the direct action.

The insurance contract contains a “pay to be paid” clause, thus, it has to be a mandatory Act that bans its content in order to establish the right of direct action of the victims.

The current Spanish Maritime Navigation Act clearly allows for direct action despite any clause in the insurance contract. However, this Act was not in force when the facts occurred and thus is not applicable.

Prior this Act, there was not a specific regulation for P&I insurance in Spain and the general provisions of the Insurance Contract Act were subsidiary applicable to this type of contracts.

Section 76 of the Insurance Contract Act guaranteed the right of direct action against the insurer and expressly stated that “*the direct action is immune to the exceptions that may correspond to the insurer against the insured*”. According to this provision, the Court affirms the right of direct action of the third injured parties.

As stated in the relevant facts, the civil liability of the tortfeasor and its insurer comes from a criminal act. This makes applicable the provisions on civil liability derived from crimes, and in concrete Section 117 of the Spanish Criminal Code, which states that the insurers who have insured the risks materialized to commit the crime will be directly liable for its civil consequences.

Finally, the tribunal also considers the nature of the P&I insurance. In this sense, concluded that the P&I Clubs are, in general terms, protection and indemnity insurers, but that here, The London Club was acting as a liability insurer. The main reason to reach

this conclusion is that The Club deposited in the tribunal the maximum amount for which the shipowner could have been condemned according to the CLC Convention provisions and liability limits.

The CLC Convention requires liability insurance in certain situations when it is applicable, and the fact that this requirement was met by The London Club confirms that it was acting as liability insurer.

Even though The London Club deposited the money complying with his obligation as insurer under the CLC Convention and did not specifically recognize anything, the Tribunal considers that this shows the function of the Club as liability insurer because that money was entered to satisfy direct claims of the victims under the CLC Convention provisions.

Thus, the Spanish Supreme Courts considers itself competent to judge the direct action of third injured parties against the P&I Club despite any forum clause on the insurance contract and states the existence, under Spanish law of an independent right with statutory nature.

B) The characterization of the claim by the British courts

The High Court of England and Scotland, who issued its judgement before the Spanish Supreme Court, characterized the right of direct action contained in the Spanish Commercial Code as contractual in nature.

The Spanish and French governments argued that the right they were exercising did not arise from the contract, but in contrast was an independent right that arose from Spanish Statutory law. In consequence, neither the clauses on the contract nor English law were applicable to the claim.

However, the P&I Club defended that the Spanish statute was only giving to the injured third party the right to subrogate in the position of the insured in the contract, assuming all the clauses.

The Court compared the Spanish provisions granting the direct action against the insurer with other legal sources that contained a right of direct action clearly independent from the contract, in concrete the CLC Convention.

It pointed out that this international convention contains an independent and statutory right of direct action **because the liability of the insurer doesn't depend of the terms of the insurance policy**. The Convention regulates the amount of the compensation with independence of the contract, establishing how to calculate it and which are its limits.

In contrast, the Spanish regulation is the source of the right of direct action against the insurer but in connection to the insurance contract. This is the reason why recovery is limited to the amount specified in the insurance contract.

Thus, the Court considers the right of direct action under Spanish law as a right of directly enforce the contract of insurance between the P&I Club and the insured. This means that its provisions have to be respected. Specially, the arbitration clause and the submission to English Law.

Putting together these arguments, the Court concluded: *“the issues relating to the appellants' right to seek compensation from the Club are to be characterised as issues relating to an obligation sounding in contract and that as such are to be determined in accordance with English law as the proper law of the obligation. It follows that, in the application of English law, if the appellants wish to pursue claims against the Club they must do so in arbitration in accordance with the terms of the contract of insurance and subject to the “pay to be paid” clause.”*

In short, the Court concluded that, according to Spanish law, the nature of the claim was contractual. The Tribunal explained that *“the direct action right under Spanish law is an independent right which derives from law rather than contract but does not exist*

separately from the contract. Therefore, the court resolved that it is not an independent right to the contract.”²⁸

As advanced previously, both the arbitration award and the High Court’s judgement were issued before the Spanish Supreme Court emitted its judgement. Nowadays, we have the Spanish Supreme Court judgment and we know which is its interpretation of the right of direct action contemplated in Spanish Statutory Law.

When the English High Court ruled its decision, it based it on external advice from Spanish law expertise. Based on that evidence, the High Court concluded that the right of direct action against the insurer had statutory origin but it was subjected to the insurance contract clauses, and thus, contractual in nature.

Nowadays, having the judgement from the Spanish Supreme Court, we know that the relevant statutory provisions had to be interpreted as laws creating an independent right of compensation.

The Spanish Supreme Court is the highest interpretative body in the Spanish Legal system, which means that his understanding of the relevant provisions is mandatory. If the English High Court had let the proceedings pending until the Spanish proceedings where ended, their judgement would probably be different.

The English Court would not have to seek advice from experts because the interpretation of this right would have been clear. Accordingly, they would probably have qualified the right of direct action as statutory and independent from the insurance contract and neither English law nor the contractual clauses would have been applied.

²⁸ Juan Zaplana, “The prestige, Court of Appeal Decision”, Published in May 2016 and visited on 1st October 2018. Available at: <https://www.steamshipmutual.com/publications/Articles/theprestigeodecision.htm>

4.1.2. The characterization of the claim in the “Yusuf Cepnioglu”²⁹

On 8th March 2014, the vessel Yusuf Cepnioglu grounded off the Greek island of Mykonos. The vessel was carrying 207 containers pursuant to 74 bills of lading issued by the Appellant, the time charterer of the vessel. The vessel was a total loss. The law and jurisdiction of the bills was Turkish. Cargo claims have been notified to both the Appellant and Furkan Cilik Sanayi Ticaret Ltd, the owner of the vessel. The Appellant and the owner are both Turkish companies.

The owner of the vessel was a member of the Respondent protection and indemnity club ("the Club") and had liability insurance against third party claims pursuant to the terms of its Club cover. The terms provided for English law and London arbitration, for the Club only to be liable if the owner had paid the claims against it and that an arbitration award is a condition precedent to the Club's liability.

After the casualty occurred, the charterers commenced arbitration proceedings in London against the owners pursuant to the terms of the charter party seeking, among others, an indemnity against liability to cargo interests, but were unable to obtain security directly from the owners.

In May 2014, the charterers commenced proceedings in Turkey directly against the club under Article 11478 of the Turkish Commercial Code, which allows for direct action against the insurer. The provisions on the Turkish Act on Private International and procedural Law allowed Turkish tribunals to consider themselves competent to hear the case.

²⁹ Facts summarized by the Supreme Court of England in the “case summary”. Available on-line at: <https://www.supremecourt.uk/cases/uksc-2016-0103.html>

At the same time, the charterers started “precautionary” proceedings in Turkey seeking security from the Club in the amount of USD 13.5 Millions.

Meanwhile, The Shipowners P&I Club started proceedings in front of the English High Court seeking to obtain an anti-suit injunction in order to prevent the charterers from prosecuting claims in Turkey according to Turkish law.

The first step to grant the anti-suit injunction was the characterization of the claim under Turkish law as contractual in nature.

The English Court of Appeal presented the issue with the following words: *“In such cases the question which has to be determined is whether the intention and effect of the foreign statute is to enable the victim to enforce against the insurer essentially the same obligations as those that could have been enforced by the insured or whether the statute has created a new and independent right which is not intended to mirror the insurer’s liability under the contract of insurance.”*³⁰

The cargo owners started proceedings in Turkey (May 2014) against the Shipowner’s P&I Club based on Sections³¹ 1478, 1473 and 1484 of the Turkish Commercial Code that guarantee the right of direct action against the liability insurer of the tortfeasor and its content and limits.

The High Court of England analyzed the main elements of the relevant provisions in the Turkish Act in order to characterize the claim that the charter brought in front of the Turkish court and extracted the following findings regarding the direct action against the insurer:

³⁰ Yusuf Cepnioglu [2016] EWCA Civ 386, p. 2

³¹ Annex II.

- i. *The victim's right is confined to a right to sue in respect of the insured perils, not perils typically insured by P&I Clubs generally and still less in respect of different perils as identified in the Turkish statute;*
- ii. *The loss sued for has to be within the terms of the policy;*
- iii. *Any claim is subject to the contractual limit contained in the Club's cover;*
- iv. *The liability must be due to an event occurring during the period of the contractual cover;*
- v. *Any claim must be brought within the period required by the Club's contractual cover;*
- vi. *Any claim would be subject to the choice of English law and London arbitration in the Club cover with the possible qualification (as to which the judge made no finding) that those provisions would not be enforceable "where to do so would be contrary to public order" because English law or arbitration would override any provision of Articles 1473-1484;*
- vii. *P&I cover is compulsory under Turkish law (presumably, though the judge did not say so in terms, for every Turkish shipowner or every owner of a Turkish flag vessel);*
- viii. *By reason of Article 1484 the Club, although its liability to the member has been partially or totally discharged, "may" remain liable to the victim. To "some" extent therefore, Turkish law divorced the right of direct actions from the claim under the Club cover; and*
- ix. *Turkish law would not allow the "pay to be paid" clause to be enforced against the victim because reliance on the clause as against a victim would render the right of direct action conferred by Article 1478 ineffective since the shipowner has not paid the charterers' claim "and is unlikely to do so".*

According to these findings, the High Court concluded: *"Findings (i) – (vi) above show the nature of the victim's right in Turkish law is to a large extent circumscribed by the*

contractual provisions between the Club and its member. Although findings (vii)-(ix) to some extent point the other way, it is only to a limited extent. The extent to which Turkish law will not allow defences open to the Club to operate against the victim is obscure and controversial. The fact that the “pay to be paid” clause would not be enforced in Turkey can hardly be permitted to be decisive of the question of characterization. As the judge pointed out, the non-enforceability of defences was much clearer in The Hari Bhum (No. 1) and The Prestige (No. 2). The direct claim in those cases was nevertheless classified as essentially a contractual rather than an independent right. It follows that it should be classified as essentially contractual in this case also”.

The High Court finds all the links between the statutory right and the insurance contract pointed out strong enough to conclude that the right of direct action is essentially the right to “get into the insured shoes” and enforce his contract with the P&I Club. Obviously, there are some elements that are independent from the contract, but according to the High Court, they are not enough to characterize the claim as independent from the insurance contract.

Thus, the High Court of England qualifies the right of direct action contained in the Turkish Commercial Code as contractual and clauses like the arbitration clause or the submission to English law are enforceable.

Since the anti-suit was granted and the proceedings in Turkey were stopped, we cannot now which position the Turkish courts had about the characterization of this action.

4.1.3. Conclusions

As seen, the nature of the right of direct action against the insurer of the tortfeasor is controversial, what results in different approaches to its characterization in the different legal systems studied.

The characterization of the claim as contractual implies that all the clauses in the insurance policy that are not expressly banned by the statute will be enforceable,

especially the submission to arbitration in London according to English law, clearly in favor of the P&I Club because it will respect the pay to by paid principle.

In short, we can affirm that the English legal system is clearly protective with the P&I Club and gives predominance to the contractual clauses, even though the claimant is not part of the contract. The main ground for this conclusion is the connection between the statutory right of direct action and some contractual provisions functioning as limits for the claim, like the risks covered or the sum insured.

In contrast, other legal systems like the Spanish one, have created statutory provisions to guaranty the direct action of the injured third parties despite the content of the insurance contract.

In these cases, the applicable background law was probably the most important aspect of the dispute, because the two involved legal systems understand the validity of this action in a really different way. The injured third parties, especially Spain and France in the Prestige case, tried to submit all their claims in Spanish courts despite the arbitration clause in the contract, making Spanish law applicable. On the other hand, the P&I Club tried to keep the claims against it subjected to Arbitration in London and applying English law.

Surprisingly, both the Spanish courts and English arbitrators and courts, considered themselves competent and applied their own legislations. As a result, the Supreme Court of Spain and High Court of England and Scotland issued two contrary judgements.

4.2. The attribution to the P&I Club of civil liability derived from a crime

“*The Prestige*” case is a clear example of the magnitude that a case of direct action against a liability insurer can reach and how many issues of different legal nature can arise. When there is a relatively small casualty, the injured third parties will have a

statutory right to claim damages in tort against the tortfeasor and therefore there will not be the need to prosecute a direct action against the liability insurer.

This reality explains why direct action claims against liability insurers are relatively few and usually in the context of huge casualties that present concerns of different legal nature.

The criminal aspect of this case is based on the disobedience of the Master to follow the orders given by the Spanish authorities.

After different maneuvers to correct the situation, the Capitan called for SOS to the competent authorities of Spain and requested the evacuation of the crew. The authorities sent different rescue teams and tugs to prevent the ship from sinking in the Spanish coasts.

The Spanish authorities gave the order to move away the vessel from the Spanish coast. **The Captain refused to comply with the orders during several hours arguing that he needed permission of the shipowner to get engaged in a salvage operation and move the ship away.**

Finally, a difficult salvage operation was carried out during several days. After acknowledging that the hole in the hull was 35 meters long, the technicians of the operation requested to the Spanish authorities a port of refuge, but the solicitude was denied. The vessel was tugged for days along the coast heading south until it finally broke in two parts.

In order to establish the liability of the tortfeasor and/or his insurer and considering the criminal charges against the Captain, the Tribunals had to decide first if he was guilty of the crime of disobedience to the authority and afterwards which economic damages his actions caused. Only if the tribunal finds the Captain's acts the cause of economic damages, the P&I insurer will have a role to play and the question of the direct action will be relevant.

Regardless the right of direct action, the P&I Club can only be liable for the damages caused by its assured. This means that the assured must be found liable for the damages caused first for the liability of the insurer to be born.

As it will be seen, the nature of the crime committed and the degree of fault are key elements to determine the civil liability of the master and shipowner. This makes necessary to present some of the criminal aspects of the case.

According to the Spanish legal system, when a crime has caused economic damages to the victim or a third party, the civil liability derived from it will be judged in the same criminal procedure.³²

The legal issues addressed by the Spanish courts are essentially three. First, to what extent the Captain is criminally and civilly liable and how this civil liability is transferred to the Shipowner and his insurer; Second, how the criminal qualification of the Captain's acts affects the civil liability of the Shipowner and his insurer; and third, which are the consequences of this qualification for the exclusive forum clause in the P&I contract.

A) The criminal liability of the operators of the ship

The tribunal of first instance, the Provincial Audience of A Coruña (Judgement n° 960/2002), condemned the Captain of the ship as the author of a crime of disobedience to 9 months of jail. According to this judgement, the crime was committed through regular negligence.

However, when the case was appealed by Spain and France among others, the Supreme Court found the Captain of the ship guilty of a crime of disobedience to the authority through **gross negligence** and condemned him to two years of jail. Thus, the difference here with the previous judgment was degree of negligence of the Captain.

The crime committed and especially the degree of negligence are essential elements for the tribunal in respect of the civil liability under the CLC Convention.

³² Sections 109 – 122 of the Spanish Criminal Code

B) The Captain's civil liability derived from the crime

Even though **the first-instance tribunal** found the Captain guilty of a crime of disobedience, it did not find proved the strict relationship between his acts and the economic damages caused by the pollution. In other words, the criminal acts of the Captain were not, in the opinion of this tribunal, the exclusive cause of the economic and moral damages caused by the oil spill. It is essential to notice here that this was a criminal procedure and that the Provincial Audience, who was the competent to judge the civil liabilities derived from the crimes prosecuted, was a criminal tribunal who approached the civil liability question from a criminal perspective and not a civil one.

Regarding this question, the tribunal stated: *“the crime of disobedience is considered accredited, but not the necessary relationship with the damages caused by Prestige oil spill”*

As a result, no civil liability was imposed on either the Captain or the owner of the vessel or the insurer.

Accordingly, the Captain was found guilty of a disobedience crime committed through negligence but not civilly liable for the economic and moral damages caused by the oil spill. Thus, neither the shipowners nor the insured faced any civil liability.

In contrast, the Supreme Court not only disagreed on the crime committed by the Captain, but also on the approach taken by the lower court about his civil liability.

As introduced, the criminal and civil liabilities of the defendant are debugged together in the same process for reasons of procedural economy. However, the two types of liability

have different nature and have to be evaluated according to different legal principles, even though the facts were prosecuted in a criminal court.³³

This means that the civil liability of the Captain and by extension, of the shipowner and the insurer, has to be established according to the civil regulations applicable to the case, and not according to the more exigent criminal principles.

In this case, the most relevant applicable legal bodies were the CLC Convention and the FIDAC Convention, as international conventions ratified by Spain and incorporated to its legal system³⁴: *“We are facing a case of civil liability arising from damages caused by the spill emanating from a ship that transports hydrocarbons, whose compensation is regulated by the Convention on Civil Liability for Damages due to Hydrocarbon Pollution.*

1991 (CLC92) and the International Convention on the Establishment of an International Fund for the Compensation of Damages due to Pollution by Hydrocarbons (FIDAC) of 1992, instruments assumed by Spain and published respectively in the BOE of September 20, 1995 and October 11 of 1997, that is, they are current and applicable rules, and they were as of the date of the facts.”

The Convention is based on the “polluters pay principle” and the liability of the shipowner is objective, what means that the he will have to indemnify for the damages actually caused by his ship. Thus, **the civil liability of the Master for his acts is attributed by the Convention.**

³³ Spanish Supreme Court’s judgement of 14th January 2016, Sentence nº 865/2015; Legal ground 63

³⁴ Spanish Supreme Court’s judgement of 14th January 2016, Sentence nº 865/2015; Legal ground 63.

According to the CLC Convention³⁵, the civil liability for oil pollution damage can only be imposed to the shipowner and every claim for recovery has to be brought only according to its provisions.

The CLC Convention establishes a liability limit to be calculated according to the specifications of the vessel and cargo³⁶. However, the Convention also establishes an exception to that limitation: *“unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.”*

In short, the Convention limits the liability of the Captain to a maximum amount except when he has acted (i) recklessly and (ii) knowing that the damage would probably occur. Was the liability limit contemplated by the Convention was applicable to the case?

Here, we see the importance of the criminal aspect of the case for the attribution of civil liability

Regarding the first requirement to ban the limitation of liability (recklessness), the Supreme Court concludes that it is inferred by the degree of fault in the commission of the crime of disobedience, this is gross negligence. Here, the Supreme Court analyzes the word “recklessly” to conclude that in the Spanish law’s context, it has to be understood as gross negligence. Accordingly, the criminal qualification of the captains’ acts as gross negligent suppose the compliance with the first requirement to ban the liability limitation on the Convention. We can see here the importance of the criminal perspective of the Captain’s acts.

Regarding the second requirement (the knowledge about the result), the Supreme Courts also considers it implied in the gross negligent acts of the Master. When someone acts

³⁵ Section 3.4 CLC 1992

³⁶ Section 5 CLC 1992

gross negligently, he is not looking to cause the potential damage but he knows it will probably occur. Thus, we can affirm that the Captain knew the harmful potential of his acts.

In conclusion, the Captain of the ship was found the author of a crime of disobedience to the authority through gross negligence and civilly liable for the damages caused by the oil spill under the CLC Convention without the right to apply the liability limitation contemplated in the same Convention.

C) The attribution of the civil liability to the shipowner

Once the civil liability of the operator of the vessel (Captain) has been established, it is essential to see if the civil liability of the Captain is transferred to the shipowner, which is the assured by The London Club.

The plaintiffs demanded from the tribunal to establish the shipowner's "subsidiary civil liability" according to Spanish criminal law.

Section 120.4 of the Spanish Criminal Code establishes the legal relationship between the employees and their companies. It is not necessary to study here in detail the actual requirements in Spanish criminal law to establish this legal relationship between the employee and his company. It is enough for the purposes of this thesis to conclude that the Supreme Court affirms: "*In this case, the two criteria of imputation required by the subsidiary civil liability ex Article 120.4 of the CP are fulfilled*"

However, the shipowner has an individual right to limit his liability under the Convention, with the same exception analyzed in the previous section. The question is then if the shipowner acted recklessly and with knowledge that the damage would probably occur.

The Supreme Court finds that according to the proven facts, the shipowner was perfectly aware of the poor state of maintenance of the ship and of the nature of the cargo. Thus, the tribunal finds that the shipowner acted recklessly sending the ship to that voyage and that he acknowledged the possibly dramatic consequences of that voyage.

In consequence, the tribunal also found inapplicable to the shipowner the limitation of liability contained in the CLC Convention.

D) The attribution of the civil liability to the P&I insurer

Once it is clear that the insured is civilly liable for the criminal acts of the Captain and if he can limit his liability, the Supreme Court studies to what extent the P&I insurer (The London Club) is also liable for the damages caused by the Master/Shipowner.

The relevant aspect of the P&I insurer's liability here is if he can limit his liability or not and how the circumstances of the Captain's acts affect him.

The plaintiffs asked the Supreme Court to condemn The London Club to pay the damages caused with the only limit of the maximum insured amount on the insurance policy with the shipowner, and not the one established by the CLC Convention.

Did have the London Club the right to limit his liability according to the CLC Convention? the tribunal answers negatively. It found The London Club liable for the damages up to the limit on the insurance policy, without applying the limit in the CLC Convention.

Section 7 of the CLC Convention imposes to the shipowner the obligation to insure the ship according to the limitation of liability. In this case, The London Club was covering this amount.

Unlike what happened with the Master of the ship and the shipowner, there is no exception for the limitation of liability of the insurer. This means that the insurer will never, when his liability comes from the application of the CLC Convention, have to pay over the limit established on it. **Thus, the criminal nature of the Captain's actions and his degree of negligence did not play a role here as far as they were not a ground to prevent the applicability of the CLC Convention limit.**

Even though the Supreme Court acknowledges this, it also points out that the concrete insurance contract covers damages caused by oil pollution with a limit of 1 Billion USD, this is over the liability limits in the CLC Convention.

In relation to this, the Court brings again Section 117 of the Spanish Criminal Code, to conclude that this provision states that the insurer will be directly liable for the civil liabilities of the assured and that the **only limitation to its liability will be the one agreed on the contract or legally established.**

According to the tribunal, the two limits are not mutually exclusive and the applicable limit will be the highest one. Here, there is the limit of 22.777.986 Euros from the CLC Convention and the 1 Billion USD from the insurance contract.

The tribunal understands that through the policy, the insurer is covering eventual liabilities of the insured even greater than the ones contemplated by the CLC Convention with its limits. This would cover for instance, the cases where the limits of the CLC are not applicable because of the exception contemplated on it, as it is the case here.

Accordingly, the contract of insurance and the CLC Convention are different sources of obligations for the P&I Club. The insurance contract creates the obligation to pay for the damages caused by the insured when a covered risk is materialized. This is not limited by the CLC Convention and the Tribunal concludes that we are in front of a case where we have legal and contractual limits and the contractual one will prevail because is the highest.

E) Conclusions

This case shows the importance of taking into account other legal sources than the ones regarding the right of direct action and liability insurance. The factual circumstance of the case will, in some cases, involve legal questions of different nature and all of them can have an impact on the right of direct action and the attribution of civil liability to the P&I insurer.

Here, the main legal source to attribute the civil liability of the casualty to the shipowner and the insurer was actually the Spanish Criminal Code and its provisions regarding civil liabilities derived from crimes, despite there was relevant provisions on liability insurance and direct action in the applicable Commercial Code.

Furthermore, the circumstance in which the crime was committed and the criminal qualification of the Master's acts were key elements to prevent the application of the liability limits included on the CLC Convention.

Thus, the criminal aspect of the case was not only relevant for the applicable sources of law but it was also important to decide the extent of the civil liability of the parties.

4.3. The arbitrability of a direct action claim

Despite the question of whether or not the contractual clauses can be invoked against the injured third parties, including the submission of any claim to arbitration, "*The Prestige*" case shows how the arbitrability of the direct action can be discussed on the base of the legal nature of the plaintiffs and the criminal origin of the damages claimed.

Accordingly, the applicability to third parties of the arbitration clause is not the only factor to determine the arbitrability of a direct action claim.

When the London P&I Club started proceedings in UK to recognize the arbitral award obtained declaring arbitration in London as the only competent forum, Spain and France opposed to the arbitrability of the claim of direct action based on two grounds. First, the impossibility to arbitrate criminal issued; and second, the immunity of states to arbitration, according to the English State Immunity Act from 1978.

As seen, the civil liability of the insurer was based on a criminal act committed by the Master and the claimants where two states, Spain and France.

4.3.1. The arbitrability of civil liabilities arising from criminal acts

One of the reason why the Spanish courts considered themselves competent despite de contractual clause submitting any claim to arbitration in London, was the criminal nature of the acts prosecuted.

When proceedings were started in UK, Spain and France discussed the arbitrability of the claim due to its criminal nature. In concrete, they said that the shipowner and his employees (the Captain) acted in a criminal way according to the Spanish Criminal Court and that the liabilities claimed where the economic consequence of their crimes, and in consequence, had also criminal nature.

The English High Court disagreed with Spain and France and stated the arbitrability of the claim based in five arguments: *“First, it noted that the actual criminal charges applied neither to Mare Shipping Inc. (the shipowner) nor 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. Second, although Spain and France brought their claims under a criminal statute, the criminal statute also contemplates civil liability. Moreover, the Court labeled the relevant statutory provisions as “civil in nature”, because they only address liability to pay in accordance with a contract. Third, Spain and France sought only a civil remedy – monetary relief – from The London Club; neither country sought to impose fines or imprisonment. Fourth, the Court found that the claims were identical to claims brought by private parties hoping to recover civil damages steaming the alleged criminal conduct. Finally, Spain and France failed to present a statute or rule of public policy prohibiting the arbitration of their claims.”*³⁷

³⁷ Erika Dixon, “When Sovereign Nations are Forced to Arbitrate: Spain and France and the Prestige Oil Spill, P. 323.

In short, the Court considered that despite the criminal nature of the Captain's acts that caused the economic losses, the claim for damages against the P&I insurer is civil in nature and accordingly, arbitrable.

4.3.2. The immunity of the states

Spain and France also discussed the arbitrability of the direct action claim based on their condition of states.

They defended that based on the English State Immunity Act from 1978, states cannot be parties in arbitration proceedings. Even though in general terms this Act prevent states from having to arbitrate, the English High Court considered that Spain and France had expressly agreed on arbitration with the P&I Club, and thus, the exception of the 1978 Act was applicable.

This conclusion was based on the characterization of the claim of direct action. As exposed on epigraph 4.1, the High Court of England considered the right of direct action under the Spanish Commercial Code and Criminal Code as a right to subrogate in the position of the insured. Accordingly, the claim was contractual in nature and all the clauses were binding for whoever was enforcing the contract, including the arbitration clause.

Furthermore, the Court explains that it is not necessary that the state had signed a contract with the Club to consider that he had an agreement to arbitrate, but it was enough with prosecuting a claim under an English contract with an arbitration clause.

4.4. The validity of anti-suit injunctions in a direct action claim.

The legal issue presented here is whether or not an anti-suit injunction can be used to prevent the third injured parties to prosecute direct actions in a jurisdiction different than the one agreed on the contract of insurance.

In the case “*Yusuf Cepnioglu*”, the P&I Club started proceedings in UK with the clear intention of obtaining an anti-suit injunction directed to the third injured parties to end the proceedings started in Turkey.

After characterizing the claim as contractual and the arbitration clause applicable to a third party claiming against the liability insurer, the High Court of England and Scotland had to decide whether or not to grant the anti-suit injunction. This epigraph contains the grounds presented by the English tribunals to issue the injunction.

An anti-suit injunction is an order which restrains a respondent from pursuing proceedings in another jurisdiction.

Where available, it can be an extremely powerful weapon in a litigant’s armory.³⁸ It is important to clarify that the order to cease the started proceedings is directed to the claimant and not the foreign tribunal.

English law requires four elements to grant an anti-suit injunction. First, that the English court has personal jurisdiction over the respondent; second, that the English court has a sufficient interest in the proceedings to justify restraining foreign proceedings; third, that there is an appropriate ground for obtaining relief; and finally, that the tribunal finds it appropriate in its discretionary power.³⁹

In the “*Yusuf Cepnioglu*” case in particular, the key element when considering granting the anti-suit injunction was the characterization of the claim as contractual or statutory. In other words, if the charterers agreed on the arbitration in London or not.

³⁸ Charles Dougherty QC and Alistair Mackenzie, “Anti-Suit Injunctions”. Published in 2 Temple Gardens on Summer 2016. Available at: http://2tg.co.uk/wp-content/uploads/2017/07/2016.06.15-A_Practical_Guide_to_Anti-Suit_Injunctions_-_Summer_2016.pdf

³⁹ Charles Dougherty QC and Alistair Mackenzie, “Anti-Suit Injunctions”

This is so, because according to the charterers reasoning, the injunction was directed to a person that had not agreed in any specific forum because basically was not a party of the contract. When this is the case, the anti-suit injunction can only be granted when the proceedings started in another jurisdiction are “vexatious and oppressive”.

Thus, the charterers argued that the injunction only was valid if the proceedings that they started in Turkey were “vexatious and oppressive”.

However and as seen before, the High Court concluded that even though it is true that the right of direct action of the charterer comes from a statutory provision in Turkish law, and they are not transferees of the insured rights by a clause in the insurance policy, the legal nature of the right of direct action and its effects are the same.

Consistently with the characterization of the claim as contractual, it is considered here in regard of the anti-suit injunction that the arbitration clause was binding for the charterer because he was acting as a transferee of the insured rights.

The Court considered that the P&I Club has an enforceable right to submit the dispute to arbitration in London and it finds that the only way to protect this right is granting the injunction: *“It is only by way of an injunction to restrain Turkish proceedings that the charterers in the present case can be required to recognize the Club’s right to have the dispute referred to arbitration.”*⁴⁰

At this point, the High Court concludes that as far as the arbitration clause is binding for the charterer, it has to be understood that he agreed on arbitration in London and therefore, the requirement of qualifying the proceedings in Turkey as vexatious and oppressive is not necessary.

Regarding the exercise of discretion of the High Court, the Court of appeal considered it diligent and correct. According to their view of the case, the Court considered correctly

⁴⁰ Yusuf Cepnioglu [2016] EWCA Civ 386, p. 33

the nature of the claim and the need to protect the right of the Club to enforce the arbitration clause.

Finally, it is important to notice that these measures are not allowed inside the EU when are issued to restring or guaranty the competence of another ordinary court of justice. However, Turkey is not a member of the EU and the English High Court can issue this kind of judgements to prevent proceedings in Turkey.

In conclusion, the qualification of the claim as contractual is the base to understand that the charterer acts “in the shoes of the insured” and accordingly is like if he agreed to submit any claim to arbitration in London. **This is the main base to grant the anti-suit injunction understood as the only way to protect an enforceable right of the insurer.**

This case shows the power of this kind of accessory actions. The charterer was Turkish and had business with a Turkish shipowner, but because the contract of insurance between the shipowner and the P&I Club contained an arbitration clause in London and a submission to English law clause, now it is unable, in practice, to exercise the right of direct action that Turkish law guarantees with any chance of success.

The only action left to him now is the submission of his claim under arbitration in London where with the greatest probability he will not succeed because of the pay to be paid clause especially banned by the Turkish relevant statutory provisions.

In my opinion, the Turkish Commercial Code had a clear aim to protect third parties allowing them to recover the damages suffered from the insurer of the tortfeasor. This is the reason why the “pay to be paid” clause is especially banned.

In this respect, the interpretation of foreign statutes by the English High Court is somehow forced and lets the victims of marine casualties unable to find compensation in a system where liability insurance is mandatory and the direct action against the insurer is guaranteed with the objective to void this outcome.

4.5. The exclusive forum clause under the Brussels Regulation

The legal issue presented here is whether or not an exclusive jurisdiction clause in the contract of insurance is opposable to a third party driving a direct action against the insurer.

In the “*Assens Havn*” Case, this legal issue is well presented by the question the Danish Supreme Court referred to the ECJ. The question was whether or not the special insurance jurisdiction provisions of the Brussels I Regulation had to be interpreted so that **third parties bringing a direct action against an insurer are bound by an agreement on jurisdiction validly concluded between the insurer and the policyholder.**

The essential facts to understand this issue are as follows⁴¹: In 2007, a Swedish company, Skåne Entreprenad Services AB (Skåne), was in charge of the transportation of sugar beet to Nykøbing Falster (Denmark). Part of the journey involved shipping the cargo from Assens (Denmark) to Nakskov (Denmark) which necessarily required Skåne to charter a number of tugs and lighters. One of these tugs was the “SEA ENDEAVOUR I”. For the purposes of this section of the journey, Skåne took out liability insurance with Navigators.

The insurance policy contained an exclusive law and jurisdiction clause whereby the parties agreed to submit to the law and exclusive jurisdiction of England and Wales. Navigators’ conditions of insurance also contained a clause stipulating that the insurance was governed by and construed in accordance with English law, and in particular, was

⁴¹ Toby Miller, Chris Primikiris and Beatrice Cameli, “The European Court of Justice – Assens Havn –v- Navigators Management (UK) Limited C-368/16”. 7th August 2017. Available at: <https://www.hilldickinson.com/insights/articles/european-court-justice-assens-havn-v-navigators-management-uk-limited-c-36816>

subject to and incorporated the terms of the Marine Insurance Act 1906. This insurance was also subject to the exclusive jurisdiction of the High Court in London.

When the “SEA ENDEAVOUR I” arrived to Assens Havn, damage was caused to the quay installations. The parties disagreed about how the damage was caused and who was liable for them.

In the light of the disagreement over who caused the damage to the quay, Assens Havn started proceedings against Skåne under Danish law and in front of the Danish competent courts. This action did not present any jurisdiction problems because it was a claim for damages in tort in Denmark. However, Skåne went into liquidation before the proceedings started.

In front of the new situation, Assens Havn started proceedings in front of the Danish Maritime and Commercial Court against the liability insurer of Skåne, Navigators.

At first instance, the Danish court dismissed the action on the grounds that it was not competent, on the basis that the agreement on jurisdiction concluded between the parties to the insurance contract was binding on the injured party, Assens Havn. On appeal, however, the Danish Supreme Court referred a question to the ECJ in order to establish its competence under the Brussels Regulation.

The ECJ issued its judgement on 13th July 2017 answering the question raised.

The answer to the presented question depends on whether the exclusive jurisdiction clause refers to courts of justice or to arbitration.

4.5.1. When the contract of insurance refers to courts of justice

The ECJ bases its decision on the interpretation of the relevant provisions according to their aim.

The Court find clear that, according to section 13.5 in connection with 14.2.a., the parties to the insurance contract can depart from the provisions of the Regulation by an

agreement when the insurance is covering all liabilities arising from the use or operation of the vessel.

Furthermore, sections 8, 9 and 10 basically establish the competent courts in claims against an insurer. Section 11 is the provision that makes this rules on the competent court applicable to a direct action from the third injured party against the tortfeasor's insurer.

Section 11 specifically makes applicable sections 8, 9 and 10, but not 13 and 14. The ECJ believes that this is not casual and that constitutes the will of the European legislator. The legislator is therefore preventing the application of any jurisdiction clause to direct action claims. In conclusion, the Court states: *"It is therefore not apparent from the scheme of the provisions of Chapter II, Section 3, of Regulation No 44/2001 that an agreement on jurisdiction may be invoked against a victim."*

According to the ECJ, this interpretation of provision 13 in connection with provision 14 is based in two elements.

First, the aim of protecting the injured third party: *"In that regard, the Court has previously noted that, in matters of insurance, prorogation of jurisdiction is strictly circumscribed by the aim of protecting the economically weaker party."*

In this sense, the Court believes that: *"The extension to victims of the constraints of agreements on jurisdiction based on the combined provisions of Articles 13 and 14 of Regulation No 44/2001 could compromise the objective pursued by Chapter II, Section 3, thereof, namely to protect the economically and legally weaker party."*

Second, the strict interpretation of the provisions: *"It follows from those provisions that that regulation establishes a system in which derogations from the jurisdictional rules in matters of insurance must be interpreted strictly"*.

These two interpretative elements were already pointed out on his previous judgement of 12 May 2005, *"Société financière et industrielle du Peloux (C-112/03, EU:C:2005:280)"*. Here, the court decided that an insured beneficiary who did not expressly agree on the jurisdiction clause was not bound by it.

Obviously, the position of the third injured party is even farther removed from the insurance contract than the one of an insured beneficiary. Accordingly, the Court's decision cannot be different here.

Taking into account this provisions and their interpretation, the court decided that *“The view must therefore be taken that **an agreement on jurisdiction made between an insurer and an insured party cannot be invoked against a victim of insured damage** who wishes to bring an action directly against the insurer before the courts for the place where the harmful event occurred, as recalled in paragraph 31 of this judgment, or before the courts for the place where the victim is domiciled, a possibility accepted by the Court in its judgment of 13 December 2007, FBTO Schadeverzekeringen.”*

Once it is clear that the submission of any claims to arbitration cannot be invoked against the injured third party, Section 23 is the legal base to ignore this clause. This provision basically states that any clause contrary to the Regulation has no legal force.

In conclusion, this case makes clear that the injured third party will not be bound by a jurisdiction clause when the Brussels Regulation is applicable to the case.

4.5.2. When the contract of insurance refers to arbitration

As see in the previous analyzed cases, it is usual practice for the P&I Clubs to include a clause in their policies submitting any dispute to arbitration in London, and not to the English courts of justice. Therefore, it is important to see what effects this judgement can have in a case were the insurance policy submits any dispute to arbitration instead of to ordinary tribunals.

The difference between submitting disputes to arbitration and courts of justice is that arbitration is out of the Regulation's scope. Indeed, Section 1.2.d. states: *“The regulation shall not apply to arbitration.”*

This question is complicated and we do not have a clear answer.⁴² The ECJ has not clarified enough with its pronouncement the impact of the Brussels Regulation in arbitration.

The most useful pronouncement regarding this issue is the ECJ case “*Gazprom*”. Here, the ECJ has to decide if the Brussels Regulation is applicable and therefore a base for the court of a member state to refuse to enforce an arbitration award that contains an anti-suit injunction.

This judgement is out of the scope of this thesis as far as it does not deal with the right of direct action against liability insurers and therefore I will not present it in deep. However, it is relevant here to analyze the effect that the Assens Havn case can have in cases where the insurance policy includes a clause submitting any dispute to arbitration, because it concretizes the relationship between the Brussels Regulation and arbitration.

The ECJ clarified that the enforcement or not of the arbitral decision cannot be assessed on the basis of the Brussels Regulation because it does not apply to arbitration awards. In concrete, the Court stated that the Regulation “*must be interpreted as not precluding a court of a Member State from recognizing and enforcing, or from refusing to recognize and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State.*”

Even though this judgement regards the enforcement of arbitration awards in another European country, and not a conflict of jurisdiction like the Assens Haven case, it has given an argument to defend that this case will not have any effect when the insurance contract refers to arbitration instead of to English Courts.

⁴² Richard Hugg, “Respecting law and jurisdiction – a one way Street?”, 16th August 2017. Available at: <https://inaceinsurance.com/2017/08/16/respecting-law-and-jurisdiction-a-one-way-street/>

Thus, this is a base for defending that the *Assens Havn* case has not effects when the contract refers to arbitration, but it does not clarify the question with enough certainty and we will have to wait until the ECJ issues a judgement regarding this facts in concrete.

4.5.3. Conclusion

This case shows the importance of European regulation for the right of direct action.

As seen in the epigraph about the characterization of the right of direct action, the understanding of this right is very different in the studied jurisdictions and thus, the competent forum and applicable law will be essential elements.

In this respect, the “*Assens Havn*” case is clarifying, with effects in all the countries where the Brussels Regulation is applicable, that the insurers will not be able to start proceedings in London to obtain a judgement sentencing that the nature of the claim that the third injured party is prosecuting in another jurisdiction is contractual *in nature* and accordingly, the submission to English Tribunals and to English law has to be respected.

This means that after this judgement, third parties will be able to bring their claims to the jurisdictions contemplated by the Brussels Regulation, like their domicile or where the casualty took place, and exercise their right of direct action against the insurer under those jurisdictions and the interpretation that their judges do about this right.

The scope of this pronouncement would be greater if the Brussels Regulation was applicable to arbitration. However, the reality is that most of the P&I Clubs policies refer to arbitration as the only competent forum and not to national courts.

4.6. Enforceability of judgements

The international nature of the maritime business explains why in a maritime casualty can easily be involved players from different nationalities. As seen in the cases object of study, the same facts can be analyzed in different jurisdictions and contrary judgements

can be issued, like in “*The Prestige*”. This reality justifies a brief reflection about the real possibilities of enforcement in the involved jurisdictions.

As seen, the same facts were prosecuted in different jurisdictions that finally issued judgements in opposite directions. The question then is, what judgements and in what extend will be enforced?

In Spain, the Provincial Audience of A Coruña (the competent tribunal for the execution of the Supreme Court’s judgement), emitted on 15th November 2017 the judgement on the quantum aspects of the case.

The tribunal condemned The London Club as directly liable for economic damages quantified in 1,88 Billions USD, with the only limit of the maximum sum insured which is 1Billion USD. This means that the execution process has started and that if the Club doesn’t pay the import voluntarily, the Spanish system will use all the enforcing mechanisms available against it.

However, we have to keep in mind that the Club obtained a favorable pronouncement from the English High Court confirming the arbitration award. Nowadays, the public intention of the club is to use it as a base to resist enforcement.⁴³

At this point, we can affirm that the case is not completely closed. Now, it will be a key element to see what mechanisms The London Club uses to avoid the enforcement of the Spanish judgement.

As seen, the strategy of The London Club starting arbitration proceedings in London before the Spanish Supreme Court issued its decision was based on the hope to obtain a

⁴³ The London P&I Club, “Prestige: Pollution incident update”. Published on 17th November 2017. Available at: <https://www.londonpandi.com/knowledge/news-alerts/the-london-pi-club-prestige-pollution-incident-update/>

confirmation of the arbitration award by the High Court that according to the Brussels Regulation has priority over any disadvantageous judgement in Spain.

It is worthy to mention here, that the Spanish and French governments already attacked this interpretation of the Brussels Regulations with two arguments.

First, that the only purpose of the proceedings started in UK was to obtain primacy against a hypothetical judgement in Spain; and Second, that according to the Brussels Regulation, the High court should have kept the proceedings pending a decision in Spain.

Even though the Spanish tribunals and the Spanish government do not recognize this effect in the pronouncement from the High Court, it is possible that if The London Club starts proceedings in the ECJ, this European court does recognize the pretended effects and invalidates the Spanish decision.

5. Possible future actions by the P&I Clubs

As seen in the three cases presented in this thesis, the regulation and interpretation of the right of direct action is different in the the studied legal systems. This makes the competent forum and the applicable law essential elements for the party's interests.

The English High Court confers contractual nature to the right of direct action against liability insurers that the British legal system and other ones like the Spanish, Turkish or Danish guarantee.

The characterization of these claims as contractual is the base to enforce the arbitration clause and the submission to English law clause on most of the P&I Insurance contract, which as exposed is in clear benefit of the insurer because it allows him to invoke all the contractual clauses that restrict or void his liability, like the "pay to be paid" clause.

However, it seems clear that outside England, the tendency is to regulate stronger rights of direct action. In the national context, we have the case "*Prestige*" as an example. Here, the Spanish Supreme Court declared that the right of direct action was independent from the contract and had statutory nature, meaning that Spanish law and jurisdiction were to be respected despite any clause on the contract between the insurer and the insured. In the international context, we find among others the CLC Convention, which includes a completely independent right of direct action understood as such even by the P&I Clubs and the English High Court. Furthermore, the ECJ stated in the Assens Havn case the importance of the aim to protect injured third parties in regard of the enforceability of a jurisdiction clause in the insurance policy against them.

Thus, the tendency to protect injured third parties from the contractual clauses in a policy in which they did not took part is clear.

The British P&I Clubs are aware of this tendency and, when looking how the future can look like, it is interesting to see what measures they can adopt or which arguments they can present to prevent injured third parties to bring their claims in front of a different jurisdiction than the British one.

There are three main aspects that the P&I Clubs can consider in order to keep the English jurisdiction competent and its background law applicable.⁴⁴

First, the weaker party arguments. As seen in the cases studied and especially in the “*Assens Havn*” case, the rationale behind a strict interpretation of the right of direct action and against the enforcement of contractual clauses against the injured third party is the aim to protect the weaker party.

However, not always the injured third party is the weaker party. It can be professional company with plenty of resources or an insurance company acting in the position of the third party due to a contractual right of subrogation.

The P&I Clubs can attack a strict interpretation of the right of direct action by arguing that in a certain case, the third party is not weaker.

Second, exclusive jurisdiction clauses. Even though it is clear after the “*Assens Havn*” case that these clauses are not invoked to third parties in the European Union, the contract can be written in a way that the liability of the insurer is only born if there is an explicit pronouncement from a concrete tribunal or arbitration panel.

Accordingly, if there is not a pronouncement of that tribunal or panel there is no contractual liability.

This type of clause would have validity in English common law, but it would be more likely precluded by EU’s legislation or in other national legislations.⁴⁵

⁴⁴ Steven Berry QC, Essex Court Chambers, “How can insurers react to the ECJ’s decision that a 3rd party victim can sue the insurer where the damage occurred or where domiciled? Is there any way out?” February 2018.

⁴⁵ Steven Berry QC, Essex Court Chambers, “How can insurers react to the ECJ’s decision that a 3rd party victim can sue the insurer where the damage occurred or where domiciled? Is there

Third, the use of arbitration clauses. As exposed before, the Brussels Regulation does not apply to arbitration. This means that probably, the “*Assens Havn*” judgement would not be applicable to a case where the contract submit the dispute to Arbitration. Thus, the P&I Clubs would be able to seek in England an arbitration award and make it enforceable through the established proceedings in front of the High Court.

This course of action would create a similar scenario that the one presented in the “*Prestige*” case.

any way out?": *“By analogy with Scott v Avery clauses this would probably be valid in principle at English common law. But it would not be surprising if this was precluded somewhere in the mass of EU and other regulation or legislation on insurance, or in the terms of particular direct action statutes.”*

6. The impact of Brexit

The biggest P&I market is the British one⁴⁶. Their concrete understanding of the right of direct action and the number of cases where English P&I Clubs are involved justify a brief comment on the consequences of Brexit.

As seen in the cases presented, the applicability of European Union's Regulations has an impact on the right of direct action.

The Brussels Regulation prevent, on one side and since the case *West Tankers*, the anti-suit injunctions between member states; and on the other side, prevent the enforceability of jurisdiction clauses in the insurance contract against the injured third party.

The Brexit is still in process and we do not know what the exact terms ruling the relationship between the UK and the EU will be. However, it seems clear that, according to art. 50 of the Lisbon Treaty, the EU legislation like the Brussels Regulation and its interpretation will cease to apply in UK.

Taking into account that European legislation is what prevents the anti-suit injunctions between member states, at least in theory, English Courts would be able to grant anti-suit injunctions in other member states with a similar outcome that the one the analyzed *Yusuf Cepnioglu* case.

Furthermore, it is clear that the English High Court characterizes direct action claims as contractual and consider the terms of the insurance contract opposable to the injured third party. In this context, the recent *Assens Havn* case guaranteeing the right of the injured

⁴⁶ Devlin McStay, "Club Clout: sizing up the leading players in P&I". 26th February 2016, available at: <https://fairplay.ihs.com/safety-regulation/article/4263161/club-clout-sizing-up-the-leading-players-in-pi>

party to present his claims in one of the jurisdictions contemplated by the Brussels Regulation and not only in the one specified in the insurance policy, would be of no effect.

This, together with the possibility of granting anti-suit injunctions could change the actual scenario giving a much stronger position to the British P&I Clubs to defend all the direct action claims only in UK.

Thus, the Brexit could have a good outcome for the British Clubs in relation to direct action.

7. Conclusions

From the definition of key concepts and the analysis of the judicial discussion of the main legal issues regarding the right of direct action, I have extracted the following conclusions.

First, the nature of the P&I Clubs and their function in the market. Even though they are Protection and Indemnity Clubs, I think that it is clear that nowadays they are acting in the market as liability insurers despite their mutual nature. No one questions the compliance with the duty to have liability insurance imposed by national and international regulations by entering into a P&I Club.

From my point of view, this qualification of the clubs suppose that they cannot appeal to their original nature as protection and indemnity insurers to enforce against third parties the pay to be paid principle, usually expressly incorporated on the insurance policies.

Second, the practical importance of the nature of the right of direct action. The characterization of a claim against the insurer as contractual, this is as a right to enforce the contract of insurance between the insurer and the insured, imply that all the defenses that the insurer has against payment to the insured are opposable to the injured third party.

This is the view defended by the English High Court and it is the ground to apply English law and recognize arbitration in London as the only competent forum. The main consequence of this is the validity of clauses like the “pay to be paid” that are expressly declared unopposable on the statutes that recognize the right of direct action.

On the other hand, the characterization of the claim as statutory and independent from the insurance policy supposes that these contractual defenses cannot be opposed to a third party.

Third, and closely connected to the previous conclusion, the importance of the competent jurisdiction. The relevant aspect of the right of direct action is not its statutory existence but the interpretation of its nature.

The English statutes also include the right of direct action, but its characterization as contractual is the reason why, in practice, under English law there are not good chances of success with such an action.

Thus, the determination of the competent courts and applicable legal system will be the most relevant aspect on a direct action claim.

Fourth, the role of provisions of different nature. Even though the right of direct action is a right to claim civil liability from an insurer, as seen in "*The Prestige*", the factual complexity of the case can make Acts of criminal nature relevant.

Thus, it is necessary to consider all the legal instruments that can have an impact on a claim of this nature, and not only the express provisions on civil statutes granting the right of direct action against liability insurers.

Fifth, the relevance of European Legislation. Especially in the "*Yusuf Cepnioglu*" and "*Assens Havn*" cases, the Brussels regulation has been the most important legal instrument.

As seen, the anti-suit injunctions are a very powerful weapon on the hands of British P&I Clubs and their inconsistency with the Brussels Regulation makes them unusable in the European Union.

Furthermore, the conflict of jurisdiction is extremely relevant and this same EU's Regulation gives to the third party different alternatives and prevent the P&I Club from contractually restringing the jurisdiction to only one favorable country.

Sixth, I believe that nowadays there is an inconsistency between the view that the P&I Clubs have of themselves and the role that they play on the marine insurance market. If these Clubs want to act as truly protection and indemnity insurers, then someone else will offer liability insurance assuming the risks of such an insurance product and will ask for primes according to it.

However, the P&I Clubs are already playing this function on the market and from my point of view, they should adapt their policies to the function that they truly do, accepting

their liability for the risks insured also in front of third injured parties. This would obviously have a repercussion on the relationship between the club and its members and on the prime they pay.

Finally, the trend to protect the third injured party.

The tendency in the studied jurisdictions and cases is to create strong tights of direct action that protect the third injured party in a marine casualty and allow him to obtain proper compensation from the tortfeasor's liability insurer.

International conventions like the CLC Convention grant a statutory and independent right of direct action. Furthermore, some of the national legal systems studied seem to contain equally strong rights of direct action when interpreted by the national courts, like the Spain in the case "*Prestige*".

However, British courts have a different understanding of this right. When the direct action contained in an Act refers to elements of the insurance contract, they qualify it as a contractual in nature and enforce clauses like the "pay to be paid" clause that in practice make the direct action impossible to success.

In my opinion, the clear tendency in Europe is to understand this right as statutory, banning the contractual clauses that suppose in practice an obstacle for the third party to claim against the P&I Club. However, the positions in the studied jurisdictions are not unified yet. These differences justify really different outcomes to the same facts, as presented when studying the characterization of the claim in "*The Prestige*".

ANNEX I. Relevant provisions in “*The Prestige*” case

A) Relevant provisions in Spanish Law

Due to the criminal charges presented against the operators of the ship and considering that the civil liability of the Shipowner and P&I Club derivate from them, several criminal provisions will be studied:

- Section 556 of the Spanish Criminal Code:

“Those who, without being included under Article 550, resist the authority or its agents, or seriously disobey them, while carrying out the duties of office, shall be punished with a sentence of imprisonment of six months to one year.”

- Section 109 of the Spanish Criminal Code

“1. Perpetration of an act defined as a felony or misdemeanor by Law shall entail, pursuant to the provisions contained in the laws, to repair the damages and losses caused thereby.

2. In all cases, the party damaged may opt to sue for civil liability before the Civil Jurisdiction.”

- Section 120.4 of the Criminal Code

“The following persons shall be held civilly liable, failing those held criminally accountable: [...] Natural or legal persons dedicated to any kind of industry or commerce, for felonies or misdemeanors their employees or assistants, representatives or managers may have committed in the carrying out of their obligations or services.”

- Section 117 of the Criminal Code

*“the insurers who have assumed the risk of pecuniary liabilities arising from the use or exploitation of any good, company, industry or activity, when, **as a result of an event***

contemplated in this Code, the event that determines the insured risk occurs, they shall be directly liable for any civil liabilities up to the limit of the compensation legally established or conventionally agreed, without prejudice to the right of repetition against whom it corresponds "

Regarding the right of direct action against liability insurance, the Insurance Contract Act was the key statute.

- Section 76 of the Insurance Contract Act

*“the injured party or his heirs will have a right of direct action against the insurer to demand compliance with his obligation to compensate, without prejudice to the right of the insurer to repeat against the insured, in the case that is due to willful conduct of the insurer, the loss or damage caused to third. **The direct action is immune to the exceptions that may correspond to the insurer against the insured.** The insurer may, however, oppose the exclusive fault of the injured party and the personal exceptions that he has against him. For the purposes of the exercise of direct action, the insured shall be obliged to inform the injured third party or his heirs of the existence of the insurance contract and its content”.*

B) The relevant provisions in the CLC Convention

In Spain, the civil liability for oil pollution in a case is regulated by the CLC Convention. The following are the most relevant provisions studied:

- Section 3.4. of the Convention:

“No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.”

- Section 5.1. of the Convention

“The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount of 2,000 francs for each ton of the ship's

tonnage. However, this aggregate amount shall not in any event exceed 210 million francs.”

- Section 5.2. of the Convention

“If the incident occurred as a result of the actual fault or privity of the owner, he shall not be entitled to avail himself of the limitation provided in paragraph 1 of this Article.”

C) Relevant provisions in the insurance Contract

The Insurance Contract clauses submitting any claim to arbitration in London and to English law are a key element in the P&I Club’s defense. In concrete, Section Clause 43:

- Rule 43.1. of the London P&I Club rules:

“These Rules and any contract of insurance entered into by the Association shall be governed by and construed in accordance with English law and shall be subject to the provisions of the Marine Insurance Act 1906 and, upon its entry into force, the Insurance Act 2015 and any statutory modifications thereof except insofar as such Acts or modification may have been excluded by these Rules or by any terms of such contracts.”

- Rule 43.2 of the London P&I Club rules:

“Subject to Rule 33.4, if any difference or dispute shall arise between an Assured (or any other person) and the Association out of or in connection with these Rules, or out of any contract between the Assured and the Association, or as to the rights or obligations of the Association or the Assured thereunder, or in connection therewith, or as to any other matter whatsoever, such difference or dispute shall be referred to arbitration in London in accordance with the Arbitration Act 1996 and any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Rule.”

ANNEX II. Relevant provisions in “The Yusuf Cepnioglu” case

A) The relevant provisions in Turkish law

The most relevant provisions in Turkish law considered in the case were:

Section 40 of the Turkish Act on Private International and procedural Law states: *“The international jurisdiction of the Turkish courts shall be determined by the domestic jurisdiction rules.”*

Section 46 of the same Act, regarding Lawsuits related to Insurance Contracts, establishes: *“Regarding the conflicts arising from insurance contracts the court of the place where the actual work place of the insurer or the branch office or agency that concluded the insurance contract is located in Turkey. Nevertheless, the competent court of jurisdiction in lawsuits filed against the insurance holder or the beneficiary is the court of the place of their domicile or habitual residence in Turkey.”*

Furthermore, in the context of international claims, this same act also specifies in its article 34: *“If the law applied to the tortuous act or to the insurance contract enables, the damaged party may directly make his claim to the insurer of the liable party.”* Thus, the act recognizes the right of a third injured party to claim damages directly against the liability insurer.

Section 1478 of the Turkish Commercial Code, that recognizes the right of direct action against the liability insurer of the tortfeasor:

“The victim may claim its loss up to the insured sum directly from the insurer provided that the claim is brought within the prescription period applicable to the insurance contract”

Other relevant provisions were Section 1473 and Section 1484 of the same code. These provisions contemplate limits to the direct action and concrete its content by referring to the insurance contract.

Section 1473:

“1) Under a liability insurance contract, the insurer shall pay to the victim compensation up to the amount stipulated in the insurance contract, for the liability of the insured due to an event that occurred, unless otherwise agreed, during the contract period, even if the loss materialized after that period.

2) If the insurance is taken out for the liability related to the enterprise of the insured this insurance shall cover, unless otherwise agreed, the liability of the representatives, administrators, auditors and also the employees of the insured. In that case, the insurance shall be deemed taken out in favour of those persons.”

Section 1484:

“In case the insurer is totally or partially discharged of its obligation of performance towards the insured, its obligation of performance as against the victim shall remain effective up to the sum insured under the compulsory insurance.”

B) The relevant provisions in the contract of insurance

Section 66 of the club rules:

“If a Member or joint Member concerned in such difference or dispute does not accept the decision of the Board following such reference and adjudication or if adjudication is waived at the discretion of the Board it shall be referred to arbitration in London, one arbitrator to be appointed by the Association, one by the Member or joint Member, and a third to be appointed by the arbitrators. The submission to arbitration and all the proceedings therein shall be subject to the provisions of the English Arbitration Act 1996 and any statutory modification or re-enactment thereof.”

Section 11 of the club rules:

“All contracts of insurance afforded by the Association to its Members and these Rules and Regulations made hereunder shall be governed by and construed in accordance with English law. In particular they are subject to and incorporate the Marine Insurance Act

1906 and upon its entry into force the Insurance Act 2015 save to the extent such Acts are modified or excluded by the Rules or by the terms of any contracts of insurance.”

ANNEX III. Relevant provisions in “The Assens Havn” case

A) The relevant provisions in the Brussels Regulation

The ECJ studies and reproduces the following provisions:

Articles 8 to 14 of the Brussels Regulation, in Section 3, headed “Jurisdiction in matters relating to insurance”, of Chapter II, set out the rules on jurisdiction in matters relating to insurance.

In accordance with Article 8 of that regulation:

“In matters relating to insurance, jurisdiction shall be determined by this section, without prejudice to Article 4 and point 5 of Article 5.”

Article 9.1 of the regulation provides:

“An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State where he is domiciled, or

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled...”

Article 10 of the regulation provides:

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

Article 11.2 of that regulation provides:

“Articles 8, 9 and 10 apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.”

Article 13 of the regulation provides:

“The provisions of this section may be departed from only by an agreement:

(2) which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this section, or

(3) which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or

(5) which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.”

Under Article 14 of the regulation:

“The following are the risks referred to in Article 13, point 5:

(1) any loss of or damage to:

(a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes.

(2) any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

(a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks.”

Article 23 of the regulation, in Section 7 of Chapter II, entitled “Prorogation of jurisdiction”, provides in paragraphs (1) and (5):

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.”

Regulation No 44/2001 has been repealed by Article 80 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1). By virtue of the second paragraph of Article 81 of that regulation, it is applicable only from 10 January 2015.

B) The relevant provisions in Danish law

Article 95 of the forsikringsaftaleloven (Law on insurance contracts) provides:

“1. When the insured party’s liability towards the injured party has been established and the amount of compensation has been determined, the injured party shall be subrogated to the rights which the insured party has against the company, in so far as his claim has not been satisfied.

2. The injured party shall also be subrogated to the insured party’s claim against the company if the injured party’s claim for compensation is affected by the liquidation, bankruptcy, composition with creditors or debt rescheduling of the insured party. To the extent to which the injured party’s claim remains unsatisfied, the full demand for compensation may be directed against the company. In the situations described in the first sentence the company must, without undue delay, inform the insured party that it has been notified of a claim for compensation.”

C) The relevant clauses of the insurance policy

Choice of law and jurisdiction:

“This insurance shall be governed by and construed in accordance with the law of England and Wales and each party agrees to submit to the exclusive jurisdiction of the courts of England and Wales.”

Furthermore, Navigators’ conditions of insurance contain the following clause:

“7. Law, practice and dispute resolution

“This insurance shall be governed by and construed in accordance with English law and, in particular, be subject to and incorporate the terms of the Marine Insurance Act 1906 and any statutory modification thereto. This insurance, including any dispute arising under or in connection with it, shall also be subject to the exclusive jurisdiction of the High Court in London.”