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The perils of the Norwegian Plan

Andrew Lee and Fiona Rafia, of Hill Dickinson, consider the differences between the Nordic Plan and the Institute Time Clauses

The Norwegian Marine Insurance Plan (or Nordic Marine Insurance Plan of 2013 – the Nordic Plan) is generally considered to be a “pro-assured” insurance regime providing fuller protection and wider coverage than other forms of marine insurance. This article contrasts cover under the Nordic Plan and the Institute Time Clauses Hulls (the ITC) and provides an overview of little-known pitfalls under the Nordic Plan.

Insured perils

The Nordic Plan covers all risks save those specifically excluded, being those covered by war risks insurance and certain standard exclusions. There is a presumption towards cover in that the burden for proving a loss which has been caused by an excluded peril falls to the insurer. Conversely, ITC policies work on a “named perils” basis where only those perils which are named under the policy will be covered. Under the ITC, the burden is reversed and it is for the assured to prove the loss is caused by a peril named in the policy.

Causation

Assureds should be aware of distinctions in how the two regimes treat causation, particularly if combining policies across the two systems, or else the assured may find itself in a situation of part coverage for legitimate losses. The Nordic Plan is distinct from the ITC in that where the loss is caused by a combination of perils, all causative factors contributing to a loss are given weight in proportion to their influence on the loss. The insurer will only be responsible for a proportion of the loss insofar as the relevant insured peril contributed to that loss.

Under English law and the ITC the policy will only respond if the “proximate cause” of the loss is an insured peril. However, where the proximate cause is an insured peril the policy will respond to the entirety of the loss notwithstanding any other influencing factors.

Where there are two proximate causes, one of which is within the policy and the other of which is neither within the policy nor the subject of an exclusion, then the insurer will be liable for the whole of the loss. Where there are two proximate causes of loss, one within the policy and the other excluded, whether the policy will respond depends upon whether the insured peril would have caused the loss notwithstanding the excluded peril. If the loss would have been caused by the insured peril in any event, then the policy will respond to the damage which the assured can establish was caused by the insured peril; any damage caused by the excluded peril will not be covered. If the loss would not have occurred but for the excluded peril, then the policy will not respond at all.

As the burden of proving that the loss falls within the policy is on the assured, where the assured cannot establish which peril (insured or excluded) caused the loss, there will be no cover. Where there is doubt as to which policy a loss should be covered by, ie marine or war perils, under the Nordic Plan, one should initially look to the dominant cause of the loss and, if the cause is evenly balanced, then the loss may be apportioned between the policies on an equal basis. Under the ITC, however, a loss must fall in its entirety under one or the other policy.

As a result, assureds should take great care not to combine cover against marine perils under the Nordic Plan with a war risk policy under ITC rules, as there is a danger, indeed a likelihood, of part coverage where, for example, the ITC war risk policy does not respond as the cause is not 100%, and the Nordic Plan only responds on an apportionment basis.

Duties of the assured

Under the Nordic Plan a breach of the assured’s duty of disclosure does not automatically revoke cover. In the case of an innocent breach, insurers are only entitled to cancel insurance with 14 days’ notice of their intention to cancel the policy. The insurer can only revoke cover to the extent that it would not have written the risk, or that it would have written it on substantially different terms had they known the alteration of risk would have occurred. The burden is on the insurer to prove that a particular activity or event is so unusual so as to constitute an alteration of risk. Where a breach has been established, the burden then moves to the assured to prove that the breach was not causative of the loss.
In August 2016 the Insurance Act 2015 will come into force in English law. One of the most significant changes of this Act is, for an insurer to revoke cover for breach of warranty, that warranty must be relevant to the risk/loss. Under English law, insurers will no longer be able to pull cover for a breach of a non-relevant term. This is a significant pro-assured shift in traditional English insurance law.

Further, if a breach of warranty can be remedied, the insurer will be liable for losses which occur after it has been remedied. Under the new Act, where the breach would have resulted in the insurer declining the risk, the policy can be treated as including that term and finally, where the insurer would have charged a greater premium, the claim will be scaled down proportionally.

The new Act goes even further to address the previous “pro-insurer” stance by replacing the “duty of utmost good faith” with a duty to make a “fair presentation of risk”, ie disclose every material circumstance which is known or ought to be known by the assured.

Safety regulations
Under the Nordic Plan, “safety regulations provisions” effectively impose additional duties on the assured on top of conventional duties of the prudent marine operator. The assured will lose cover if he can be shown to have breached a safety regulation and there is a causal link between that breach and the loss. This is one of the key perils associated with insurance under the Nordic plan.

Safety regulations in this context include provisions such as SOLAS, class, flag state and applicable public authorities. The burden of proof rests with the assured, to prove there is no causal link between the breach and the loss, or that the assured has not breached the safety regulation through negligence.

Safety regulations are not defined under the Nordic plan. Some regulations, such as SOLAS, are directly mentioned as examples of applicable regulations, whereas other regulations may be binding if relevant. This leaves unsatisfactory ambiguity in the regime. For example, it may be argued SOLAS is too general and too vague to generally qualify as a safety regulation which could lead to cover exceptions, since otherwise H&M cover would hardly ever result in cover for casualties involving older vessels.

“Under the Nordic Plan ‘safety regulations provisions’ effectively impose additional duties on the assured on top of conventional duties of the prudent marine operator”

Further, there is a duty on the assured to be extra vigilant in that he must comply not just with flag state regulations and safety measures, but also be fully versed in any local relevant regulation which may be found relevant for the purposes of the Nordic Plan and on which cover may be revoked. By way of example, in some jurisdictions the coastguard must be notified in the event of a main engine breakdown while underway, even if this breakdown is rectified by the crew. The coastguard may then impose limitations on the vessel’s further operation – perhaps, for example, an inspection of the vessel or transit with tugs may be required. If the shipowner does not know of his obligation to notify the coastguard and the vessel suffers a further breakdown giving rise to a casualty, might the loss be found to have arisen from the breach of a safety regulation? The answer is probably “yes”.

Contrastingly, policies under the ITC will be governed by traditional principles of seaworthiness and due diligence, which, while in some circumstances a more strenuous test to pass, provides assureds the comfort of certainty as to what is required.

Disclosure
Both regimes encompass an ongoing duty to disclose, however the Nordic Plan goes one step further in terms of keeping the insurer informed of casualties and if a “casualty threatens to occur”. This wording is nebulous and assureds may find themselves unwittingly losing cover. Following on from our example above, if a vessel experiences an engine failure in open waters which is resolved by the crew; is this a “casualty”? Indeed, it could be found a casualty had already occurred. Is the assured obliged to report all mechanical malfunctions or points of learning gleaned from routine safety drills? At what point does a mechanical failure of engine alarm become a reportable incident? This uncertainty is unsatisfactory for assureds and potentially obviates the peace of mind which insurance is meant to provide.
Negligence

Crew negligence is a covered risk under both regimes. However negligence on the part of the assured is treated differently. The ITC requires the loss must not have resulted from “want of due diligence” on the part of the owner of their agents; as with provisions of seaworthiness, this is a relatively high hurdle for the assured to prove. However, it is well trodden ground and assureds are likely to know how to comply.

Under the Nordic Plan, greater emphasis is placed on safety regulations: the assured will generally remain covered for negligence, except where the negligence results in a breach of safety regulations and there is causation between that breach and the loss. This extends to the negligence (and resulting causation) of any organisation or individual to whom the assured has delegated decision-making authority and any negligence in performing that authority. While cover will only be revoked for negligence of persons with decision-making authority, this is a wide definition and probably does not need to go as near to the top as “the owner or their agents”.

Miscellaneous provisions

The Nordic Plan requires that a constructive total loss (CTL) may only be claimed if the costs of recovery/repair exceed 80% of the insured value or market after repair, whichever is higher, before a CTL can be claimed. These costs do not include salvage, which is payable in addition to the costs of repair or CTL. General average (GA) and salvage costs are payable under the Nordic Plan, in full, even if the contributory value exceeds the insured value. GA, salvage and sue and labour are not subject to a deductible. GA contributions payable by freight interests are covered under the Nordic Plan where they fall on the assured ship owner, for example “destination freight”.

Under the ITC, a CTL may only be claimed if the costs of recovery/repair exceed the insured value. Further, GA, salvage and sue and labour are covered, subject to a reduction for any “underinsurance”, ie if the insured value of the vessel falls below the sound value. GA, salvage and sue and labour are also subject to an agreed deductible.

The Nordic Plan contains several clauses which appear to be favourable to the assured. However there are several clauses which are more nebulous in nature, and may result in an insured finding they do not have full cover once a loss is incurred

The applicable law and jurisdiction under the Nordic Plan is that of the lead claims underwriter where that leader is domiciled in a Nordic country. Otherwise, Norwegian law is to apply with no stipulation as to jurisdiction. Under the ITC English law and jurisdiction apply unless otherwise stipulated.

Conclusion

On the surface, the Nordic Plan contains several clauses which appear to be more favourable to the assured. However there are several clauses which are more nebulous in nature, and may result in a prudent insured finding they do not have full cover once a loss is incurred.

Further, where the ITC is traditionally thought as favourable to the assured, it can, and frequently is, modified with additional clauses to address this balance. Further, once the Marine Insurance Act 2015 is in force, the ITC will no longer have many of the features which traditionally set it apart as a pro-insurer regime. The removal of the strict warranty principles will go a long way to address this imbalance. Assured may find that the “known” nature of cover under the ITC is far more preferable than the uncertainty associated with cover under the Nordic Plan.

MRI

Andrew Lee, partner in the marine, trade & energy team and Fiona Rafia, trainee solicitor, both at Hill Dickinson’s Singapore office
Suez Fortune Investments Ltd and Another v Talbot Underwriting Ltd and Others (The "Brillante Virtuoso") – QB (Comm Ct) (Flaux J) [2015] EWHC 42 (Comm) – 15 January 2015

On 5 July 2011 the tanker Brillante Virtuoso was waiting off Aden when a group of armed uniformed men in a small boat approached, describing themselves as the “port authorities”. They were permitted to board, but they were in fact pirates. Once on board, they detonated an explosive device in the engine room. The explosion caused a fire which engulfed the engine room and accommodation. The vessel was a dead ship without power.

The crew raised the alarm in the early hours of 6 July 2011 (by which time the armed men had left the vessel), and were rescued by a US navy vessel. On the same day the owners entered into a LOF salvage contract with salvors. Salvage operations were carried out between 6 July 2011 and 7 October 2011 before towing the vessel to Khor Fakkan where a ship-to-ship transfer of the cargo was undertaken. After the STS operation the salvors delivered the vessel to the owners on 7 October 2011. The vessel remained a dead ship anchored in international waters and the owners hired two tugs to stand by the vessel from 7 October 2011 until 15 March 2012 when she was delivered to buyers to whom she was sold for scrap.

The owners’ surveyor formed the opinion that the cost of repair would exceed the insured value of US$55 million, and on 7 December 2011 the owners tendered notice of abandonment (NOA) to the vessel’s insurers declaring the vessel a constructive total loss (CTL). The insurers rejected the NOA the same day but agreed that the question whether the vessel was a CTL should be determined as of that date.

The owners and mortgagee of the vessel (the claimants) made an insurance claim against the insurers. The insurers declined liability. The agreed value of the vessel under the hull and machinery section of the policy (section A) was US$55 million and a further US$22 million under the increased value section (section B).

On 8 February 2012 the claim form was issued. On 20 February 2012 the owners’ shipbrokers procured an offer to purchase the vessel for US$700,000 “as is where is”. The owners’ insurance brokers emailed the insurers informing them that the vessel would be sold for scrap unless the insurers objected by close of business that day with full and adequate reasons. No objections were received and accordingly, on 21 February 2012, a memorandum of agreement was signed by the owners and the purchasers.

The claimants’ primary case was that the vessel suffered loss and damage by reason of a peril or perils insured against, namely the acts of pirates and/or persons acting maliciously, alternatively terrorists and/or persons acting from a political motive and/or the vessel suffered loss and damage by reason of piracy, vandalism, sabotage, violent theft and/or malicious mischief. The claimants claimed an indemnity for: (i) a CTL; alternatively (ii) if the vessel was not a CTL for partial loss and loss of hire; and (iii) sue and labour expenses incurred.

The insurers’ primary defence was that the claimants were in breach of a warranty in the policy, which was denied by the claimants. The insurers also disputed the extent of the damage to the vessel and the cost of repair. The insurers disputed that the vessel was a CTL and took issue with the claimants on their calculation of the alternative partial damage claim and as to their entitlement in that event to loss of hire cover. The insurers also disputed the amount and the period of the sue and labour expenses claimed.

A split trial was ordered, with the issue as to whether the vessel was a CTL and the other quantum issues to be tried first.

The issues for decision were:
(i) Was the vessel a CTL?
(ii) Have the claimants lost the right to claim for a CTL by the sale of the vessel?
(iii) If the vessel was not a CTL, what is the measure of indemnity recoverable by the claimants for a partial loss?
(iv) Are the claimants entitled to an indemnity for loss of hire?
(v) Are the claimants entitled to an indemnity for salvage, tug hire and port expenses incurred since the date of the casualty in respect of the vessel as: (a) salvage; (b) sue and labour; and/or (c) by reason of an election made by the insurers under section 63 or 79 of the Marine Insurance Act 1906?

The policy incorporated the Institute Time Clauses – Hulls (1.10.83) and also provided for cover against loss of hire. The policy also incorporated the LPO 454 wording.

Held, that on the evidence, the overall cost of repair exceeded the insured value of the vessel of US$55 million, so that the vessel was a CTL.

The court would reject the insurers’ submission that the owners had lost the right to claim for a CTL. The insurers were well aware throughout that the owners were proposing to sell the vessel and the insurers did not object to the sale. At all material times, the owners pressed the insurers to accept that the vessel was a CTL. The owners always intended to credit the insurers with the proceeds of sale in the event that a CTL claim was paid, in accordance with insurers’ requirements. In those circumstances, this was not a case where, in selling the vessel, the owners were acting solely for their own account and thereby acting inconsistently with a willingness to treat the vessel as abandoned. Rather this was a case where in selling the vessel the owners were acting in the interests of both themselves and the insurers, so that no question of revocation of the NOA or of loss of the right to claim for a CTL could arise (Royal Boskalis Westminster NV v Mountain [1997] 1 LRLR 523 considered).

Since the court had concluded that the vessel was a CTL and that the owners had not lost the right to claim for a CTL, it was not strictly necessary to address the alternative case as to the measure of indemnity recoverable for a partial loss, but the appropriate method for calculating depreciation under a valued policy was the actual depreciation in market value. Accordingly, the maximum indemnity for a partial loss would be US$9,500,000 as the insurers contended (Irvin v Hine (1949) 83 LJ L Rep 162; [1950] 1 KB 555 and The Catariba [1997] 2

EDITED BY MICHAEL DAICHES, BARRISTER
The policy made it clear that, save in the case of a CTL caused by blocking and trapping, the loss of hire cover would only respond in the case of a partial loss, not a CTL. Since the court had concluded that the vessel was a CTL, the loss of hire cover was inapplicable. However, in principle loss of hire cover would have been available if this had not been a case of constructive total loss (The Wondrous [1992] 2 Lloyd’s Rep 566 considered).

The claimants had claimed sue and labour expenses consisting of:

1. The owners’ proportion of the salvage award: US$2.343,703.65.

2. The cost of the various standby tugs from redelivery by the salvors on 7 October 2011 until the vessel was delivered to the purchasers on 15 March 2012, which totalled US$7,526,805.44.

3. Agency fees and disbursements in the sum of US$100,800.

The owners were clearly entitled to an indemnity in respect of their liability to the salvors. In relation to the other expenses of standby tugs and agency fees, the insurers had resisted liability on the basis that: (1) on completion of the salvage services on 7 October 2011 the peril covered by the war risks policy was no longer operating; and (2) sue and labour expenses were not recoverable at all after the notice of abandonment was served on 7 December 2011 or once the claim form was issued on 8 February 2012.

In the court’s view, even after redelivery by the salvors on 7 October 2011, the vessel remained in the grip of the original peril. A completely dead and disabled ship anchored in international waters without any tug assistance posed a serious and obvious danger not only to itself but to other shipping. However, the insurers were correct in contending that the entitlement to recover sue and labour expenses came to an end either once the notice of abandonment was served on 7 December 2011 or once the claim form was issued on 8 February 2012 (Kuwait Airways Corporation v Kuwait Insurance Co SAK [1996] 1 Lloyd’s Rep 664 considered).

Peter Macdonald Eggers QC, Tim Jenms and Richard Sarli (Hill Dickinson LLP for the owners and Reed Smith LLP for the mortgagee) for the claimants; David Goldstone QC and Nichola Warrender (Norton Rose Fulbright LLP) for the defendants.
COURT OF APPEAL

20–22 January; 1 April 2015

THE LONDON STEAM SHIP OWNERS
MUTUAL INSURANCE ASSOCIATION LTD
v
THE KINGDOM OF SPAIN AND ANOTHER
(THE “PRESTIGE”)
(NO 2)

[2015] EWCA Civ 333

Before Lord Justice MOORE-BICK,
Lord Justice PATTEN and
Lord Justice TOMLINSON

Arbitration — Award — Enforcement — P&I Club seeking to enforce arbitration awards for negative declaratory relief against Spain and France following loss of oil tanker Prestige — Whether defendants entitled to rely on state immunity — Whether defendants deemed to have submitted to English jurisdiction — Whether defendants agreed in writing to submit dispute to arbitration — State Immunity Act 1978, sections 2(3)(b) and 9(1).

In November 2002 the tanker Prestige sank off the coast of Spain. The resulting damage was very extensive and the costs of cleaning up exceeded the amount of the owners’ liability under the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC), in respect of which the owners were compulsorily insured by the claimant (the Club).

In late 2002 criminal proceedings were instituted in Spain against the master, chief officer and chief engineer, and in 2010 claims were brought by several Spanish legal entities, including the State Administration of Spain (Spain), against the vessel’s owners on the grounds that they were vicariously liable for the acts of the master. At about the same time the French authorities (France) joined the proceedings making similar claims. All the claims were made under provisions of the Spanish Penal Code which enabled a person who had suffered injury as a result of a criminal offence to recover damages in the criminal proceedings in respect of his loss.

In those proceedings Spain and France also made claims against the Club under article 117 of the Spanish Penal Code which enabled an injured party to pursue a direct claim against the defendant’s insurer. Those claims were based both on the Club’s obligation to indemnify the owners against their CLC liability and on its obligation to indemnify them against their independent liability for the tortious acts of the master, chief officer and chief engineer.

The CLC provided for direct action against insurers in respect of their obligations to indemnify owners in respect of their liability under it, and the Club acknowledged its liability to Spain and France in that respect. However, in relation to the other heads of claim it maintained that they were bound by the contract contained in the Club rules, which provided that it was to be governed by English law and that disputes were to be referred to arbitration. The rules also contained a “pay to be paid” clause, and the Club maintained that on the true construction of that clause it was under no liability to the claimants.

The Club played no part in the Spanish proceedings. However, it commenced London arbitration proceedings seeking negative declaratory relief in respect of any non-CLC liability to Spain and France. Neither Spain nor France participated in the arbitrations. In due course the arbitrator published awards granting the declarations which the Club sought.

Hamblen J held:

(i) that the claims being made by Spain and France against the Club were to be characterised in English law as claims to enforce English law obligations rather than independent Spanish statutory rights, and that those obligations could be enforced only in accordance with their terms, ie in arbitration and subject to the pay to be paid clause;

(ii) that Spain and France had become parties to the arbitration agreement in the Club rules and were therefore entitled to state immunity by virtue of section 9(1) of the State Immunity Act 1978;

(iii) that the claims were arbitrable; and
(iv) that it was appropriate in the exercise of his discretion to give permission to enforce the awards as judgments.

He therefore dismissed the applications of Spain and France for declarations that the awards had been made without jurisdiction and gave permission to the Club to enforce them as judgments.

Spain and France appealed.

——— Held by CA (Moore-Bick, Patten and Tomlinson LJ) that the appeal would be dismissed.

(1) Characterisation formed part of English conflict of law rules and was the means whereby the court identified the system of law by reference to which a particular issue between the parties was to be determined. In the present case the issue was whether the appellants were bound by the terms of the Club’s rules, in particular the arbitration clause and the “pay to be paid” clause, which depended on ascertaining the nature of the right which the appellants sought to enforce. Under the Spanish legislation the right conferred on the claimant was in substance one to enforce the contract of insurance. The nature and scope of the obligation was governed by the law under which it was created, ie the proper law of the contract, which was English law. Applying English law, if the appellants wished to pursue claims against the Club they had to do so in arbitration in accordance with the terms of the contract of insurance and subject to the “pay to be paid” clause (see paras 14, 25 to 30);


(2) A state was immune from proceedings save to the extent that it had consented to the jurisdiction either expressly or by taking a step in the proceedings of a kind that demonstrated an election to waive immunity. In making their applications for relief under sections 67 and 72 of the Arbitration Act 1996 the appellants took a step in the proceedings otherwise than for the sole purpose of claiming immunity. They were therefore deemed to have submitted to the jurisdiction pursuant to section 2(3)(b) of the State Immunity Act 1978 (see paras 46 and 50 to 53);


(3) By commencing proceedings in Spain the appellants formally asserted claims that were subject to arbitration agreements. The pursuit of such claims amounted to an adoption by the appellants of the arbitration agreements. It entitled the Club to refer the disputes to arbitration and it satisfied the requirement of section 9(1) of the State Immunity Act 1978 for an agreement in writing (see para 70);

——— The Hari Bhum (No 2) [2005] 2 Lloyd’s Rep 378, considered.

(4) The claims made by the appellants in the Spanish proceedings were arbitrable (see paras 77 to 82).
This was an appeal by the defendants The Kingdom of Spain and the French State against the decision of Hamblen J ([2014] 1 Lloyd’s Rep 309) granting permission to the claimant P&I Club to enforce two arbitration awards as judgments of the High Court. The awards granted the claimant negative declaratory relief against the defendants in relation to oil pollution damage following the loss of the vessel Prestige in November 2002.

Joe Smouha QC and Anna Dilnot, instructed by K&L Gates LLP, for Spain and France; Christopher Hancock QC and Charlotte Tan, instructed by Ince & Co LLP, for the Club.

The further facts are stated in the judgment of Moore-Bick LJ.

Judgment was reserved.

Wednesday, 1 April 2015

JUDGMENT

Lord Justice MOORE-BICK:

A. Background

1. These proceedings arise indirectly out of the sinking of the vessel Prestige off Cape Finisterre in November 2002. The vessel was carrying 70,000 tonnes of fuel oil, which escaped and polluted the Atlantic coastline of northern Spain and southern France when the vessel broke up. The resulting damage was very extensive and the costs of cleaning up far exceeded the amount of the owners’ liability under the International Convention on Civil Liability for Oil Pollution Damage 1992 (“CLC”), in respect of which they were compulsorily insured.

2. The facts giving rise to the proceedings are described fully in the judgment of Hamblen J, from which the following summary is largely drawn. In late 2002 criminal proceedings were instituted in Spain against the master, chief officer and chief engineer and in 2010, at the conclusion of the investigatory stage, claims were brought by several Spanish legal entities, including the State Administration of Spain (“Spain”), against the vessel’s owners on the grounds that they were vicariously liable for the acts of the master. At about the same time the French authorities (“France”) joined the proceedings making similar claims. All those claims were made under provisions of the Spanish Penal Code which enable a person who has suffered injury as a result of a criminal offence to recover damages in the criminal proceedings in respect of his loss.

3. In those proceedings Spain and France also made claims against the owners’ protection and indemnity insurers, The London Steamship Owners’ Mutual Insurance Association Ltd (“the Club”), under article 117 of the Spanish Penal Code which enables an injured party to pursue a direct claim against the defendant’s insurer. Those claims were based both on the Club’s obligation to indemnify the owners against their CLC liability and on its obligation to indemnify them against their independent liability for the tortious acts of the master, chief officer and chief engineer.

4. The CLC itself provides for direct action against insurers in respect of their obligations to indemnify owners in respect of their liability under it and accordingly the Club acknowledged its liability to Spain and France in that respect. However, in relation to the other heads of claim it maintained that they were bound by the contract contained in the Club rules, which provided that it was to be governed by English law and that disputes were to be referred to arbitration. The rules also contained a “pay to be paid” clause (see Firma C-Trade v Newcastle Protection and Indemnity Association (The Fanti and The Padre Island) [1990] 2 Lloyd’s Rep 191; [1991] 2 AC 1) and the Club maintained that on the true construction of that clause it was under no liability to the claimants.

5. The Club played no part in the Spanish proceedings. It did, however, commence arbitration in London seeking declarations that Spain and France were bound by the arbitration clause in its rules and that it was not liable under the contract. The references proceeded separately, but the same arbitrator, Mr Alistair Schaff QC, was appointed in each case. Neither Spain nor France agreed to the appointment of an arbitrator and it was therefore necessary for the Club in each case to obtain an order from the court pursuant to section 18 of the Arbitration Act 1996 in order to constitute the tribunal. In due course the arbitrator published awards granting the declarations which the Club sought.

6. The Club then applied under section 66 of the Arbitration Act 1996 for permission to enforce the awards as judgments of the High Court. Spain and France opposed those applications on the grounds that as states they were immune from proceedings by reason of the State Immunity Act 1978. However, in the course of those proceedings they themselves issued application notices seeking declarations under sections 67 and 72 of the Arbitration Act that the awards had been made without jurisdiction. The grounds on which they sought that relief were that the rights they sought to enforce against the Club arose under Spanish law independently of the contract of insurance. They also contended that the claims were by their nature not susceptible to arbitration.
7. The Club’s purposes in taking proceedings in this country were twofold: first, it wished to establish by what it considered to be the proper process that any liability it might have to Spain or France was subject to the terms of the contract as contained in the rules, ie, that it was subject to the “pay to be paid” clause and could be enforced only by arbitration; secondly, it wished to obtain a judgment in this country before judgment was delivered in the Spanish proceedings so that, if any attempt were made to enforce a Spanish judgment against it in this country, it could rely on article 34(3) of the Judgments Regulation. In the event, the Spanish proceedings did not result in the conviction of any member of the vessel’s crew of an offence which gave rise to a liability enforceable against the Club. However, an appeal is pending, the outcome of which might be different.

B. The decision below

8. The proceedings before Hamblen J occupied seven days, in the course of which the judge heard evidence from expert witnesses on Spanish law. He held:

(i) that the claims being made by Spain and France against the Club were to be characterised in English law as claims to enforce English law obligations rather than independent Spanish statutory rights, and that those obligations could be enforced only in accordance with their terms – ie in arbitration and subject to the “pay to be paid” clause;

(ii) that Spain and France had become parties to the arbitration agreement in the Club rules and were therefore not entitled to state immunity by virtue of section 9(1) of the State Immunity Act 1978;

(iii) that the claims were arbitrable; and

(iv) that it was appropriate in the exercise of his discretion to give permission to enforce the awards as judgments, because there was a real possibility that the resulting judgments would fall within article 34(3) of the Judgments Regulation and would prevent enforcement of any Spanish judgment in this country or elsewhere in Europe.

He therefore dismissed the applications of Spain and France for declarations that the awards had been made without jurisdiction and gave permission to the Club to enforce them as judgments.

9. This is the appeal of Spain and France against the judge’s orders. The judge gave permission to appeal in respect of his decisions on characterisation, state immunity and enforcement. He refused permission to appeal in respect of his decision on arbitrability, in respect of which the appellants sought permission from this court. In the event, the appellants abandoned their challenge to the exercise of the judge’s discretion, with the result that only three of the four issues just mentioned arise for consideration on this appeal.

C. Characterisation

10. As became apparent in the course of argument, the question of characterisation is closely linked to that of state immunity. Mr Smouha QC for the appellants preferred to address state immunity first, but I find it more convenient to begin with characterisation.

11. Characterisation forms part of the English conflict of laws rules and is the means whereby the court identifies the system of law by reference to which a particular issue between the parties is to be determined. For this purpose it is important to distinguish between claims and issues, since a single claim may give rise to several issues, not all of which are to be determined by reference to the same system of law. This point was emphasised by Auld LJ in Macmillan Ltd v Bishopsgate Investment Trust plc (No 3) [1996] 1 WLR 387, when he said at page 407B to C:

“Subject to what I shall say in a moment, characterisation or classification is governed by the lex fori. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and defence.”

12. In a similar vein Aldous LJ said at page 418A to B:

“I agree with the judge when he said [1995] 1 WLR 978, 988: ‘In order to ascertain the applicable law under English conflict of laws, it is not sufficient to characterise the nature of the claim: it is necessary to identify the question at issue’. Any claim, whether it be a claim that can be characterised as restitutionary or otherwise, may involve a number of issues which may have to be decided according to different systems of law. Thus it is necessary for the court to look at each issue and to decide the appropriate law to apply to the resolution of that dispute.”

13. Questions very similar to those which arise in the present case arose in Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 1) [2004] 1 Lloyd’s Rep 206. In para 16 of my judgment in that case I said in a passage subsequently approved by this court:

"16. The issue in the present case is whether New India is bound by the arbitration clause which in turn depends on whether it is seeking
to enforce a contractual obligation derived from the contract of insurance or an independent right of recovery arising under the Insurance Contracts Act. If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterised as one of statutory entitlement to which there may be no direct equivalent in English law. In that case the issue would in my view have to be determined in accordance with Spanish law. If, on the other hand, the claim is in substance one to enforce against the insurer the obligation made by the insolvent insured, the issue is to be characterised as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law: see Adams v National Bank of Greece.”

14. As in Through Transport, the issue in the present case is whether the appellants are bound by the terms of the Club’s rules, in particular the arbitration clause and the “pay to be paid” clause which depends on ascertaining the nature of the right which the appellants seek to enforce. Two possibilities present themselves: a right to enforce an obligation defined by the contract of insurance and an independent statutory right created by Spanish legislation and independent of the contract. The judge held that it was the former. The essence of his reasoning is to be found in paras 87 to 89 of his judgment where he said:

“87. In all these cases both the law creating the right of direct action and the existence and validity of the contract made subject to the direct action will be essential prerequisites of the third party’s right. Both are necessary to the existence of that right. In my judgment, in deciding whether or not the direct action right is ‘in substance’ a claim to enforce the contract or a claim to enforce an independent right of recovery, what is likely to matter most is the content of the right rather than the derivation of that content. It is the content of the right which will be the most telling guide to what ‘in substance’ that right is.

88. The essential content of the right is provided by the contract. Save for the article 76 exceptions, the third party’s right is as set out in and defined by the contract. It is the contract that must be looked to in order to determine whether there is any right to recover from the insurer and, if so, on what basis and with what limitations. In many cases the contract is all that will need to be considered. In the present case, for example, there is no suggestion of wilful misconduct by the assured or of ‘personal’ defences arising. In those circumstances the third party’s rights will be determined solely by reference to and by the contract.

89. Whilst it is correct that the source of the right is the law rather than the contract that will always be the case where there is a right of direct action. By definition the third party is not a party to the contract so that his right will have to arise elsewhere, almost invariably under a direct action statute. Because the right is one which is created by law/statute it will also be the law/statute which defines the content of the right even if, as here, it does so by reference to the contract. The law/statute will usually also set out anti-avoidance provisions or other limitations on the insurer’s contractual rights. The key features which are relied upon by the defendants are therefore features that are likely to be present in most direct action cases. In Through Transport, for example, the direct action right was created by the Finnish Act; it was the Finnish Act which determined that the right was to be one to claim compensation in accordance with the contract, and it was the Finnish Act which rendered void any contractual provisions which derogated from the protection provided under it. It was nevertheless held to be in substance a right to enforce the contract.”

15. This approach was subsequently accepted as correct and applied by Teare J in Shipowners’ Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu) [2015] 1 Lloyd’s Rep 567, to which our attention was drawn after the conclusion of the argument.

16. Mr Smouha QC submitted, however, that the judge’s analysis was flawed because he concentrated too much on the content of the liability imposed on the Club by Spanish law and too little on its source and essential nature. He ought to have paid closer regard to the provisions of Spanish law and the nature of the right to which they give rise. Had he done so, he would have concluded that in this case, unlike Through Transport, the right was an independent statutory right created by Spanish law and that its content was to be determined in accordance with Spanish law. Accordingly, if (which has not been determined) Spanish law would not give the same effect to the “pay to be paid” clause as English law, it would not operate to defeat the appellants’ claim. In response Mr Hancock QC submitted that the judge was right to have regard primarily to the content of the liability which the appellants are seeking to enforce. He submitted that, since Spanish law accepts that (subject to certain exceptions) the direct claim against the insurer reflects the terms of the contract of insurance, the distinction between the nature and content of the insurer’s liability is
(i) Spanish law

17. The starting point of the enquiry must be the terms of the Spanish legislation. The judge heard evidence from Spanish lawyers and made a number of findings which, since they are not the subject of any appeal, must be accepted in full. He set out his findings about the legislative background in paras 59 to 63 of his judgment. Of particular importance are article 76 of the 1980 Insurance Contract Act and articles 109, 116 and 117 of the Penal Code.

18. Article 76 of the 1980 Act, which is concerned with the right to bring a direct action against a civil liability insurer, provides (in translation) as follows:

"The injured or aggrieved party or their heirs shall be entitled to a direct action against the insurer to demand of him the fulfillment of the obligation to compensate, without prejudice to the insurer’s right to recover from the insurer in the event that the damage or injury to the third party was caused by the willful misconduct of the insured. Direct action shall be exempt from the defences that the insurer may have had in respect of the insured. The insurer may, however, allege that the insured party is exclusively liable and may also raise the personal defences he may have in respect of the injured party. For the purposes of bringing direct action, the insured shall be obliged to inform the injured party or their heirs of the existence of an insurance contract and the content of the same.”

19. Articles 109, 116 and 117 of the Penal Code are concerned with civil claims in criminal proceedings. They provide as follows:

“Article 109
Perpetration of an act defined as a felony or misdemeanour by Law shall entail, pursuant to the provisions contained in the laws, repairing the damages and losses caused thereby.

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

... Article 116
1. All persons held criminally accountable for a felony or misdemeanour shall also be held liable under Civil Law if the fact gives rise to damages or losses. If two or more persons are responsible for a felony or misdemeanour, the Judges or Courts of Law shall set the proportion for which each one must be held accountable.

Article 117
Insurers that have underwritten the risk of monetary liabilities arising from use or exploitation of any asset, company, industry or activity when as a consequence of a fact foreseen in this code, an event takes place covered by the risk insured, shall have direct civil liability up to the limit of the legally established or contractually agreed compensation, without prejudice to the right to bring an action for recovery against who such may be appropriate.”

20. The judge found that the direct action contemplated by article 117 has the same nature and is subject to the same legal regime as that contemplated by article 76 of the 1980 Act.

21. As one would expect, the legislation has been the subject of judicial exposition. In para 65 the judge cited at length from a judgment of the Provincial Court of Madrid, which he found contained a correct exposition of Spanish law. It included the following:

“It should be emphasised that this direct action of the wronged third party against the insurer [i.e the right of direct action under article 76] can be exercised both within civil and criminal jurisdictions (if the accident covered by the insurance has a criminal nature and the insured party is criminally liable).

II. In principle, for the direct action of the wronged third party against the insurer to be successful, it is essential that if it was exercised by the insured party against the insurer, that it was also successful. However this general rule has two clear exceptions in Article 76 of the Insurance Contract Law (LA LEY 1957/1980), in which, despite the fact that the insurer is not obligated to indemnify the insured party for the accident that occurred, nevertheless, it is obligated to indemnify a wronged third party when the direct action is exercised by them. Of course, in these two cases, the insurer is granted the right to a recovery action against the insured party in order to recover the amount of money with which the wronged third party was indemnified.

The first of these two exceptions is when the damage caused to the wronged third party is due to the malicious behaviour of the insured party.

... The second of these two exceptions is when the insurer is obligated to pay the indemnity to the wronged third party because it is prevented from bringing up to challenge them, in their exercise of this direct action, any exception that it would have otherwise been able to bring up to challenge the insured party.

So, when faced with a wronged third party who exercises such direct action, the insurer can oppose all the ‘defences’ that it deems convenient, and specifically, those referring to the lack of facts constituting the third party’s right (which should be operative even when they
have not been alleged by the insurer, if the Judge believes that these facts constituting the right of the claimant have not been proven, then the action that is being exercised would not have been brought about, and would be inexistent). These ‘defences’ or exceptions in a broad sense are the following:

(a) Inexistence of a civil liability insurance policy between the insurer and the insured party or the extinguishing of this contractual legal relationship.

(b) The absence of the right of the wronged third party to compensation, due to the absence of one or more of the requirements necessary for the civil liability of the insured party to be relevant with respect to the wronged third party.

(c) The right of the third party is outside the coverage of the insurance policy: the objective limits to the insurance policy’s coverage will determine the substantial contents of the insurer’s obligation, such that the right of the wronged third party will have been produced with respect to the insured party, but this is exclusively covered by the insurer against the creation of the obligation to indemnify for acts established in the policy the results of which are civilly liable; This is deduced from the formation of Article 76 of Law 50/1980, dated October 8, regarding Insurance Contracts (LA LEY 1957/1980) which follows precisely from the precept that said that the wronged party will have the ability to take ‘direct action against the insurer in order to demand from it compliance with the obligation to indemnify, within the limits established by applicable regulations, in the case of obligatory insurance, or due to the contract, in the case of voluntary insurance’ (article 108 of the Draft Bill of 1969), a paragraph that was eliminated in the subsequent Draft Bill (Article 76 of the Draft Bill of 1970) because its contents were considered obvious, and therefore its declaration unnecessary. It is also deduced from the need for it to be related to the first sentence of Article 76, which grants the wronged third party or its inheritors the action to demand from the insurer compliance with its obligation to indemnify, with Article 1, which reduces the obligation to indemnify on the part of the insurer up to the ‘limits agreed upon’, and with Article 73, which also adheres to this obligation, on the part of the insurer, to indemnify up to the “limits established in the Law and in the policy.”

The insurance coverage comes to be contractually defined by the clauses delimiting the insured risk and by the limiting clauses of the right of the insured party to charge the indemnity produced by the accident, where both the former (those that delimit risk) and the latter (those limiting the rights of the insured party) can be challenged by the insurer, when faced by a wronged third party who exercised direct action.

22. The judge found in para 66 that:

“... the general rule and starting point is that the third party can only claim against the insurer if and to the extent that the assured would also have been able to claim against the insurer, subject to the specific exceptions laid down in article 76 itself.”

23. Having considered the evidence of the experts relating to personal defences and to certain points of disagreement between them, he found in para 82 that:

“In so far as it is necessary to make any findings as to whether the direct action right is an independent right as a matter of Spanish law, I find that it is independent in origin but not in content. It derives from the law rather than the contract, but it does not exist separately from the contract and its content reflects the contract, save for the article 76 exceptions. If it is not necessary to choose whether or not that means that it is an independent right I find that it is not, for the reasons given by Dr Ruiz Soroa, as outlined above.”

(ii) The nature of the right against the insurer

24. As the judge pointed out in para 87, whenever legislation gives a third party a right to make a direct claim against an insurer by reference to the terms of the contract of insurance both the statutory and contractual rights are involved. The third party would have no right to claim against the insurer but for the right given him by statute, but the content of that right is defined largely, if not entirely, by the contract. It is for this reason that I find the distinction between the source of the claimant’s right and the content of that right somewhat sterile. In some cases, of which Through Transport is an example, the terms of the legislation make it reasonably clear that the claimant is intended to be given a right to enforce the contract in place of the insured. In that case section 67 of the Finnish Insurance Contract Act 1994 provided that:

“A person who has sustained bodily injury, property damage or financial loss under general liability insurance is entitled to claim compensation in accordance with the insurance contract direct from the insurer if... the insured has been declared bankrupt or is otherwise insolvent.” (Emphasis added.)
It was not difficult in that case to infer that the intention of the legislature was to enable claimants to enforce the contract of insurance against the insurer in place of the insured.

25. In my view the critical question is what, in substance, was the nature of the right that the legislation was seeking to confer on the third party. Where a wrongdoer is insured against liability of some kind it will be possible to identify an insurer who may be held liable in his place, but, unless the legislation is intended to work in an arbitrary fashion, it will be necessary to establish that the contract covers the liability in question. That in turn means ascertaining the limits of the insurer’s obligation, which also means that he should be able to raise any defences that would be available to him in an action brought by the insured. If the legislation conferring a direct right of action against the insurer recognises that in substance that is the case, it is difficult to resist the conclusion that its intention and effect is to enable the third party to enforce the insurer’s same obligations as those that could have been enforced by the insured himself. If, on the other hand, the legislation prevents the insurer from relying in defence of a claim on important provisions which define the scope of his liability, one may be driven to the conclusion that the legislation has created a new right which is not intended to mirror in substance the insurer’s liability under the contract.

26. In some cases it may not be easy to decide on which side of the line the case falls, but the court must ultimately determine whether the right conferred on the claimant is in substance one to enforce the obligation created by the contract of insurance or one to enforce a liability which is independent of the contract. In the former case the nature and scope of the obligation will be governed by the law under which it was created, in a case of this kind the proper law of the contract. In the latter it will be governed by the law of the country whose legislation created it. One useful indication may be the extent to which the law creating the right of direct action seeks to modify the scope of the obligation to which the contract would otherwise give rise. In the case of articles 76 and 117, Spanish law recognises that the third party’s right to claim against the insurer is to be determined by the terms of the contract, save for the exclusion of certain “personal defences” on what appear to be public policy grounds. The fact that the right to recover against the insurer is largely defined by the terms of the contract and that under Spanish law those relatively limited modifications to the contractual obligation are recognised both point to the conclusion that the effect of the legislation is in substance to enable the claimant to enforce the obligations arising under the contract of insurance.

27. Mr Smouha QC drew our attention to two matters which he said pointed to the conclusion that the liability of the insurer is treated as sounding in tort rather than contract and so as arising independently of the contract of insurance. The first concerns the judge’s finding about the meaning of the first sentence of article 76 of the 1980 Act, which provides that:

“The injured or aggrieved party or their heirs shall be entitled to a direct action against the insurer to demand of him the fulfilment of the obligation to compensate . . .”

The judge found that “the obligation to compensate” refers to the insured’s obligation to compensate the third party, so that the effect of article 76 is to give the third party a right to recover from the insurer the compensation that he is entitled to recover from the insured wrongdoer.

28. The second is the fact that the limitation period applicable to a claim under articles 76 and 117 is the one-year period applicable to claims in tort rather than the two-year period applicable to claims under contracts of insurance.

29. I do not think that either provides any real support for his argument. Whether the claim is treated by Spanish law as sounding in tort rather than contract is beside the point. What matters is the essential nature and scope of the right conferred by the legislation. If, as the judge has found, the legislation confers on the third party a right to recover damages from the insurer but only to the extent that the contract of insurance allows, it is necessary to look to the contract of insurance to determine the extent of that right. That is simply another way of saying that in substance the third party is given a right to enforce the contract against the insurer. Since that contract is governed by English law, it is necessary to turn to English law to determine the scope of the insurers’ liability and the terms on which it may be enforced.

30. It is important to remember that the court is concerned with the characterisation of issues rather than claims and that the relevant issues for present purposes are whether the Club’s liability can be enforced only in arbitration and whether the “pay to be paid” clause operates to defeat a claim under the policy. Both questions relate to the content of the obligation. In my view, therefore, the judge was right to concentrate on the substance of the obligation, by which I understand him to have meant its scope and content. This case differs from Through Transport in as much as article 76 of the 1980 Act is not couched in terms of enforcing the contract of insurance, but on the judge’s findings it seems to me that that is what in substance it entails and there is a clear finding that article 117 of the Penal Code has the same effect. For these reasons I
have reached the conclusion that 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 they 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.

D. State immunity

31. Mr Smouha QC submitted that the appellants, as sovereign states, were not subject to the jurisdiction of the English courts unless it could be shown they had brought themselves within the scope of one of the exceptions set out in sections 2 to 11 of the State Immunity Act 1978; see section 1. The judge held, following my decision in Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 2) [2005] 2 Lloyd’s Rep 378, that the appellants had become parties to the arbitration agreement as a result of making a claim against the Club in the Spanish proceedings, but Mr Smouha QC submitted that his decision was wrong, because the requirement of section 9(1) of the State Immunity Act for an agreement in writing can be satisfied only by a written manifestation, authenticated by an authorised signatory, of the state’s consent to refer the relevant dispute to arbitration. No such agreement had been made in this case. In response to the Club’s contention that the appellants had submitted to the jurisdiction in the manner contemplated by sections 2(3) (instituting or taking a step in the proceedings) and 3(1)(b) (becoming parties to an obligation which falls to be performed in the United Kingdom) he submitted that neither appellant had instituted or taken a step in any proceedings of a kind which evidences an unequivocal election to waive immunity and allow the court to determine the claim on its merits: see per Nourse LJ at page 32 col 2 to page 38 col 1.

32. Mr Hancock QC accepted that the starting point for the purposes of any discussion of state immunity was section 1 of the State Immunity Act 1978, which provides that a state is immune from the jurisdiction of the courts of the United Kingdom except as provided in Part I of the Act. He submitted, however, that neither appellant was entitled to immunity in respect of the proceedings under section 66 of the Arbitration Act 1996 because both had agreed in writing within the meaning of section 9(1) of the State Immunity Act to submit to arbitration the dispute relating to the arbitrator’s jurisdiction and the Club’s liability. He also submitted that proceedings under section 66 of the Arbitration Act related to an obligation which by virtue of a contract fell to be performed in the United Kingdom within the meaning of section 3(1)(b) of the State Immunity Act and that in any event, by seeking relief under sections 67 and 72 of the Arbitration Act, each of the appellants had instituted their own proceedings or had taken a step in the Club’s proceedings and were therefore to be deemed to have submitted to the jurisdiction under section 2(3) of the State Immunity Act.

(i) A step in the proceedings

33. It is convenient to begin by considering the third of those questions, which in my view yields a clear answer to this limb of the appeal. Section 2 of the State Immunity Act provides, so far as material, as follows:

“(3) A State is deemed to have submitted:
(a) if it has instituted the proceedings; or
(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of:
(a) claiming immunity . . .”

34. In Kuwait Airways Corporation v Iraqi Airways Co [1995] 1 Lloyd’s Rep 25 this court considered what constitutes a step in the proceedings for the purposes of section 2(3)(b). All three members of the court held that it is a step of a kind which evidences an unequivocal election to waive immunity and allow the court to determine the claim on its merits: see per Nourse LJ at page 32 col 1, Leggett LJ at page 34 col 1 and Simon Brown LJ at page 37 col 2 to page 38 col 1.

35. Mr Hancock QC submitted that by their conduct both appellants had demonstrated their willingness for the English court to assume jurisdiction over them for the purposes of determining the Club’s application. In the case of Spain, the failure to challenge the court’s jurisdiction in accordance with CPR Part 11 following the filing of an acknowledgment of service amounted to a submission to the jurisdiction in accordance with rule 11(5): see Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] 1 Lloyd’s Rep 475. In the case of France, the failure to file an acknowledgment of service or to challenge the court’s jurisdiction amounted to a submission to the jurisdiction. Moreover, both appellants had filed evidence contesting the Club’s applications on their merits and both had initiated proceedings seeking relief under sections 67 and 72 of the Arbitration Act 1996.

36. Mr Smouha QC submitted that CPR Part 11 does not apply to states that wish to claim immunity
under the State Immunity Act. In this case both appellants made it clear at the outset that they did not submit to the jurisdiction and wished to claim immunity. That, he said, was sufficient to preserve their right to do so, since a state does not lose its right to immunity simply because it also contests the proceedings on the merits. The proceedings under section 67 and 72 were to be regarded as merely consequential on the position taken in response to the Club’s application.

37. CPR Part 11 is entitled “Procedure for disputing the court’s jurisdiction” and provides, so far as material, as follows:

“(1) A defendant who wishes to:
(a) dispute the court’s jurisdiction to try the claim; or
(b) argue that the court should not exercise its jurisdiction
may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court’s jurisdiction.

(4) An application under this rule must:
(a) be made within 14 days after filing an acknowledgment of service; and
(b) be supported by evidence.

(5) If the defendant:
(a) files an acknowledgment of service; and
(b) does not make such an application within the period specified in paragraph (4), he is to be treated as having accepted that the court has jurisdiction to try the claim.”

38. The judge held that, whatever may be the position under English procedural law, a state will not be held to have taken a step in the proceedings for the purposes of section 2(3)(b) of the State Immunity Act unless it has acted in a positive way that is sufficient to constitute an election not to insist on immunity. He found that both Spain and France had made their positions clear and that neither had acted in such a way as to waive immunity.

39. Although their positions are very similar, it is convenient to deal with the appellants separately.

(a) Spain

40. The award against Spain was published on 13 February 2013. On 14 March 2013 the Club issued proceedings under section 66 of the Arbitration Act, which it served on Spain pursuant to an order granted by Andrew Smith J for service out of the jurisdiction. On 14 May 2013 Spain filed an acknowledgment of service in which it stated its intention to apply to set aside the order granting permission for service out of the jurisdiction and reserved all its rights. However, it did not complete the box headed: “I intend to dispute the court’s jurisdiction”, nor did it make an application to set aside the order for service out or take any other practical steps to dispute the court’s jurisdiction to hear the Club’s application. Accordingly, although it made it clear that it contested the jurisdiction of the arbitrator, it did not state clearly that it disputed the jurisdiction of the court to determine that question. Indeed, were it not for the final sentence one would have understood that it was content for the court to deal with the question on its merits. However, the final sentence read as follows: “The defendant will rely on grounds of challenge available under the Arbitration Act 1996 and also under the Sovereign Immunity Act [sic] 1978”. The sentence is a little opaque, but in my view it is sufficient to prevent the document being treated as an unequivocal election to submit to the jurisdiction.

41. On 21 June 2013 the solicitors acting for Spain wrote to the Club indicating their intention to make an application to the court to dispute the jurisdiction, but in the event they failed to do so. In that letter they set out the grounds on which they said their client would be challenging the award, the first of which was in fact a claim to immunity under the State Immunity Act.

42. On 28 June 2013 Spain applied for an extension of time within which to file evidence in response to the Club’s application and to issue proceedings under sections 67 and 72 of the Arbitration Act seeking a declaration that the award had been made without jurisdiction. No application was made for an extension of time in which to dispute the court’s jurisdiction. In his witness statement served in support of the application Spain’s solicitor, Mr Meredith, reserved the right “to raise any and all available arguments to resist recognition and enforcement of the award arising out of the State Immunity Act 1978”, but did not state in terms that Spain intended to seek permission to make an application to dispute the court’s jurisdiction. At the same time he dealt with the merits of the Club’s application to enforce the award, asking the court in the exercise of its discretion not to grant the relief sought.

43. On 5 August 2013 Spain issued an application for relief under sections 67 and 72 of the Arbitration Act and at the same time filed a second statement by Mr Meredith opposing the Club’s application under section 66 and supporting Spain’s own application. Spain did not make any formal application to dispute the court’s jurisdiction, but in his witness statement
Mr Meredith said: “If it is correct that there was no valid arbitration agreement, [Spain is] immune from suit on the basis of the State Immunity Act 1978”. The court was then invited to dismiss the Club’s application on the merits.

44. On the face of it, Spain’s issue on 28 June 2013 of an arbitration claim form seeking extensions of time might be said to be a step in the proceedings, but since all that Spain was seeking at that stage was further time to challenge in one way or another the claim against it, I think it is difficult to regard it as amounting to an unequivocal election to allow the court to determine the issue on the merits. That is all the more so when viewed in the context of the reference to the State Immunity Act in the evidence filed in support of the application. I do not think it possible to treat any of these steps as steps in the proceedings taken otherwise than for the purpose of claiming immunity.

45. Mr Hancock QC submitted that it is for English procedural law to prescribe the means by which a state which has been served with proceedings can establish a claim to immunity under the Act. He argued that CPR Part 11 does not apply to a defendant who wishes to challenge the jurisdiction of the court to file an acknowledgment of service and make the necessary application. A failure to do so will, he submitted, constitute a positive election to submit to the jurisdiction pursuant to rule 11(5). Support for that proposition can be found in Dickinson, Lindsay and Loonam, *State Immunity*, para 4.081. Mr Smouha QC submitted that CPR Part 11 does not apply to a claim to state immunity; there must be a step in the proceedings otherwise than for the purpose of claiming immunity, if it is to be lost.

46. In my view it is obviously desirable that if a party wishes to challenge the jurisdiction of the court it should do so in an orderly way. It is also desirable that the rules of procedure should prescribe the manner in which challenges to the court’s jurisdiction should be made, as Part 11 does. However, unlike the extra-territorial jurisdiction which the court exercises in accordance with Part 6 of the Rules and which is derived from generally recognised principles of private international law, state immunity rests on principles of consent derived from customary public international law now codified in the State Immunity Act 1978. Subject to the specific exceptions set out in sections 2 to 11 of that Act, the general rule is that a state is immune from proceedings, save to the extent that it has consented to the jurisdiction, either expressly or by taking a step in the proceedings of a kind that demonstrates an election to waive immunity. It is for this reason that merely filing an acknowledgment of service does not amount to a waiver of immunity.

In those circumstances I do not think that a state which has filed an acknowledgment of service but has failed to take any action to challenge the jurisdiction of the court can be treated by virtue of rule 11(5) as having submitted to the jurisdiction. Contrary to Mr Hancock QC’s submission, it has not taken a “negative” step in the action of a kind that is inconsistent with an assertion of immunity. The situation in the present case is quite different from that which obtained in *Maple Leaf v Rouvroy*, which concerned only the submission of a private party to the jurisdiction for the purposes of the Judgments Regulation.

47. That brings me to Mr Hancock QC’s submission that, whatever may be the position in relation to the Club’s proceedings under section 66 of the Arbitration Act, Spain is not entitled to claim immunity in relation to the proceedings under sections 67 and 72, which it commenced itself. Moreover, having by that means waived immunity in relation to the determination of the arbitrator’s jurisdiction, it waived immunity in relation to the determination by the court of the Club’s application under section 66.

48. The judge dealt with this issue briefly, holding that Spain’s position throughout had been that it was disputing the jurisdiction of both the court and the arbitrator. A state is not entitled to claim immunity in relation to proceedings which it has itself commenced; section 2(3)(a) of the State Immunity Act; by doing so it has clearly consented to the court’s determining the claim and so has elected to waive any right to immunity. It is true, as the judge said, that until it issued its application notice Spain had generally made it clear that it was reserving its position in relation to immunity. It can also be said that its application, apart from having been made in the proceedings brought by the Club rather than by way of separate originating process, was no more than a corollary of the stance it had taken in relation to those proceedings.

49. If the application had been issued only for the purposes of claiming immunity, it would not have constituted a relevant step in the proceedings: see section 2(4)(a); but in fact by its application notice Spain sought a declaration that the arbitrator did not have substantive jurisdiction because there was no arbitration agreement between itself and the Club. The application notice, therefore, was directed to the substantive grounds for setting aside the award and had nothing to do with Spain’s right to claim immunity from the jurisdiction of the court. Nonetheless, Mr Smouha QC submitted that a state is entitled to resist enforcement at the same time as it claims immunity and that in this case Spain was forced by the compressed timetable sought by the Club to pursue its substantive objections to the
Club’s application concurrently with its claim to immunity in order to avoid being prevented from pursuing them at all.

50. The decision in Kuwait Airways v Iraqi Airways makes it clear that section 2(4) of the Act is a relieving section, that is, it presupposes that the state has taken a step in the action: see per Nourse LJ at page 31 col 2. I accept that a state which wishes to claim immunity is not precluded from taking steps at the same time to resist enforcement, for example, by applying to set aside a default judgment, and that the acid test by which to determine whether it has taken a step in the proceedings otherwise than for the sole purpose of claiming immunity is whether it has acted in such a way as to demonstrate that it is willing to allow the court to determine the substance of the dispute. However, I do not think that it is enough in this case to say that Spain had made clear its intention to claim immunity; it is necessary to consider how it actually conducted itself in relation to the proceedings. The reference to state immunity in Mr Meredith’s witness statement did not make it clear that the only purpose of issuing the application under sections 67 and 72 was to claim immunity; indeed, it could hardly do so, given the nature of the relief sought. On the contrary, in the witness statement immunity was said to exist if there was no valid arbitration agreement. It is difficult to resist the conclusion, therefore, that Spain was positively inviting the court to determine whether the arbitrator had jurisdiction, which was the principal issue raised by the Club’s application.

51. I can well understand that Spain felt itself to be under pressure to agree to an early hearing and did not want to allow its argument on the arbitrator’s jurisdiction to go by default, but in the light of the Club’s request for expedition it had to decide what course to take. It chose to apply for relief under sections 67 and 72 of the Arbitration Act and in doing so it took a step in the proceedings otherwise than for the sole purpose of claiming immunity. It is therefore deemed to have submitted to the jurisdiction under section 2(3)(b) of the State Immunity Act.

(b) France

52. The Club’s application to enforce the award against France was issued on 9 July 2013. It was served on 24 July 2013 pursuant to an order of Eder J giving permission to serve out of the jurisdiction. On 13 August the solicitors acting for France wrote to the Club seeking its agreement to have the proceedings heard at the same time as those against Spain. The Club agreed. No acknowledgment of service was filed and no application was made to dispute the court’s jurisdiction. On 19 August 2013 France issued an application in the Club’s proceedings seeking relief under sections 67 and 72 of the Arbitration Act. Mr Meredith’s statement supporting the application was in substantially the same terms as that filed in support of the application made by Spain. For the reasons given in relation to Spain’s application, I consider that the issue of the application notice constituted a step in the proceedings within the meaning of section 2(3)(b) of the State Immunity Act.

53. For all these reasons I am satisfied that the appellants must be regarded as having submitted to the jurisdiction pursuant to section 2(3)(b) of the State Immunity Act 1978.

54. This makes it unnecessary to decide whether the appellants have also submitted to the jurisdiction under either or both of sections 9(1) or 3(1)(b).

However, since both questions were fully argued I propose to state my views on them.

(ii) Section 9(1) of the State Immunity Act

55. Section 9(1) of the State Immunity Act 1978 provides as follows:

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

56. The judge held, applying the decision in Through Transport (No 2), that when a person makes a claim under an insurance policy containing an arbitration clause he becomes a person claiming under or through a party to the arbitration agreement and thereby a “party” to the arbitration by virtue of section 82(2) of the Arbitration Act 1996. He recognised, however, that that was but the first step in the analysis and went on to consider whether that was sufficient to bring a state within the scope of section 9(1) of the State Immunity Act. He held that it was, in part because he could see no reason why the expression “agreement in writing” should mean different things in the two Acts and partly because, in his view, the purpose of section 9(1) was to ensure that a state which became bound to pursue a claim (if at all) by arbitration in London was bound to accept the supervisory jurisdiction of the English courts if it chose to pursue that claim. In his view that conclusion was reinforced by the decisions of Gross J in Ministry of Trade of the Republic of Iraq v Tsavliris Salvage (International) Ltd (The Alhair) [2008] 2 Lloyd’s Rep 90 and of Gloster J and this court in Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2) [2006] 1 Lloyd’s Rep 181; (CA) [2006] EWCA Civ 1529; [2007] 1 Lloyd’s Rep 193; [2007] QB 886.

57. In Through Transport (No 2) no question of state immunity arose, because the person seeking to make a claim against the Club was an Indian
insurance company, New India Assurance Co Ltd. The only question for decision was whether that company had become a party to the arbitration agreement for the purposes of an application to the court under section 18 of the Arbitration Act. Under section 18(2) any party to an arbitration agreement may apply to the court to exercise its power to appoint an arbitrator. The arbitration clause in the Club’s rules provided that any dispute or claim should be referred to arbitration in London. I held that the assertion of a claim by New India and its rejection by the Club caused a dispute to arise and that, because New India was claiming to enforce the obligation contained in the contract of insurance, it was claiming “under or through” the insured. It therefore became a party to the arbitration agreement within the meaning of the Act and so amenable to the supervisory jurisdiction of the English courts.

58. Mr Hancock QC submitted that the same principles apply when a state seeks to enforce an obligation that is subject to an arbitration agreement. In principle that may be so, but it does not necessarily answer the question whether the state has agreed in writing to submit the dispute to arbitration within the meaning of section 9(1) of the State Immunity Act. Mr Smouha QC submitted that section 9(1) should be interpreted in the context of customary international law, in which consent is the foundation of the submission by one state to the courts of another. For that purpose nothing less than express consent will do. In support of that submission he drew our attention to the “Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries” (“Draft Articles”) adopted by the International Law Commission in 1991. He submitted that whatever else the appellants had done in this case, neither of them had entered into an agreement in writing to refer present or future disputes to arbitration.

59. The Draft Articles do not deal directly with the principles by which states become parties to arbitration agreements, but they do lend support to Mr Smouha QC’s submission that consent lies at the root of the submission by one state to the jurisdiction of the courts of another. Thus, article 7, which is headed “Express consent to exercise of jurisdiction” states the proposition in negative terms as follows:

“1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:
   (a) . . .
   (b) in a written contract . . .”

60. The commentary states:

“(3) . . . The obligation to refrain from subjecting another State to its jurisdiction is not an absolute obligation. It is distinctly conditional upon the absence or lack of consent on the part of the State against which the exercise of jurisdiction is being sought.

(4) Consent, the absence of which has thus become an essential element of State immunity, is worthy of the closest attention . . . This unwillingness [sc to submit to the jurisdiction] or absence of consent is generally assumed, unless the contrary is indicated . . . . There must be proof or evidence of consent to satisfy the exercise of existing jurisdiction or competence against another State.”

61. In relation to arbitration article 17 provides as follows:

“If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity or interpretation of the arbitration award;
(b) the arbitration procedure . . .”

62. It is true that in Belhaj v Straw [2015] 2 WLR 1105 the court was unwilling to accept the Draft Articles (which have yet to come into force) as a statement of customary international law, but the passages to which I have referred are illustrative of a basic principle that is widely accepted and were relied on by Mr Smouha QC for no more than that. It is unnecessary to determine the extent to which they may be of assistance in resolving more difficult issues.

63. A question similar to that which arises in this case arose for consideration in Svenska. In that case the government of Lithuania had signed an agreement between Svenska and a state-owned oil company for the exploitation of certain oil reserves under a rubric stating that it acknowledged itself to be bound as if it were a signatory. The agreement contained an ICC arbitration clause and a waiver of sovereign immunity. The government of Lithuania argued that it was generally recognised by tribunals dealing with international disputes that nothing less than express consent to the jurisdiction of the arbitrators was sufficient to hold a state a party to an arbitration agreement, a proposition which was said to reflect customary international law. In fact, however, the authorities on which it relied demonstrated little more than that a state will not be held to be a party to an arbitration agreement simply
by virtue of the fact that it has put forward one of its own state organisations as a party to the contract.

64. In Svenska the arbitrators had jurisdiction under the ICC rules to decide whether the government of Lithuania had agreed to refer the particular dispute to arbitration. They published an award holding that, by indicating its intention to be bound by the terms of the agreement, it had done so and the award was not open to challenge. This court held that that was sufficient to bring the case within section 9(1) of the State Immunity Act, but in that case the arbitration agreement was contained in a document which had been signed by the government of Lithuania in order to express its willingness to be bound by its terms. In the present case, by contrast, although there was an arbitration clause in the Club rules, those rules had not been signed or otherwise adopted in writing by either of the appellants. Insofar as they adopted the arbitration clause at all, they did so only by bringing proceedings in Spain to enforce against the Club an obligation which was subject to an arbitration clause.

65. The questions for decision, therefore, are: (a) whether the appellants consented to arbitration; and (b) if so, whether it is sufficient to satisfy section 9(1) of the State Immunity Act that a state has consented to arbitration in accordance with terms recorded in writing. If it were not for the fact that the appellants had brought proceedings in Spain I do not think that they could be said to have consented to arbitration, since they did not become parties in the full sense to an arbitration agreement with the Club merely by acquiring a right under Spanish law to make a claim against it: see Through Transport (No 2) [2005] 1 Lloyd’s Rep 67 at para 52.

66. The appellants, of course, wish to enforce their claims against the Club without referring them to arbitration, but that is something they cannot do, for reasons I have already given. As a result of the assertion of those claims and the Club’s rejection of them, a dispute has arisen which falls within the scope of the arbitration clause: see Through Transport (No 2). Accordingly, for as long as the appellants continue to maintain their claims I do not think that they can be heard to say that they have not consented to arbitration or that the consent necessary for a submission to the jurisdiction of the English courts as the courts exercising supervisory jurisdiction over the arbitration is lacking.

67. However, that still leaves the question whether the requirement in section 9(1) of the State Immunity Act for an agreement in writing can be satisfied by anything less than a document signed by or on behalf of the state. The judge held that it can. He thought that it would be surprising if, in a section dealing with agreements to arbitrate, Parliament had chosen to use words in a sense significantly different from that which they bear in the Arbitration Act. He derived some support for that conclusion from his understanding that the purpose of section 9 was to ensure that if a state has agreed to resolve disputes by arbitration it has rendered itself amenable to such process as may be necessary to render the arbitration effective. He could discern no indication in the State Immunity Act itself that states are to be treated differently from private parties for this purpose and he drew further support for his conclusion from the decisions in The Altair and Svenska.

68. Section 9(1) primarily contemplates at least that the state in question has made itself party in the full sense to an arbitration agreement expressed in writing. That was the position in both Svenska and The Altair, in each of which the state had, by different means, become bound as, or to the same extent as, a party to the contract. In Through Transport (No 2) the question was whether New India was a “party to the arbitration agreement” within the meaning of section 18(2) of the Arbitration Act. Since “party” is defined in section 82(2) as including any person claiming under or through a party to the agreement, I held that New India was a party for the purpose of section 18, because, having made a claim against the insurer, it was claiming under or through the insured, Borneo Maritime Oy. As a member of the Through Transport club Borneo Maritime was a party to the arbitration agreement under which New India was bound to pursue its claim.

69. Although in the present case the appellants must also pursue their claims by arbitration, they, like the claimant in Through Transport, are not parties to the arbitration agreement in the full sense. If they wish to pursue their claims they must do so in arbitration (see paras 60 and 63 of the judgment of the Court of Appeal in Through Transport), but commencing proceedings in Spain did not involve a breach of an agreement to arbitrate (see paras 65 and 95 of the same judgment). When the appellants began proceedings against the Club in Spain and the Club failed to concede the claim, disputes arose between themselves and the Club which were capable of being referred to arbitration and could only be validly determined in arbitration.

70. In Through Transport (No 2) I held that once a dispute or difference had arisen it could be referred to arbitration by either side. That is because the dispute had arisen out of an attempt to enforce an obligation that was itself qualified by, and subject to, the arbitration agreement. The position in the present case is substantially the same. The appellants sought to enforce a claim against the Club in proceedings in Spain and, if the Club had not taken steps to protect its position, they would, if successful, have obtained a judgment
Immunity Act was passed it was already accepted to arbitration agreements. At the time when the State than the formal assertion of claims that were subject proceedings was for these purposes nothing more dispute to arbitration, but the commencement of be treated as having agreed in writing to submit the not, as a result of having issued proceedings in Spain, Mr Smouha QC submitted that the appellants could against it capable of being enforced in this country. Mr Smouha QC submitted that the appellants could not, as a result of having issued proceedings in Spain, be treated as having agreed in writing to submit the dispute to arbitration, but the commencement of proceedings was for these purposes nothing more than the formal assertion of claims that were subject to arbitration agreements. At the time when the State Immunity Act was passed it was already accepted that the expression “arbitration agreement” in section 32 of the Arbitration Act 1950 (defined as an agreement in writing to submit to arbitration present or future differences) did not require the agreement to be signed (see Mustill and Boyd, Commercial Arbitration, 2nd Edition, page 55), a position now reflected in section 5(2) of the Arbitration Act 1996. That being so, it would be surprising if Parliament had intended section 9(1) to apply only in cases where there is a contract containing an arbitration clause formally signed by or on behalf of the state. Accordingly, I accept that the pursuit of a claim in the Spanish proceedings amounted to an adoption by each of the appellants of the agreements. That had two important consequences: it gave the Club (as well as the appellants) the right in each case to refer those disputes to arbitration and it satisfied the requirement of section 9(1) for an agreement in writing.

71. The proceedings under section 66 of the Arbitration Act 1996 are for permission to enforce each of the awards as a judgment. In Svenska this court held that such proceedings relate to the arbitration and so fall within section 9(1) of the State Immunity Act. If it were necessary to do so, therefore, I would hold, in agreement with the judge, that the appellants are not immune from the jurisdiction of the English courts in relation to the proceedings.

(iii) Section 3(1)(b) of the State Immunity Act

72. Section 3(1)(b) of the State Immunity Act 1978 provides as follows: “A State is not immune as respects proceedings relating to:

(a) . . .

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) fails to be performed wholly or partly in the United Kingdom.”

73. Mr Hancock QC submitted that the appellants were under an obligation to pursue their claims in arbitration in London and that, since that obligation fell to be performed in the United Kingdom, they were amenable to the jurisdiction of the English courts in respect of proceedings relating to that obligation. Mr Smouha QC contended, however, that an obligation to arbitrate (if any such obligation existed) fell outside section 3(1)(b) so that the position was governed exclusively by section 9(1) of the Act. Since, like the judge, I am satisfied that the appellants submitted to the jurisdiction by virtue of section 9(1) of the Act, I shall express my opinion on this question as briefly as I can.

74. In paras 129 to 137 of its judgment in Svenska this court considered whether an application to register a foreign arbitration award in this country under section 9 of the Administration of Justice Act 1920 constituted proceedings “relating to” the obligation on which the award was based so as to fall within the expression “proceedings relating to a commercial transaction” in section 3(1)(a) of the State Immunity Act. The court considered that it did not, because the subsection was to be interpreted as referring to the proceedings before the court rather than to the transaction underlying the award. In reaching that conclusion the court was influenced by the overlap that would otherwise exist between section 3 and section 9.

75. The court’s view that the narrower meaning of section 3(1) was to be preferred (though not the reasoning by which it reached its conclusion) was subsequently endorsed by a majority of the Supreme Court in NML Capital Ltd v Republic of Argentina [2011] 2 Lloyd’s Rep 628; [2011] 2 AC 495. However, four members of the court, Lord Phillips of Worth Matravers, Lord Walker, Lord Collins of Mapesbury and Lord Clarke of Stone-cum-Ebony, considered that a potential overlap with section 9(1) was not a ground for giving section 3(1) a narrow rather than a wide construction. Since Lord Phillips and Lord Clarke dissented on the interpretation of section 3(1)(a), those expressions of opinion may not form part of the ratio of the decision, but they carry strong persuasive force. The present case differs from NML, being concerned with proceedings to enforce an arbitration award obtained in this country. Once one accepts, however, that the proceedings relating to arbitration are not governed exclusively by section 9, the question is whether the present proceedings are proceedings “relating to an obligation which by virtue of a contract falls to be performed wholly or partly within the United Kingdom”.

76. In my view the answer to that question in this case is not straightforward. The appellants themselves have not incurred an obligation to the Club by virtue of a contract in the ordinary sense. At best, all that can be said is that, when a claim was asserted by the appellants and resisted by the Club, a difference arose which, by virtue of the Club rules, the appellants and the Club were entitled to refer to arbitration. It is arguable that that is not sufficient to constitute an obligation of the kind envisaged by section 3(1)(b) and since it is not necessary to reach
a final decision on the point for the disposal of the appeal, I prefer not to do so.

E. Are the claims arbitrable?

77. Mr Smouha QC submitted that the claims made by the appellants in the Spanish proceedings were inherently incapable of being determined by arbitration because a conviction in the proceedings was an essential element of the cause of action against the insurer. Since an arbitrator cannot convict a person of a criminal offence, the claim cannot be constituted in arbitration proceedings.

78. It was not disputed that in the ordinary way an arbitrator has jurisdiction to find facts which constitute a criminal offence (fraud being an all too common example) or that in an appropriate case an arbitrator also has jurisdiction to find that a criminal offence has been committed. As the judge pointed out, however, it is necessary to distinguish between a finding of criminal conduct and a conviction which provides the basis for a penal sanction. It may also be important in this context to distinguish between a claim and a dispute or difference.

79. Before the judge, as before us, the central plank of the appellants’ argument was that liability under article 117 depends on a conviction. The text of articles 109, 116 and 117, to which I have already referred, suggests that the liability is civil in nature and that a conviction is merely a precondition to the right to pursue such claims in criminal proceedings. Any doubt about that, however, is in my view removed by paras 106 and 107 of the judgment below. In para 106 the judge found that although claims of this kind are brought under the Penal Code, the relevant provisions are civil in nature and are construed according to civil principles of law. Although the Public Prosecutor has a right to bring claims on behalf of third parties, they remain the third parties’ claims, with the result that any judgment is rendered in favour of the third party.

80. The judge dealt with the appellants’ argument in the following way:

“107. . . . whether the claim is brought under article 76 or article 117, the right to recover from the insurer depends on proof of an insured liability under the insurance contract and does not require a finding of criminal liability. Even if it did, it would not be a finding involving criminal responsibility or criminal penal consequences. It would simply be a step towards establishment of a civil law monetary claim. Further, it would be remarkable if civil claims advanced in criminal proceedings were inarbitrable, whereas if the same claims had been advanced in civil proceedings they would not have been, so that arbitrability would effectively be at the option of the claimant.”

81. In my view this passage amounts to a finding that a conviction is not an integral element of the cause of action. The distinction is important, because even if a conviction were a precondition to the right to recover against the insurer, there would be no reason why an arbitrator should not determine a claim of this kind, taking into account whether the condition has or has not been satisfied. He cannot, on the other hand, formally convict any person of a criminal offence.

82. The argument does not end there, however, because the arbitration agreement is not concerned with claims as such but with differences and disputes. The principal disputes between the appellants and the Club were whether the appellants were bound by the arbitration clause in the Club’s rules and whether the “pay to be paid” clause was effective to defeat their claims. Those were the disputes which the Club referred to arbitration and the grounds on which it sought declaratory awards confirming that it was under no liability. They could be determined by the arbitrator without having to decide whether any of the accused in the Spanish criminal proceedings had committed any offences, since in those proceedings neither of the appellants was seeking to enforce any right against the Club. In my view the matters referred to the arbitrator were capable of being the subject of an award, although the court is entitled to have the final word on jurisdiction. I would grant the appellants permission to appeal on this additional ground, but in my view it does not provide a basis for allowing the appeal.

F. Conclusion

83. For these reasons I am satisfied that the obligation which the appellants wish to enforce against the Club is governed by English law. It cannot be enforced otherwise than by arbitration in accordance with the Club rules and the appellants have submitted to the jurisdiction of the English courts in relation to the determination of the arbitrator’s jurisdiction and the Club’s application to enforce the award as a judgment. I would therefore dismiss the appeal.

Lord Justice PATTEN:

84. I agree.

Lord Justice TOMLINSON:

85. I also agree.
The vessel was defective. The crew became aware of the ingress in the bowthruster room, which would inevitably melt in the course of the contemplated voyage. A proximate cause of the loss and damage was the ingress of seawater, and the ingress was fortuitous, having been caused by crew negligence at the loading port. The casualty was proximately caused by a fortuity. There was a loss by crew negligence and there was no want of due diligence by the owners or managers. The loss was not caused by the unseaworthiness of the vessel to which the owners were privy within section 39(5) of the Marine Insurance Act 1906.

However, the judge held that the owners had forfeited the claim by reason of fraudulent devices employed in supporting it. The owners’ agent had written a letter to the underwriters’ solicitors which was intended to promote the claim in the hope of a prompt settlement and which contained false and misleading statements that the author had no grounds to believe were true, and which were made recklessly – Apogitos v Agnew [2002] 2 Lloyd’s Rep 42; [2003] QB 556 (The Aegeon) followed.

The owners appealed. They submitted: (1) that any representation in the letter was not made fraudulently or with the necessary intent to improve the owners’ prospects of settlement or success in the claim (the relevant test suggested in The Aegeon); and (2) that the court should not follow the obiter decision in The Aegeon.

Held, that as to the facts, the judge was entitled to find at least recklessness on the agent’s part. That finding was unassailable. As to the law, the judge had followed The Aegeon and had held, with manifest reluctance, that notwithstanding that the owners’ claim was a good one, and that the owners had not overvalued the claim, their agent’s reckless telling of an untruth to the underwriters meant that the owners could not recover.

The question was whether the rule whereby a fraudulent device deprived the insured of any right to recover anything applied also in the case of fraudulent devices – the expression used for the making of statements which were known by the insured to be untrue or which were made recklessly, not caring whether they were true or false, in support of a claim honestly believed by him to be good both as to liability and amount.

Although the decision in The Aegeon was obiter (because the court there held, following The Star Sea [2001] 1 Lloyd’s Rep 389, that the rule, whether or not it extended to fraudulent devices, did not apply after the commencement of litigation), there were powerful reasons why the court should apply The Aegeon as a matter of ratio. First, The Aegeon, albeit not binding, was authoritative. Secondly, a fraudulent device was, in a way, a sub-species of a fraudulent claim. Thirdly, there was a public policy justification for the rule as applied to both claims and devices. In either case its draconian consequence only applied to those who were dishonest. Fourthly, the Law Commission had looked at the fraudulent device doctrine in some detail as part of its research into the post-contract duty of good faith on the part of an insured. There was nothing in the Law Commission’s reports that militated against, and much that supported, the application of the rule to devices as well as claims. Fifthly, there was antecedent authority which provided some support to the application of the rule to fraudulent devices (see Lek v Matthews (1927) 29 LJ L
occurred once the ice started to melt. The engine room pumping room was open to the sea, initially subject to a barrier of ice which valve. That rendered the vessel unseaworthy. The bowthruster through both those physical defects as a result of the open suction and the filter lid to be displaced; and because water could enter integrity in the bowthruster room because the freezing of the system to remain open to the sea. The vessel lost her watertight of the pump. Water had entered the bowthruster room as a result the emergency fire pump and in the filter located at the inlet side area. As a result, when the crew finished using the emergency fire close the sea inlet valve to the pump located in the bowthruster

The defendant underwriters were the hull and machinery policy included the Institute Time Clauses – Hulls 1/10/83 and DC Merwestone

The court would reject the owners’ argument under the Human Rights Act 1998, namely that to follow The Aegeon would involve an infringement of article 1 of the first protocol to the ECHR. The fraudulent device doctrine had a legitimate public policy aim, namely to deter fraud in the making of claims and to frustrate any expectation that, if the fraud failed, the fraudster would not lose out. The more difficult question was whether the means employed to pursue that aim was reasonably proportionate to the aim sought to be realised and whether there was a fair balance between the means adopted to fulfil the relevant aim and the insured’s interest in the indemnity afforded by the policy. The critical question was whether a bright line rule that the use of a fraudulent device which fulfilled the conditions set out in The Aegeon (that the device must be directly related to the claim, must have been intended by the assured to promote his prospect of success, and would have tended to yield a not insignificant improvement in the assured’s prospects of success) forfeited the claim was a proportionate means of securing the aim of deterring fraud in relation to insurance claims. The answer was in the affirmative. Once it was accepted that deterrence was itself a legitimate aim, the fact that forfeiture was a harsh, in some circumstances very harsh, sanction did not mean that it was disproportionate to that aim. The rule was only applicable in the case of fraud, from which no insured should have any difficulty in abstaining. The careless or forgetful insured was not affected, nor was the insured who told some irrelevant lie or whose lie was not told in order to induce payment. Those limitations on the scope of the rule rendered it a proportionate response to the aim of deterrence of fraud, which crossed a moral red line and might be difficult to detect.

The appeal would be dismissed.

Chirag Karia QC and Tom Bird (Holman Fenwick Willan LLP) for the owners; Colin Edelman QC and Ben Gardner (Ince & Co) for the underwriters.
Market remains challenging

The International Union of Marine Insurance held its annual conference in Berlin recently. Here we reproduce some of the stories from the event.

IUMI (International Union of Marine Insurance) unveiled its annual report on the marine insurance market at its conference in Berlin and announced global premiums for 2014 of US$32.6bn. Although a 3.2% reduction on the 2013 figure, converting local currencies to a single US dollar figure was impacting on the true result. Vice-chairman of IUMI’s Facts & Figures Committee, Astrid Seltmann explains “The 2014 reduction was largely attributed to the strong US dollar, particularly for the cargo market which is generally written in other currencies.”

The 2014 total comprised income from the following regions:
- Europe 52.6%
- Asia Pacific 25.0%
- Latin America 9.8%
- North America 6.4%
- Middle East 3.1%
- Africa 3.0%

and the following business lines:
- Global hull 23.2%
- Transport/cargo 51.9%
- Marine liability 6.6%
- Offshore/energy 18.2%

Cargo

In the cargo sector, a number of local markets experienced positive growth but that growth was largely hidden by the strong US dollar. It is generally assumed a loss ratio of 70% or less represents a “technical profit” for the sector. While the 2014 underwriting year seems to have produced a technical profit (based on figures as of December 2014) it is likely the Tianjin explosion – as potentially the largest single cargo loss ever recorded – will impact significantly on 2014 and 2015 results. The outlook for the cargo market is hard to predict in light of the current changing economic environment.

“The incident at Tianjin should serve as a substantial wake-up call to all cargo insurers”

Nick Derrick, chairman of IUMI’s Cargo Committee, warned large cargo losses were having a significant impact on the marine insurance sector. The incident at Tianjin should, according to Derrick, serve as a “substantial wake-up call to all cargo insurers. Tianjin port covers an area of around 125 sq km but only a small part of the port was affected by the explosion. Even so, we are expecting to see cargo losses of at least $1.5bn with some reports stating the final figure could be as high as $6bn.

Cargo insurers need to understand what the dollar loss might have been if the entire port had been affected, perhaps by a natural catastrophe such as an earthquake or tsunami.”

He continued “Added to the direct impact of the Tianjin explosion, we also understand goods outside of the blast area have been contaminated by dangerous chemicals. This will add to the final loss figure.” The Tianjin incident, coupled with other large losses in 2015 – including the grounding of car carrier Hoegh Osaka resulting in a vehicle loss exposure of £35m – is expected to have an impact on the profitability of the marine cargo sector in 2014 and 2015. Derrick believes the management of unexpected accumulation risk will become an increasing problem for cargo insurers in the future and called for new technology to assist insurers in handling that risk. More positively, Derrick reports a reduction in successful piracy attacks off the Somali coast but warned that attacks off the Malay Peninsula were increasing and called for more to be done to suppress this trend.

Closer to home, IUMI’s cargo committee has highlighted a growing threat to cargo underwriters from so-called “broker facilities”. Increasingly, brokers were channelling business to enhanced fee-paying insurers without assessing the individual risk. Not only was this a dangerous activity in its own right, but it also placed pressure on full-service underwriters who had to carry full costs but with less business.

Reacting to an alarming increase in cargo thefts globally, IUMI is calling for the introduction of a range of measures to help reverse this worrying trend. In a position paper the association points out cargo theft is no longer confined to high-value goods and that online trading platforms are making it easy to trade these products openly. The crime. Håkan Nyström, a member of IUMI’s Political Forum, says “There is a market for any kind of stolen goods and online platforms are making it easy to trade these products openly. The impact on the economy is huge. Back in 2008 the EU estimated the annual economic damage to Europe was €8.2bn and this figure must be vastly increased today. Comparable numbers are not available for Africa, the Americas or Asia but we believe these regions are suffering in the same way.”

Although IUMI applauds the preventative measures implemented already – including the security standards being...
promoted by the Transport Asset Protection Association (TAPA) – the organisation wants more action. Specifically:

- Relevant national authorities should develop and share an overview of cargo theft in their country. Based on this, they should initiate a dialogue with local insurers and other stakeholders to identify initiatives to deal with crime hotspots.
- Improve law enforcement through transnational coordination and co-operation between countries and national police forces.
- Create special police units and specialised departments of public prosecution to deal with cargo crime.
- Pay close attention to online platforms trading stolen cargo. Also give specific attention to cyber fraud including electronic bills of lading and permits.
- Increase police presence in public traffic areas.
- Create a network of high-security truck parks.

**Hull**

Hull sector premiums amounted to $7.6bn, which was a 5.8% reduction from 2013. The majority of hull business is written in US dollars and so the strong US dollar was not thought to be the sole reason for the reduction in premium income in 2014. Some markets (Lloyd's, IUA, Nordic) recorded an improvement compared to last year while others, notably Japan and Latin America, delivered a reduction in income. The extraordinary absence of major hull losses in 2014 resulted in the sector recording a technical profit for the underwriting year 2014. In addition, hull premiums are generally collected in US dollars whilst repair costs are often paid out in local currencies; this might also have contributed to the stronger performance. 2015 has already seen a number of total losses and this will have a negative impact on the 2015 results.

IUMI’s ocean hull committee chairman, Mark Edmondson, comments “Overcapacity and a flatter cycle are the new normal. Hull underwriters are facing extremely challenging market conditions driven by chronic over-capacity. Rates are highly competitive and to achieve an acceptable profit insurers require a sensible and well-conceived mix of business; a thorough knowledge of risk and increasingly good fortune. While risk selection is a skill in which many hull insurers pride themselves, the ‘miss’ factor can so often be the difference between achieving a positive or negative return for capital providers.”

Other factors influencing the hull market include malicious and non-malicious cyber threat; oil price volatility; and technological advancements of vessels in scale, size and complexity.

Overall, Edmondson thinks the risk profile of the hull market was improving: “The tanker industry is now better regulated; the average age of the 20,000 dwt plus dry bulk fleet in now just nine years; and port state detentions are down. Some practitioners are asking if the current reduction in frequency of major losses is the norm rather than the exception. Although we’ve seen a relatively low major casualty rate for 2013-2014, I believe this will be short-lived. That said, an emphasis on understanding the wider issues that affect both the shipping and marine insurance industries and a more detailed knowledge of risk is increasing.”

**Overall**

Overall, the seeming improvement in the 2014 underwriting results is likely to be overshadowed by events in 2015 – particularly in Tianjin. The trend towards large losses continues, and the market environment continues to change.

Patrizia Kern-Ferretti, chair of IUMI’s Facts and Figures Committee, says “Uncertainty seems to be the only constant going forward. Economic upturn is likely to support growth in premiums but the high-growth markets are slowing down. Risks from a China-led slowdown have also increased. Although world trade is subdued, it is not clear how far this reflects a structural shift in trade intensity of production. At the same time, our sector is experiencing strong M&A (mergers and acquisitions) activity which will further globalise capacity and present possibilities for diversification and more specialised products. M&A is also making more talent available in the market and that, coupled with an abundance of capital, has the potential to increase the number of companies supplying insurance which will maintain pressure on pricing.”

**“Economic upturn is likely to support growth in premiums going forward, but the high-growth markets are slowing down”**

**Concerns over “mutual recognition”**

Concerns were raised by marine insurers on the potential impact of “mutual recognition” by classification societies acting as EU Recognised Organisations (ROs). Classification societies can be individually approved by EU flag states to operate as EU ROs and this gives them authority to carry out statutory surveys and certifications on behalf of flag states. “Mutual recognition” is an EU Regulation (article 10.1 of Regulation (EC) No 391/2009) – in place since 2009 to enforce EU ROs to accept another society’s certification of certain vessel components on transfer of class. The purpose of the initiative is to ease the financial burden on shipowners by reducing the amount of re-certification required when a vessel moves class.

Frederic Denefle, chairman of IUMI’s Legal and Liability Committee, explains: “Under these mutual recognition conditions, a vessel can transfer class but a range of components within that vessel could easily have been certified by another society. This gives us a problem in terms of traceability and accountability. An insurer might be happy to accept risk based on a specific classification society but could have a problem if it is not clear which society – or societies – have actually awarded the certification. Mutual recognition makes it harder to be certain of the quality and the source of the survey.

“This is probably not too much of an issue today as mutual recognition does not currently cover safety-related components”, he continued, “but as more complex equipment is included under the mutual recognition umbrella, there will come a time when marine insurers will need a mechanism to ensure they fully understand the risk they are covering.”

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**Hull premium 2014 by region**

<table>
<thead>
<tr>
<th>Region</th>
<th>Premium 2014</th>
<th>Change 2013 to 2014</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Europe</td>
<td>$5.1bn</td>
<td>0.1%</td>
<td>1.0%</td>
</tr>
<tr>
<td>Asia/Pacific</td>
<td>$3.4bn</td>
<td>5.1%</td>
<td>5.3%</td>
</tr>
<tr>
<td>Latin America</td>
<td>$1.1bn</td>
<td>-5.3%</td>
<td>-5.3%</td>
</tr>
<tr>
<td>North America</td>
<td>$1.6bn</td>
<td>5.1%</td>
<td>5.1%</td>
</tr>
<tr>
<td>Middle East</td>
<td>$1.0bn</td>
<td>-5.8%</td>
<td>-5.8%</td>
</tr>
<tr>
<td>Africa</td>
<td>$0.3bn</td>
<td>53.0%</td>
<td>53.0%</td>
</tr>
</tbody>
</table>

*OCtObEr 2015*
The Insurance Act 2015 received royal assent on 12 February 2015, having been sped through the Houses of Parliament under a special procedure for non-controversial Law Commission Bills.

Following submission of the Law Commission Bill to Parliament in July 2014, several days of witness evidence to the Special Committee of the House of Lords in December 2014 resulted in a final version of the Bill, published on 16 January 2015. Under the expedited procedure applicable to Law Commission Bills, this text went forward to the full House and then to the House of Commons, to receive Royal Assent on 12 February 2015. It was crucial that the whole process should be completed before the end of Parliament and in particular before the general election in May 2015.

**Insurance Act 2015: three failures, two-and-a-half successes**

The expedited procedure was crucial to the success of the venture, creating a one-off opportunity to promulgate the results of the consultation process that has taken place since 2006. The expedited procedure was equally to some extent the undoing of the Bill. Only uncontroversial bills can be made the subject of this procedure. This meant leaving out a few obvious candidates for reform, notably insurable interest and liability for insurance premiums under section 53 of the Marine Insurance Act 1906. These are said to be the subject of a future additional consultation paper. It must be assumed that the intent is to abolish the Marine Insurance (Gambling Policies) Act 1909, under which there has famously not been a single prosecution in over 100 years, and where modern regulation has now replaced any need for criminal statute. That, along with the insurable interest provisions of the Marine Insurance Act 1906, have indeed been targets for law reform at least since the Gambling Act 2005 created a very peculiar and uncertain legal position in relation to insurable interest in property insurance. Section 53 on the other hand requires a more delicate touch – replacement rather than repeal.

Worse, late payment of insurance indemnities was omitted at a late stage after the Lloyd’s Market Association voiced objections. The concern was said to be that the claims management industry would lose no time in adding the cause of action for late payment of damages to its arsenal, at substantial cost to the insurance industry and intermediates to insureds. Although no mention was made, it is sincerely hoped that late payment remains on the agenda, although this has not been made explicit. If not, unless some bold claimant has the resources to take a case challenging *Sprung v Royal Insurance (UK) Ltd* ([1999] Lloyd’s Rep IR 111) to the Supreme Court, we are therefore stuck with the current rule for the foreseeable future. Fortunately regulatory measures (ICOBS 8.1.1) appear to
How about the successes of the Insurance Act 2015?
The new Act embraces the duty of fair presentation in place of the duty of disclosure. Key are the provisions in section 3(3) and (4), where a fair presentation of the risk is defined as one disclosing every material circumstance which the insured knows or ought to know, or failing that: “disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances”. The latter is the lower bar and therefore the one likely to be subject to litigation. The appearance of the “prudent insurer”, a fictional standard, means that the standard of disclosure is to be regardless of the underwriter’s own capacities in general or on the particular day. A drunken underwriter who happened not to be put on notice by the insured’s failure to disclose can therefore still call upon this rule (subsection 4). To constitute a fair presentation, disclosure must also be reasonably clear and accessible to the prudent insurer and must be substantially correct and made in good faith (subsection 3).

The provisions of the Act on fair presentation and duty of disclosure remain mostly unchanged from the Draft Bill proposed by the Law Commissions in July 2014, but with several paragraphs added to clarify whose knowledge is to bind the insured; a topic on which there was much discussion in the December Special Committee. The Act adopts the “deliberate or reckless” language of the Consumer Insurance (Disclosure and Representations) Act 2012, avoiding the use of the word fraud which carries undesirable connotations in relation to the standard of proof. A deliberate or reckless breach permits the insurer to avoid while retaining the premium. For other breaches on the part of the insured, the policy remains intact and the remedy is proportionate to the effect on the underwriter.

As for insurance warranties, they will be modified beyond recognition by the amendments. In the 1906 Act, the second sentence of section 33(3) is deleted. This is the sentence containing the remedy: “If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date”. The previous sentence stating that warranties must be exactly complied with is however left intact, leaving some of the familiar draconian effect. Courts have been known to enforce the strict compliance element even in recent years – for instance in the marine cases GE Frankona Reinsurance Ltd v CMM Trust No 1400 (The Newfoundland Explorer) [2006] Lloyd’s Rep IR 704 and Brownsville Holdings Ltd v Adamerco Insurance Co Ltd (The Milasan) [2000] 2 Lloyd’s Rep 458 (where the judges’ strict interpretation of the crewing warranty was explicitly left undisturbed by the later Court of Appeal authority in Pratt v Algaion Insurance Co SA (The Resolute) [2009] Lloyd’s Rep IR 149).

The remedy of permanent, automatic discharge from the insurer’s liability changes to suspension of liability for the duration of the failure to comply with the term. In addition, section 11 of the Insurance Act is headed “Terms not relevant to the actual loss”. This section has been comprehensively redrafted compared to the July 2014 proposal. The gist of the provision is to add to the suspensory nature of the new remedy a requirement that the insured’s failure to comply with policy requirements somehow contributed to the risk of loss. The notions involved are complex and invite a retrospective look at the non-compliance to determine if it “could not have increased the risk of the loss”. It remains to be seen if such a hypothetical test can be successful in practice; on the face of the provision, the bar for the insurers seems set excessively low if all that is required is proof that a failure to comply could have increased the risk.

What is said above applies to express as well as implied warranties, including those in the Marine Insurance Act 1906, sections 36 to 41. There appears to be no direct indication of whether the suspensory nature and the “increase of risk” provision are to apply also to section 39(5), which is not a warranty. In addition, basis of the contract clauses will be outlawed; but these were never a problem in marine insurance because section 35(3) stipulates that all policy terms must be in or appended to the policy itself.

Marine insurance warranties are not a quaint feature of antiquity but are in common use in today's market, in the forms of crewing warranties, class warranties and towing warranties and perhaps others. The Law Commissions have been fairly consistent in avoiding discussion of MAT insurance (Marine, Aviation and Transport) throughout the sequence of Reports. In that light, it is perhaps surprising that the Act makes extensive modifications to the Marine Insurance Act 1906 in this regard.

Fraudulent claims are dealt with in a minimalist way; the Act appears to do little more than codify current case law, such as it is. The definition of fraudulent claims, and in particular the fate of the rule on fraudulent means and devices, are not addressed at all; Versluit Dredging BV v HDI-Geting Industrie Versicherung AG (The DC Mervestone) [2015] Lloyd’s Rep IR 115 having been subject to an application for leave to appeal at the time of the Special Committee hearings in December 2014. In this part, the Act represents succinct clarity but perhaps not an unambiguous success.

Comments
The Act creates a few open questions both in what has been left out and in what has been addressed. There is no doubt whatsoever that it is a milestone in insurance law reached at long last on weary feet, and that it contains several essential innovations. However, there is a strong possibility of litigation in relation to several features of this new Act, in particular the fair presentation requirements and the scope of knowledge...
of the insured. Other parts consolidate existing case law, developed over the past century since the Marine Insurance Act 1906 and do not represent anything new. On the whole, the enactment does not amount to a radical overhaul of the law, worthy of the Consumer Insurance (Disclosure and Representations) Act 2012.

The Law Commissions have given notice of plans to continue the law reform project and to put forward another bill after the May 2015 elections. However, in the coming year, parliamentary time will be scarce with a new government looking to put through its most controversial and flagship legislative measures in the first parliament following the elections. There is no doubt that insurance law reform is sorely needed. However, if this Act is the final word, business insureds have arguably been somewhat short-changed by the law reform project and the market remains reliant on regulatory measures.

Johanna Hjalmarsson
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