

Kolloquium im SPB 8a, SS 2022

Fall Nr. 3: EuGH, Rs. C-700/20, *The London Steam-Ship Owners' Mutual Insurance Association Limited ./. Kingdom of Spain*,

Schlussanträge AG Collins, 5.5.2022, EU:C:2022:358

(Hinweis: Sachverhalt leicht modifiziert; Schlussanträge derzeit nur in englischer Sprache verfügbar)

I. Introduction

1. Slightly under two decades ago, in November 2002, the *M/T Prestige* ('the vessel'), a single-hull oil tanker registered in the Bahamas, broke into two sections and sank off the coast of Galicia (Spain). At the time the vessel was carrying 70 000 tonnes of heavy fuel oil and the resulting oil spill caused significant damage to beaches, towns and villages along the northern coastline of Spain and the western coastline of France.

The sinking of the vessel generated a lengthy dispute between its insurers and the Spanish State pursued by way of two different procedures in two Member States. It resulted in two judgments: one delivered by the Audiencia Provincial de La Coruña (Provincial Court, A Coruña, Spain), the other handed down by the High Court of Justice (England & Wales), Queen's Bench Division (Commercial Court) (United Kingdom). The Spanish State ultimately sought to have the judgment of the Audiencia Provincial de La Coruña recognised by the courts of England & Wales. In the last days of the transitional period after the withdrawal of the United Kingdom from the European Union, the High Court of Justice (England & Wales) made a reference for preliminary ruling seeking an interpretation by the Court of Justice of Article 1(2)(d) and Article 34(1) and (3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Nota bene: Der Fall wird im Kolloquium unter der Brüssels Ia VO besprochen.

II. Facts of the dispute, procedure in the main proceedings and questions referred for a preliminary ruling

13. At the time the vessel sank, its owners ('the owners') had Protection & Indemnity ('P&I') insurance with The London Steam-Ship Owners' Mutual Insurance Association Limited ('the Club'), pursuant to an insurance contract concluded by a certificate of entry dated 20 February 2002 ('the insurance contract'). By that contract, the Club agreed to provide P&I cover for the owners in respect of, inter alia, any one occurrence of liability for pollution up to a maximum aggregate amount of 1 billion United States dollars (USD). The insurance contract was subject to the Club's Rules, that is, the standard terms and conditions of the insurance policy incorporated into the certificate of entry. Rule 3, entitled 'Right to recover', provided for a 'pay to be paid' clause in the terms following:

” 3.1 If any member shall incur liabilities, costs or expenses for which he is insured he shall be entitled to recovery from the Association out of the funds of this Class, PROVIDED that:

3.1.1 actual payment (out of monies belonging to him absolutely and not by way of loan or otherwise) by the Member of the full amount of such liabilities, costs and expenses shall be a condition precedent to his right of recovery...”

14. Rule 43 of the Club’s Rules, entitled ‘Jurisdiction and law’, contained an arbitration clause whereby ‘if any difference or dispute shall arise between a Member and the Association’, ‘such difference or dispute’ was to be referred to arbitration in London (United Kingdom) before a sole legal arbitrator subject to English law and the Arbitration Act 1996.

15. In late 2002, criminal proceedings were initiated in Spain against, inter alia, the vessel’s master, chief officer and chief engineer.

16. In June 2010, at the conclusion of the investigatory stage of the criminal proceedings, several legal entities, including the Spanish State, brought civil claims against a number of defendants, including the Club as the owners’ liability insurer under the insurance contract pursuant to a right of direct action under Article 117 of the Spanish Criminal Code.¹ The Club did not take part in the Spanish proceedings.

17. On 16 January 2012, the Club initiated arbitration proceedings in London, whereby it sought declarations to the effect that, pursuant to the arbitration clause in the insurance contract, the Spanish State was bound to pursue its claims under Article 117 of the Spanish Criminal Code in London and that the Club was not liable to the Spanish State in respect of such claims as a matter of English law and/or under that contract. The Spanish State did not participate in the arbitration proceedings. (9)

18. By an award delivered on 13 February 2013 (‘the Award’), the arbitral tribunal held that, since the claims in question were of a contractual nature under English conflict of law rules, English law applied to the contract. The Spanish State could not thus benefit from the owners’ contractual rights without complying with both the arbitration clause and the ‘pay to be paid’ clause. Moreover the Spanish State ought to have initiated arbitration proceedings in London to recover payment from the Club. The Award also declared that, in the absence of prior payment of the insured liability by the owners, the Club was not liable to the Spanish State in respect of the claims. In any event, the Club’s liability did not exceed USD 1 billion.

19. In March 2013, the Club applied to the referring court under section 66(1) and (2) of the Arbitration Act 1996 for leave to enforce the Award in the jurisdiction in the same manner as a judgment or order and for a judgment to be entered in the terms of the Award.² The Spanish

¹ Article 117 of Ley Orgánica 10/1995 del Código Penal (Organic Law 10/1995 on the Criminal Code) of 23 November 1995 provides that ‘insurers which have assumed the risk of financial liabilities arising from the use or exploitation of any property, industry, undertaking or activity, in the case where the event constituting the risk insured materialises as a result of a circumstance provided for in this Code, shall incur direct civil liability up to the limit of the compensation laid down by law or by agreement, without prejudice to the right of recovery against the person concerned’.

² Section 66 of the Arbitration Act 1996, (5) entitled ‘Enforcement of the award’, provides that:
“(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
(2) Where leave is so given, judgment may be entered in terms of the award.

State opposed that application. It sought orders to set aside the Award and/or to declare the Award of no effect, pursuant to sections 67 and/or 72 of the Arbitration Act 1996. Those sections provide that an English arbitral award may be challenged on the grounds, inter alia, that the tribunal lacked substantive jurisdiction and that the relevant dispute could not properly be submitted to arbitration. The Spanish State also argued that the referring court should decline to exercise its discretion to enter judgment.

20. Following a seven-day trial in the course of which factual evidence together with expert evidence of Spanish law was heard, on 22 October 2013 the referring court delivered judgment. It ordered that the Spanish State's applications be dismissed, granted the Club, pursuant to section 66(1) of the Arbitration Act 1996, leave to enforce the Award and declared that, pursuant to section 66(2) of that act, judgment was to be entered against the Spanish State in the terms of the Award. On the same date it delivered a separate formal judgment which stated that 'pursuant to section 66(2) of the Arbitration Act 1996, judgment is entered against the [Spanish State] in the terms of the Award'.

21 The Spanish State appealed against the section 66 judgment to the Court of Appeal (England & Wales) (Civil Division) (United Kingdom). By judgment of 1 April 2015, that court dismissed the appeal.

22 On 13 November 2013, the Audiencia Provincial de La Coruña (Provincial Court, A Coruña) gave judgment in the Spanish proceedings. It made no finding as to the civil liability of the owners or of the Club. Various parties appealed against that judgment to the Tribunal Supremo (Supreme Court, Spain). By judgment of 14 January 2016, that court held, inter alia, that the master and the owners were liable in respect of the civil claims and that the Club was directly liable pursuant to Article 117 of the Spanish Criminal Code, subject to the global limit of liability of USD 1 billion. It remitted the matter to the Audiencia Provincial de La Coruña (Provincial Court, A Coruña) to determine the quantum of the respective liabilities of the defendants to the Spanish proceedings. By judgment of 15 November 2017 (rectified on 11 January 2018), that court held that, as a result of the accident, the master, the owners and the Club were liable to over 200 separate parties (including the Spanish State) in sums in excess of EUR 1.6 billion, subject, in the case of the Club, to the global limit of liability of USD 1 billion. Various parties appealed against that judgment before the Tribunal Supremo (Supreme Court), which, by judgment of 19 December 2018 (amended on 21 January 2019), upheld it, subject to a limited number of variations.

23 On 1 March 2019, the Audiencia Provincial de La Coruña (Provincial Court, A Coruña) issued an execution order setting out the amounts that each of the claimants, including the Spanish State, were entitled to enforce against the respective defendants, including the Club ('the Spanish judgment').

24 On 25 March 2019, the Spanish State applied to the High Court of Justice (England & Wales) to have the Spanish judgment recognised under Article 33 of Regulation No 44/2001. That court acceded to that application by order of 28 May 2019 ('the registration order'). [\(11\)](#)

25 On 26 June 2019, the Club lodged an appeal against the registration order under Article 43 of Regulation No 44/2001. It relied on two grounds. First, it argued that, pursuant to

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award. The right to raise such an objection may have been lost ..."

Article 34(3) of Regulation No 44/2001, the Spanish judgment was irreconcilable with the section 66 judgment which the Court of Appeal (England & Wales) (Civil Division) had upheld on 1 April 2015. Second, by reference to Article 34(1) of Regulation No 44/2001, it submitted that recognition or enforcement of the Spanish judgment was manifestly contrary to English public policy. The Spanish State contested the Club's appeal. It asked the referring court to refer six questions for a preliminary ruling on the interpretation of Regulation No 44/2001.

26 In those circumstances, on 22 December 2020, the High Court of Justice (England & Wales), Queen's Bench Division (Commercial Court) decided to refer the following questions to the Court of Justice for a preliminary ruling:

„1. Kann (...) ein Urteil (...) gemäß Section 66 des Arbitration Act 1996 (...) eine für die Zwecke von Art. 34 Nr. 3 der Verordnung (EG) Nr. 44/2001 relevante ‚Entscheidung‘ des Mitgliedstaats, in dem die Anerkennung geltend gemacht wird, darstellen?

2. Kann ein Urteil, das wie ein Urteil nach Section 66 des Arbitration Act 1996 entsprechend einem Schiedsspruch ergeht, angesichts dessen, dass es sich dabei um eine Entscheidung handelt, die aufgrund der in Art. I Abs. 2 Buchst. d vorgesehenen Ausnahme betreffend die Schiedsgerichtsbarkeit nicht in den sachlichen Anwendungsbereich der Verordnung Nr. 44/2001 fällt, eine für die Zwecke von Art. 34 Nr. 3 der Verordnung relevante ‚Entscheidung‘ des Mitgliedstaats, in dem die Anerkennung geltend gemacht wird, darstellen?

3. Für den Fall, dass Art. 34 Nr. 3 der Verordnung Nr. 44/2001 keine Anwendung findet, wenn die Anerkennung und Vollstreckung einer Entscheidung eines anderen Mitgliedstaats der nationalen öffentlichen Ordnung widersprechen würde, weil dies wegen eines früheren nationalen Schiedsspruchs oder eines früheren Urteils, das ein Gericht des Mitgliedstaats, in dem die Anerkennung geltend gemacht wird, entsprechend dem Schiedsspruch erlassen hat, gegen den Grundsatz der Rechtskraft verstoßen würde, ist dann eine Berufung auf Art. 34 Nr. 1 der Verordnung Nr. 44/2001 als Grund für die Ablehnung der Anerkennung oder Vollstreckung zulässig oder regelt Art. 34 Nrn. 3 und 4 der Verordnung abschließend die Gründe, nach denen Rechtskraft und/oder Unvereinbarkeit der Anerkennung und Vollstreckung einer Entscheidung im Sinne der Verordnung entgegenstehen können?³

Aufgabenstellung

1.) Welche Vorschriften der Brüssel Ia-VO wären auf den Fall anwendbar, wenn er in den zeitlichen Anwendungsbereich der Brüssel Ia-VO fiel?

2.) Welche Dokumente müsste das Königreich Spanien vorlegen, um die Anerkennung in England zu erwirken?

3.) Welchen Rechtsbehelf müsste der Club ergreifen, um sich gegen die Vollstreckung zu wehren? Hätte der Rechtsbehelf Aussicht auf Erfolg?

³ Offizielle Übersetzung des Vorabentscheidungsersuchens auf der website des EuGH.