Neutral Citation Number: [2022] EWHC 1655 (Comm)

Claim No. CL-2021-000075

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**

**IN THE MATTER OF THE ARBITRATION ACT 1996**
**IN THE MATTER OF AD HOC ARBITRATIONS**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2022

**Before**:

**SIR ROSS CRANSTON**
**Sitting as a High Court Judge**

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**Between:**

**(1) UK P&I CLUB N.V.** **Claimants**

**(2) UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION LTD (formerly known as the UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (EUROPE) LTD)**

**- and –**

**REPÚBLICA BOLIVARIANA DE VENEZUELA** **Defendant**

**RCGS "RESOLUTE"**

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**DAVID LEWIS QC and ALEXANDER THOMPSON** (instructed by **Kennedys Law LL**) for the **Claimants**

**POONAM MELWANI QC and JAMIE HAMBLEN** (instructed by **Roose + Partners**) for the **Defendant**

Hearing dates: 4, 5 May 2022

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Tuesday 28 June 2022

**Sir Ross Cranston:**

## I INTRODUCTION

1. This case arises out of the total loss of a Venezuelan navy patrol vessel, the BVL Naiguatá GC-23, in early 2020. The loss was the result of a collision with the RCGS Resolute, an ice-classed cruise liner, which engaged in tourism to Antarctica. The Resolute was insured by the first claimant, UK P&I Club NV. Following the loss Venezuela brought civil claims in 2020 in the courts of Dutch Curaçao and in Venezuela itself. In February 2021 the claimants sought an anti-suit injunction in this court against Venezuela on the basis that these claims were in breach of the arbitration clause in the contract of insurance with the Resolute's owners. In ex parte proceedings the following month this court granted an interim anti-suit injunction against Venezuela.

2. The main issues in these proceedings are first, whether Venezuela is bound to arbitrate in London the claims it has advanced in the Venezuelan court, and secondly, whether it is entitled to immunity under the State Immunity Act 1978 from a permanent anti-suit injunction to restrain it from pursuing both sets of foreign proceedings. If this court were to grant a permanent anti-suit injunction it seems that it would represent the first time that the English courts have taken such action directly against a state without the state having somehow agreed.

## II BACKGROUND

3. As indicated the Naiguatá is owned by Venezuela. At the time of the collision the Resolute was owned by Bunnys Adventure & Cruise Shipping Company Ltd, chartered under a bareboat charter to White Swan Shipping Inc, and managed by Columbia Cruise Services GmbH & Co KG as head managers and Columbia Shipmanagement Ltd as sub-managers. The first claimant, UK P&I Club NV, is a subsidiary of the second claimant, United Kingdom Mutual Steam Ship Assurance Association Ltd. Both are mutual insurance associations providing protection and indemnity ("P&I") insurance to their members under written contracts of insurance. In the judgment the first claimant is referred to as "the Dutch Club", the second as "the English Club", and the claimants collectively as "the Clubs".

4. The casualty involving the Resolute and the Naiguatá occurred on 30 March 2020. In outline the Naiguatá had been sent to intercept the Resolute, there was an altercation, and the vessels collided. As a result, the Naiguatá suffered serious damage to her hull, took on substantial amounts of water, and sank. There is no agreement as to how the casualty occurred or where, including whether in territorial or international waters. It is common ground that after the collision the Resolute sailed to nearby Curaçao, where it arrived on 31 March 2020.

### The proceedings in outline

5. Venezuela's claims in Curaçao (in the amount of c. €125 million) and in Venezuela (in the amount of c. €300 million) are against the Resolute, its owners and head managers, and the Clubs as the vessel's P&I insurer. They were instituted between April and September 2020. In some respects the defendants in the proceedings were misnamed but nothing turns on that for the present proceedings.

6. The Clubs' proceedings for anti-suit relief are on the basis that Venezuela's claims in Venezuela and Curaçao were, in substance, claims to enforce the terms of the contract of insurance between the Dutch Club as insurer and its members, especially the owners, as assureds: *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co (The Hari Bhum) (No 1)* [2004] 1 Lloyd's Rep 206 (Moore-Bick J) and [2005] 1 Lloyds Rep 67 (CA). Accordingly, the parties are bound by the contract of insurance, including the London arbitration and English law clauses, so that it is contrary to its terms for Venezuela to pursue claims against the Clubs other than in London arbitration. Further, the Clubs contend, the parties are bound by any contractual defences available to the Clubs.

7. The Clubs issued their service and injunction applications and the arbitration claims on 15 February 2021, seeking interim and final anti-suit injunctions restraining Venezuela from pursuing its claims otherwise than in London arbitration.

8. On 10 March 2021 HHJ Pelling QC, sitting as a High Court judge, heard the service and injunction applications. He gave a fully reasoned judgment the following day: [2021] EWHC 595 (Comm). He held that Venezuela was not immune from proceedings or an anti-suit injunction and granted interim relief as well as orders in relation to service out and alternative service of various documents (other than the application notice and arbitration claim form).

9. On 14 May 2021 the Clubs served a notice of arbitration on Venezuela, appointed their arbitrator, and invited Venezuela to appoint an arbitrator in accordance with the terms of the arbitration clause in the contract of insurance. In the arbitration the Clubs seek substantive relief in relation to the underlying merits of Venezuela's claims, including declarations of non-liability and an award of equitable compensation in respect of any loss suffered in the foreign proceedings.

10. In November 2021 Venezuela filed an Acknowledgment of Service in this court indicating an intention to contest jurisdiction and to defend the claims. The following month it served notices on the Clubs appointing its arbitrator in each of the references, without prejudice to its jurisdictional objections. The parties have agreed to a stay of the arbitration until after this hearing has concluded.

11. In January this year Venezuela made Part 11 applications contending that it had state immunity from suit and contesting the order granting permission to serve out. Venezuela also requested any extension of time necessary to make these applications. The parties' stance is that it is unnecessary for me to consider whether Venezuela should be granted an extension of time or, indeed, whether service was properly effected.

12. By agreement of the parties and confirmed in an order which Knowles J made in March this year, this hearing concerns both whether the interim anti-suit injunction granted by HHJ Pelling QC should be made final, as well as Venezuela's objections regarding state immunity and jurisdiction. For present purposes the Clubs have given assurances that Venezuela will not be regarded as having waived immunity or submitted to the jurisdiction.

## The contract of insurance

13. The Resolute was entered with the Dutch Club in respect of P&I cover from 20 February 2020. Under the contract of insurance, the Dutch Club agreed to provide P&I cover for the owners, bareboat charterers and managers of the vessel in respect of, inter alia, collision liabilities. The contract of insurance was subject to the 2020 Club Rules (the "Rules"). The Rules provide for 100 percent cover, include the usual P&I "pay to be paid" clause, make liability subject to any laws pertaining to limitation, and exclude cover for war risks perils, and certain sanctions risks.

14. The Rules are governed by English law (Rule 42). Rules 40B-C provide for any disputes to be referred to the adjudication of the directors of the Clubs, which the directors may then waive, enabling the parties to refer the dispute "to the arbitration in London of two Arbitrators (one to be appointed by the Association and the other by such Owner or such other person) and an Umpire to be appointed by the Arbitrators, and the submission to arbitration and all the proceedings therein shall be subject to the provisions of the English Arbitration Act, 1996, and any statutory modification or re-enactment thereof."

15. Rule 40D then provides:

> "No Owner or such other person shall be entitled to maintain any action, suit or other legal proceedings against the Association upon any such difference or dispute…(ii) if the reference to such adjudication shall have been waived, unless and until such difference or dispute shall have been referred to arbitration as provided in paragraph (C) of this rule and the Award in such reference shall have been published…".

## Proceedings in Curaçao

16. Venezuela commenced civil proceedings before the Curaçao court on 2 April 2020, seeking a pre-judgment arrest of the Resolute in support of claims it intended to bring against its owners. The vessel was arrested. The owners petitioned for the release of the Resolute as well as summary dismissal of the civil proceedings. The petition alleged that the Resolute had not rammed the Naiguatá, rather the Naiguatá rammed the Resolute; that the Resolute was on an innocent passage; and that her bulbous bow was virtually indestructible, the vessel being of the highest ice class, as a result of which the Naiguatá had been damaged and possibly sunk by repeatedly ramming the Resolute. The court subsequently dismissed the owners' petition.

17. Some eight weeks later, Venezuela commenced civil proceedings in Curaçao by writ dated 28 May 2020 seeking damages in relation to the loss of the Naiguatá against the owners, head managers (misnamed) and insurer (misnamed). The Clubs have not appeared or participated in any of the preliminary hearings. At this stage the proceedings seem to have been stayed.

18. The Clubs obtained expert evidence on Curaçaon law from Professor Tiggele-van der Velde, an expert in the field of insurance law in The Netherlands. She opines that a claim by a third party directly exists in Curaçao law under article 7,954 of the Curaçao Civil Code, but only in relation to death or personal injury and not for property damage. If a claim for property damage exists, she contends, logically it would have to be subject

to the terms of the insurance policy and the general defences that the insurer could rely upon as against the injured.

19. Venezuela has been unable to appoint an expert in Curaçaon law. For this reason it accepts that for the purposes of this hearing it is bound to arbitrate the claims it has brought in Curaçao. Thus at this hearing the only point Venezuela takes as regards the claims it brings in Curaçao is whether injunctive relief can or should be granted.

20. The focus of this judgment is on Venezuela's claims in Venezuela; its consequences for the proceedings in Curaçao follow.

**The Venezuelan proceedings**

21. The Venezuelan proceedings are before the Thirteenth First Instance Court with Civil, Commercial, Transit, Banking and Maritime Jurisdiction in Caracas, Venezuela, for damages in tort under Article 321 of the Venezuelan Maritime Trade Law and Articles 1,185 and 1,191 of the Venezuelan Civil Code.

22. As originally framed on 14 April 2020 the action was against the Resolute herself, the master and the owners, but on 9 September 2020 Venezuela amended the writ to include further allegations and added as defendants the head managers and the insurer (misnamed).

23. The proceedings were formally served under Venezuelan law by way of summons posters placed in two Venezuelan newspapers. However, the amended writ itself has not been served on either of the Clubs. The Clubs have not appeared or participated in the proceedings. It appears that the Venezuelan action has been stayed pending the resolution of these proceedings.

24. The amended writ of 9 September 2020 alleges that the Naiguatá proceeded to the Resolute and made contact to verify the circumstances and reasons that, contrary to Venezuelan's Organic Law of Aquatic Spaces of 2014, it had almost stopped in Venezuelan waters without authorization. As a vessel belonging to the Venezuelan Navy performing coast guard duties, the Naiguatá was authorised to do this by the Venezuelan constitution and the 2014 law. The Naiguatá then initiated the process of maritime traffic control in accordance with the legal protocols established in Venezuela and ordered the Resolute to proceed to Pampatar Port, Venezuela, in compliance with Venezuelan legal protocols for coast guard vessels. The Resolute disobeyed this order, stating she would continue to her destination of Curaçao, in which direction she then proceeded. The Naiguatá pursued the Resolute and fired a shot across its bows. Following this, the Resolute collided with the Naiguatá and hit it repeatedly, as the vessels navigated in parallel, before the Resolute performed a manoeuvre and hit the middle of the Naiguatá with its bulbous bow. Subsequently, the Naiguatá sank. The writ alleges that the Resolute did not stop to assist the crew of the Naiguatá.

25. The writ also states that because the Naiguatá acted at all times in compliance with the legal regime in Venezuela, the conduct of the Resolute was completely unjustified. Pursuant to Articles 321 of the Law on Maritime Trade, the owners were liable for the damages caused to the Naiguatá, since the sinking was caused exclusively as a result of the Resolute's fault. The monetary claims made by Venezuela include the value of the

navy vessel, including a claim for the military equipment (e.g., guns) on board, and the expenses for the environmental damage that may have been generated from the sinking.

26. Subsequently, Venezuela has made clear that it intended to claim against the Dutch, not the English Club, as insurers of the vessel. The Clubs accept that if the court is not persuaded to grant anti-suit relief in favour of the Dutch club, the Clubs do not pursue independently anti-suit relief in favour of the English Club.

27. The Clubs do not accept the circumstances of the collision which Venezuela advances. A report which the owners of the Resolute commissioned from a firm of marine consultants uses information from the Resolute's "black box", which provides continuous information on the ship's navigational position and operation of its rudders and engines every second. The report's executive summary states that the collision occurred at 1.01 am ship's time when the vessel was in international waters. There are details about how the collision occurred. The striking force on the Resolute must have been from aft to starboard; the Resolute did not turn to starboard but there was a sudden impact from the other vessel. This pushed it rapidly to port and not to starboard where the patrol ship had been. The executive summary adds that the Resolute stood by to offer search rescue duties, remained in the area for an hour and forty minutes, but was instructed to proceed on its passage by the Maritime Rescue Co-ordination Centre in Curaçao.

## III ANTI-SUIT INJUNCTION TO SUPPORT ARBITRATION CLAIMS

28. The Clubs' case that Venezuela's claims in Venezuela are in substance to enforce the terms of the contract of insurance between the Dutch Club as insurer and its members, especially the owner; that Venezuela is bound by the terms of that contract, including the London arbitration clause, the English law clause and the defences in the contract; that the Venezuelan proceedings are contrary to the terms of the contract of insurance; and that consequently this court has jurisdiction and should order a final anti-suit injunction.

29. Venezuela contends that in Venezuelan law it has a direct claim against the Clubs, which is born of the law and independent of the contract of insurance. Therefore the Clubs cannot rely on any arbitration or jurisdiction clause in the contract of insurance as against Venezuela's claims in Venezuela. There is consequently no basis for an anti-suit injunction.

### Legal principles

30. The principles relating to anti-suit injunctions in support of an arbitration clause were conveniently summarised by Cockerill J in *Times Trading Corp v National Bank of Fujairah (Dubai Branch), The Archagelos Gabriel* [2020] EWHC 1078 (Comm), [2020] Bus LR 1752, [2020] 2 Lloyd's Rep 317, [38]. In summary (1) the court has the power under section 37 of Senior Courts Act 1981 to grant an injunction "in all cases in which it appears to the court to be just and convenient to do so", the touchstone being what the "ends of justice" require; (2) the court has jurisdiction under the Act to restrain foreign proceedings when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration; (3) the jurisdiction to grant an anti-suit injunction must be exercised with caution, but that does not mean refraining from taking action, merely that the court "does not do so except with circumspection": *The Angelic*

*Grace* [1995] 1 Lloyd's Rep 87, 92 per Leggatt LJ; (4) a claimant must demonstrate on the balance of probabilities a negative right not to be sued, at the trial of a final injunction: *Enka Insaat ve Sanayi v Chubb* [2020] 3 All ER 578 (CA), [64], [66] per Popplewell LJ; and (5) the court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of an arbitration clause, unless the injunction defendant (who bears the burden on this point) can show strong reasons to refuse the relief.

31. In relation to (5), Longmore LJ held in *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710, [2006] 1 All E.R. (Comm) 32, [2005] 2 Lloyd's Rep. 170 that in the case of an exclusive jurisdiction clause, comity had a smaller role, its true role being to ensure that the parties' agreement was respected. Comity was due to whatever country it was to the courts of which the parties have agreed to submit their disputes, since this upheld party autonomy: [32]. The corollary was that the party who initiated proceedings in a court other than the court agreed was acting in breach of contract, the normal remedy for which was the grant of an injunction to restrain the continuance of proceedings: [33]. Rix and Laws LJJ agreed.

32. As regards (2), a contractual basis for relief, an anti-suit injunction may also be granted on what has been described as a quasi-contractual basis. One strand is the so-called derived rights basis. This is a three-party situation where there is no privity of contract between the injunction claimant (A) and the injunction defendant (B), but the latter asserts in the foreign jurisdiction a claim against A that is based on a contract to which A is a contractual party. Thomas Raphael QC, *The Anti-Suit Injunction*, 2nd ed, Oxford, 2019, para. 10.84 summarises a further development which overlaps with the derived rights approach:

> "Perhaps more controversially, the case law shows that injunctions may also fall within this principle even where the injunction defendant's substantive claims are said by the injunction defendant not to be contractual under the local law, and in turn are said not to fall within the exclusive forum clause, but would be viewed as contractual, and subject to the exclusive forum clause, under English principles of characterisation, if and to the extent they are coherent claims (even though the injunction claimant denies that there is, in fact, any such contractual relationship)."

33. Falling under this head are where in foreign jurisdictions statutory or other law enables a third party to sue liability insurers directly. The issue in this type of case is one of characterising the third party's foreign claim. If it is in substance contractual, it is subject to any arbitration clause and the other clauses of the relevant contract. An anti-suit injunction is potentially available to restrain the third party from pursuing the foreign proceedings in breach of an exclusive forum clause. If legislation or the law in the foreign jurisdiction creates an independent right which does not mirror the insurer's liability under the contract of insurance, the arbitration clause is unlikely to bind the third party since the contract is not a necessary condition of the claim.

34. There are three key authorities. In the first, *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* (No.1) [2003] EWHC 3158 (Comm), [2004] 1 Lloyd's Rep. 206, a container of garments was lost in the course of carriage from Calcutta to Moscow, somewhere in Russia after arrival by sea in Kotka, Finland, and delivery to the road haulage company, Borneo Maritime Oy for onward carriage to Moscow. New India had insured the goods against

loss or damage in transit and settled a claim by the shipper for its loss. Borneo Maritime Oy was now insolvent. New India claimed against the P & I Club under a direct action provision, section 67 of the Finnish Insurance Contracts Act 1994.

35. Moore-Bick J granted an anti-suit injunction restraining New India from continuing an action in the Kotka District Court on the basis that its claim under section 67 was in substance to enforce the contract of insurance. Under that contract it was bound to pursue its claim in arbitration, rather than its statutory right to recovery. Applying the approach to characterisation which Auld LJ enunciated in *Macmillan Ltd v Bishopsgate Investment Trust Plc (No. 3)* [1996] 1 WLR 387, 407, Moore-Bick J said that the exercise of characterisation had to be directed not to the cause of action or the claim in Finland, but to the individual issues which underlay it: [15]-[16]. The experts on Finnish law agreed that in principle the claimant's right of recovery was regulated by the terms of the contract of insurance itself, not by the terms of the statutory right: [18]. What in substance section 67 conferred on a claimant, said Moore-Bick J, was a right to enforce the terms of the contract, which was governed by English law, not the Finnish law with its anti-avoidance provisions: [19]-[20].

36. Although on appeal the Court of Appeal set aside the anti-suit injunction, it upheld Moore-Bick J's decision that New India was bound to pursue any claim by arbitration in England. The substance of New India's claim under section 67 of the Finnish Act was to enforce the contract: [2004] EWCA Civ 1598, [2005] 1 All E.R. (Comm) 715, [2005] 1 Lloyd's Rep. 67, [57]-[60].

37. The second decision is *London Steam-Ship Owners' Mutual Insurance Association Ltd v Spain & France, The Prestige (No 2)* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep. 309. In broad outline this concerned two arbitration awards about oil spillage off Cape Finisterre. There were criminal and civil claims in Spain against the owners of the vessel and their P & I insurer. The club accepted its liability to Spain and other claimants under the Convention on Civil Liability for Oil Pollution Damage, which provides for direct action against the relevant insurer but caps the amount. In relation to other liability, section 76 of the Spanish Insurance Contract Act 1980 provided for direct action against the insurer. The Club contended that the claimants had to bring their claims in arbitration; Spain and France contended that their direct action rights were in substance independent, not contractual rights.

38. Hamblen J held that the direct action rights which might be enforced against the insurer were the insured's contractual rights, except that the insurer could not rely as against the third party on personal defences or a defence based on wilful misconduct. The direct action right was an independent right in origin but not in content: [87]. The essential content of the right was provided by the contract, except for the article 76 exceptions: [88]. The exceptions went beyond the anti-avoidance provisions of the Finnish Act in the *Hari Bhum* case and indeed created a liability for an event which would not normally be insurable (damage caused by wilful misconduct). However, they did not go so far as to change the essential nature of the right: [90]. By contrast the direct action right under the Convention on Civil Liability for Oil Pollution Damage was an independent right, since it depended on little more than the fact of the existence of liability insurance: [93].

39. The Court of Appeal upheld Hamblen J's judgment: [2015] EWCA Civ 333, [2015] 2 Lloyd's Rep. 33. Moore-Bick LJ reiterated that the critical question was what, in

substance, was the nature of the right that the legislation was seeking to confer on the third party. Where a wrongdoer was insured against liability of some kind it would be possible to identify an insurer who may be held liable in his place but, unless the legislation was intended to work in an arbitrary fashion, it would be necessary to establish that the contract covered the liability in question: [25]. In the case of article 76, the right to recover against the insurer was largely defined by the terms of the contract given the relatively limited modifications to the contractual obligation: [26]. Whether the claim was treated by Spanish law as sounding in tort rather than contract was beside the point; what mattered was the essential nature and scope of the right conferred by the legislation: [29].

40. Thirdly, there is *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS, The Yusuf Cepnioglu* [2016] EWCA Civ 386, [2016] 3 All ER 697, [2016] 1 Lloyd's Rep 641. In that case charterers claimed against the insurers in Turkey despite the owner's contract of insurance providing for London arbitration under English law. Article 1478 of the Turkish Commercial Code allowed a claim for loss up to the insured sum directly from the insurer, provided that the claim was brought within the prescribed period in the insurance contract. The Court of Appeal upheld Teare J, who had maintained an anti-suit injunction against the charterers' pursuing the Turkish proceedings: [2015] EWHC 258 (Comm), [2015] 1 All E.R. (Comm) 966, [2015] 1 Lloyd's Rep. 567. It held that the charterers' action was essentially contractual in nature. The fact that the pay to be paid clause would not be enforced in Turkey was not decisive: [17], [20]. In the course of his judgment Longmore LJ downplayed considerations of comity, in part because it was unclear which country should give way to which: [34] (see also Moore-Bick LJ at [43]-[44]).

41. There are some differences between and within these authorities as to the basis of characterisation and the court's jurisdiction to grant anti-suit relief. For present purposes, however, the one issue to be determined is whether in substance Venezuela's claims in the Caracas court are to be characterised as contractual claims asserted against them as liability insurers, or whether it is exercising an independent right of action born of the law which does not mirror the Club's liability under the contract of insurance.

**Characterising the Venezuelan claims**

42. Both sides engaged experts to assist the court. As regards Venezuelan law the Clubs obtained expert evidence from Carlos Eduardo Acedo, at one point a Professor of Contractual Liability and Torts in Venezuela, and later director and vice-president of the Venezuelan Association of Insurance Law. He has written a book on insurance law (and has other publications on insurance law as well). He has had insurers as clients and has regularly spoken and published papers on insurance law. He has been on the board of three insurance companies.

43. Venezuela obtained an expert opinion on its law from Mr Freddy Belisario Capella, formerly professor in Maritime Law in the Central University of Venezuela and a retired regular judge of the Superior Maritime Court.

44. The parties agreed that it would not be necessary to hear oral evidence from the experts.

45. The parties also produced in translation the relevant laws and commentaries on them. As in any civil law system the commentaries play a significant role in the interpretation of the law.

*(a) Venezuelan law and commentary on third party claims against insurers*

46. Under the Law on Insurance and Reinsurance Companies 1994, the regulator, Superintendencia de la Actividad Aseguradora ("Sudeaseg"), was empowered to approve insurance policies. That power continues to the present: Insurance Law 2016, articles 8(9), 138. Under it Sudeaseg has approved a contract for compulsory third party motor vehicle insurance.

47. The 1996 Land Traffic Law provided that the driver, owner and insurance company were "jointly and severally liable to repair all the material damage caused by the circulation of the vehicle…": article 54. Under article 58, the Ministry was to inform Sudeaseg of complaints against those insurance companies which failed to comply with "the obligations contracted in the Third-Party Liability Policies of Vehicles…" Article 60 of that law provided: "Victims of traffic accidents or their heirs shall have a direct claim against the insurer within the limits of the amount insured by the contract." Article 61 stated:

> "In no case may the objections [defences] that the insurer has against the insured be raised against the victims or respective successors in title…Notwithstanding, the insurer may make a claim against the insured when he or she has not paid the agreed premium…"

Article 62 imposed a 12 month limitation period on bringing a civil action.

48. In 1999 the Clubs' expert in the present proceedings, Mr Acedo, published a jointly authored book, in the course of which he referred to the direct claim which a third party victim could make against an insurer. This could only be made, he wrote, under the 1996 motor vehicle law. He stated that payment to the third party victim would be within the coverage limits. The mechanism for implementation could be found in the policy itself, which could be understood as a stipulation for the benefit of the victim, in accordance with Article 1,164 of the Civil Code (p.285 of the original). Under the heading "Direct claim" Mr Acedo stated that the insurer could not raise against the victim the objections it would have against the policy holder such as late notification, citing Article 61 of the Law (p.288).

49. In 2001 the Land Traffic Law was repealed and replaced by the Land Transport Law. The provisions in Articles 127 to 133 for third-party liability insurance for motor vehicles was organised in the same manner as previously: victims had a direct claim against the insurer within the policy amounts (Article 132); objections which an insurer had against the insured could not be raised against victims (Article 133, first indent); and insurers could recover from an insured as in old Article 61 (Article 133, second indent).

50. On 20 October 2003, Sudeaseg published a Decision ("the 2003 Decision") stating that, given the entry into force of Law on Insurance Contracts 2001, the text of the Vehicle Civil Liability Insurance Policy had to be adapted. As to the purpose of the insurance, Point One of the Decision stated that the insurance company undertook "to compensate

third part(ies), under the terms established in the policy, for damage to people or property for which the Insured Party or the Driver is liable…in accordance with the legislation governing land traffic and transport, up to the maximum amount provided in this Policy for each accident". Point Ten of the Decision stated that the insurance company would be entitled to reimbursement by the insured of amounts paid to the third party when, for example, the insured had not paid the agreed premium.

51. In 2003 Alberto Baumeister Todedo analysed civil liability under Venezuelan Traffic Law. Both sides relied on his commentary. In that work Mr Baumeister explained that it had been rightly stated by La Roche of the direct action which a third party had against the insurance company that it "does not really refer to the exercise of a civil liability action: the personal obligation of the insurer is of a contractual nature, totally unrelated to the liability derived from a tort. [L Roche] warns, immediately thereafter, 'it constitutes a derogation from the principle of privity of contracts…in Article 1,159 CC'."

52. Mr Baumeister then drew the distinction between the direct action and the so-called "stipulation in favour of a third party", the former originating in the law, the latter from the contract. Invoking Halperin, Mr Baumeister contrasted in tabular form on the one hand a direct action, with the holder exercising the right in his own name, by virtue of the debtor's independent right against which defences arising after the birth of the right cannot be raised, and on the other hand the oblique action, the right of the debtor being asserted against which defences before and after the exercise of the action can be raised: p.136 of original. Mr Baumeister then states (p.137) that the standing of the person who makes a direct action claim had ex lege standing, born of the law, which confers the option of claiming against the debtor "in the place of and replacing the person with respect to whom the obligation originates (Vg. The insured party in the case of Article 60 LT)."

53. Under the heading of "Limits of the obligation of the insurer or guarantor", Mr Baumeister stated in relation to the strict liability system which the transport legislation contemplates, that it is not what is ordinarily considered as such in legal doctrine:

> "[T]he insurer is only liable to the victim in the terms of the insurance contract, not only within the limits of the insured sum in the contract, as it can be expressly deduced from Article 60 LT, but also subject to 'the insured terms'. Therefore, if from the policy annex it can be gathered that there is no liability or compensation for loss of profit or indirect damage, the victim cannot expect payment for said kind of material damage, even if the insured owner and driver are so liable (p.139 of original).…in no case may the exceptions that the insurer may have against the insured be opposed to the victim or his heirs, the guarantor not being able to argue in his defence the responsibility or fault of the insured or any other personal except with him…the insurer is under the obligation to pay the victim or his heirs what, by sentence, could result even if the insured has not paid the insurance premium agreed in the contract" (p.140)."

54. In an article in 2007 Jose Alfedo Sabatino Pizzolante noted that the direct action of a third party victim against an insurer could be seen in international instruments such as Article VII (8) of the International Convention on Civil Liability for Oil Pollution Damage.

55. In 2008 the law changed again. The Law on Land Transport, Article 192 provided: "The driver or the owner of the vehicle and his or her insurance company shall be jointly and severally liable for compensating for any damage caused by the vehicle." Articles 195 and 196 reflected Articles 58 and 62 of the previous law on reporting complaints and the limitation period.

56. The Supreme Court, Political Chamber, handed down a judgment in April 2010 concerning the imposition of a fine on an insurance company for not giving reasons for refusing to pay a third party victim of a motor vehicle accident. (The law to this effect is referred to earlier.) The court stated that while, in principle, third parties are outside the contractual insurance relationship, they form a potential part of the legal relationship in receiving compensation under it. Later in the decision the court said that the insurance company could hardly deny its duty by arguing that the third party was not a party to the contractual relation of insurance. Rather, it was obliged, if necessary, to indemnify the third party for damage covered by the motor vehicle civil liability policy.

57. In 2013 Alfredo Morles Hernandez published a book in which he identified what he called some inexplicable omissions in the 2008 law, for example (1) the direct claim under old Article 60 (1996)/Article 132 (2001) which injured parties had against the insurance company; and (2) the objections which the insurer could raise against the victim in previous Article 61 (1996)/Article 133 (2001). Mr Morles commented that, notwithstanding the omissions, the right of third parties to bring a claim was implicit in the joint and several liability established in Article 192 of the Land Transport Law. He added that the incomprehensible elimination of the prohibition on the insurer invoking defences against the victim which it had against the insured could be explained by this being a repetition of a rule of general law, res inter alios acta. The contrary would require express legal provision. Finally, Mr Morles commented, recovery of the insurer from the insured under Article 133 continued.

*(b) The expert evidence: nature of direct action right against insurers*

58. As indicated earlier the claims in Venezuela state that they are brought in tort under article 321 Venezuelan Maritime Trade Law, and under articles 1,185 and 1,191 of the Venezuelan Civil Code. Both experts agreed that this is not the basis for the claims.

59. (i) Mr Acedo's first report. In his first report, prepared for the ex parte hearing, Mr Acedo opined that it must be the case that Venezuela was advancing a direct action against the Clubs. Mr Acedo identified two types of direct actions by a victim against an insurer, those based in law and those based on the insurance contract: paras. [11], [13] of his report. Mr Acedo was of the view that ordinarily direct actions are not available outside the context of motor vehicle insurance: [19]-[20]. There were exceptional cases as where the insurer was insolvent and had been negligent in collecting insurance moneys (an oblique action under article 1.278 of the Civil Code) or the insured instructed the insurer to pay the victim or assigned its rights against the insurer to the victim (articles 1,317 (delegation) and 1,549 (assignment) of the Civil Code respectively): [30]-[36].

60. Direct actions in the motor vehicle insurance context stemmed not from the law (as was previously the case before the Motor Traffic Law was amended in 2008) but from the standard and compulsory motor vehicle insurance policy, which has a clause providing that the insurer undertakes to indemnify third parties "in the terms established in the

policy…": [21]-[22]. As far as he could gather there was nothing comparable in the Club rules conferring a right of direct action on the victim ([39(b)]) or obliging the Club to pay any damages caused by the Resolute directly to Venezuela: [41].

61. In his view there were no provisions in the Maritime Trade Law establishing the victim's direct action against the shipowner's insurer, and maritime cases fell under the general rule, according to which there was no direct action: [24]-[26], [55]. Mr Acedo disagreed, he said, with the view that the rule in motor vehicle accidents could have a wider ambit in liability insurance because reasoning by analogy was not allowed to contradict a general rule, in this case the privity of contract rule in article 1,166 of the Civil Code. Although that wider view had been expressed by two authors (Mr Hugo Mármol Marquís and Rafael Darío Barreto), he had disagreed with it in his jointly authored book (referred to earlier): [27]-[29].

62. Mr Acedo stated that in direct actions by victims against motor vehicle insurers under the old law, defences available to the insurer against the insured were not available against the victim: [52]. (Mr Acedo footnoted the book by Alfredo Morles Hernandez referred to earlier, published in 2013.) Consequently, the insurer could not defend itself against the victim with the same defences available against the insured, for example on grounds that the insured had not paid the premium: [53]. However, liability to third parties in this context was now governed by the standard motor vehicle liability policy. It does not state that the defences available against the insured are not available as against the third party. Mr Acedo took the view that the defences would be available since the right of third parties to claim against the insurer would stem from the contract: [54].

63. If the wider view of the two authors previously referred to was correct and applied to all liability insurance, Mr Acedo opined that the same would apply: the right of the third party would derive from the insurance contract and thus defences available to the insurer against the insured would be available against the third party: [56].

64. (ii) Mr Belisario's report. In his report, Mr Belisario opined that Venezuela was entitled to and had brought a direct action in relation to the Resolute similar to or analogous to the one provided in Article 192 of the Land Transport Law relating to motor vehicle insurance. That was a non-contractual claim, independent of the contract of insurance: [33(a)]. Direct action claims were a matter of public order in Venezuela: [46]. Mr Belisario opined that this direct action was a mechanism closely linked to the concept of compulsory liability insurance for motor vehicles: [46]. The main objective was the protection of victims since a direct action allowed them to obtain compensation for damages regardless of the solvency of the insured. All that a victim needed to prove was the existence of the claim against the tortfeasor, the quantum, and a right of direct action. The issues that arose were those that arose in relation to a tortious claim, not those that may arise in a claim between the insured and insurer: [47].

65. Mr Belisario disagreed with Mr Acedo that direct actions only exist in the case of motor vehicle insurance. That is not the view of other commentators, including Baumeister [50]-[51]. He reviewed the situation of third party claims against insurers, and the strict liability on their part to a motor accident victim which arose not under the insurance contract but the law: [54]-[61]. There was no statutory provision precluding this form of analogous direct action claim in maritime legislation: [62]. Thus the right of direct action could arise from jurisprudence or doctrine, and Mr Belisario stated that in this

context it arose by analogy, agreeing fully with the views of the two commentators Mr Acedo quoted: [62]-[63]. Mr Belisario added that it would be up to the judge deciding the case, but it was clear that given these authorities Venezuela was entitled to try to substantiate its claim on this basis: [63], [70].

66. As to the nature of this third party claim, Mr Belisario opined that the action is born of the law. It is a non-contractual claim independent of the contract of insurance between the insurer and insured. Liability arises from the wrongful act of a tortfeasor under Venezuelan law: [40], [71(c)]. The position in the jurisprudence and in the writings of renowned jurists is that the victim's third party rights rest not in the contract, "because it does not grant the victim any right, but through the law and that, on the basis of the insured's guilt…": [65]. The insurer cannot rely as against the victim on any jurisdiction or arbitration clause in the contract of insurance: [66]. The courts of the place where the harm occurs have jurisdiction: [66]. Direct actions born of law are non-contractual and in contrast to an oblique action are not subject to any contractual defences. Liability is very much like that between a victim and tortfeasor: [71(c)].

67. (iii) Mr Acedo's second report. In a second report, Mr Acedo opined that there is no general right of direct action against a liability insurer outside the field of compulsory motor vehicle insurance. For any direct action right to exist, it would need to be founded on the doctrine of analogy applied under article 4 of the Civil Code and there would need to be a legal void. Mr Acedo opined that in this case there is no legal void since article 1,116 of the Civil Code (the rule on privity of contract) and article 1,223 (the rule which states that there is no joint liability "except by virtue of an express agreement or provision of the Law") provide the necessary legal framework.

68. As to any analogy with motor vehicle insurance, Mr Acedo opined that in 2008 the Land Transport Law which granted an express direct action was repealed. The direct action available in the motor vehicle context, even though the victim is not a party to an insurance contract, is now based on the Land Transport Law together with the standard car liability policy. The standard motor vehicle liability policy has been imposed by the regulator, Sudeaseg, which has the power to regulate joint liability vis-à-vis the traffic accident victim of the car driver, the car owner and the car liability insurer. Because Susadeg has issued this mandatory contractual policy providing a contractual basis for a direct action claimant, it follows that any direct action arising by analogy with the Land Transport Law must be contractual. Mr Acedo's conclusion was therefore that, even if there was a direct action based on analogy with the Land Transport Law, it would be contractual. Despite a submission by Venezuela to this effect, there is no inconsistency between Mr Acedo's first and second report.

*(c) Analysis*

69. The existence in Venezuelan law of a general third party right against insurers outside the motor vehicle context is unclear. Mr Acedo denies that such a right exists. He contends that in the motor vehicle context, following the adoption of the new law in 2008, the third party right derives from the standard compulsory motor vehicle insurance policy imposed by Susadeg. Because it derives from this policy it must also be contractual. Importantly, Mr Acedo opines that any direct action arising by analogy with the Land Transport Law in other insurance contexts is no longer possible. However, he concedes that commentators like Mr Hugo Mármol Marquís and Rafael Darío Barreto contend that there is the possibility of a direct action by third parties

based on the law, the perspective which Mr Belisario adopts in his report. That also seems to be the view of Mr Baumeister.

70. Moreover, Alfredo Morles Hernandez in his 2013 commentary states that, despite the omissions in the Land Transport Law, a third party right of action along previous lines can be spelt out of the provisions of the general law such as the joint and several liability provision in Article 192 of the Land Transport Law. That would apply by analogy to insurance claims outside the motor vehicle context.

71. Given the views of most commentators, and despite Mr Acedo's powerful arguments to the contrary, it seems to me that Venezuela has an arguable case (which I do not need to decide) that its law recognises that a third party victim may have a right of direct action against an insurer based on an analogy with what exists in the motor vehicle context.

72. Venezuela contends that this right of direct action is closely related to the concept of compulsory, not contractual insurance, and the analogy is based on the strict liability created by Article 192 of the Land Transport Law. In other words, it is born not of contract but of the law, as Mr Belisario contends in his expert report. As with Article 60 of the old law the existence of contractual claims for traffic cases under the standard, compulsory insurance policy has no impact on these direct actions. As Mr Belisario suggests, this third party claim is in the nature of tortious liability. Venezuela also submitted that the nature of the direct action of a third party victim against an insurer is comparable to that under the International Convention on Civil Liability for Oil Pollution Damage.

73. None of this is persuasive. It will be recalled that both experts cited Mr Baumeister's commentary. His view is that any direct action which a third party has against the insurer is of a contractual nature, unrelated to a liability derived from tort. It will also be recalled that Mr Baumeister opined that the insurer's liability is to the third party victim according to the terms of the insurance contract, so that if from the policy annex it could be gathered that there is no liability or compensation for loss of profit or indirect damage, the victim could not expect payment. The notion that the terms of an insurance contract have no relevance to the liability to a third party is not supported by Mr Morles either. As well there is the decision of the Supreme Court, Political Chamber, in April 2010, referred to earlier. All this is apart from Mr Acedo's powerfully argued opinion.

74. To say that the claim is born of the law begs the question, as Hamblen J pointed out in *The Prestige (No 2)* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep. 309 [84]-[87]. The contention that the third party claim is along the lines of tortious liability, or is a form of strict liability, is beside the point when it is the nature of the right which is determinative, not its derivation. In any event these suggestions lack support in the commentaries.

75. In my judgment the only possible conclusion which can be drawn about Venezuelan law is that if there is a direct action by third parties against liability insurers based on an analogy with that against a motor vehicle insurer, whether under the old or new law, it is subject to the terms of the insurance contract.

76. Article 61 of the Land Traffic Law 1996 provided expressly that the insurer could not raise against the third party the personal defences it might have against the insured.

Despite the omission of this express provision in the 2008 law, Mr Morles asserts that that this is still the case, basing himself on the general law. It will be recalled that at pages 136 and 140 of his commentary, Mr Baumeister in sketching the nature of the right of direct action opined that defences arising after the birth of that right could not be raised as against the third party. In my judgment, the position in Venezuelan law is that, with any third party insurance claim in Venezuelan law outside the field of motor vehicle insurance, the insurer cannot raise personal defences it might have against an insured. However, defences in the contract are not precluded since they are not personal as between the insurer and insured and necessarily precede the third party's rights.

## IV STATE IMMUNITY

77. Given the characterisation of Venezuela's claims against the Clubs in the Caracas court, the grounds for an anti-suit injunction are well laid. Venezuela's claims are subject to the arbitration clause in the contract of insurance. However, Venezuela has raised state immunity. Two main issues need to be resolved relating to this, first, whether Venezuela has immunity from this court's adjudicative jurisdiction under section 1 of the State Immunity Act 1978 (the "SIA" or "1978 Act"), and secondly, whether it has in addition immunity from injunctive relief under section 13(2)(a) of that Act.

### A. Adjudicative immunity: section 1 SIA

78. Section 1 of the 1978 Act provides that a State is immune from the jurisdiction of the courts of the United Kingdom except as provided for by one of the exceptions in Part I of the Act. Venezuela claims state immunity from the court's jurisdiction by virtue of section 1.

#### *(a) Section 3 (1)(a): commercial activity exception*

79. Along with sections 2 and 4-11, section 3 of the 1978 Act falls under the heading in Part I, "Exceptions from immunity". It provides in its relevant parts:

> "3. *Commercial transactions and contracts to be performed in United Kingdom*
>
> (1) A State is not immune as respects proceedings relating to—
>
> (a) a commercial transaction entered into by the State…
>
> (2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.
>
> (3) In this section "commercial transaction" means—
>
> (a) any contract for the supply of goods or services;
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.

80. The courts have enunciated a number of principles for construing the exception from immunity contained in section 3(1)(a). First, the categories of commercial transaction and commercial activity as defined in section 3(3)(c) are to be widely interpreted: see *Benkharbouche v Secretary of State for Foreign and Commonwealth Affair*s [2017] UKSC 62, [2019] AC 777, [10], per Lord Sumption (with whom the other members of the Supreme Court agreed); *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 2 AC 495, [86], per Lord Mance; *Kuwait Airways Corporation v Iraqi Airways* [1995] 1 WLR 1147, 1159, per Lord Goff.

81. Secondly, the Act must be construed against the background of what is known as the restrictive theory of state immunity. As the Court of Appeal recently explained, this draws a distinction between claims arising out of the activities which a state undertakes *jure imperii*, i.e., in the exercise of sovereign authority, from which it is immune, and those arising out of activity which it undertakes *jure gestionis*, i.e., activity of a kind which might appropriately be undertaken by private individuals, in particular what is done in the course of commercial or trading activities, from which it is not immune: *London Steam-Ship Owners' Mutual Insurance Association Ltd v Spain, The Prestige (Nos 3 and 4)* [2021] EWCA Civ 1589, [39].

82. Thirdly, the ultimate test of what constitutes an activity *jure imperii* is whether the activity in question is, of its own character, a governmental act, as opposed to an act which a private citizen could perform: *Kuwait Airways Corporation v Iraqi Airways Co* [1995] 1 WLR 1147, 1160A-B, per Lord Goff (with whom Lords Jauncey and Nicholls agreed), applying *Playa Larga v I Congreso del Partido* [1983] 1 AC 244, 267B-C, per Lord Wilberforce. Lord Goff added that it is a cardinal feature of the restrictive approach to state immunity that regard should be had to the nature, not the purpose, of the relevant activity: at 1162C. If therefore the act in question is of a commercial character, the fact that it was done for governmental or political purposes does not mean that it attracts state immunity. In characterising an activity as sovereign or otherwise, an act must be considered in context: *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1577, per Lord Hope, 1580-1581, per Lord Clyde (a decision on section 16(2) of the 1978 Act, disapplying Part I of the Act to proceedings relating to anything done by or in relation to the armed forces of a state while in the UK).

83. Venezuela accepts that the activity which the court must characterise in this case is its claims against the Clubs in Venezuela which are the basis of the application for relief in this court. It submits that its claims set out in the writ of 9 September 2020 in the Venezuelan proceedings are sovereign in character. As a result, section 3(1)(a) SIA is not applicable. Considered in their context, it submits, the claims could only ever be brought by a sovereign state, and they should be characterised as sovereign. The claims have this character, Venezuela submits, because they relate to military or law enforcement activity by the Venezuelan state. The Naiguatá was patrolling as a coast guard vessel. The claims are for the loss of that vessel, including the military equipment on board, and for the environmental damage to Venezuela's sovereign territory. Those

are claims which only a state could bring and are properly to be regarded as a sovereign act which could not be instigated by a private individual.

84. In my view Venezuela misstates the character of the claims it brings against the Clubs in the Caracas court. Certainly they are claims which arise out of a collision with the Naiguatá, a Venezuelan navy vessel on patrol, and are brought to recover compensation for its loss and associated environmental damage. However, even in their wider context they are ordinary civil claims in private law, brought in the ordinary civil courts, and those which a private individual could bring. They involve nothing more than what a non-sovereign would do in undertaking legal proceedings of this character. The claims seek to enforce an insurance liability for losses which have occurred, albeit that these might relate to military equipment and include environmental damage. That liability is under a commercial contract of insurance by which a P&I club has granted cover to the owners of the Resolute against the consequences of maritime casualties. The activity of Venezuela in seeking compensation in the Caracas court by virtue of this commercial contract is commercial in character: *London Steam-Ship Owners' Mutual Insurance Association Limited v Spain, The Prestige (Nos 3 and 4)* [2021] EWCA Civ 1589, [36].

85. Consequently, the commercial exception in section 3(1)(a) applies and Venezuela's conduct in launching proceedings against the Clubs in the Caracas court does not attract adjudicative immunity from this court's processes provided for in section 1 of the 1978 Act.

*(b)* ***Section 9: the arbitration exception***

86. Section 9(1) SIA reads: "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."

87. Earlier I concluded that Venezuela's claims in the Venezuelan courts are contractual in character. Although not an original party to the insurance contract, by claiming according to its terms in the Venezuela proceedings Venezuela has adopted them, including the London arbitration clause. It is to be regarded as having agreed in writing to submit the dispute to arbitration within the meaning of section 9. For this additional reason it is not immune from this court's jurisdiction under section 1 of the 1978 Act.

**B. Enforcement immunity from injunctive relief: section 13(2)(a) SIA**

88. Section 13 of the 1978 Act reads, as far as relevant:

> "13 Other procedural privileges
>
> (1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.
>
> (2) Subject to subsections 3 and 4 below
>
> > "(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

> (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale."

Section 13(3) provides that section 13(2)(a) does not prevent giving relief with the written consent of a state, and section 13(4) that it does not prevent the issue of process in respect of property which is for the time being in use or intended for use for commercial purposes.

89. The Clubs contend that in insulating a state's non-sovereign activity from injunctive relief, section 13(2)(a) engages article 6 ECHR and its right of access to the court. It precludes them obtaining an anti-suit injunction to ensure that Venezuela, like any other party engaged in non-sovereign activity, does not advance its claims before the courts in Venezuela (and Curaçao) in breach of contract. This cannot be justified as pursuing a legitimate object by proportionate means because it exceeds the requirements of customary international law. In this regard the Clubs' argument is founded on the restrictive doctrine of state immunity as applied by the Supreme Court in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777. In their submission the section must be read down under section 3(1) of the Human Rights Act 1998 so that it does not prevent injunctive relief against a state in relation to its non-sovereign activity.

***(a) Nature of section 13(2)(a): enforcement immunity***

90. In considering the 1978 Act in *Alcom Ltd v Republic of Colombia* [1984] AC 750 Lord Diplock, with the agreement of the other law lords, said that it drew a clear distinction between the adjudicative jurisdiction and the enforcement jurisdiction of the UK courts. He said at 600F:

> "Sections 2 to 11 deal with adjudicative jurisdiction. Sections 12 to 14 deal with procedure and of these, sections 13(2) to (6) and 14(3) and (4) deal in particular with enforcement jurisdiction."

91. This distinction between adjudicative and enforcement jurisdiction in the 1978 Act, and the prohibition in section 13(2) on measures of constraint likely to be invoked against a state, are well accepted: see Hazel Fox and Philippa Webb, *The Law of State Immunity*, 3rd ed, Oxford, 2013, 212-214. Given the clear dictum in *Alcom*, any submission that section 13(2) is not about enforcement immunity is untenable: see also *ETI Euro Telecom International NV v Bolivia* [2008] EWCA Civ 880, [2009] 1 WLR 665, at [113], [128], albeit a case involving a freezing injunction.

92. In my judgment section 13(2) contains a separate and additional immunity (or privilege) as regards enforcement measures including injunctions, even if there is adjudicative jurisdiction by way submission to jurisdiction, prior consent, or (as in this case) the operation of one of the exceptions in sections 2-11 of the 1978 Act.

***(b) Is article 6 ECHR engaged?***

93. The first issue is whether article 6(1) ECHR is engaged by section 13(2)(a) SIA. Venezuela submits that for article 6 to be engaged there must be a dispute relating to a legal right which at least arguably exists. An anti-suit injunction is a discretionary

remedy; its issue is not a matter regarding a legal right. Venezuela cites *Masson v Netherlands* (1996) 22 EHRR 491, where the court held that because compensation under the Dutch law was discretionary, article 6(1) was not engaged to meet the complaint of a lack of due process in consideration of an application for a payment: [52]. *Boulois v Luxembourg* (2012) 55 EHRR 32 was also cited in support of its case, where it was held that article 6(1) was not engaged since there was no "right" to prison leave.

94. In *Regner v Czech Republic* (2018) 66 EHRR 9, the Grand Chamber of the European Court of Human Rights reiterated that for article 6(1) to be applicable under its civil limb (i) there must be a dispute regarding a "right" recognised under domestic law; (ii) the dispute must be genuine and serious; (iii) it may relate not only to the existence of a right but to its scope and exercise; and (iv) the result of the proceedings must be directly decisive for the right: [99]. Rights conferred by domestic legislation can be substantive, procedural, or a combination of both. The Grand Chamber added that there is a right within the meaning of Article 6(1) where a substantive right recognised in domestic law is accompanied by a procedural right to have that right enforced through the courts. "The mere fact that the wording of a legal provision affords an element of discretion does not in itself rule out the existence of a right…": [102]. Article 6(1) is not applicable where there is a mere hope of being granted a right: [103].

95. At one time interim measures including injunctions were not regarded as engaging article 6(1) since they did not finally determine civil rights and obligations. However, in *Micallef v Malta* (2010) 50 EHRR 37 the Grand Chamber of the European Court of Human Rights said that a different approach to its previous caselaw was justified. That new approach was that article 6(1) applied to both the main and injunction proceedings if certain conditions were fulfilled. The nature of the measure, and its object, purpose and effects had to be scrutinised in order to consider whether it effectively determined the right at stake, regardless of the length of time it was in force: [84]-[85]. In that case there was a dispute between neighbours as to property rights and the purpose of the injunction had been to determine, albeit for a limited period, the right of access to the property in issue in the main proceedings. Accordingly, the court decided that the injunction proceedings had fulfilled the criteria required for article 6(1) to apply: [87].

96. In my view article 6(1) is engaged in the present case. The Clubs are asserting a substantive equitable right not to be subjected to court proceedings by a party asserting its entitlement to the benefit of a contract which obliges it to pursue that benefit through London arbitration alone. An anti-suit injunction is to protect that right, yet section 13(2)(a) prohibits the Clubs' access to the court to seek to have Venezuela observe the arbitration clause in the insurance contract under which it claims. Section 13(2)(a) SIA is a bar which would not operate if a non-state party were involved. In *Micallef v Malta* (2010) 50 EHRR 37, the Grand Chamber was explicit that they were developing the jurisprudence and that article 6(1) applied to injunctions as well as the main proceedings. Paragraph [102] of *Regner v Czech Republic* reinforces the position.

97. Since article 6(1) ECHR is engaged, the issue becomes whether the bar in section 13(2)(a) can be justified. An interference with an article 6(1) right can be justified if it pursues a legitimate objective by proportionate means and does not impair the essence of the right.

***(c) Justification of s.13(2)(a) as legitimate and proportionate: customary international law***

98. The Clubs argue that section 13(2)(a) cannot be justified as a proportionate restriction on their article 6(1) right, since it exceeds the requirements of customary international law in barring anti-suit injunctions in relation to non-sovereign as well as sovereign acts. The Clubs' submissions rest heavily on *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777. The Clubs submit that section 13(2)(a) is incompatible with article 6(1) and disproportionate unless Venezuela can show either (1) a binding rule of customary international law that confers immunity from anti-suit injunctive relief, or (2) a tenable view that customary international law mandates immunity from such relief. In its submission the only relevant rule of customary international law in this context is the restrictive doctrine of state immunity.

(i) Customary international law as justification: the jurisprudence

99. *Fogarty v United Kingdom* (2002) 34 EHRR 12 was a decision of the European Court of Human Rights, where it held that the assertion of state immunity in a discrimination claim by an employee of an embassy in London did not violate article 6(1) ECHR. On the assumption that the article was engaged, the court held that preventing the employee's access to the court was justified. The Convention had so far as possible to be interpreted in harmony with other rules of international law, including those relating to state immunity: [35]. A state taking measures which reflected generally recognised rules of public international law on state immunity could not, in principle, be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in article 6(1): [36]. International practice was divided but it could not be said that the UK was alone in holding that immunity attached to suits by employees at diplomatic missions or that, in affording such immunity, it went outside currently accepted international standards: [37]. It had not exceeded the margin of appreciation: [39].

100. In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777 the claimants raised employment claims against foreign embassies in London. The embassies claimed state immunity under section 1 SIA. The issue was whether in the circumstances section 4(2)(b) of the 1978 Act (under which immunity depends on the nationality and residence of a claimant at the date of the employment contract) and section 16(1) (which extends state immunity to the claims of any employee of a diplomatic mission) were incompatible with article 6(1) ECHR (and its counterpart, article 47 of the Charter of Fundamental Rights of the European Union) in denying the right of access to the courts and therefore should be read down under section 3 of the Human Rights Act 1998. That turned on whether the sections were consistent with a rule of customary international law and therefore a justified interference with the article 6(1) right.

101. In giving the judgment of the court, Lord Sumption considered relevant jurisprudence of the European Court of Human Rights. As regards *Fogarty v United Kingdom* he quoted paragraphs [37] and [39] of the judgment and added:

> "These observations are consistent with the view that in the absence of a recognised rule of customary international law, article 6 is satisfied if the rule applied by a

> Convention state lies within the range of possible rules consistent with 'current international standards.'": [24].

102. At paragraph [52] Lord Sumption considered the international consensus in favour of the restrictive doctrine of state immunity. The true basis of the doctrine historically, he explained, was the equality of sovereigns, but that never warranted immunity extending beyond what sovereigns did in their capacity as such. In support he cited Lord Wilberforce in *Playa Larga v I Congreso del Partido (The I Congreso)* [1983] 1 AC 244, 262:

> "The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of par in parem, which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate."

103. Lord Sumption then held that in an employment context there was no basis in customary international law for the application of state immunity to acts of a private law character: [63]. Sections 4(2)(b) and 16(1) were incompatible with article 6 ECHR (and article 47 of the Charter) in going beyond what was required by the restrictive doctrine of state immunity and could not be justified based on domestic policy: [68]. Therefore, the states whose embassies employed the claimants were not entitled to immunity: [76].

104. The relevant principles which emerge from the jurisprudence are: (1) restrictions on article 6(1) ECHR rights are only justified if they pursue a legitimate objective by proportionate means and do not impair the essence of the claimant's right; (2) both customary international law and domestic policy may offer justification: *Benkharbouche*, [34], [68]; (3) in the absence of a recognised rule of customary international law, the domestic rule is compatible with article 6(1) if it is within the range of possible rules consistent with current international practices: *Fogarty v United Kingdom*, [36]-[39]; *Benkharbouche*, [24]; (4) the restrictive doctrine in customary international law is based historically on the idea that governmental acts of one state are not matters upon which the courts of other states will adjudicate: *Benkharbouche*, at [52], citing Lord Wilberforce in *The I Congreso*; (5) there is an international consensus as to the scope of state immunity in favour of the restrictive doctrine: *Benkharbouche*, [52].

105. As to principle (3), in *Benkharbouche* Lord Sumption accepted that *Fogarty v United Kingdom* was consistent with the view that if there is no recognised rule of customary international law, a margin of appreciation is applied: [24]. Unlike the Clubs, I cannot read down Lord Sumption's very clear statements about *Fogarty* in light of other passages in his judgment to mean that Venezuela must go further to show that there is a tenable view that customary international law mandates immunity from anti-suit relief.

106. Principle (5) is stated in *Benkharbouche* in general terms but was decided in the context of a case involving adjudicative immunity, and its history (principle 4) explained by reference to adjudicative immunity (the reference to Lord Wilberforce in *The I Congreso* [1983] 1 AC 244, 262). Nothing was said in *Benkharbouche* about enforcement immunity. In my view the restrictive doctrine of immunity applied in *Benkharbouche* relates to bars on the adjudicative jurisdiction of the court but is not

determinative in the separate area of enforcement immunity afforded by s.13(2)(a) of the 1978 Act.

(ii) Customary international law: the enforcement jurisdiction

107. To identify a rule of customary international law it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation. While complete uniformity of practice is not required, substantial uniformity is. Substantial differences of practice and opinion within the international community upon a given principle is not consistent with that principle being law: *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777, [31].

108. The prohibition on coercive orders against states in the 1978 Act, in particular in sections 13(1) and 13(2)(a), is shared by some seven jurisdictions which have materially identical statutes, namely Singapore (State Immunity Act 1979); Pakistan (State Immunity Ordinance 1981); Canada (State Immunity Act 1985), South Africa (Foreign State Immunities Act 1981); and Malawi (Immunities and Privileges Act 1984). There are also 15 UK overseas territories which apply the 1978 Act.

109. The UN Convention on Jurisdictional Immunities of States and their Property 2004, article 24.1, provides:

> "Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case..."

110. The Convention has attracted 22 parties but is not in force since it needs 30 states for that. Not all its provisions represent customary international law: *Benkharbouche*, at [36]. However, in the drafting sessions for the Convention the assumption seems to have been that, according to customary international law, while a state might order another state to perform or refrain from performing a specific act, such orders were of no effect, whether related to non-sovereign matters or otherwise: see the *Seventh Report of the Special Rapporteur*, [12], [14], [27], [39], [77], and [131]; *Report of the Drafting Committee to the 38th session of the International Law Commission* (1986) at [98]-[103]; *Report of the Drafting Committee to the 43rd session of the International Law Commission* (1991), [49]-[55] and *ILC Commentary* (1991), pp. 61-62.

111. Many continental jurisdictions and commentators take the view that anti-suit injunctions should not be granted as a matter of principle: *Raphael on the Anti-Suit Injunction*, 2nd ed, Oxford, 2019, para. 1.23.

112. Only eight states have ratified the European Convention on State Immunity, 1972, ETS, No. 74. Article 18 prohibits criminal and financial sanctions in relation to non-disclosure, and article 23 provides that no measures of execution or preventive measures may be taken against the property of a contracting state in the territory of another without express consent. The Convention says nothing specifically about orders in the nature of injunctions and specific performance, but it might be thought significant that it does not expressly permit them.

113. The Australian Foreign States Immunities Act 1985 states that a court with jurisdiction over a case should be able to make such orders against a state as are appropriate and otherwise within power, including injunctions or orders for specific performance: s.29. However, it expressly precludes threats of committal or fines in the case of non-compliance: s.34. In adopting this position, Australia was consciously taking an independent line, and not adopting the position elsewhere: see Australia, Law Reform Commission, *Foreign State Immunity*, Report No 24, 1984, paras. [136]-[137] (authored by the late Professor James Crawford).

114. The Crawford Report notes that the United States Foreign Sovereign Immunities Act 1976 contains no provision dealing with the question of remedies such as injunctions and specific performance. However, the House Report commented that when appropriate these could be ordered, although a foreign diplomat or official could not be imprisoned for contempt in the event of non-compliance, and fines might be unenforceable. United States courts have issued injunctions and orders for discovery, and instigated contempt proceedings for non-compliance (as in *Chabad v Russian Federation*, 798 F Supp 2d 260 (DCC 2011); 915 F.Supp.2d 148)

115. There is no clear and settled view in customary international law regarding orders for injunctions and specific performance against states in proceedings relating to their non-sovereign activity or otherwise. The restrictive doctrine is not in play in this area. Anti-suit injunctions are generally eschewed by civilian jurisdictions. There would seem to be a substantial uniformity that if a court does order a coercive measure against a state, any criminal or financial penalties attached are of no effect. In taking an independent line, Australia expressly allows injunctions and specific performance, but the legislation qualifies this since they cannot be backed by sanctions. An anti-suit injunction not backed by sanctions may have a utility when it comes to the enforcement of judgments obtained in breach of it. United States courts have issued injunctions and orders for specific performance against states, with sanctions for non-compliance, but as in other matters of international law that country is an outlier.

116. In taking the position it has in section 13 of the 1978 Act, in particular section 13(2)(a), the UK is certainly not an outlier. Its approach has been adopted in commercially important jurisdictions like Canada and Singapore, as well as other countries, and it is the law in important commercial centres in the UK's overseas territories. Article 6 ECHR is satisfied since section 13(2)(a) lies within the range of possible rules consistent with current international standards.

***(d) Justification of s.13(2)(a) as legitimate and proportionate: domestic policy***

117. If section 13(2)(a) engages article 6(1) ECHR it can be justified as well by reference to legitimate domestic policy, if pursued by proportionate means. That was recognised in this context by Lord Sumption in *Benkharbouche* at paragraph [68], despite the Clubs' submission to the contrary. It was also the decision of the majority in *General Dynamics United Kingdom Ltd v Libya* [2021] UKSC 22, [2022] AC 318.

118. *General Dynamics* concerned the enforcement of a New York Convention arbitration award against a foreign state. Section 12 SIA, which provides that any "writ or other document required to be served for instituting proceedings against a state" is to be served by being transmitted through the Foreign, Commonwealth and Development Office to the relevant state's Ministry of Foreign Affairs. In the Supreme Court Lord

Lloyd-Jones (with whom Lord Burrows agreed) found that there was no rule of customary international law supporting section 12(1). However, considerations of international law and comity strongly supported a reading of it making its procedure mandatory: [57]-[62], [76(5)].

119. As to the precise relationship of article 6 ECHR and state immunity, Lord Lloyd-Jones accepted that it was unclear. He referred to paragraph 54 of *Al-Adsani v United Kingdom* (2001) 34 EHRR 11, where the Grand Chamber held that, although article 6 was applicable to the proceedings in question, the grant of immunity to a state in civil proceedings may pursue the legitimate aim of complying with international law to promote good relations between states through the respect of another state's sovereignty: [83]. Lord Lloyd-Jones continued:

> "84 In this case we are not directly concerned with a state's immunity from the adjudicative or enforcement jurisdiction of another state but with an attendant procedural privilege accorded to states by the SIA...The procedure secures benefits for both claimant and defendant states in circumstances of considerable international sensitivity and where, without such a provision, difficulties are likely to be encountered in effecting service. It is also intended to prevent attempts at service by alternative methods, for example on state representatives or on diplomatic premises, which might all too easily constitute a violation of international law. It provides a means of service which is in conformity with the requirements of both international law and comity…"

Lady Arden agreed: [88], [92], [96], [99]-[100].

120. To my mind, notwithstanding that section 13(2)(a) interferes with an article 6 ECHR right, it pursues legitimate domestic objectives by proportionate means and does not impair the essence of that right. First, there is the rationale given by the Lord Chancellor to Parliament during passage of what became section 13, that remedies of a personal nature such as injunctions and orders for specific performance were not appropriate against states. "The ultimate sanction for such orders lies in contempt. Clearly the processes for punishing contempt cannot be used against a foreign state": HL, Hansard, vol 389, col 1527-8, 16 March 1978.

121. Fox and Webb in *The Law of State Immunity*, 3rd ed, Oxford, p.214, note that in the debate Lords Wilberforce and Denning argued that the proposed exception relating to post-judgment enforcement against commercial property without the consent of the State should be widened to include pre-judgment interlocutory injunctions (HL, Hansard, vol 389, col 1526, 16 March 1978), but the government successfully resisted this.

122. Secondly, this is an area of considerable international sensitivity, more so it could well be thought than with the service issue in *General Dynamics*. The fact is that many jurisdictions and writers do not countenance orders, especially coercive orders against states, in particular the anti-suit injunction. A number of states have adopted versions of section 13(2)(a) of the 1978 Act, and internationally legislators have taken the decision not to permit their courts to grant personal remedies that order a state to act or not act on pain of penalties. In common law jurisdictions like the UK and those emulating it, this policy has been adopted by legislators irrespective of any position the courts might have applied in earlier times as in *Trendtex Trading Corporation v Central*

*Bank of Nigeria* [I977] QB 529 and *Hispano Americana Mercantil SA v Central Bunk of Nigeria* [1979] 2 Lloyd's Rep 277 (both involving freezing orders and, of course, a central bank, not a state).

123. Thirdly, there are issues of comity and procedural propriety. Comity in this context is not on all fours with that identified by Longmore LJ in *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710 and *The Yusuf Cepnioglu* [2016] EWCA Civ 386. Here one of the parties, the one to be subjected to an order not to pursue a course of action, is a state, not another commercial party. As Lord Lloyd-Jones explained in *General Dynamics*, considerations of comity and principles of international law are in play more so in a state's enforcement jurisdiction. As we have seen in *General Dynamics*, comity was an important consideration in winning the day: [59], [62], [84].

124. Finally, the fact that the Clubs will not have an injunction preventing parallel proceedings does not render worthless their right to have Venezuela's claims determined by way of London arbitration. As well as an order to this effect, there may also be supportive remedies available to the Clubs including, at least in a contractual context, the compensation for breach of the arbitration agreement and declaratory relief which the Clubs are seeking in the arbitration, and which could be relied upon to resist enforcement of any judgment which Venezuela obtains in the foreign proceedings.

**(e) *Reading down section 13(2)(a)***

125. If I am wrong in concluding that section 13(2)(a) stands intact from article 6 attack, the issue would arise whether it can be read down, as the Clubs submitted, to remove any incompatibility. The Clubs contended that immunity from anti-suit injunctions could be limited to sovereign acts. Words could be inserted in section 13(2)(a) that, in relation to anti-suit injunctions, the prohibition only applies in respect of a transaction or activity in which the state enters or in which it engages in the exercise of sovereign authority. Alternatively, the section could contain a general provision that it has purchase subject to compliance with article 6(1) ECHR.

126. In response to Venezuela's submissions, the Clubs reformulated their submissions during the hearing for a reading down not in relation to all injunctions and orders for specific performance but confined to anti-suit injunctions. Moreover, contrary to the standard practice the Clubs also accepted during the hearing that there did not need to be a penal notice attached to the permanent anti-suit injunction (which hitherto they had sought).

127. The test for reading down a provision according to section 3 of the Human Rights Act 1998 is that it must not be incompatible with the underlying thrust of the legislation - as has been expressed in the authorities, that it would not go against the grain of the legislation, would not call for legislative deliberation or change the substance of the provision completely, would not remove its pith and substance, or would not violate one of its cardinal principles: *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [32], per Lord Nicholls, [110]-[112], per Lord Rodger; *General Dynamics*, at [99], per Lady Arden.

128. In my view the section cannot be read down in an interpretive manner. The Clubs' submission is effectively for an amendment of the legislation to carve out anti-suit injunctions, whilst leaving the prohibition on other orders for another day. The Clubs

justified their concession about penal notices on the ground that these are not automatic, and in any event are not a necessary element when the injunction can be enforced by way of contempt proceedings. To my mind, however, this confirms that what the Clubs are seeking is more a legislative exercise than an exercise in interpretation. It is not within the competence of this court to recraft section 13(2)(a) in the manner the Clubs suggest.

## V CONCLUSION

129. For the reasons given the claim which Venezuela seeks to advance in the Caracas court for loss of the Naiguatá is one which must be brought in London arbitration. It is subject to the terms of the contract of insurance which the Clubs entered with the Resolute's owners. However, in accordance with section 13(2)(a) of the State Immunity Act 1978, the Clubs are not entitled to a permanent anti-suit injunction against Venezuela in relation to the foreign proceedings which Venezuela is taking against them.