Neutral Citation Number: [2022] EWHC 2062 (Comm)

Case No: CL-2022-000322

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2022

Before :

MR JUSTICE FOXTON

- -

Between :

(1) QBE EUROPE SA/NV
(2) QBE (UK) LIMITED **Claimants**

- and -

GENERALI ESPAÑA DE SEGUROS Y REASEGUROS **Defendant**

- -
- -

Oliver Caplin (instructed by **Stephenson Harwood LLP**) for the **Claimants**
Saira Paruk (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing date: 26 July 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

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THE HONOURABLE MR JUSTICE FOXTON

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 Monday 01 August 2022 at 14:00.

Mr Justice Foxton :

1. The Claimants (**QBE Europe** and **QBE UK** and together **QBE**) seek an urgent anti-suit injunction (**ASI**) to restrain proceedings brought by the Defendant (**Generali**) against QBE UK in Spain, and to prevent Generali from commencing similar proceedings against QBE Europe. The proceedings in Spain assert a direct claim against QBE UK under a Spanish statute, by reference to a liability insurance policy (**the Policy**) which QBE issued to High Definition Holding Ltd (**Owners**), the owner of the yacht Motor Yacht Angara (**the Yacht**).

2. QBE allege that those proceedings have been brought in contravention of a London arbitration agreement contained in the Policy, to which Generali's claim is subject, and that they should be restrained by an ASI. Generali denies that the claim it has brought in Spain is one which engages the London arbitration agreement and argues that there are a number of reasons why the court should refuse to grant an ASI in any event.

A THE BACKGROUND

3. On or about 1 June 2016, QBE UK's predecessor in title, QBE Insurance (Europe) Ltd, issued the Policy, which provided a policy of fixed premium P&I insurance to the Owners in respect of the Yacht.

4. On 1 November 2020, QBE Europe took over QBE UK's rights and obligations under the Policy via a transfer in accordance with Part VII of FSMA 2000 pursuant to the Order of Zacaroli J dated 21 October 2020. The effect of that transfer, at least as a matter of English law, is that QBE Europe has replaced QBE UK as the insurer under the Policy.

5. Clause 63 of the Policy contains what has been described as a multi-faceted dispute resolution and choice of law clause. This provides:

> "63.2 Any other dispute or difference arising between the Insurer and the Assured under this policy shall in the first instance be referred to the Claims Committee for consideration and adjudication. Such reference shall be on written submissions only
>
> 63.3 If the Assured does not accept the decision of the Claims Committee, such difference or dispute shall be referred to the arbitration in London of two arbitrators (one appointed by the Insurer and the other by the Assured) and an Umpire to be appointed by the Arbitrators, and the submission to arbitration and the proceedings therein shall be subject to the provisions of the Arbitration Act 1996, and any statutory modification or re-enactment thereof for the time being in force.
>
> 63.4 This policy shall be governed by and construed in accordance with English law. […]".

6. On 3 July 2016, there was an incident which appears to have caused damage to an undersea power cable linking the islands of Mallorca and Menorca, leading to

hydrocarbon pollution to the local area. It has been alleged that the Yacht was the cause of that incident. The undersea cable was owned by Red Eléctrica de España (**REE**). REE had the benefit of a property damage and civil liability insurance policy with Generali (as to 65%) and another insurer, pursuant to which it received an indemnity in respect of the loss caused by the incident in a sum said to amount to approximately EUR 7,700,000.

7. On 22 February 2021, Generali's Spanish lawyers, Herbert Smith Freehills Spain LLP wrote to QBE UK's Spanish lawyers, Albors Galiano Portales asserting the entitlement to bring a direct action claim and seeking payment. Stephenson Harwood LLP replied to that letter on 15 June 2021, challenging the merits of the asserted claim, stating that any claim would have to be brought in London arbitration and that ASI relief would be sought if there was any attempt to pursue the claim by other means.

8. Undeterred, on 23 February 2022, Generali commenced proceedings against QBE UK before the Court of First Instance of Madrid (**the Spanish Proceedings**). QBE UK was served on 10 June 2022. The Statement of Claim (**SoC**) served in the Spanish Proceedings proceeds as follows:

   i) QBE UK was identified as "the civil liability insurer" of the Yacht.

   ii) The damage to the cable, the losses suffered by REE as a result, and the basis for the allegation that the owners of the Yacht were legally liable to REE for causing the loss and damage, were then set out.

   iii) The policy which REE had taken out with Generali, and the indemnity paid thereunder, were summarised.

   iv) The steps taken to locate the owners of the Yacht and obtain details of their insurance cover were set out, with a summary of the exchanges with QBE UK's legal representatives.

   v) The SoC then pleaded those terms of the Policy said to provide civil liability cover responding to the Owners' liability arising out of the damage to the cable. Section A clause 15, setting out the "perils covered", was quoted, together with Section B clauses 40 and 53 (addressing insured value and damage to common property) and Section C clause 66 (lack of cover for liabilities, costs and expenses "covered by another policy").

   vi) The SoC asserted that the effect of the Policy was that "cover is established for the liability deriving from the damage caused by the vessel to REE's submarine power cable", and that certain policy exclusions did not apply.

   vii) It was then asserted that Generali was subrogated to REE's rights against QBE UK by virtue of section 43 of the Spanish Insurance Contracts Act 1980 (**the ICA**).

   viii) It was asserted that REE (and hence, by virtue of its rights of subrogation, Generali) had a direct claim against QBE UK by virtue of Article 465 of the

Spanish Maritime Navigation Act (**the MNA 2014**). That claim was said to be tortious in nature, with the result that the London arbitration clause in the Policy did not apply.

ix) Reliance was also placed on Article 1902 of the Spanish Civil Code (which creates a general liability to compensate for loss caused by acts or omissions undertaken negligently or with fault), principles of Spanish tort law and Article 18 of the Rome II Regulation.

x) It was asserted that the Spanish courts had jurisdiction.

B THE APPLICABLE LEGAL PRINCIPLES

Wholly contractual ASI applications

9. Most ASI applications are made by a party who asserts that both it, and the respondent to the application, are parties to an arbitration or jurisdiction agreement, and that the respondent has brought or is intending to bring proceedings against the applicant in breach of the arbitration or jurisdiction agreement.

10. I was referred to Jacobs J's summary of the key principles which govern the grant of anti-suit relief in this wholly contractual context in *AIG Europe SA and Ors v John Wood Group Plc and Ors* [2021] EWHC 2567 (Comm), [58] (which, to the extent it was in issue, was approved and further explained by Males LJ on appeal, [2022] EWCA Civ 781, [10]). The principles so summarised are as follows:

i) The court's power to grant an ASI to restrain foreign proceedings, when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration, is derived from section 37(1) of the Senior Courts Act 1981, and it will do so when it is "just and convenient".

ii) The touchstone is what the ends of justice require.

iii) The jurisdiction to grant an ASI should be exercised with caution.

iv) The injunction applicant must establish with a "high degree of probability" that there is an arbitration or jurisdiction agreement which governs the dispute in question.

v) The court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of a forum clause unless the defendant can show strong reasons to refuse the relief (relying on *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87).

vi) The defendant bears the burden of proving there are strong reasons.

11. By way of further elaboration of those last two points:

i) It has been held that respect for comity is not a strong reason for the court not to give effect to a contractual choice of forum clause, and that comity requires that

where there is an agreement for a sole forum for the resolution of disputes under a contract, that agreement is respected: Males LJ in *AIG Europe*, [8]. By way of parenthesis, in that context, comity is served by applying the same respect to choice of court or arbitration agreements in favour of other jurisdictions and arbitral seats.

ii) It has been held that the existence of a mandatory provision of foreign law applicable in the foreign court which overrides the contractual choice of jurisdiction is not a strong reason to refuse an ASI: *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret (The Yusuf Cepnioglou)* [2016] EWCA Civ 386, [34]-[37] and [57]-[58] and Thomas Raphael QC, *The Anti-Suit Injunction* (2nd) (***Raphael***), [8.31] – [8.44].

So-called "quasi-contractual" ASI applications

12. There are ASI applications which do not share the feature identified in [9] above – either because the claimant denies that it is party to the contractual choice of jurisdiction in issue, or does not assert (and perhaps positively denies) that the defendant is party to that contractual choice of jurisdiction, or (which, on one analysis, is the position of QBE UK in this case), both. However, it may nonetheless be the case that the right which the respondent is purporting to assert in the non-contractual forum arises from an obligation under a contract to which the arbitration or jurisdiction agreement is ancillary, such that the obligation sued upon is "conditioned" by the arbitration or jurisdiction agreement.

13. When deciding whether or not to grant ASI relief in this context, English law does not treat the arbitration or jurisdiction agreement as irrelevant (such that the ASI applicant has to bring itself within one of the categories of "non-contractual anti-suit injunctions" discussed in *Raphael*, chapter 5, and in many cases to satisfy what has been described as the "more onerous and more nuanced" test of showing the foreign proceedings are vexatious and oppressive: *Times Trading Corporation v National Bank of Fujairah (Dubai Branch) (The Archagelos Gabriel)* [2020] EWHC 1078 (Comm), [42]). Instead, in cases in which the right which the respondent seeks to assert in the non-contractual forum is regarded by the English court as contractual in nature, and arises under a contract which is subject to the arbitration or jurisdiction agreement, the English court regards the arbitration or jurisdiction agreement as a highly significant factor when determining whether or not to grant ASI relief. For that reason, ASIs granted in this context are sometimes referred to as "quasi-contractual" and the right which the ASI applicant asserts (which cannot be contractual in nature) is classified as an equitable right not to be sued in respect of a particular claim otherwise than in accordance with any forum agreement conditioning that claim (see for example *Clearlake Shipping Pte Ltd x Xiang Da Marine Ltd* [2019] EWHC 1536 (Comm), [37]).

14. "Quasi-contractual" ASI applications arise from a number of different fact patterns. It is convenient at this point to highlight two of them.

15. In many cases, the ASI respondent seeks to assert in the non-contractual forum a right derived from a contracting party (e.g., by virtue of direct action statute of the kind

which commonly allow the victims of torts or those standing in their stead to proceed directly against the providers of liability insurance to the wrongdoer or by pursuant to a right of subrogation). The granting of ASI relief in these circumstances has been rationalised on a "benefit and burden" basis: the ASI respondent cannot enjoy the benefit of the derived right without complying with the associated obligation to pursue the right only in the contractual forum. For example, in *Through Transport Mutual Insurance Association (Eurasia) Limited v New India Assurance Association Company Limited* [2003] EWHC 3158 (Comm), [39] Moore-Bick J stated:

> "There is a strong presumption that in commercial contracts of this kind parties should be free to make their own bargains and having done so should be held to them. By parity of reasoning those who by agreement or operation of law become entitled to enforce the bargain should equally be bound by all the terms of the contract."

The same point is sometimes explained on the basis that the obligation to arbitrate (or to litigate in a particular jurisdiction) is a legal incident of the right asserted: *Schiffahrtsgesellschaft Detlev von Appen v Voest Alpine Intertrading (The Jay Bola)* [1997] 2 Lloyd's Rep 279 and *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co (No 2)* [2005] EWHC 455 (Comm), [24]-[25].

16. In this "derived rights" context, it is now clear (at least to Court of Appeal level) that an application for ASI relief will be approached by reference to the same decision-making framework as that which applies in a wholly contractual context. In *The Yusuf Cepnioglu*, [32]-[35], Longmore LJ held that the *Angelic Grace* framework applied, and there was no requirement to establish vexatious or oppressive conduct, because the ASI was necessary to protect a contractual right to have the substantive rights arising under the contract in question determined in the contractual forum. Moore-Bick LJ (at [49]-[56] but in particular at [49] and [55]) held that whether the ASI was sought against a party to the arbitration agreement, or against a non-party seeking to exercise a derivative right, "the basis for the court's intervention is the same in each case", namely "enforcement by arbitration alone is an incident of the obligation which the claimant [in the non-contractual forum] seeks to enforce and because the defendant [in that forum] is therefore entitled to have any claim against him pursued in arbitration". At [55], he explained that "there is no distinction in principle between the position of a claimant [in the non-contractual forum] who is an original party to a contract containing an arbitration clause and one who is a remote party … [T]he rationale of the decision in *The Angelic Grace* applies equally to both cases".

17. There are also cases in which the ASI applicant denies (or at least is not willing to assert) that it is a party to the contract which it claims the respondent is seeking to assert in the non-contractual court, and which the contract in question makes subject to an arbitration or jurisdiction agreement. These are sometimes referred to as Non-Contractual Claimant cases. In some of these cases, the ASI respondent positively asserts that it is a party to the disputed contract (for example a claim under a bill of lading to which the respondent claims to have succeeded). In others, it may be the ASI respondent's position that it is not seeking to enforce the contract in question (for example where it is bringing a claim under a foreign direct-action statute of some kind).

18. It was not suggested that a different approach was required so far as QBE UK was concerned, on the basis that its application was not simply a derived rights case but a Non-Contractual Claimant case as well. QBE contended that it was entitled to an injunction, however QBE UK fell to be treated, and Generali did not seek to draw a distinction in this respect between the test to be applied to QBE UK's application, and that to be applied to QBE Europe's application. In circumstances in which QBE UK was the original party to the Policy, and given the principle of separability of arbitration agreements under English law which allows for the possibility that even if QBE UK had ceased to be party to the Policy, it had not ceased to be party to the London arbitration agreement in respect of disputes arising from the fact that it had originally been a party to the Policy, I can well understand why this was not seen as a significant issue in this case.

19. In any event, there is a substantial body of first instance authority which holds that a Non-Contractual Claimant can obtain an ASI in both the scenarios referred to in [16] and [17] above. By way of summary:

    i) In *Sea Premium v Sea Consortium* (11 April 2011), David Steel J held at pp.22-23 that, because the claim asserted by the respondent was contractual in nature, the respondent was bound by the arbitration clause in so far as it was seeking to assert a contractual claim against the owner of a vessel under time charter (even though the owner was not a party to the time charter which the respondent was seeking to enforce). It is clear that David Steel J accepted that the case before him was analogous to a conventional derived rights ASI, and that he did not regard the fact that the owner was denying that it was a party to the contract in issue as a distinguishing factor.

    ii) *Jewel Owner Ltd v Sagaan Developments Trading Ltd (The MD Gemini)* [2012] EWHC 2850 (Comm), a case in which a shipowner denied that it was the contracting party under a bunker supply agreement but sought an ASI to prevent proceedings being pursued under that agreement otherwise than in accordance with the English exclusive jurisdiction clause it contained. At [15], Popplewell J observed *obiter* that "generally it would be oppressive and vexatious for a party asserting a contractual right in a foreign jurisdiction under a contract which contains an exclusive jurisdiction clause in favour of England to seek to enforce the rights under that contract without giving effect to the jurisdiction clause which is part and parcel of that contract notwithstanding that the party being sued maintains that it is not party to that contract".

    iii) *Dell Emerging Markets (EMEA) v IBMaroc.com SA* [2017] EWHC 2397 (Comm), Teare J followed these decisions stating (at [34]):

> "In those cases, and in the present case … it would be inequitable or oppressive and vexatious for a party to a contract, in the present case IB Maroc, to seek to enforce a contractual claim arising out of that contract without respecting the jurisdiction clause within that contract. If the approach of Longmore LJ in *The Yusuf Cepnioglu* is applicable to the present case the reason is simply that IB Maroc, when seeking to enforce a contractual right, is bound to accept that its claim must be 'handled

through the English courts' as required by the contract in question."

iv) In *Clearlake Shipping Pte Ltd x Xiang Da Marine Ltd* [2019] EWHC 1536 (Comm), [37], Bryan J described an ASI in these circumstances as "protecting the injunction claimant's equitable rather than legal right not to be vexed by litigation in relation to a contract where the party asserting the claim is not respecting the dispute resolution clause", and held that *The Angelic Grace* framework applied.

20. Finally, in *Times Trading Corporation v National Bank of Fujairah (The Archagelos Gabriel)* [2020] EWHC 1078(Comm), Cockerill J reviewed these cases (albeit in a context in which the ASI clamant positively asserted that it was in a direct contractual relationship with the respondent: [71]). At [72], Cockerill J observed that the various quasi-contractual ASI cases reflected "the same underpinning – that it would be invidious to permit someone who is invoking a contract as the basis for its claim to do so otherwise than in accordance with the jurisdictional regime of that contract, to which they have either themselves agreed or to which they claim some right to enforce". On that analysis, she held that the *Angelic Grace* framework applied (78]).

21. In the light of the first instance authority referred to in the preceding two paragraphs, if QBE UK is to be treated as a Non-Contractual Claimant, then I am in any event satisfied that the ASI applications in this case were to be determined by reference to *The Angelic Grace* framework. In my view, that is so both in cases in which the ASI respondent asserts that it is a party to the relevant contract, and in cases in which it is not a contracting party but is seeking to enforce a derived right (cf. *Raphael*, [10.84]). In both cases, the respondent is seeking to assert a contractual right without respecting an incident or condition of that right which requires the claim to be asserted in an English-seated arbitration or before the English court. Moore-Bick LJ in *The Yusuf Cepnioglu*, [49] and [55] identified that factor as the justification for granting ASI relief in both contractual and quasi-contractual cases.

22. Finally, it may be relevant to note that the fact that proceedings have been brought for ASI relief by reference to a contract to which either the applicant, the respondent, or both are said not to be parties also has the potential to raise issues as to the proper basis for serving applications for such relief out of the jurisdiction. In order to remove any scope for doubt on this issue so far as claims to enforce exclusive jurisdiction clauses are concerned, the Civil Procedure Rules Committee has approved an amendment to CPR 6.33(2B) to provide that a claimant may serve a claim form on a defendant outside the jurisdiction where "for each claim made against the defendant to be served and included in the claim form … the claim is in respect of a contract" which "contains a term to the effect that the court shall have jurisdiction to determine the claim" (on the basis that the width of the words "in respect of" will address any issues which might otherwise arise from the quasi-contractual nature of such ASI applications).

When are the principles applicable to "quasi-contractual" ASIs engaged?

23. In order to answer this question, it is necessary to classify the right being asserted in the non-contractual forum by reference to English conflict of law principles. As Moore-Bick LJ explained in *The Yusuf Cepnioglu*, [42], the issue "depends on the

system of law which governs the right he seeks to enforce, as that is characterised by English conflicts of law rules".

24. The application of that test has been the subject of further consideration, and guidance, in cases in which the proceedings in the non-contractual forum have been brought under a so-called direct action statute.

25. In *London Steam-Ship Owners' Mutual Insurance Association Ltd v Spain* [2013] EWHC 3188 (Comm), Hamblen J adopted the following approach:

    i) The issue to be determined was whether the third party was seeking to enforce a contractual obligation derived from the contract of insurance or advancing an independent right of recovery under the relevant statute ([49]).

    ii) That involved ascertaining the nature of the claim "as a matter of substance" ([50]-[51]), which involved "a consideration of the nature of the right as a matter of the relevant foreign law" and its "characterisation …. applying English conflict of law rules" ([52]).

    iii) In answering this question, "what is likely to matter most is the content of the right rather than the derivation of that content" ([87]).

    iv) Where the direct action statute contains not simply "anti-avoidance" provisions (negating contractual provisions which would take-away the protection which the direct action statute is intended to provide) but provisions which materially alter the insurer's obligations (e.g. by imposing liability for events which would not normally be covered by insurance), "the question is whether the extent of the exceptions is such as to change the essential nature of the right created so that it can no longer be regarded as being in substance a contractual right" ([90]).

26. In the Court of Appeal ([2015] EWCA Civ 333), Moore-Bick J expanded on that analysis:

    i) He found the distinction drawn between the source and the content of the right "somewhat sterile" ([24]), and said that the critical issue was "what, in substance, was the nature of the right that the legislation was seeking to confer on the third party" ([25]).

    ii) In an important passage, he continued:

> "Where a wrongdoer is insured against liability of some kind it will be possible to identify an insurer who may be held liable in his place, but, unless the legislation is intended to work in an arbitrary fashion, it will be necessary to establish that the contract covers the liability in question. That in turn means ascertaining the limits of the insurer's obligation, which also means that he should be able to raise any defences that would be available to him in an action brought by the insured. If the legislation conferring a direct right of action against the insurer recognises that in substance that is the case, it is difficult to resist the conclusion that its

> intention and effect is to enable the third party to enforce against the insurer the same obligations as those that could have been enforced by the insured himself. If, on the other hand, the legislation prevents the insurer from relying in defence of a claim on important provisions which define the scope of his liability, one may be driven to the conclusion that the legislation has created a new right which is not intended to mirror in substance the insurer's liability under the contract."

iii) At [26], he continued:

> "One useful indication may be the extent to which the law creating the right of direct action seeks to modify the scope of the obligation to which the contract would otherwise give rise. In the case of Articles 76 and 117 , Spanish law recognises that the third party's right to claim against the insurer is to be determined by the terms of the contract, save for the exclusion of certain 'personal defences' on what appear to be public policy grounds. The fact that the right to recover against the insurer is largely defined by the terms of the contract and that under Spanish law those relatively limited modifications to the contractual obligation are recognised both point to the conclusion that the effect of the legislation is in substance to enable the claimant to enforce the obligations arising under the contract of insurance."

iv) He observed that "whether the claim is treated by Spanish law as sounding in tort rather than contract" is "beside the point" ([29]).

27. At first instance in *The Yusuf Cepnioglu* [2015] EWHC 258 (Comm), [34], Teare J identified a number of "indicia" that the direct action statute provided "a claim to enforce the contract" the facts that the perils insured against, the monetary limit and the period of cover were determined by the insurance policy. He held that the fact that the Turkish direct action statute in issue in that case precluded the operation of provisions in the policy which would discharge the insurer's liability did not change the essential nature of that right. In the Court of Appeal ([2016] EWCA Civ 386), Longmore LJ defined the essential issue as to whether "the intention and effect of the foreign statute is to enable the victim to enforce against the insurer essentially the same obligations as those that could have been enforced by the insured or whether the statute has created a new and independent right which is not intended to mirror the insurer's liability under the contract of insurance" ([1]). He upheld Teare J's conclusion, noting at [20] that "the victim's right in Turkish law is to a large extent circumscribed by the contractual provisions between the Club and its members". Moore-Bick LJ at [45] agreed, holding that "the claimant's right to recover against the club was essentially circumscribed by, and reflected, the cover provided under its rules", even if the statute had purported to invalidate certain defences ([50]-[55]).

C THE PROPER CHARACTERISATION OF THE CLAIM ADVANCED IN THE SPANISH PROCEEDINGS

Clause 63 of the Policy

28. In support of its argument that the direct claim in this case is not, in substance, a statutory right to enforce contractual obligations arising under the Policy, Generali relies on clause 63 of the Policy. This provides:

> "63. Disputes and Governing Law
>
> 63.1 The Assured here by submits to the jurisdiction of the High Court of Justice of England in respect of any action brought by the Insurer to recover sums which the Insurer may consider due to it from the Assured. Without prejudice to the foregoing, the Insurer shall be entitled to commence and maintain in any jurisdiction any action to recover sums which the Insurer may consider to be due to it from the Assured.
>
> 63.2 Any other dispute or difference arising between the Insurer and the Assured under this policy shall in the first instance be referred to the Claims Committee for consideration and adjudication. Such reference shall be on written submissions only.
>
> 63.3 If the Assured does not accept the decision of the Claims Committee, such difference or dispute shall be referred to the arbitration in London of two arbitrators (one appointed by the Insurer and the other by the Assured) and an Umpire to be appointed by the Arbitrators, and the submission to arbitration and the proceedings therein shall be subject to the provisions of the Arbitration Act 1996, and any statutory modification or re-enactment thereof for the time being in force.
>
> 63.4 This policy shall be governed by and construed in accordance with English law.
>
> 63.5 The Marine Insurance Act 1906 shall apply to this policy.
>
> 63.6 The Insurance provided by the Insurer shall not nor is intended to confer any right or benefit on any third party under the Contracts (Rights of Third Parties) Act 1999 or any similar provision, enactment or principle of law contained in the laws of any State which purports to do so."

29. In reliance on this clause, Generali makes two points.

30. First, it notes that clauses 63.2 and 63.3 refer to "the Assured" and "the Insurer", and that clause 63.2 refers to "any dispute or difference arising between the Insurer and the Assured under this policy" which it suggests is a narrower formulation than is sometimes found in arbitration agreements. For those reasons, Generali contends that the London arbitration agreement in this case does not, as a matter of construction, extend to claims brought by a non-party, even if that non-party is exercising a right of "the Assured" on a derivative basis. As to this argument:

    i) I am willing to assume in Generali's favour that it is possible for, an arbitration or jurisdiction agreement to be drafted so as only to apply to claims to enforce obligations arising under the framework contract brought between the original contracting parties, and not persons exercising derivative rights "through or

under" them. In this regard I note that s.58 of the Arbitration Agreement Act 1996 (which provides that an arbitral award is binding on the parties or those claiming "through or under them") applies "unless otherwise agreed by the parties" (although s.82(2), which defines references to a party to an arbitration agreement as including "any person claiming under or through a party to the agreement", applies for the purposes of Part 1, and therefore to the mandatory provisions in Schedule 1 to the extent they refer to "a party to an arbitration agreement").

ii) I am also willing to assume that if the arbitration agreement in issue was limited in this way, it would not be appropriate to grant an ASI on quasi-contractual grounds requiring a non-party seeking to exercise a derivative right to do so in what the original parties had agreed, so far as they were concerned, would be the contractual forum. That would be because the underlying premise of quasi-contractual ASIs – that it should not be open to the respondent to enforce a right arising under the contract without complying with the contractual dispute resolution provisions conditioning the exercise of that right – would not apply, the derived right not being so conditioned to the extent that it was asserted by a non-party.

iii) However, I cannot accept that the wholly unexceptional wording of clauses 63.2 and 63.3 begin to provide a basis for the argument that clause 63 is so limited. Language which would prevent the arbitration agreement extending to those exercising the rights of parties in a derivative manner would have to be extremely clear (not least because there is no obvious reason why the parties should contract on a basis which would allow one party to circumvent a mandatory arbitration agreement by assigning the right it wished to enforce to someone else). The functional definitions "Insurer" and "Assured" are no more capable of disapplying the London arbitration agreement to non-parties exercising derived rights in this case than the expressions "owners" and "charterers" in the arbitration agreement had this effect in *The Jay Bola* [1997] 2 Lloyd's Rep 279, 282.

iv) Nor does the use of the words "arising between" lend any support to such an argument. In my view, Mr Caplin was correct to characterise this submission as one redolent of the technical arguments on the wording of different arbitration agreements deprecated by the House of Lords in *Fiona Trust v Privalov* [2007] UKHL 40, [13].

v) The obligation to submit claims first to QBE's claims committee does not preclude the application of the London arbitration agreement to non-parties exercising the parties' contractual rights on a derivative basis.

vi) To the extent to which clause 63.6 is relied on in this context, for the reasons I explain below, this argument is misconceived.

31. Second, Generali argues that clause 63.6 shows that the parties had excluded the possibility of third parties having a contractual right to enforce its terms, and that the presence of clause 63.6 in a clause which also addresses the issues of arbitration and

governing law supports the view that the arbitration agreement was not capable of applying to non-parties. As to this:

i) Clause 63.6 is not intended to exclude the exercise by a non-party of a right which the Policy grants to one of the contracting parties on a derivative basis, but to avoid any suggestion that the Policy directly confers an (ex hypothesi) non-derivative right directly on a non-party.

ii) It is to be noted that clause 46 of the Policy does not preclude the assignment *of the Policy* altogether, albeit it requires the insurer's consent. It is well-established that provisions of this kind do not preclude the assignment of rights arising under the Policy as opposed to the Policy itself (*MacGillivray on Insurance Law* (15th), [20-005] and [20-015]), but the separate treatment of assignment in clause 46 is a further indication that clause 63.6 of the Policy is not concerned with derivative rights but direct rights.

iii) The suggestion that there is significance in the fact that clause 63.6 appears in the same clause as the arbitration agreement in clause 63.3 is belied by the fact that the applicable law provision appears in clause 63 as does the provision making the Policy subject to the Marine Insurance Act 1906.

32. In these circumstances, I am not persuaded that clause 63.6 of the Policy is of any relevance to the issue of whether the right accorded to Generali by Article 465 of the MNA 2014 is, in substance, a right to enforce the contractual obligations arising under the insurance policy. Indeed, the suggestion that the nature of the right accorded by Article 465 will primarily depend on the terms of the particular insurance policy in issue is itself unpersuasive. The nature of the right created by Article 465 will depend on the terms of the statute read in context, and the answer ought to be same whatever the terms of the particular policy in issue.

The SoC

33. I have summarised the terms of Generali's SoC above. If regard is had to the SoC alone, I am satisfied that QBE has shown a strong case that the claims there advanced are, as a matter of substance, an attempt to enforce the contractual rights of the Owners under the Policy:

i) The insured perils are invoked for the purpose of establishing that the Policy is required to respond to the damage to the cable. While the relevant paragraphs appear under the heading "The Facts", they are asserted in order to establish one of the ingredients of the Article 465 claim.

ii) Generali pleads three further provisions of the Policy for the purpose of establishing that the Policy has not effected any relevant "carve out" from the scope of the pleaded insured peril: clauses 40, 55 and 66.

iii) That is done for the purposes of supporting the conclusion urged on the court that "cover is established for the liability deriving from the damage… under the cover provided for in clause 15, Section A of the Policy" and that "the possible

limitations or restrictions/exclusions to which this cover is subject do not affect" that conclusion (SoC, [75]).

iv) It addresses, and argues against the application, of another clause (clause 42 which warranted compliance with flag state requirements at the date the Policy was entered into) (SoC, [76]).

v) The amount of the claim is defined by reference to the Policy limits (SoC, [78] and [120]) and the deductible (SoC, [81]).

34. I should refer at this point to a further section of the SoC on which QBE understandably placed forensic reliance:

i) At SoC [125]-[129], Generali noted that the MNA 2014 had superseded the earlier Spanish direct statute which had featured in *The Prestige* litigation – Article 76 of the ICA.

ii) SoC, [127] pleads that "Section 467 of the [MNA 2014] establishes that the insurer may raise the same defences against the injured party that would correspond to its insured, but, as with the [ICA], it cannot raise against the third party the defences that it could raise against the insured, derived from the content of the insurance contract".

iii) SoC, [128] notes that under the s.76 of the ICA, "the civil liability insurer can raise all those arguments that, in relation to liability, its insured could raise; but it cannot claim against the injured third party the grounds for exemption from its obligation to indemnify that it could claim against the insured".

iv) SOC, [129] noted that, as interpreted in case law, s.76 of the ICA distinguished between "objective" and "subjective" pleas of defence, allowing the insurer to invoke the former in answer to direct action claim, but not the latter. "Subjective" defences were "those arising from the conduct of the insured". The SoC then adopted and deployed the same distinction, arguing that the alleged breach of the warranty at clause 42 of the Policy was a "subjective" defence and therefore not available to QBE UK.

35. QBE emphasises these passages because the effect of the expert evidence adduced by Generali is that the MNA 2014 involved a significant departure from the ICA in this respect, and that so-called objective defences can no longer be raised by an insurer in answer to a direct claim.

The expert evidence

36. The character, and limitations on, the right of direct action conferred by Article 465 of the MNA 2014 was the subject of evidence before me from:

i) Beatriz Perez del Molino Vila of Perez de Molino & Asociados for QBE (a marine insurance lawyer with over 33 years' experience of maritime claims including direct action claims under the ICA and the MNA 2014); and

ii) Professor Fernando Gascon Inchausti for Generali, who is professor of civil procedure and Head of the Doctoral School at the Universidad Complutense de Madrid, but who does not appear to have expertise in insurance or maritime law.

37. I also had the benefit of an article, relied upon by both experts, by Professor Eliseo Sierra Noguero, Assistant Professor of Commercial Law at the Autonomous University of Barcelona (and an experienced maritime and commercial lawyer) entitled, "Obligation of payment and direct action against the P&I insurer" and which was published in the Critical Journal of Real Estate Law, No 778, 1294-1318. There is, as yet, minimal Spanish case law on Article 465 of the MNA 2014 (in contrast to the ICA, to which Spanish case law has made a significant contribution).

38. In brief summary, Ms Perez del Molino Vila contends as follows:

i) The Article 465 direct claim is circumscribed by and founded on the content of the Policy.

ii) The ICA continues to supplement the MNA 2014 so far as commercial vessels are concerned.

iii) In response to a direct action claim brought under Article 465 of the MNA, the insurer can raise all defences which would have been available in an action brought by the insured (it being Ms Perez del Molino Vila's view that a maritime insurer faced with a direct action claim under the MNA 2014 can even raise so-called personal defences which would have been available against the insured, albeit she accepts that many commentators disagree).

39. Professor Gascon Inchausti contends as follows:

i) The MNA 2014 itself determines the structure and content of the direct action right with no, or limited, reference to the Policy.

ii) Articles 465 to 467 of the MNA 2014 constitute a complete code for direct action claims, to the exclusion of the ICA.

iii) The insurer cannot raise in response to a direct action claim under Article 465 of the MNA 2014 any of the defences which could have been raised in answer to a claim by the insured.

40. In resolving this conflict on the expert evidence, I have found it helpful to consider the issues by reference to a number of topics.

The terms of Articles 465 to 467 of the MNA 2014

41. The MNA 2014 provides in relevant respects as follows:

Section X of the Preamble provides:

"The Act sanctions, with non-disposable status, direct action by the party damaged against the insurer to demand that it fulfils the obligation to

> compensate. The insurer may oppose such claims with limitation of liability (for maritime credits under Title VII) or even limitation of debt (that of the carrier of individual or things) that the insured may have arisen on its part against the damaged party claiming".
>
> The relevant provisions appear at Article 464 to 467:
>
> "Article 464. Mandatory insurance.
>
> Mandatory civil liability insurance required pursuant to this Act shall be regulated, in the first place, by the specific provisions thereof and, failing that, by the terms set forth in this Section.
>
> Article 465. Obligation of the insurer and direct action.
>
> The insurer's obligation to compensate in this type of insurance exists from the moment the liability of the insured party arises against the damaged third party. The latter shall be entitled to direct action against the insurer to demand the fulfilment of his obligation. Any contractual agreement that alters the provisions of this Article shall be void.
>
> Article 466. Limit of coverage.
>
> The insurer shall be liable up to the maximum limit of the sum insured for each one of the events causing liability that occur during the term of the contract.
>
> Article 467. Limitations of liability to compensate.
>
> The insurer may rely on the same defences against the third party that would correspond to the insured, and especially the quantitative limits of liability that the insured may invoke in accordance with the applicable law or the contract from which the insured's liability was derived."

42. These provisions offer something for both sides, and no definitive answer to the questions before the court. While Article 465 refers to the "insurer's obligation to compensate in this type of insurance" (i.e., liability insurance), that can be read as a reference to the obligation arising under the MNA 2014 to compensate the victim of the insured's wrong rather than the obligation under the insurance policy to indemnify the insured. The first and third sentences could be said to create a new obligation on the insurer's part accruing at the same time as the insured's liability to the victim. However, I accept that these provisions can also be read as addressing a procedural problem (allowing the victim to sue the insurer before or independently of the claim against the insured) or (as I suspect is the better view) addressing a rather narrower substantive issue, negating the effect of "pay to be paid" provisions frequently found in P&I policies which postpone the accrual of the insured's claim against the insurer to the point when the insured has itself discharged the relevant liability.

43. Clause 466 clearly references the terms of the insurance policy, both for the purposes of providing that the insured limits apply to a direct action claim and (inferentially) that the relevant liability must accrue during the period of the insurance.

44. Finally, it is common ground that clause 467 provides that the insurer can raise the same defences against the victim in the direct action claim that the insured could have raised against the victim, but that no reference is made to whether the insurer can raise the same defences in the direct action claim that it could have raised against the insured. Generali can certainly argue that there is no such reference because it is not open to an insurer to raise any such defences. However, some caution is required before drawing such a significant conclusion from an omission. For example, it is common ground that a direct action claim only lies against the insurer in respect of loss caused by perils insured against and for a type of liability covered by the policy. However, there is no express reference to these requirements in the text of Articles 463 to 467. An alternative explanation for the omission in both cases is that Articles 463 to 467 are not intended to provide a complete and self-contained code, but to build on the terms of Article 76 of the ICA.

45. However, the position becomes clearer when regard is had to the background to the MNA 2014, and to commentary and such case law as there is which has addressed these issues.

Was Article 465 of the MNA 2014 intended to modify or supersede Article 76 of the ICA?

46. Article 76 of the ICA provides:

> "The injured party or his heirs will have direct action against the insurer to demand the fulfilment of the obligation to compensate, without prejudice to the insurer's right to repeat against the insured person, in the event that the damage or harm caused to a third party it is due to fraudulent ('dolus') conduct of the insured. **The direct action is immune to the exceptions that may correspond to the insurer against the insured person.** The insurer can, nevertheless, oppose the exclusive fault of the injured party and the personal defences that he has against the latter. For the purposes of the exercise of the direct action, the insured person is obliged to inform the injured third party or his heirs of the existence of the insurance contract and its content."

47. The highlighted words have been interpreted by Spanish case law as preventing the insurer from raising so-called "subjective" or "personal" defences it may have against the insured in response to a direct action claim by the victim (such as defences based on the insured's conduct) but permitting the insurer to raise so-called "objective" or "improper" defences.

48. However, the Spanish courts (including the Supreme Court in the *Seabank* case 688/2003) had at one point held that Article 76 of the ICA did not provide a direct action claim against a P&I insurer in respect of maritime liability claims. There appear to have been two strands in the reasoning underpinning that conclusion.

    i) First, that the "pay to be paid" clauses generally found in P&I insurance had the effect that these were not liability insurances properly so-called but contracts of indemnity of a more particular kind.

ii) Second, because the ICA did not apply to marine insurance in any event, which was regulated by the Spanish Code of Commerce.

49. Both of those strands are referred to in one of the few court decisions which have addressed Articles 465 to 467 of the MNA 2014, the decision of the Commercial Court of Palma in Judgment No 234/2016 of 14 July 2016. The Commercial Court of Palma observed:

> "The Supreme Court's decision of 3 July 2003, written by the Hon. Mr. Xavier O Callagahan, is clear in the sense of the definition of the standard policies, of the impossibility of exercising direct action against the insurer, and that the right to compensation is conditional on the prior payment of the damages caused. For this purpose, I reproduce it. It states
> '.... In this case, the insurance contract is of the so-called protection and indemnity type known as PI insurance, lacking positive regulation in Spanish law, shipowner's liability insurance, as mutual insurance, in which the shipowners themselves or related persons are organised through clubs to provide coverage among themselves, subject to the legislation of the country in which they have been constituted, the submission to a specific legislation, which is usually English, being valid and also the arbitration clause in London, also usual: both are contained in the insurance contract in this case. In this type of insurance, the insured risk is the liability generated by the damage that may be caused to a third party, not in the sense that they cover the indemnity to be paid, but that they satisfy the indemnity already paid to the third party, hence it does not even contemplate the possibility of direct action by the third party against the insurer. It is not the classic civil liability insurance, but the effective indemnity insurance, which covers the insured for the loss suffered by the insured for having indemnified the third party'(...).
>
> ... [N]or in any case would the direct action provided for in article 76 of the Insurance Contract Act (RCL 1980, 2295) be applicable, since this law does not apply to marine insurance (the case law is very settled: 'maritime insurance is not governed primarily by the Insurance Contract Act of 1980 but by the special provisions of the Commercial Code [[Section 3 of Title III of Book Three], to which the former is merely complementary.'"

50. Against that background, it was Ms Perez del Molino Vila's evidence that Article 465 of the MNA 2014 was intended to expand the ability to bring a direct claim to the maritime context. In my view, it is highly arguable that Articles 465 to 467 were intended not simply to do that (and thereby overcome the second of the two arguments which had precluded the application of Article 76 of the ICA to P&I policies), but also the first, and that the first and third sentences of Article 465 were intended to overcome the effect of "pay to be paid" provisions (cf [42] above). However, Generali's argument has to go much further than this, and argue that Articles 465 to 467 of the MNA 2014 were intended to operate entirely independently of Article 76 of the ICA, and that the principles which applied to Article 76 direct action claims were of no relevance to direct actions brought under Article 465.

51. Ms Perez del Molino Vila's opinion to the contrary derives strong support from the following:

i) Article 406.1 of the MNA 2014 (which appears in the same Title as Article 465 – "On Maritime Insurance Contracts" – albeit in a different section and chapter), which provides:

> "TITLE VIII ON MARITIME INSURANCE CONTRACTS
>
> CHAPTER I
>
> GENERAL PROVISIONS
>
> Article 406. Scope of application.
>
> 1. Insurance contracts that have the object of compensating damage arising from the risks inherent to maritime navigation shall be subject to this Act. In the terms not foreseen *in this Act*, the Insurance Contracts Act shall apply".

(emphasis added).

ii) The decision of the Commercial Court of Palma referred to above, addressing the effect of Articles 465 to 467 of the MNA, described the MNA as (in effect) removing an obstacle to the application of Article 76 of the ICA in the maritime sphere:

> "In this way, direct action is allowed, in accordance with article 76 of the LCS, against insurers of P&I policies, thus overcoming the jurisprudence established since the Supreme Court ruling of 2003, which determined the inadmissibility of direct action against this type of policy. Therefore, the Maritime Navigation Act makes possible the exercise of direct action against such P&I Clubs, bypassing the typical obstacles posed by such policies, making these insurers have to respond directly."

iii) The decision of the First Instance Court of Vigo (Judgment 7/2018) which, referring to Articles 465 to 467 of the MNA 2014 which were not directly applicable to the events in that case, said that the effect of the MNA 2014 was that "direct action is being allowed in accordance with Article 76 [ICA] … against P&I policy insurers, thereby getting round the case law established after [the *Seabank* case] of 2003 which determined that a direct action was inadmissible in relation to this type of policy".

iv) Professor Sierra's article, which quotes extensively from court decisions addressing the ICA in his analysis of the MNA 2014 regime, and which describes the "specific legal framework" dealing with what defences the insurer can raise in a direct action claim as "made up on Article 466 and 467 [of the MNA 2014], other rules of the [MNA 2014] and [ICA] and the specific exceptions framework" provided by various international conventions. Elsewhere in the same article, Professor Sierra states that "the maritime legislator does not configure it differently from the general category of civil liability insurance in Articles 73 to 76" and that "the maritime law framework is

complete with the [ICA] rules which are applicable in matters not provided for in the [MNA] (Art 406.1, second paragraph and Sec X [MNA] statement of reasons). Minor jurisprudence confirms this supplementary application".

v) The stance which Generali, through its Spanish lawyers, adopted in the SoC served in the Spanish Proceedings.

52. Both Hamblen J and the Court of Appeal in *The Prestige* held that, as a matter of substance, Article 76 of the ICA created a direct right to enforce the contractual rights arising under an insurance policy, the inability to raise personal defences being insufficient to change the essentially contractual nature of that right. My conclusions as to the relationship of Articles 465 to 467 of the MNA 2014 and the ICA lend significant support for QBE's contention that that is also the effect of the MNA 2014.

Professor Sierra's article

53. Professor Sierra's article contains a number of passages which support Ms Perez del Molino Vila's opinion, and are inconsistent with Professor Fernando Gascon Inchausti's analysis:

i) Direct action was "above all a procedural economy" which gave "a right of its own – substantive and procedural – of the injured party against the insurer with the purpose, on the one hand of faster compensation" (p.1305 citing a Spanish Supreme Court decision).

ii) The direct action is an "autonomous and independent action", but only arises in respect of "a liability covered by the specific insurance contract since otherwise there is no coverage, nor direct liability of the insurer to the insured or the third party" (ibid).

iii) The insurer can challenge "both the lack of liability of its insured for the damage caused as well as the absence of contractual coverage for this type of civil liability " (p.1306).

iv) However, "certain contractual agreement cannot contradict the rules imperatively applicable to that contract such as denying direct action or the framework of opposable or unopposable exceptions" (ibid). "Opposable exceptions" (i.e., defences the insurer is free to raise in answer to the direct action claim") include the policy limits, liability for wilful misconduct on the part of the insured which has not been contractually assumed and excluded perils (p.1307).

v) In this context, Professor Sierra states that "the jurisprudence of the Supreme Court also indicates 'the insurer answers within the limits of the contract and the law' …. and 'the obligation only extends to the facts provided for in the contract itself, excluding direct action, since the injured party cannot claim a right not in the contract itself'".

vi) He also noted that "Article 76 [ICA] states that "direct action is immune to the exceptions that may correspond to the insurer against the insured" (p.1307).

54. It is clear from the article that, in Professor Sierra's view, the insurer can raise a defence of "no coverage", whether on the basis that the policy does not respond to the type of legal liability which has arisen, the particular peril is not insured, the financial limits of the policy have not been engaged or the maximum liability under the policy would be exceeded.

55. Professor Sierra's view on how far other defences can be raised in the direct action claim is not expressed quite so clearly. However, I accept that the statement "Article 76 [ICA] states that direct action is immune to the exceptions that may correspond to the insurer against the insured" uses language which the Spanish Supreme Court in Judgment 12/2022 regarded as denoting "personal" or "subjective" as opposed to "impersonal" or "objective" defences. As this section appears under a heading "opposable and unopposable exceptions by the insurer with the injured party", following an earlier passage in which Professor Sierra had identified "the specific legal framework of the opposable exceptions" as including the ICA, I am satisfied that Professor Sierra was referring to the non-availability of personal defences under Article 76 of the ICA because he regarded the distinction between personal and non-personal defences as relevant to the position under the MNA 2014 as well.

Professor Ternero's analysis

56. I was also referred to the contribution made to a 2006 book by Professor Ternero when commenting on a draft of what became the MNA 2014. Professor Ternero is Professor of Maritime Law at the Escuelas Superiores de las Marinas Civiles of Santander and Cadiz, and therefore, like Professor Sierra, a specialist in maritime law. Professor Ternero specifically addresses the fact that what became Article 467 of the MNA 2014 referred to the availability to the insurer of the defences which the insured would have had against the victim, but not defences which the insurer would have had against the insured. He then stated:

> "As a result, in the absence of another provision in the [MNA], it can be affirmed that the regime of the direct action of the liability insurance for maritime navigation shall observe what is generally regulated for this action in the [ICA] (art76), because it is the supplementary rule for other insurance modalities, in the absence of the Law that is applicable to them, and the usual integrating mechanism of direct action for other liability insurance required by different special rules".

57. After discussing the distinction which the Spanish courts had drawn when applying Article 76 of the ICA between "objective exceptions" and "personal exceptions", and noting that the ICA regime was "one of the most progressive of all that is known", Professor Ternero concluded that "this state of the direct action does not seem to change in the regulation provided for in the [MNA] for liability insurance for marine navigation".

58. Professor Ternero's contribution, therefore, also provides strong support for the views expressed by Ms Perez del Molino Vila, and is inconsistent with the opinions expressed by Professor Fernando Gascon Inchausti.

Other matters relied upon by Generali

59. There are various further matters relied upon by Generali in support of its contention that the rights it asserts in the Spanish Proceedings are not contractual as a matter of substance and/or are not conditioned by the London arbitration agreement in the Policy.

60. First, Generali points to the fact that it was compulsory for the Owners to have liability insurance, reflecting an important public policy. However, the compulsory nature of the insurance does not bear on the issue of whether the right accorded by Article 465 of the MNA 2014 is, in substance, a right to enforce the compulsory insurance or a right arising independently of it. In any event, as has often been noted, there is an important public policy in this jurisdiction of holding parties (and, I would add, those claiming through or under them) to contractual promises to arbitrate: see the references in *NDK Ltd v HUO Holding Ltd* [2022] EWHC 1682 (Comm), [73].

61. Second, it is suggested that the London arbitration agreement is "null, void, inoperative or incapable of being performed" for the purposes of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and/or contrary to public policy for the purposes of Article V.2(b) of the New York Convention because, as a matter of Spanish law, it is not possible to contract out of the direct action provisions of the MNA 2014. It is also said that "Spain is the court first seized which therefore has jurisdiction to assess whether the arbitration clause in QBE's Policy is null, void, inoperable or whether the case ought to be referred to arbitration".

62. However:

    i) As a matter of the applicable law of the London arbitration agreement and the law of the seat of the arbitration agreement (both of which are English law), the London arbitration agreement is valid, binding and enforceable, and there has been no suggestion otherwise.

    ii) The fact (if it be a fact) that Spanish law will not give effect to the London arbitration agreement when granting a direct right of action under the Policy to a non-party in respect of obligations arising under a Policy which is subject to English law and provides for London arbitration is no reason why the English court should not do so: *Riverrock Securities Ltd v JSC International Bank of St Petersburg* [2020] EWHC 2483 (Com), [59]-[61].

    iii) It is for the English court, as the court of the seat, to determine whether the London arbitration agreement is governed by English law and/or is enforceable as a matter of English public policy. There would be no utility in deferring that decision to allow a Spanish court to answer different questions as to the status of the London arbitration agreement as a matter of Spanish law and its enforceability as a matter of Spanish public policy: *Riverrock*, [22]-[31] and *Enka Insaat ve Sanayi v OOO Insurance Co Chubb* [2020] EWCA Civ 574, [42] (not affected in this respect by [2020] UKSC 38).

iv) Issues of public policy with regard to the enforcement of arbitration agreements are matters for each national court: *Stati v Kazakhstan (No 2)* [2019] 1 WLR 897, [38] and *Yukos Capital SARL v OJSC Rosneft Oil Co (No 2)* [2014] QB 458.

63. Third, it is said that the claims advanced in the Spanish Proceedings are tortious in nature. However, that characterisation does not answer the question of whether the right accorded by Article 465 is, in substance, a right to enforce the insurance contract. As Moore-Bick LJ observed in *The Prestige*, [29], whether the claim is treated by Spanish law as sounding in tort rather than contract is "beside the point".

Conclusion

64. Against that background, I have reached the following conclusions:

i) QBE has made out to a very high level of probability that Article 465 of the MNA 2014 provides the direct claimant with a right to enforce the insurer's contractual obligation to indemnify.

ii) QBE has made out an equally strong case that Article 465 is subject to what might be termed "coverage" defences: does the insurance policy respond to the type of liability in question, is the cause of the loss an insured peril, and whether (and to what extent) the direct claim falls within the contractual limits of coverage.

iii) QBE has shown to a high degree of probability that non-personal defences which the insurer could raise in proceedings brought by the insured under the policy can also be raised in answer to a direct action.

iv) QBE has not made out a strong case that personal defences can also be raised in direct action proceedings. While Ms Perez de Molino supports that position, it is inconsistent with Professor Sierra's article and Professor Ternero's analysis, and would involve Article 465 of the MNA 2014 adopting a *more favourable* treatment of the insurer than was the position under Article 76 of the ICA, even though the purpose of Article 465 appears only to have been to extend the Article 76 regime to the maritime context and (perhaps) address "pay to be paid" clauses, rather than to improve the position of the maritime insurer in that eventuality.

65. Reverting to the considerations identified in the authorities I have summarised at [23] to [27] above, I am satisfied that QBE has made out a very strong case to the following effect:

i) The right which Article 465 of the MNA 2014 grants to Generali is, in substance, the right directly to enforce the contractual promise of indemnity which the Policy creates.

ii) The respects in which the MNA 2014 arguably denies to the insurer the ability to raise defences which would avail in proceedings brought by the insured (i.e. personal defences), and the fact that Article 465 arguably reverses the effect of

"pay to be paid" clauses by providing that the insurer's liability will arise at the same time as the insured's liability to the victim, are not such as to change the essential nature of that right, such that it can no longer be regarded as being in substance a contractual right.

iii) While in view of my conclusion at [64(iii)] it is not necessary to go this far, it would in my view be a very rare case in which the disapplication of provisions which did not form part of the primary definition of cover (i.e. those defining the type of loss, insured perils, the temporal application of the policy, the attachment point and limits) would have this effect. It is those provisions which principally determine the scope of the contractual promise the insurer has made, and which constitute what Moore-Bick LJ described in *The Prestige (No 2)*, [22] as the "important provisions which define the scope of his liability",

iv) It follows that I am satisfied that the claims advanced by Generali in the Spanish Proceedings are, in substance, contractual in nature and are conditioned by the London arbitration agreement in the Policy, such that an ASI based on so-called "quasi-contractual" grounds is, in principle appropriate.

D HAS GENERALI SHOWN A STRONG REASON FOR REFUSING ASI RELIEF?

66. Generali has put forward a number of reasons which it contends, individually or cumulatively, amount to a strong reason for refusing ASI relief.

67. First, it relies once again on clause 63.6 of the Policy, and the fact that the operation of the Contracts (Rights of Third Parties) Act 1999 is excluded. For reasons I have already explained, this point is misconceived. If Generali is unable to pursue a successful claim under the Policy in arbitration when seeking to exercise the Owners' rights on a derivative basis, that will not be because of clause 63.6 of the Policy, but either because no relevant derivative right has arisen or because other terms of the Policy provided QBE with a defence.

68. Second, it relies on what is said to be the narrow wording of the London arbitration agreement which "suggests that the parties (and QBE in particular) did not intend that the arbitration agreement was to apply to third parties". However, if the wording of the London arbitration agreement is capable of applying to Generali's assertion of the derived right (and I am satisfied it does: see [30] above), its (alleged and relative) narrowness cannot constitute a good reason for refusing an ASI for the purposes of holding Generali to that obligation. That is also true of the reliance on clause 63.6 in this context.

69. Third, reference is made to considerations of comity. However, as noted above, that is a factor which is of little or no weight under the *Angelic Grace* framework (see [11]) which I am satisfied applies here. That is equally the case when ASI relief is sought on a quasi-contractual basis: see *The Yusuf Cepnioglu*, [34] (Longmore LJ observing that "invocation of comity in cases of this kind is not particularly apposite because it is never clear which country should give way to which") and [58] (Moore-Bick LJ stating that "in my view questions of comity in the established sense do not arise in a case such as this"). Nor do I accept that the (Spanish) public policy underpinning the

MNA 2014 requires a different conclusion, given the obvious English public policy in upholding the obligation to arbitrate which conditions the rights which Generali seeks to assert (see [62]). Finally, to the extent to which there are contractual defences available in arbitration proceedings which the MNA 2014 would have precluded in the Spanish Proceedings, matters of that kind were held in *The Yusuf Cepnioglu* not to constitute strong reasons not to grant ASI relief in the quasi-contractual context (see Longmore LJ at [36]).

70. Fourth, it suggests that it would be premature to grant an ASI in respect of QBE Europe because "as things currently stand" (or, as it was put in Generali's skeleton, "as of now") Generali has stated it does not intend to join QBE Europe to the Spanish Proceedings. However, Generali accepts that, as and when it has satisfied itself that there has indeed been a transfer of liabilities under the Policy from QBE UK to QBE Europe, it will seek to join QBE Europe to the Spanish Proceedings.

71. It is clear that the court has jurisdiction to grant ASI relief on a *quia timet* basis (*Hospira UK v Eli Lilly* [2008] EWHC1862). This is sometimes essential to avoid an "anti-anti-suit" injunction being obtained on the commencement of proceedings in the non-contractual court. Absent an undertaking not to commence proceedings against QBE Europe (and none has been forthcoming), I am satisfied that there is a real risk of Generali seeking to join QBE Europe without notice to the Spanish Proceedings, at a time of its choosing, and that this justifies granting ASI relief.

E WOULD IT BE JUST AND CONVENIENT TO GRANT THE ORDER SOUGHT?

72. Finally, Ms Paruk sought to resurrect various of the arguments raised at the "strong reasons" stage of the argument as reasons why the court should refuse to grant ASI relief as a matter of discretion. The third stage of the *Angelic Grace* enquiry is generally concerned with issues such as delay or unclean hands on the part of the applicant (see for example *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1078 (Comm), [102]-[103] and *ADM Asia-Pacific Trading Pte Ltd v PT Budi Semesta Satria* [2016] EWHC 1427 (Comm), [34]).

73. The principal factors relied on by Ms Paruk in this context were (i) considerations of comity; (ii) the public policy underpinning the MNA 2014; (iii) the fact that Generali is not in breach of contract and (iv) the fact that Generali will not be able to bring a successful claim in the arbitration by reason of clause 63.6. However, those factors do not have the effect that it is not just and convenient to grant ASI relief, any more than they provided strong reasons not to grant such relief. These points do not become a more potent brew simply because they have been re-bottled. It is noteworthy in this regard that Longmore LJ in *The Yusuf Cepnioglu*, [36] listed a series of factors relied on in that case, including that the charterers were not in breach of contract, that any claim would be defeated by the "pay to be paid" clause, comity and the policy of "victim protection" underpinning the direct action statute. He upheld the Judge's decision that these factors did not make it in appropriate to grant ASI relief.

F CONCLUSION

74. For these reasons, I am satisfied that it is appropriate to grant QBE UK and QBE Europe the ASI relief they seek.

75. I would like to express my thanks to counsel and their legal teams, both for the co-operation which allowed this application to be determined urgently, but without putting undue pressure on the court, and for the high quality of the arguments advanced.