

Judgment of the ECJ in the Prestige Case - The End of 'Pay to Be Paid' Clauses in the European Union?

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I. THE PESTIGE CASE: THE FACTS



II. JURISDICTION TO HEAR THE DIRECT ACTION CLAIM

- Direct action claim brought by the Spanish State against the shipowner's P&I Club before the Spanish Courts.
- Negative declaratory action claim brought by the P&I Club before a London arbitrator.

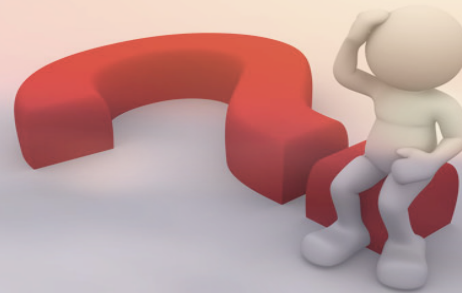


II. JURISDICTION TO HEAR THE DIRECT ACTION CLAIM

- Spanish Supreme Court held that it had jurisdiction to hear the direct action claim.
- London arbitrator held that, according to the arbitration clause, it had jurisdiction to hear the negative declaratory action.
- High Court (and Court of Appeal) held that the direct action brought by the Spanish State had to be submitted to arbitration.

II. JURISDICTION TO HEAR THE DIRECT ACTION CLAIM

Why did two courts consider themselves competent to hear the same facts between the same parties?



- Lack of *lis pendens* mechanisms between arbitration and jurisdiction.
- Arbitration is excluded from the material scope of the Brussels I Regulation [art. 1.2 d)].
- Art. 27 of the Brussels I Regulation is not applicable.

III. THE EXISTENCE OF CONTRADICTIONARY DECISIONS

Judgment of the Second Chamber of the Spanish Supreme Court

- Ordered the P&I to compensate the Spanish State for the damages caused by its insured.
- Spanish Law: direct action is mandatory.
- The pay to be paid clause is not enforceable against the injured third party.

Arbitration Award of the London arbitrator named in the policy

- Exonerated the P&I Club from liability.
- English Law: direct action is non-mandatory.
- The pay to be paid clause is enforceable against the injured third party.

IV. THE RECOGNITION OF THE SPANISH JUDGMENT IN THE UK

1. Arbitral award: **13 February 2013.**
2. Judgment of the English High Court enforcing the award: **22 October 2013.**
3. Judgment of the Spanish Supreme Court: **14 January 2016.**
4. Proceedings to enforce the Spanish judgment in the United Kingdom: **March 2019.**
5. Reference for a preliminary ruling from High Court: **22 December 2020.**
6. Judgment of the ECJ: **20 June 2022.**



V. THE DECISION OF THE ECJ ON THE PRESTIGE CASE

Is it permissible to rely on Article 34(1) of Regulation No 44/2001 as a ground of refusing recognition or enforcement?

Judgment of the ECJ of 4 February 1988, *Horst Ludwig Martin Hoffmann v. Adelheid Krieg* (C-145 / 86):

- Art. 34(1) is to be applied only in exceptional cases.
- Is not applicable when the dispute concerns the compatibility between a foreign and a national decision.

Judgment of the ECJ in the *Prestige* case (para. 80):

- “Article 34(1) of Regulation No 44/2001 must be interpreted as meaning that (...) the recognition or enforcement of a judgment from another Member State cannot be refused as being contrary to public policy on the ground that it would disregard the force of res judicata acquired by the judgment entered in the terms of an arbitral award.”

V. THE DECISION OF THE ECJ ON THE PRESTIGE CASE

A judgment enforcing an award is capable of constituting a relevant “judgment” of the Member State in which recognition is sought for the purposes of Article 34(3) of the Regulation?

- Title III of the Regulation does not indicate that the decision which is objected to as a ground for refusal must be a decision falling within the scope of the Regulation.
- The recognition of a judgment given by the courts of a Member State can be refused if there is an irreconcilable judgment confirming an arbitral award:

“a judgment entered in one Member State in the terms of an arbitral award is capable of constituting a ‘judgment’, within the meaning of Article 34(3) of Regulation No 44/2001, which prevents the recognition, in that Member State, of a judgment given by a court in another Member State if those two judgments are irreconcilable.” (ECJ, *Prestige*, para. 53)

V. THE DECISION OF THE ECJ ON THE PRESTIGE CASE

Does this mean that the ECJ concluded that the Spanish Supreme Court's judgment in the Prestige case could not be enforced in the UK because of the existence of an earlier, irreconcilable judgment? (*paras. 54-58*)

An arbitral award can, by means of a judgment entered in the terms of that award, produce effects in the context of Article 34(3) of the Brussels Regulation only if:

1. Does not infringe **Article 47 of the Charter of Fundamental Rights of the European Union**.
2. Enables the **objectives of the free movement of judgments in civil matters** and of **mutual trust in the administration of justice in the European Union** to be achieved.

V. THE DECISION OF THE ECJ ON THE PRESTIGE CASE

The decision of the English High Court infringed two rules:

1. The relative effect of an arbitration clause in an insurance contract (*paras. 60-63*):

- Jurisdiction (or arbitration clauses) contained in the policy are not enforceable against the injured third party (judgment ECJ of 13 July 2017, *Assens Havn*, C-368/16, EU:C:2017:546, paras. 31 and 40).

2. The *lis pendens* mechanisms provided for in the Regulation (*paras. 64-69*):

- When the arbitration proceedings were commenced, proceedings were already pending before the Spanish courts.
- Article 27.1 and 27.2 Brussels I Regulation
- The English arbitrator should have stayed the proceedings of its own motion, first, and had to have declined jurisdiction in favour of the Spanish court, subsequently.

V. THE DECISION OF THE ECJ ON THE PRESTIGE CASE

CONCLUSION OF THE ECJ:

“Article 34(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a judgment entered by a court of a Member State in the terms of an arbitral award does not constitute a ‘judgment’, within the meaning of that provision, where a judicial decision resulting in an outcome equivalent to the outcome of that award could not have been adopted by a court of that Member State without infringing the provisions and the fundamental objectives of that regulation, in particular as regards the relative effect of an arbitration clause included in the insurance contract in question and the rules on lis pendens contained in Article 27 of that regulation, and that, in that situation, the judgment in question cannot prevent, in that Member State, the recognition of a judgment given by a court in another Member State.”

VI. FUTURE EFFECTS

- 1) **Impossibility to enforce the arbitration (or jurisdiction) clause against the injured third party.**
- 2) **Jurisdiction to hear direct action claims shall lie with**
 - a) the courts of the Member State where the insurer is domiciled, or
 - b) the courts where the injured third party is domiciled.
- 3) **Impossibility to enforce the “pay to be paid” clause in the UE.**
- 4) **Only ONE possibility:**
 - 1) The direct action is not recognised in the legal system of the Member State where is domiciled.
 - 2) In the legal regime of the Member State where is domicile the direct action is a contractual action.

**MANY THANKS FOR
YOUR ATTENTION**

