



Direct Action against Civil Liability Insurers under the New Spanish Navigation Act.

The BREXIT impact.

F. Javier Zabala

TABLE OF CONTENTS

- **Brief introduction to the Spanish Navigation Act.**
- **Direct Action: What does the Spanish Law say?**
- **Direct Action: What does the Case Law say? The Prestige.**
- **The BREXIT impact.**



THE NEW SPANISH NAVIGATION ACT

- A comprehensive Act which regulates all aspects of navigation.
- Entered into force in September 2014 replacing the old regulation contained in the Code of Commerce 1885.
- It is a law inspired by the freedom of the parties. Nevertheless, some of the provisions of the Act are indeed MANDATORY.
- Implements into Spanish Domestic Law the International Conventions such as CLC 92, LLMC 76/96 and the Hague Visby Rules (not Hamburg which have been ratified by Spain) **but** contains compulsory provisions to protect shipper's interests going beyond the provisions of the international conventions.



WHAT'S NEW? THE MAIN CHANGES

- Liability of the Carrier for delay in delivery of the goods.
- Lien proceedings before the Notary Public.
- New requirements for the validity of the Jurisdiction and Arbitration Clauses in B/L's.
- **Direct Action against P&I Clubs.**



Direct Action: What does the Spanish Law say? The new Spanish Navigation Act.



DIRECT ACTION AGAINST THE CLUBS (arts. 463-467 SNA)

- P&I as a Civil Liability insurance?
- What about the English Law and Jurisdiction clauses governing the contract of insurance?
- What does the Act actually say?
 - **Article 463 SNA** establishes that:

“The rules governing civil liability insurance shall apply to the coverage of risk of certain obligations arising to compensate third parties included in maritime insurance of another class”.



DIRECT ACTION AGAINST THE CLUBS (arts. 463-467 SNA)

Now, what does maritime insurance of another class actually mean? Does it mean:

- P&I Insurance?
- Cargo Insurance?



DIRECT ACTION AGAINST THE CLUBS (arts. 463-467 SNA)

The story behind it all:

The draft wording of this Article before it went to Parliament actually did say P&I Insurance...

The Spanish market thought it was not fair!



DIRECT ACTION AGAINST THE CLUBS (arts. 463-467 SNA)

But the Congress thought that **protection to innocent third parties** had to be afforded.

They believed that the **terms governing the relationship between the Associations and the Members could not be opposed to innocent third parties** who were not party to the contract of insurance. Particularly when dealing with civil liability risks. Members and the Clubs can negotiate terms which affect their relationship but not those affecting third parties.



DIRECT ACTION AGAINST THE CLUBS (arts. 463-467 SNA)

The final wording of the Act was nevertheless amended and the words *maritime insurance of another class* were introduced as we have seen before to create uncertainty in the industry without apparent or reasonable explanation, leaving it to the Courts to interpret its meaning...

Can you think why



DIRECT ACTION AGAINST THE CLUBS (arts. 463-467 SNA)

Excuse Mr. PM, but I do not want my premium to go up!



Parliament listened to the rather concerned Shipowning community and decided to change P&I for **maritime insurance of another class** and leave it to the Courts to explain what they actually meant and in the meantime not make much noise in the City...



DIRECT ACTION AGAINST THE CLUBS (arts. 463-467 SNA)

Before we look at the case law, let's see what the Act says in relation to the action itself:

Direct Action:

- Article 465. Obligation of the insurer and direct action. **The obligation of the insurer to compensate in such insurance exists from the moment of liability of the insured arises before the third party damaged.** The latter shall be **entitled to direct action against the insurer** to demand that it fulfill its obligation.



DIRECT ACTION AGAINST THE CLUBS (arts. 463-467 SNA)

- The Article further says that: any contractual clause that alters the terms of this Article shall be void.
- **But** I have a contract with a clause making the insurance contract subject to English Law where there is no such a thing as Direct Action!

VOID



DIRECT ACTION AGAINST THE CLUBS (arts. 463-467 SNA)

Cover limits:

- 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 raise the same exceptions** before the party damaged as it may with respect to the insured, and **especially the quantitative limits** of liability that the latter may enjoy pursuant to the applicable law or the contract from which the liability arises.



Direct Action: What does the case law say?



DIRECT ACTION AGAINST THE CLUBS (The Prestige Case)

- The **MV *Prestige*** was a Liberian owned single-hulled oil tanker, carrying 76,972 tons of fuel oil that on 19th November 2002 sank off the coast of Galicia, Spain. The sinking caused a major environmental disaster, polluting thousands of miles of coastline across Spain, Portugal and France with an estimated 63,000 tonnes of oil spilled.



DIRECT ACTION AGAINST THE CLUBS (The Prestige Case)

- After nearly 14 years of litigation the Supreme Court decision of 14th January 2016 **condemns the master Apostolos Mangouras to two years in prison for reckless crimes against the environment**, overturning the 2013 decision of the Court of Appeal.
- The Court has **swept aside liability limitations** because it said Mangouras and Mare Shipping both acted recklessly.
- Court further said that **the London Club bears direct liability** and having swept aside limitations for the incident has noted that it had a limit of \$1bn on its coverage.
- The Supreme Court did not set the amount of liability leaving it for a later phase of the litigation long distance run.



DIRECT ACTION AGAINST THE CLUBS (The Prestige Case)

- The Supreme Court Decision **does clarify and confirms** that the **Civil Liability provisions contained in the Act do apply to Protection and Indemnity insurance.**
- It grants third parties the right to exercise direct actions against P&I Clubs in tort.



DIRECT ACTION AGAINST THE CLUBS (The Prestige Case)

- The Supreme Court criticizes the decision adopted by the London Club not to appear before the Court to submit their defence:

***English law and jurisdiction &
Pay to be paid***

- *Obiter dicta* decision. It is not binding to other Courts but it will be of undeniable reference and importance to the other Judges.



DIRECT ACTION AGAINST THE CLUBS (The Prestige Case)

- The CONSEQUENCES of the PRESTIGE decision:
 - **P&I Clubs** will very likely be seen by the Courts as **Civil Liability Insurers under the new Spanish Maritime Navigation Act.**
 - Third party claimants are therefore entitled to exercise direct actions against P&I Clubs who will be held jointly liable for the liabilities incurred by its members.
 - Pay to Be Paid rule and English Law and jurisdiction clauses seem void/ cannot be opposed to innocent third parties not a party to the contract of insurance.



DIRECT ACTION AGAINST THE CLUBS (The Prestige Case)

- The Clubs have been invited to participate in the legal proceedings to invoke their defences: English Law and Jurisdiction and Pay to be Paid.

If you don't challenge it the odds are you will be condemned.

- We are seeing a significant amount of direct actions against the Clubs following the Supreme Court Decision from angry and hungry claimants who are looking at the pockets full of pounds of the Clubs.



The BREXIT impact.



BREXIT: LEGAL REPERCUSSIONS (Referendum)

- A referendum was held on 23 June 2016 to decide if the UK should leave or remain in the EU.
- Leave won by a critical 52%
- Parliament still has to approve the laws that will rule the new status.



BREXIT: LEGAL REPERCUSSIONS

(Art. 50 Lisbon Treaty)

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. (...).

5. (...).



BREXIT: LEGAL REPERCUSSIONS

If the Treaties cease to apply to the UK...

- .- 1968 Brussels Convention?
- .-Lugano Convention?

The only certainty will
be...

UNCERTAINTY!



The return of the *anti-suit injunctions*?



THE RETURN OF THE ANTI-SUIT INJUNCTIONS?

UK might grant again the *anti-suit injunctions* to prevent parties from litigating in EU Member State courts in contravention of an exclusive jurisdiction clause in favour of the English courts.

WHY NOW??



THE RETURN OF THE ANTI-SUIT INJUNCTIONS?

The *anti-suit injunctions* were found incompatible with EU law by the European Court of Justice (ECJ).

This decision was taken by ECJ in the *West Tankers (C-185/07)* case.



THE RETURN OF THE ANTI-SUIT INJUNCTIONS?

West Tankers (C-185/07) case.

ECJ stated that:

- *“It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement”.*



THE RETURN OF THE ANTI-SUIT INJUNCTIONS?

West Tankers (C-185/07) case.

FACTS:

- Brussels Regulation provides a **complete set of rules** for the assignment of jurisdiction between Member States.
- All courts in all the Member States are forced to apply those rules **on the basis of a relationship of mutual trust between Member States.**



THE RETURN OF THE ANTI-SUIT INJUCTIONS?

But...what if the UK is not considered a
Member State anymore?



THE RETURN OF THE ANTI-SUIT INJUNCTIONS?

Keep in mind art. 50.2 LT:

“the Union shall negotiate and conclude an agreement with that State (UK in our case), setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union”.



THE RETURN OF THE ANTI-SUIT INJUNCTIONS?

Objectively, the UK will not be bound anymore by EU regulation/principles so...it will be free to grant **anti-suit injunctions** again.

Unless a joint agreement EU-UK keep the prohibition with a view of continuing with the kind relationships between both of them.



How does the *anti-suit injunctions* affect the Spanish Direct Action against the Clubs?





Many thanks