Michaelmas Term
[2026] UKSC 36
On appeal from: [2024] EWCA Civ 1536

JUDGMENT

The Kingdom of Spain and another (Respondents) *v* The London Steam-Ship Owners' Mutual Insurance Association Limited (Appellant) No 2

before

Lord Lloyd-Jones
Lord Leggatt
Lord Burrows
Lord Doherty
Lord Snowden

JUDGMENT GIVEN ON
28 October 2026

Heard on 22 and 23 June 2026

Appellant – The London Steam-Ship Owners' Mutual Insurance Association Ltd
Thomas de la Mare KC
Christopher Hancock KC
Charlotte Tan
Alexander Thompson
(Instructed by Wikborg Rein LLP)

Respondents – The Kingdom of Spain and The French State
Anna Dilnot KC
Naomi Hart
(Instructed by Squire Patton Boggs (UK) LLP and K&L Gates LLP)

LORD LEGGATT AND LORD BURROWS (with whom Lord Lloyd-Jones, Lord Doherty and Lord Snowden agree):

1. Introduction

1. The underlying question on this appeal is how the principle that a third party cannot take the benefit of a contract without accepting its burden, often called "the conditional benefit principle", applies to a contract containing an arbitration clause. More specifically, if a third party asserting a right derived from an insurance contract containing such a clause enforces that right in court rather than arbitration and obtains a judgment against the insurer, may the insurer be awarded "equitable compensation" for losses arising from that judgment?

2. It might be thought that the obvious remedy for the insurer against the third party is an injunction restraining breach of the obligation to arbitrate or "equitable damages" awarded in lieu of an injunction under what was section 2 of the Chancery Amendment Act 1858 (Lord Cairns' Act) and is now section 50 of the Senior Courts Act 1981. But here these remedies are not available. This is because the third parties who are in breach of the obligation to arbitrate are states, and section 13(2)(a) of the State Immunity Act 1978 provides—subject to an exception for written consent not applicable here—that "relief shall not be given against a State by way of injunction". That also means—as the Court of Appeal held, and there is no appeal from this aspect of the decision—that there is also no power to award damages in lieu of an injunction.

3. The case has its origin in an environmental disaster. In November 2002, the tanker "Prestige", carrying 70,000 tonnes of oil, was damaged in a storm and sank off the Spanish coast. Its cargo escaped, causing widespread pollution damage to the Spanish and French coastlines.

4. The appellant ("the Club") is what is commonly known as a "P&I club": a mutual association which provides protection and indemnity insurance to its members against third-party liabilities. For the year 2002, the Club insured the owners and managers of the "Prestige" under a contract incorporating the Club's Rules. For the purposes of this case, two rules are significant: a "pay to be paid" clause, which made payment of the full amount of the member's liability a condition precedent to its right of recovery under the insurance contract; and, at the heart of the issues in these proceedings, a London arbitration clause, which required disputes to be referred to arbitration in London and for the arbitration to be subject to English law.

5. Among the many claims arising from the disaster were civil claims brought by Spain and France ("the States") who are the respondents to this appeal, against the Club under article 117 of the Spanish Penal Code 1995. That provision gives a third party

victim—here the States—a direct right of action against the insurer—here the Club—of liabilities arising from an insured event. That is, rather than (or in addition to) pursuing the insured through a claim in, for example, tort, the States can enforce the contract of insurance directly against the insurer.

6. In Spanish proceedings the Club was held directly liable to the States under article 117. The liabilities were quantified by an execution order of the Provincial Court dated 1 March 2019 ("the Spanish judgment"). This declared that the States were entitled to recover up to around €2.355 billion in the case of Spain and €117 million in the case of France, subject to the US$1 billion limit of the insurance cover.

7. As explained below, although its source is a Spanish statute, the right conferred by article 117 of the Spanish Penal Code has been characterised, applying English conflict of laws rules, as in substance a contractual right and therefore governed by English law as the law applicable to the insurance contract. Applying English law, article 117 of the Spanish Penal Code is an exception to privity of contract. The doctrine of privity of contract in English law says that only a party to a contract can enforce the contract or be bound by it. But there are exceptions. As such an exception, article 117 can be seen as analogous to statutory exceptions in English law such as the Third Parties (Rights against Insurers) Act 2010 and, more generally, the Contracts (Rights of Third Parties) Act 1999, which enable third parties to enforce contracts provided statutory requirements are met.

8. When a third party relies on such an exception to the privity rule to exercise a contractual right, the third party will—by operation of the conditional benefit principle—be bound by any term of the contract relevant to the exercise of that right. It has been established in these proceedings that, by pursuing the Spanish proceedings against the Club, the States (a) became bound by the arbitration clause in the insurance contract to submit the dispute to arbitration in London and (b) acted and continue to act in breach of that obligation. The case has reached this court on an appeal on a question of law arising out of arbitral awards which, as a remedy for such breach, awarded the Club "equitable compensation".

9. The central issue raised on the appeal is whether a court or arbitral tribunal has power to award such compensation for breach of what has been described as an "equitable obligation to arbitrate". As we explain in this judgment, the question in our view rests on a false premise. Properly understood, the obligation of which the States are in breach is not equitable but contractual, and the appropriate remedy is not equitable compensation but common law damages.

2. Relevant procedural history

10. The history of the Spanish and English proceedings is long and complex. This judgment need not rehearse it in full. What follows is an outline of the procedural history relevant to this appeal.

(1) The Schaff awards

11. The States sought to enforce their direct rights (as third parties to the contract of insurance) under article 117 of the Spanish Penal Code by suing the Club in Spain. The Club then commenced arbitration proceedings in London against each State. The States did not participate in the arbitrations. In each case the arbitrator, Alistair Schaff QC, made an award declaring: (i) that the State was bound by the arbitration clause in the insurance contract and that all direct claims against the Club must be referred to arbitration in London; and (ii) that, pursuant to the "pay to be paid" clause, because the owners of the "Prestige" had not paid the amount of any insured liability, the Club was not liable to the State.

12. An initial question considered by the arbitrator was how, under English conflict of laws rules, the States' direct claims against the Club should be characterised. Applying a test taken from *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co (The Hari Bhum) (No 1)* [2003] EWHC 3158 (Comm); [2004] 1 Lloyd's Rep 206, para 16, approved by the Court of Appeal at [2004] EWCA Civ 1598; [2005] 1 Lloyd's Rep 67, para 57, he asked: were the States "seeking to enforce a contractual obligation derived from the contract of insurance or an independent right of recovery arising under [Spanish law]"? Mr Schaff held that the claims were properly to be regarded as claims to enforce a contractual obligation derived from the contract of insurance. Two consequences followed. First, because the States could only enforce the contract of insurance in accordance with its terms which included the arbitration clause, the proper forum for the determination of those claims was arbitration in London. Second, the content of the Club's contractual obligation was governed by English law. Under English law, the settled effect of a "pay to be paid" clause is that, until the insured's liability has been discharged by payment, the insurer has no liability to the insured: see *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The Fanti and The Padre Island)* [1991] 2 AC 1.

(2) Challenges to the Schaff awards

13. The Club applied to the High Court under section 66 of the Arbitration Act 1996 for permission to enforce the two awards as judgments. The States resisted the applications on grounds which included state immunity from the jurisdiction of the courts of the United Kingdom. They also sought relief themselves under sections 67 and 72 of

the 1996 Act on the ground (among others) that the arbitrator lacked jurisdiction because the States were not bound by the arbitration clause in the insurance contract.

14. The applications were heard by Hamblen J, who rejected the States' challenges to the jurisdiction of both the court and the arbitrator and granted the Club permission to enforce the awards: see *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain (The Prestige) (No 2)* [2013] EWHC 3188 (Comm); [2014] 1 Lloyd's Rep 309. Hamblen J held, in agreement with the arbitrator, that the direct action right against liability insurers conferred by Spanish law was in substance a right to enforce the insurance contract rather than an independent right of recovery. The critical factor was that the essential content of the right was provided by the contract. Under English law, the proper characterisation of the right was therefore contractual. Hamblen J also held, following earlier authorities, that a third party who exercises a right to enforce a contract containing an arbitration clause becomes bound, when the claim is disputed, to pursue its claim in arbitration in accordance with the arbitration agreement. Where that party is a state, it has "agreed in writing" to submit the dispute to arbitration and thus is excepted from immunity by section 9(1) of the State Immunity Act 1978. Section 9(1) 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." The States were therefore bound by the arbitration clause and were not immune from the jurisdiction of the courts of the United Kingdom as respects proceedings relating to the arbitrations.

15. The States appealed to the Court of Appeal, which dismissed the appeals: [2015] EWCA Civ 333; [2015] 2 Lloyd's Rep 33. Moore-Bick LJ (with whom Patten and Tomlinson LJJ agreed) confirmed that the issues relating to the States' right to seek compensation from the Club "are to be characterised as issues relating to an obligation sounding in contract" and, as such, "are to be determined in accordance with English law as the proper law of the obligation". It followed, applying English law, that "if the [States] wish to pursue claims against the Club they must do so in arbitration in accordance with the terms of the contract of insurance and subject to the 'pay to be paid' clause" (para 30).

16. On state immunity, Moore-Bick LJ held, at para 70, that section 9(1) of the State Immunity Act 1978 is not limited to cases where there is a contract containing an arbitration clause formally signed by, or on behalf of, the state. It also applies when the state has, through the commencement of proceedings, formally asserted claims that were subject to arbitration agreements. Accordingly, the pursuit of a claim in the Spanish proceedings "amounted to an adoption by each of the [States] of the agreements". That had two important consequences: it gave the Club, as well as the States, the right in each case to refer those disputes to arbitration and it satisfied the requirement of section 9(1) of the State Immunity Act 1978 for an agreement in writing.

(3) The further arbitration proceedings

17. The States chose to ignore those rulings and continued to pursue their claims against the Club in Spain culminating in the Spanish judgment. The Club did not appear in those proceedings to contest liability although it did participate, under protest, in the hearing on quantum.

18. In response, the Club commenced further arbitrations in London against the States. The Club sought declarations, injunctions, and monetary relief on the basis that the States had pursued their direct claims in the Spanish courts in breach of their obligations to arbitrate declared in the Schaff awards and upheld in *The Prestige (No 2)*. The monetary relief claimed was compensation for costs incurred in defending the Spanish proceedings and for any sums incurred, or to be incurred, if steps were taken to enforce the Spanish judgment.

19. The States did not respond to the notices of arbitration and the Club applied under section 18 of the Arbitration Act 1996 in each case for the court to appoint an arbitrator. France did not defend the application and Dame Elizabeth Gloster was appointed sole arbitrator in the reference.

20. Spain did defend the application, contending that the court had no jurisdiction in the matter because of state immunity and that Spain had not agreed to submit to arbitration the claims which the Club was now seeking to advance. Except on one point not relevant on this appeal, the judge (Henshaw J) rejected those arguments: see *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain (The Prestige) (Nos 3 and 4)* [2020] EWHC 1582 (Comm); [2020] 1 WLR 4943. He held that the claims which Spain became bound to arbitrate by pursuing its direct claims against the Club were not limited to those claims themselves but also included the Club's claims for relief arising from Spain's pursuit of court proceedings in disregard of the arbitration agreement. He also held, following *The Prestige (No 2)*, that Spain had "agreed in writing" to submit this dispute to arbitration for the purposes of section 9(1) of the State Immunity Act 1978. For this reason (and others), Spain did not have state immunity and the court had jurisdiction to appoint an arbitrator. The judge appointed Sir Peter Gross as sole arbitrator in the reference.

21. Spain appealed, but the Court of Appeal dismissed the appeal on these issues for substantially the same reasons as those given by Henshaw J: *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain (The Prestige) (Nos 3 and 4)* [2021] EWCA Civ 1589; [2022] 1 WLR 3434.

(4) The awards of Sir Peter Gross and Dame Elizabeth Gloster

22. The arbitration proceedings, in which the States each participated under protest as to the arbitrator's jurisdiction, ultimately led to awards by Sir Peter Gross in the Spain arbitration and by Dame Elizabeth Gloster in the France arbitration. Those awards have led to this appeal.

23. In his First Partial Award dated 6 January 2023, Sir Peter Gross held that the Club was entitled to declarations recording that Spain was in breach of its obligation not to pursue its direct claims against the Club other than by way of London arbitration. He found that obligation, based on the conditional benefit principle, to be clearly established by *The Prestige (No 2)* and *The Prestige (Nos 3 and 4)*. In reliance on authorities that we consider later in this judgment, the arbitration was conducted on the assumption that the relevant obligation was equitable rather than contractual. The Club's money claim was thus framed as a claim for equitable compensation.

24. Sir Peter Gross rejected an argument that the power to award equitable compensation is confined to breaches of fiduciary duty and held, at para 184, that it could be awarded for Spain's breach of its "equitable obligation" to arbitrate. He also rejected a contention that the Club caused its own loss, or failed to mitigate it, by failing to appear in the Spanish proceedings to seek a stay in favour of arbitration or to invoke the "pay to be paid" clause.

25. As to the Club's claim for an injunction to restrain Spain from enforcing the Spanish judgment, Sir Peter Gross held that an arbitrator, unlike a court, can grant an injunction against a state without written consent, despite section 13(2)(a) of the State Immunity Act 1978 (quoted at para 2 above). He nevertheless declined to grant an injunction as a matter of discretion. Instead, he upheld in principle the Club's claim for equitable damages in lieu of an injunction under section 50 of the Senior Courts Act 1981. He concluded that equitable damages and equitable compensation were both available remedies, subject to avoiding double recovery.

26. Some losses had already occurred, in particular costs incurred in the Spanish proceedings. Others were only prospective and contingent on steps being taken to enforce the Spanish judgment. The Club claimed compensation for both existing and future loss. The claim in respect of future loss was put on two alternative bases. First, although the States had not yet executed the Spanish judgment, the Club argued that, if and when losses did arise from its execution, those losses would result from the States' past conduct in pursuing their direct claims against the Club in Spain and obtaining the Spanish judgment. On this analysis, the loss would be caused by breaches already committed. Alternatively, the Club claimed indemnities on a quia timet basis to avert losses that would otherwise result from future breaches.

27. Sir Peter Gross granted relief in a Second Partial Award dated 27 March 2023. In summary, the relief comprised:

(1) A declaration that Spain has acted, and is acting, in breach of its obligation not to pursue its direct civil claims against the Club other than by way of London arbitration (para A(1)).

(2) A declaration that, if Spain takes any further steps to enforce the Spanish judgment, it will be in breach of that obligation (para A(2)).

(3) An order that, if Spain obtains a final monetary judgment against the Club in any jurisdiction outside Spain in execution of the Spanish judgment (a "Further Execution Order"), Spain must in that jurisdiction "pay, give credit to and indemnify" the Club in an equal and opposite amount (para A(3)).

(4) An order that, if Spain obtains satisfaction in any country of an amount awarded by the Spanish judgment or a Further Execution Order, it must pay and indemnify the Club in an amount equal to the sum obtained (para A(4)).

(5) An order that Spain indemnify the Club for its costs of defending Spain's direct civil claims in Spain and any proceedings to enforce the Spanish judgment (para A(5)).

28. In the France arbitration, Dame Elizabeth Gloster reached broadly similar conclusions to those reached by Sir Peter Gross in the Spain arbitration. In her First Partial Award dated 8 February 2023 she held that there was power to award equitable compensation and that it was appropriate to do so for both existing and future loss. With regard to future loss, she accepted that the Club was entitled to the relief sought on both bases advanced (as set out in para 26 above), although she preferred the analysis based on past breaches (paras 145-147).

29. Like Sir Peter Gross, Dame Elizabeth Gloster also held that an arbitral tribunal has the power to grant an injunction against a state. But, unlike him, she granted an injunction as a matter of discretion. She found it unnecessary to decide whether equitable damages under section 50 of the Senior Courts Act 1981 should be awarded.

30. The formal relief granted by Dame Elizabeth Gloster was set out in a Second Partial Award dated 2 May 2023. Apart from the injunction, this relief was substantially the same as the relief granted by Sir Peter Gross against Spain.

(5) The arbitration appeals

31. Both States applied for permission to appeal to the High Court under section 69 of the Arbitration Act 1996 on questions of law arising out of the awards. The questions on which Spain sought permission to appeal included (Ground 3) whether the tribunal has the power to grant an injunction against Spain and (Ground 4):

> "Does a tribunal or a court have jurisdiction to award 'equitable compensation' for breach of an 'equitable obligation to arbitrate' arising from the conditional benefit principle, when there is no power to grant injunctive or specific relief within s.50 of the Senior Courts Act, as applied by s.48(5) of the Arbitration Act [by which a tribunal has the same powers as a court to order an injunction]?"

32. Similarly, the questions on which France sought permission to appeal included (Ground 1) whether the arbitral tribunal has the power to grant an injunction against the French State and (Ground 2):

> "whether the arbitral tribunal has the power to award equitable compensation for breach of an equitable obligation to arbitrate arising by application of the conditional benefit principle, or whether equitable compensation is otherwise available in those circumstances."

33. Butcher J heard each application on a rolled-up basis and handed down both his judgments on the same day: see [2023] EWHC 2473 (Comm); [2024] 1 WLR 2331 for Spain and [2023] EWHC 2474 (Comm); [2024] 2 All ER (Comm) 175 for France.

34. In each case Butcher J allowed the State's appeal on the question whether the tribunal had the power to grant an injunction, or equitable damages in lieu under section 50 of the Senior Courts Act 1981. He therefore set aside the injunction granted by Dame Elizabeth Gloster and held that Sir Peter Gross had been wrong to rely on section 50 as an alternative basis for the monetary relief that he had awarded.

35. On the question whether the tribunal had the power to award equitable compensation, Butcher J gave permission to appeal but dismissed the appeals. His essential reasoning, stated at para 336 of the Spain judgment, was that the States were in breach of an equitable obligation that was "equivalent" to the contractual obligation which the insured itself owed. Breach of the contractual obligation would give rise to a remedy in damages, and he saw no reason why a corresponding monetary remedy should

not be granted for breach of the equivalent equitable obligation. He considered it to be "a sensible incremental development of the law to recognise the availability of equitable compensation in a case such as this". By contrast, there was no good reason why the availability of a monetary remedy should be tied to the availability of an injunction.

(6) The decision of the Court of Appeal

36. The States appealed on these and other issues to the Court of Appeal. The leading judgment was given by Sir Geoffrey Vos MR, with whom Andrews and Falk LJJ agreed in a joint concurring judgment: [2024] EWCA Civ 1536; [2025] 1 WLR 3011.

37. The Court of Appeal upheld the judge's conclusions that the arbitrators had no power to grant an injunction against a state or to award damages in lieu under section 50 of the Senior Courts Act 1981. But - for reasons we will consider later - the Court of Appeal also decided that the arbitrators lacked the power to award equitable compensation for breach of the States' "equitable obligation to arbitrate" their disputes with the Club. The Court of Appeal therefore allowed the States' appeals on that ground (ie that equitable compensation should not have been awarded) and set aside the relevant parts of the awards.

3. The issues on this appeal

38. The Supreme Court granted the Club permission to appeal on two grounds. These are that the Court of Appeal erred:

> (1) in holding that there is no power to award equitable compensation for breach of an equitable obligation to arbitrate in a case of conditional benefit against a state ("Ground 1"); and
>
> (2) in exceeding the statutory limits of an appeal under section 69 of the Arbitration Act 1996 ("Ground 2").

39. It is with Ground 1 that this appeal is principally concerned. That is the focus of what follows. But towards the end of our judgment we will briefly address Ground 2.

4. The nature of the obligation to arbitrate in a conditional benefit case and the remedies for breach of that obligation

(1) The assumption embedded in Ground 1

40. The question raised by Ground 1 is a loaded question because it embodies a questionable assumption that any direct answer would implicitly accept. The question assumes that the obligation to arbitrate arising by operation of the conditional benefit principle is "equitable". In other words, it assumes that, although the rights which the States have sought to enforce in the Spanish proceedings have been characterised as contractual rights, the States' corresponding obligations to comply with the arbitration clause in the contract are not. Instead, they are conceived as arising in equity. Thus, breach of the obligation to arbitrate is conceived as being an equitable wrong.

41. This characterisation of the obligation has then shaped the debate about the monetary remedy that can be awarded to compensate the Club for loss caused by a breach. If the obligation is contractual, the ordinary compensatory remedy for a breach of contract is (common law) damages. On the other hand, while "equitable compensation" can be awarded for an equitable wrong, it cannot be awarded for breach of contract.

42. Until relatively recently, the remedy of equitable compensation was little discussed or analysed. It was sometimes unhelpfully labelled "accounting for loss". A catalyst for greater understanding was a path-breaking article by Ian Davidson, "The Equitable Remedy of Compensation" (1982) 13 Melbourne University Law Review 349. In England and Wales, the principles governing the award of equitable compensation have been analysed and clarified by two seminal decisions of the highest court: *Target Holdings Ltd v Redferns* [1996] AC 421 and *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] AC 1503, both of which concerned breaches of fiduciary duty. Those cases made it clear that equitable compensation, as its name suggests, is a monetary remedy that can be awarded to compensate for loss caused by an equitable wrong.

43. Equitable wrongs are civil wrongs that have their historical origin in the body of law known as equity which was developed by the Court of Chancery. They include breach of trust or other fiduciary duty, dishonest assistance in a breach of fiduciary duty, breach of the equitable duty of confidence (which is distinct from the tort of misuse of private information) and those forms of estoppel that constitute causes of action, in particular proprietary estoppel. In principle, there is no reason why equitable compensation cannot be awarded for breach of any equitable wrong.

44. It may be thought that, in a rational system of law, nothing should turn on whether a civil wrong originates from law developed in the common law courts or in the Court of

Chancery. Yet despite the amalgamation of the common law courts and the Court of Chancery by the Judicature Acts 1873–1875, English law still distinguishes equitable compensation, which can be awarded for an equitable wrong but not for a common law wrong such as breach of contract, from common law damages (which is the standard monetary remedy for a common law wrong). Equitable compensation does not currently represent an exact equivalent of common law damages. One notable difference is that equitable compensation is a discretionary remedy (ie it is not available as of right) and is subject to defences - such as unreasonable delay ("laches") or lack of "clean hands" - which do not directly apply to common law damages.

45. To move to a "fusion" of common law and equity, however desirable, cannot sensibly be achieved in a single case. Certainly, and not surprisingly, those deeper "fusion" questions have not featured in the submissions on this appeal and are outside its scope.

46. We therefore consider that a fundamental question that needs to be determined is whether the obligation that arises here by operation of the conditional benefit principle is equitable. In other words, are we dealing with an equitable wrong? Only once the obligation has been correctly characterised can we decide whether the arbitrators had the power to grant equitable compensation. If there has been an equitable wrong, equitable compensation can in principle be awarded. But if the obligation is contractual, so that the wrong is, or is to be treated as, the common law wrong of breach of contract, equitable compensation cannot be awarded. The question then becomes how this affects the awards made by the arbitrators and whether there is reason to set aside or vary the awards or remit them for reconsideration.

(2) Third party rights against insurers and analogous situations

47. It is helpful to see the wider context in which, as mentioned in para 7 above, the third party's right to enforce a contract under article 117 of the Spanish Penal Code has parallels in English law. An analogous statute in England and Wales is the Third Parties (Rights against Insurers) Act 2010 and, applying to all contracts and not just contracts of insurance, the Contracts (Rights of Third Parties) Act 1999. There are other situations that raise the same issue. The most obvious is the assignment of contractual rights to a third party.

48. In all these situations, a third party who is entitled to, and does, enforce a contractual right is bound by any term of the contract which governs the way in which the right may be enforced, such as an arbitration clause. But why is that so? How can the clause bind a person who ex hypothesi is not a party to the contract and has not agreed, or promised, to arbitrate? The answer, as will now be explained and amplified, lies in the conditional benefit, or benefit and burden, principle.

(3) The conditional benefit / benefit and burden principle

49. The term "conditional benefit" is used in two senses. Most commonly, it refers to a right the existence of which depends on satisfaction of a condition. An example is the "pay to be paid" clause. Where an insurance contract contains such a clause, the right to be paid by the insurer arises only when the insured liability has been discharged by payment. A third party entitled to enforce such a right assumes no obligation. The position is simply that - like the original contracting party - it cannot claim the benefit unless the condition is satisfied. There is no exception involved to the rule that a contract cannot be enforced against a third party. This has nothing to do with the conditional benefit or benefit and burden principle (we will use these expressions interchangeably) that we are concerned with in this case.

50. The second type of "conditional benefit" does involve such an exception to (or at least a circumvention of) the privity rule on its burden side. In this sense the term refers to a right the assertion of which subjects the claimant to a related obligation or burden. As Megarry V-C explained in *Tito v Waddell (No 2)* [1977] Ch 106, 289, the principle rests on the simple idea of:

> "ordinary fairness and consistency that from the earliest days most of us heard in the form 'You can't have it both ways,' or 'You can't eat your cake and have it too,' or 'You can't blow hot and cold'."

Similarly, Lord Hodge, giving the judgment of the Supreme Court in *Aspen Underwriting Ltd v Credit Europe Bank NV* [2020] UKSC 11; [2021] AC 493, explained that the principle is based on avoiding inconsistency. He said, at para 26:

> "This concept, which has often been described as 'conditional benefit', is to the effect that an assignee cannot assert its claim under a contract in a way which is inconsistent with the terms of the contract."

The *Aspen Underwriting* case concerned a claim by an assignee of an insurance contract containing an exclusive jurisdiction clause. Lord Hodge emphasised that, had the assignee sought to enforce its right through litigation, it would have been bound by the exclusive jurisdiction clause to bring the proceedings in England.

51. Although the conditional benefit / benefit and burden principle may be regarded as an exception to English law's privity of contract rule, on its burden side, it does not infringe the rule's underlying rationale. The justification for the rule that a contract binds

only the parties to it is obvious: contractual burdens should not be imposed on parties without their consent. But in a benefit and burden case the third party has a choice whether to take the benefit of the contract. It is only when it chooses to do so (by seeking to enforce a contractual right) that it becomes subject to obligations which would in that situation have applied to the original contracting party. Thus, the justification for the privity doctrine, on its burden side, is not infringed.

(4) Is the burden legal or equitable?

52. The history of the conditional benefit, or benefit and burden, principle was reviewed at length by Megarry V-C in *Tito v Waddell (No 2),* at pp 289-310. That review showed that the principle may operate both in situations governed by the common law and in equity (see pp 292 and 308-309). The principle was in fact first recognised by the common law. Megarry V-C traced its origin to two common law rules. One was a "technical rule relating to deeds" whereby "if a person is named as a party to a deed, but does not execute it, the deed will nevertheless be held to bind him if he knowingly takes the benefit of it" (p 289). Megarry V-C described this as being "not much more than part of a rule for determining who are to be treated as being parties to a deed." The other rule, found in Littleton's treatise on tenures first published in 1482 (and in Co Litt 230b), was developed in the context of indentures of land.

53. A significant case decided under the common law before the Judicature Acts came into force is *Aspden v Seddon (No 2)* (1876) 1 Ex D 496. A landowner had conveyed land to a company for use as a cotton mill. The landowner reserved the right to carry out mining underneath the surface of the land and agreed to pay compensation if the mining operations caused subsidence and damage to the mill. The Seddons, who had acquired the mining rights, later carried out mining which did cause such damage; and Aspden, who had purchased the mill, brought an action against the Seddons claiming compensation. The question whether Aspden was entitled to recover compensation from the Seddons was referred to the Court of Exchequer on a case stated. The Court (Bramwell B and Cleasby B) answered the question in favour of Aspden, and their decision was affirmed by the Court of Appeal.

54. Bramwell B considered that the case could be analysed in two ways and did not think it necessary to decide between them (see pp 503-504). On one analysis, the mining rights were conditional on payment of compensation for damage. In the absence of such payment, there was no right to mine so that the Seddons' conduct was wrongful and they were liable in tort for the damage. On this view, the case involved the first type of conditional benefit described above (see para 49). The alternative view was that the Seddons, by exercising the right to mine, came under a corresponding obligation to pay compensation for damage caused. This was an application of the conditional benefit or benefit and burden principle.

55. Cleasby B adopted the second analysis, as did James LJ in the Court of Appeal. Cleasby B explained why recognising an obligation to pay compensation did not involve the imposition of an involuntary burden on the defendants. As he put it, at p 508:

> "Then the law says, You ought to bear the burden because you have enjoyed the land. There is no necessity imposed, it is not a burden in that sense, it is optional with him whether he exercises the right or not. It makes no difference whether it is mines or land. … Here you have enjoyed these mines, you have enjoyed this licence. During the time that you enjoyed it this burden - that is, this obligation to make compensation for what you have done - has come into existence."

56. *Aspden v Seddon (No 2)* was followed in other cases where parties who had acquired mining rights from the original holders of the rights, by enjoying the benefit, came under an obligation to pay compensation for damage done: see *Chamber Colliery Co Ltd v Twyerould* [1915] 1 Ch 268n; and *Westhoughton Urban District Council v Wigan Coal and Iron Co Ltd* [1919] 1 Ch 159.

57. Another case examined in detail in *Tito v Waddell (No 2)* was *Halsall v Brizell* [1957] Ch 169. There Upjohn J said (in obiter dicta), at p 182, that purchasers of houses on an estate could not enjoy the benefit of using the roads and other facilities on the estate without undertaking the obligations agreed by the original owners of paying for the upkeep. Although the case was brought in the Chancery Division, there was no mention at all of equity and Megarry V-C considered that, as what was in issue was an obligation to pay money, Upjohn J must have been contemplating an obligation at law: see *Tito v Waddell (No 2)*, at p 308.

58. Cases were also discussed in *Tito v Waddell (No 2)* in which the benefit and burden principle operated in equity. An example is *E R Ives Investment Ltd v High* [1967] 2 QB 379. A landowner had built a block of flats with foundations which trespassed on his neighbour's land. He agreed that, in return for the neighbour allowing the foundations to remain, the neighbour should have a right of way over his land. The right of way was never registered as a land charge, and the land was later sold. The Court of Appeal held that the neighbour had a right of way in equity across the land. One basis for holding that it bound the new owners of the land was the conditional benefit principle. In the words of Lord Denning MR, at p 394:

> "The principle clearly applies in the present case. The owners of the block of flats have the benefit of having their foundations in [the neighbour's] land. So long as they take that benefit, they must shoulder the burden."

59. In *Tito v Waddell (No 2)*, at p 309, Megarry V-C considered whether the benefit and burden principle should be regarded as operating under the common law or in equity. He said:

> "Put shortly, it seems to me that whether the liability under the pure principle is legal or is merely equitable must primarily depend on whether the burden itself is legal or equitable. If the burden is merely equitable, so will be the liability. If the burden is legal, then I do not see why the liability should not also be legal. Whether the process that requires the burden to be assumed is legal or equitable, and whether it is based on acceptance or operates as a rule of law, what has been assumed should retain its quality of being legal if it is legal and equitable if it is equitable. If you take a burden, you must take it as you find it."

60. We agree with this analysis. What matters is not whether the conditional benefit principle itself is classified as a principle of the common law or equity, or both, but the character of the obligation on which it operates. The principle dictates that the obligation imposed on the third party who takes the benefit should be the obligation undertaken by the original party and not a different obligation. The third party should be under the same burden as the original party and not under a lesser or greater burden. That means that the obligation must retain its character as legal or equitable and that the remedies available for breach should be the same.

61. Applying this logic, the best way to understand the operation of the conditional benefit / benefit and burden principle in a case of the present kind is that it treats the third party, for the purposes of the arbitration clause, as if it were a party - or, more simply, as a party - to the insurance contract. Although the third party has not agreed or promised to arbitrate, when the third party chooses to claim the benefit of the contract by asserting a right under the contract, the law requires the third party to comply with the arbitration agreement that applies to the assertion of the right. The third party is therefore bound by the obligation to arbitrate any dispute relating to its claim in the same way as a party to the insurance contract. Thus, a breach of that obligation is (treated as being) a breach of contract.

62. It would be irrational for the third party to be in a different, and potentially better, position as regards remedies for breach than if the third party had been a contracting party. Suppose that in a claim against the third party for breach of the obligation to arbitrate there is a discretionary equitable defence, such as laches or lack of clean hands, that would bar a claim for equitable compensation but would not bar a claim for common law damages. The third party would be left potentially better off by its breach than would the original contracting party if, in relation to the third party, the obligation were

characterised as an equitable obligation for which equitable compensation, and not an award of common law damages, is the appropriate remedy. That would be irrational because there is no good reason to treat the third party differently—and certainly not more favourably—than the contracting party in the event of breach. This irrationality is avoided by treating the third party as a party to the arbitration agreement and therefore subject to the usual remedies for breach of contract.

63. There is a parallel with the law on assignment. Under an assignment, the contractual rights are transferred to the assignee and, while obligations or liabilities cannot be assigned, there is a principle that the assignee cannot take the benefit without the burden. That principle is often expressed by saying that the assignee takes "subject to equities": see eg *Chitty on Contracts*, 36th ed (2026), paras 23-071, 23-080–23-081. But there is no suggestion in the case law that the assignee who fails to abide by the equities is liable for breach of an equitable obligation triggering equitable compensation. Rather, the assignee in that event is treated as if it were a contracting party and therefore subject to the usual remedies for breach of contract.

64. The approach of treating the third party as a party to the contract for the purposes of an arbitration clause also aligns with the approach spelt out in section 8(1) of the Contracts (Rights of Third Parties) Act 1999 ("the third party shall be treated for the purposes of [the Arbitration Act 1996] as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party"). This provision was considered in, for example, *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm); [2004] 1 Lloyd's Rep 38, where Colman J, at para 42, spoke of the third party "standing in the shoes of [the] promisee" in respect of the enforcement of the substantive term subject to the arbitration clause.

65. In short, a third party entitled to enforce a contract containing an arbitration clause who chooses to take that benefit by asserting a claim under the contract thereby becomes bound by the arbitration clause in relation to that claim in the same way as a party to the contract. If the third party breaches that obligation, the remedies available are thus the same remedies as would be available against an original party for breach of contract. It is a mistake to regard the obligation to arbitrate as an equitable obligation, with its breach being an equitable wrong attracting the remedy of equitable compensation.

5. The relevant case law

66. In the light of this analysis and conclusion, it is instructive to consider how the relevant case law has developed and where a wrong path was taken leading to the incorrect view that the obligation to arbitrate is equitable. When and how did the view gain hold, culminating in the arbitral awards and decision of the High Court in this case,

that the obligation to arbitrate is equitable, attracting equitable compensation, rather than contractual, attracting common law damages?

67. Ordinarily, the error would not matter because an appropriate remedy would be an injunction and/or equitable damages under section 50 of the Senior Courts Act 1981 and those remedies would be available whether the wrong was legal or equitable. But in a case such as this, where those remedies are not available, the error may have practical consequences.

(1) The Jay Bola

68. The source of the error can be traced to a passage in the judgment of Hobhouse LJ in *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine International GmbH (The Jay Bola)* [1997] 2 Lloyd's Rep 279. An insurer became subrogated, on payment of an insurance claim for cargo damage, to the rights of the insured under a voyage charter. The voyage charter was governed by English law and contained a London arbitration clause. The insurer brought an action in Brazil (in its own name, as Brazilian law permitted) against the disponent owners - who were themselves time charterers - of the vessel. The time charterers then sought an anti-suit injunction in England. The insurer argued that, because it was not a party to the voyage charter, it was not bound by the arbitration clause nor subject to the jurisdiction of the English court. The judge rejected those arguments and granted an injunction, and the Court of Appeal upheld that decision.

69. Hobhouse LJ, who gave the main judgment, began his analysis of the law, at p 285, by examining the legal position of the parties to a contract containing an arbitration clause. A party who commences litigation rather than referring a dispute to arbitration is in breach of contract. If the litigation is abroad and the English court has jurisdiction over the defendant, the primary remedy is an anti-suit injunction: see eg *Aggeliki Charis Cia Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87. Hobhouse LJ added that "the aggrieved party also has the option to sue for damages for breach of contract" (citing *Doleman & Sons v Ossett Corpn* [1912] 3 KB 257, 267-268), though he said that "this is rarely a satisfactory remedy". The reasons for preferring an injunction are clear. If there is no injunction, a party must choose whether to incur the costs of defending proceedings it should not have to face and risks an adverse judgment causing losses which may be difficult as well as burdensome and costly to recover. Hence in *The Angelic Grace*, at p 96, Millett LJ observed that "damages are manifestly an inadequate remedy".

70. Turning to the position of the insurance company, Hobhouse LJ cited authorities showing that an insurer who acquires rights by assignment or statutory transfer which are subject to an arbitration clause has the right to refer a claim to arbitration. He then said, at p 286:

> "Likewise, the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognizing the obligation to arbitrate."

71. That was a clear statement and application of the conditional benefit principle. The seeds of subsequent confusion were sown, however, when Hobhouse LJ chose to illustrate why the insurers' argument was unsound by taking what he called "a simple analogy". We would take issue with that description: the hypothetical case he then outlined might, we think, more accurately be called "a complicated analogy". Because of the difficulty it has caused, we think it necessary to quote the full passage:

> "If the assignee of a legal right in action seeks to enforce that right against the debtor without taking into account an equitable set-off which the debtor was entitled to raise against the assignor, the debtor's remedy, prior to the Common Law Procedure Acts and the Judicature Acts of the last century, would have been to apply in the Court of Chancery for an injunction to restrain the assignee from asserting the common law right in the Common Law Courts unless and until he recognized the equitable right of the debtor. The injunction was granted to provide the debtor with the appropriate protection from the unconscionable conduct of the assignee; it does not depend upon any liability of the assignee for the sums to be set-off. The right to apply for an injunction is not a 'cause of action' of the same character as the right to sue for damages for breach of contract or tort or to collect a legal debt. It is an application for an equitable remedy to protect the plaintiff against the consequences of unconscionable conduct."

72. After observing that the Judicature Acts allowed equitable set-off to be raised in the same proceedings as the common law claim, Hobhouse LJ continued, at p 286:

> "However, where the action is brought by the assignee in another jurisdiction which does not recognize the equitable right of the debtor, the debtor's only remedy is (just as it was in the first half of the last century) to apply for an injunction to restrain the assignee from refusing to recognize the equity of the debtor. *The present case is such a case. The insurance company is failing to recognize the equitable rights of the time*

> *charterers. The equitable remedy for such an infringement is the grant of an injunction*." (emphasis added)

73. In the next paragraph, he said:

> "This conclusion accords with the authorities about the scope of the jurisdiction to grant injunctions. … The present case falls clearly within the scope of that jurisdiction because the application of the time charterers for an injunction has been made to protect *a contractual right of the time charterers* that the dispute be referred to arbitration, a contractual right which equity requires the insurance company to recognize. The jurisdiction in this case does not depend upon such concepts as forum non conveniens or oppressive and vexatious conduct. It depends upon *the contractual rights of the time charterers* …" (emphasis added)

74. Hobhouse LJ's analogy introduced three equitable concepts: an assignment, which, before the Judicature Act 1873 provided for the statutory assignment of choses in action, was effective only in equity; an equitable set-off; and the equitable remedy of an injunction.

75. Rather than illuminating the analysis of the claim in *The Jay Bola*, the analogy in our view obscured it and led Hobhouse LJ to make two misstatements, although they did not affect the ratio of the decision. His hypothetical case involved a claim by the assignee of a legal debt to which the debtor had an equitable set-off. It was a mistake to say that "[t]he present case is such a case" and that the insurance company was "failing to recognise the equitable rights of the time charterers". In *The Jay Bola* the time charterers were not relying on an equitable set-off or any other equitable right. Their right to have disputes submitted to arbitration was a contractual right, as Hobhouse LJ had earlier made clear. It therefore arose at common law and not in equity.

76. Hobhouse LJ corrected course in the next paragraph when he said that the application for an injunction had been made to protect "a *contractual* right of the time charterers that the dispute be referred to arbitration" (our emphasis); but he then added "a contractual right which equity requires the insurance company to recognize". That was a further mistake. As discussed above, the principle of benefit and burden is a principle of the common law as well as equity. As the right of the time charterers that the dispute be referred to arbitration was contractual, it was the common law and not equity which required the insurance company to recognise the right. In this respect the conditional benefit principle is not like an equitable assignment, which confers only an equitable right on the assignee.

77. The analogy also obscured another distinction. As Hobhouse LJ pointed out, an equitable right of set-off is not a right which, if infringed, gives rise to a cause of action such as a claim for damages. It operates purely defensively to prevent the enforcement of a claim where the defendant has a cross-claim that - in the classic formulation of the test - is "so closely connected with [the claim] that it would be manifestly unjust to allow [the claimant] to enforce payment without taking into account the cross-claim": *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927, 975. A contractual right that any claim be pursued only by arbitration (and therefore not through litigation) is different in character. In one sense it is a negative right, as it arises only if a claimant chooses to pursue a claim which is disputed and does so other than through arbitration. But in that event the holder of the right has a cause of action giving rise to remedies which include - as Hobhouse LJ had recognised - the option to sue for damages for breach of contract.

78. The only relevance of equity on the facts of *The Jay Bola* was that the relief sought - an injunction - is an equitable remedy. But that remedy is available for legal wrongs, such as a breach of contract, as well as equitable wrongs and, since the Judicature Acts, is available in any court and not just the Court of Chancery. Hobhouse LJ had already identified the justification for granting an anti-suit injunction where there is an obligation to arbitrate as being to restrain a breach of contract; and he reverted to the correct analysis when he said (see para 73 above) that "[t]he jurisdiction [to grant an injunction] in this case does not depend upon such concepts as forum non conveniens or oppressive and vexatious conduct. It depends upon the contractual rights of the time charterers".

79. The contractual nature of the right infringed was also the basis for the jurisdiction of the English court over the Brazilian insurer. The jurisdictional gateway relied on by the time charterers permitted service abroad of a claim to enforce a contract or obtain relief in respect of a breach of contract governed by English law. The insurers argued that this gateway applied only where the contract was one to which the relevant claimant and defendant were "in the fullest sense" parties. Hobhouse LJ rejected that submission saying, at p 287:

> "There are only two relevant questions: Is there a contract? Is the plaintiff seeking to enforce that contract against the defendant? In the present case both those questions are to be answered in the affirmative."

80. In a concurring judgment, Sir Richard Scott V-C explained the conditional benefit principle in purely contractual terms. Citing *Halsall v Brizell* and *Tito v Waddell (No 2)*, p 309 (which contains Megarry V-C's analysis quoted at para 59 above), he said, at p 291, that the insurer could not enforce the insured's contractual rights under the voyage charter "without accepting the contractual burden, in the form of the arbitration agreement to which those rights are subject". The time charterers were "contractually entitled", against

the insured or any assignee of the insured, to require the enforcement of those rights to be pursued by arbitration. Proceeding otherwise was therefore "a breach of [the time charterers'] contractual entitlement".

81. Properly understood, therefore, *The Jay Bola* supports our analysis. It decided that a third party cannot enforce a right derived from a contract containing an arbitration clause without recognising the contractual obligation to arbitrate and not litigate its claim, and that an injunction to restrain a breach of that contractual obligation is in principle an appropriate remedy. But, as we will see, the case has not always been properly understood and the misleading references to equity in Hobhouse LJ's "simple analogy" have been taken out of context.

(2) Subsequent cases

82. *Through Transport (No 1)* (see para 12 above), like this case, concerned a direct claim against a P&I club. After the carrier became insolvent, the insurer of goods lost in transit ("New India") brought proceedings against the club (as the carrier's liability insurer) in Finland under legislation comparable to the Third Parties (Rights against Insurers) Act 2010. Relying on a London arbitration clause in the contract with its member, the club applied to the English court for an anti-suit injunction. Applying the test mentioned at para 12 above, Moore-Bick J characterised New India's claim for conflict of laws purposes as a claim to enforce a contractual obligation derived from the insurance contract, rather than the assertion of an independent right of recovery arising under the Finnish statute. English law, as the governing law of the contract, therefore determined whether the arbitration clause applied to the claim made against the club. The judge held that it did and granted an injunction.

83. On appeal, the Court of Appeal affirmed the decision that New India was bound to pursue its claim against the club in arbitration but set aside the injunction. The reasoning was in some respects contradictory. The court held that the club was entitled to a declaration that New India was bound to refer any claims against the club in respect of the goods to arbitration in accordance with the arbitration clause. Yet it set aside a declaration that the proceedings commenced in Finland "are in breach of the arbitration clause". Clarke LJ said, at para 65:

> "As indicated at [para] 52 above, we do not think that New India was in breach of contract. So, for example, the club could not in our view sue New India for damages for commencing the proceedings in Finland."

The reference to para 52 was to a statement that:

> "New India did not become a party to an arbitration agreement. We agree that self-evidently New India was not an original party and there is no basis upon which it could be held that there was any novation or transfer to New India of the rights and obligations of the insured under the club rules."

84. The reasoning in para 52 did not support the statement (obiter) in para 65 of the judgment that the club could not sue New India for damages for commencing the proceedings in Finland. The Court of Appeal had correctly held that, although New India was not a contracting party, by asserting rights under the insurance contract it became bound by the arbitration clause contained in the contract to arbitrate rather than litigate its claim against the club. There was no reason why the club could not claim damages for loss caused by breach of that obligation.

85. The error affected the court's decision to set aside the anti-suit injunction. One of the reasons given was that "New India is not in breach of contract in bringing these proceedings in Finland" so that "the principles in cases like *The Angelic Grace* do not apply directly" (para 95). This led the court to apply a test of whether the Finnish proceedings were vexatious or oppressive. Unfortunately, *The Jay Bola* - where that test had been rejected and *The Angelic Grace* applied - was not cited.

86. The case returned to the English courts in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (No 2)* [2005] EWHC 455 (Comm); [2005] 2 Lloyd's Rep 378. The club applied for a court order appointing an arbitrator. Section 18 of the Arbitration Act 1996 gives a court power to appoint an arbitrator on the application of "any party to the arbitration agreement". New India argued that section 18 did not apply because the Court of Appeal had held in *Through Transport (No 1)* that New India was not a party to an agreement to arbitrate. Moore-Bick J did his best to rationalise the earlier decision. He held that all the Court of Appeal had done was to dispose of the suggestion that New India had become a party to a contract with the club as a result of the statutory transfer to it of the insured's rights and obligations. This did not prevent New India from being bound by the arbitration clause - as the Court of Appeal had held that it was - if it made a claim against the club. By section 82(2) of the 1996 Act, references to a party to an arbitration agreement "include any person claiming under or through a party to the agreement". New India fell within the scope of this provision and therefore within section 18. So the court could appoint an arbitrator.

87. In *Shipowners' Mutual Protection Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS (The Yusuf Cepnioglu)* [2016] EWCA Civ 386; [2016] 3 All ER 697 the Court of Appeal revisited its decision in *Through Transport (No 1)*. *The Yusuf Cepnioglu* was another case involving proceedings brought against a P&I club, this time in Turkey, under a statute which gave the claimant a direct right of action. Based on the London arbitration clause in the contract with its member,

the club applied successfully to the English court for an anti-suit injunction. The decision to grant the injunction was affirmed by the Court of Appeal.

88. The direct right of action against the club was again characterised for the purpose of English conflict of laws rules as essentially contractual. English law, as the law applicable to the insurance contract, therefore governed both the right and the obligation to arbitrate which arose when the claimant sought to enforce that right. Drawing on *The Jay Bola*, Longmore LJ and Moore-Bick LJ (with each of whose judgments McFarlane LJ agreed) both concluded that the principles applicable to the grant of an anti-suit injunction were those in *The Angelic Grace*. In so far as a different approach had been taken by the Court of Appeal in *Through Transport (No 1)*, that decision was in conflict with *The Jay Bola* and the court was entitled to choose which decision to follow. They preferred the reasoning in *The Jay Bola*: see paras 31-33, 56.

89. Although Moore-Bick LJ referred to the club's right to have any claim against it pursued in arbitration as a right which equity would protect by injunction, there was no suggestion that the right was itself equitable. It was inherent in the court's reasoning that the right was contractual (see, eg, para 33: "the Club's application for an injunction is made 'to protect a contractual right …'").

90. The idea that the right was equitable surfaced in *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA (The Front Comor)* [2005] EWHC 454 (Comm); [2005] 2 All ER (Comm) 240. An insurer, exercising subrogated rights, brought proceedings in Italy making a claim in tort against a shipowner. The insured had contracted with the shipowner to refer disputes to arbitration in London in accordance with English law. Colman J held that the insurer was bound by that agreement and maintained an anti-suit injunction to restrain the insurer from pursuing the Italian proceedings. But he referred, in paras 70 and 71, to the "equitable rights" of the shipowners under the arbitration agreement, adopting the language used in *The Jay Bola* in the passage quoted at para 72 above.

91. A similar view was also taken by Thomas Raphael QC in his influential book, *The Anti-Suit Injunction*, 1st ed (2008). Relying on the same passage in *The Jay Bola*, he suggested, at para 10.10, that:

> "the case law is best explained by the conclusion that … there is a substantive equitable obligation binding a third party not to seek to take the benefit of a contract without the burden of the exclusive forum clause to which that contract is subjected".

The second edition, published in 2019, expresses the same view, eg at para 10.19. We think it unsound for reasons already given.

92. In *Airbus SAS v Generali Italia SpA* [2019] EWCA Civ 805; [2019] 4 All ER 745 the Court of Appeal expressly approved the reasoning of Colman J in *West Tankers*. Like *West Tankers*, *Airbus* was not a benefit and burden case. Males LJ emphasised, at para 94, that these were not cases - like *The Jay Bola* - in which third party insurers were seeking to enforce contractual rights under a contract containing an arbitration clause. Rather, they were enforcing by way of subrogation an independent claim in tort which the insured was bound by a contract with the defendant to arbitrate. Males LJ stated the position in such a case, at para 96, to be as follows:

> "(1) Insurers exercising rights of subrogation to make a non-contractual claim are bound by an English arbitration or jurisdiction clause to the same extent as their insured would have been.
>
> (2) Whereas the commencement and pursuit of proceedings contrary to the terms of an arbitration or jurisdiction clause by the insured would constitute a breach of contract, the commencement and pursuit of such proceedings by insurers constitutes a breach, not of the contract but of an equivalent equitable obligation which the English court will protect."

93. Although the effect of subrogation does not arise for decision on this appeal, its effect cannot sensibly be to transmute a contractual obligation of the insured into "an equivalent equitable obligation" of the insurer. Any subrogated claim against a third party must be brought in the name of the insured and, vis-à-vis the third party, the involvement of the insurer is generally irrelevant. If there is an arbitration agreement between the insured and a third party, the insurer therefore cannot bypass that agreement as it has no separate right of action.

94. In *West Tankers* and *Airbus* the rights of subrogation were in each case conferred by Italian law, which permitted the insurers to bring proceedings in Italy in their own name. As the distinction between law and equity is not a feature of civilian legal systems, the effect of subrogation under Italian law cannot be to create new equitable obligations: it can only be to vest in the insurer already existing rights and obligations of the insured. Where the relevant rights and obligations arise under an arbitration agreement, they are contractual. The assertion in *West Tankers*, approved in *Airbus*, that an English arbitration or jurisdiction clause gives rise to an "equitable right" to have a claim referred to arbitration is therefore misconceived.

95. Describing the obligation to arbitrate as equitable made no difference to the decisions in *West Tankers* and *Airbus*. The remedies sought were an injunction (in *West Tankers*) and a declaration (in *Airbus*). There was no monetary claim which required the

court to consider whether common law damages or equitable compensation was an available remedy. Such a claim was, however, made in *Argos Pereira Espana SL v Athenian Marine Ltd (The Frio Dolphin)* [2021] EWHC 554 (Comm); [2022] 1 All ER (Comm) 345. An arbitrator awarded equitable compensation for costs incurred in defending proceedings brought by an assignee of cargo claims in Spain in breach of an "equitable obligation" to arbitrate. On an appeal under section 69 of the Arbitration Act 1996, Sir Michael Burton held that the assignee could not challenge the arbitrator's decision that it was in breach of an equitable obligation because permission to appeal on that question had been refused (paras 9-12). The only issue was whether equitable compensation was recoverable for breach of such an obligation. Sir Michael Burton held that it was.

96. That decision then influenced the arbitrators and Butcher J in this case in concluding that equitable compensation is an available remedy: see the First Partial Award of Sir Peter Gross, para 183; the First Partial Award of Dame Elizabeth Gloster, paras 109–111; the Spain judgment, para 336(4); and the France judgment, para 58. Indeed, if one assumes that the obligation to arbitrate is equitable so that its breach is an equitable wrong, there is no good reason to deny that equitable compensation can in principle be awarded.

(3) Inconsistency with the case law

97. It is worth spelling out the inconsistencies between the assumption that the obligation to arbitrate is equitable and other propositions of law established in the cases discussed above. The following conclusions reached in those cases treat the obligation as contractual and therefore as a common law obligation:

> (1) For the purposes of the conflict of laws, the obligation has been characterised as contractual and therefore governed by the law of the arbitration agreement: see *Through Transport (No 1)*; *The Prestige (No 2)*; *The Yusuf Cepnioglu*.
>
> (2) For the purposes of extra-territorial jurisdiction, a claim to enforce the obligation has been viewed as a claim to "enforce a contract" governed by English law: see *The Jay Bola*.
>
> (3) The obligation has been held to engage the principle in *The Angelic Grace* that an anti-suit injunction may readily be granted to enforce a contractual promise to arbitrate: see *The Jay Bola* and *The Yusuf Cepnioglu*.

(4) Where the obligation arises, an arbitral tribunal has substantive jurisdiction, based on the existence of an arbitration agreement with the third party, over a claim for relief for breach of the obligation: see *The Prestige (No 2)*.

(5) A third party which owes the obligation is a "party to the arbitration agreement" within the meaning of section 18 of the Arbitration Act 1996 giving the court power to appoint an arbitrator: see *Through Transport (No 2)* and *The Prestige (Nos 3 and 4)*.

(6) Where the third party is a state, it has been held not to enjoy immunity because it has "agreed in writing" to arbitrate for the purpose of section 9(1) of the State Immunity Act 1978: see *The Prestige (No 2)* and *The Prestige (Nos 3 and 4)*.

98. It is inherent in all these decisions that the third party is regarded as under a contractual obligation to arbitrate. That is inconsistent with treating the obligation as equitable.

(4) Conclusion

99. We conclude that an obligation to arbitrate arising by operation of the conditional benefit principle is a contractual obligation owed at common law and not an equitable obligation. Its breach is therefore not an equitable wrong and equitable compensation is not an available remedy.

6. The reasoning of the Court of Appeal

100. It follows that the entire debate in this case about whether compensation may be awarded against the States for breach of their obligation not to pursue their direct claims against the Club other than by arbitration has rested on a false premise. The obligation has wrongly been treated as an equitable obligation when, properly analysed, it is a contractual obligation enforceable under the common law by reason of the conditional benefit principle. In other words, we are concerned with remedies for breach of contract and not with equitable compensation for an equitable wrong.

101. That error in how the case was analysed and argued by the parties affected the Court of Appeal's reasoning. But some of the reasons given by the Court of Appeal for holding that there was no power to award equitable compensation would, if valid, apply equally to a claim for damages for breach of a contractual obligation. As we read the judgments, the Court of Appeal gave four reasons for its decision on this issue. We will consider them in turn.

(1) Is the conditional benefit principle "defensive"?

102. First, the Master of the Rolls held that to award equitable compensation would "disregard the nature of the conditional benefit principle", which "does not give rise to a cause of action of a conventional kind" (paras 216-218 and 221). That understanding was based on the passage in *The Jay Bola,* discussed at para 77 above, in which Hobhouse LJ, in explaining his "analogy", said that the right of an assignee asserting an equitable set-off to apply for an injunction "is not a 'cause of action' of the same character as the right to sue for damages for breach of contract or tort" (see para 71 above). Andrews and Falk LJJ agreed with the Master of the Rolls and expanded on the point at paras 251–257. They said that remedies granted in conditional benefit cases have been and could only be negative or declaratory in nature because "the third party is not in fact a party to the contract so cannot be sued for breach of it". If it were otherwise, "principles of privity of contract would be materially eroded" (para 253). The right and corresponding obligation that arises in conditional benefit cases was thus said, at para 257, to be "of a peculiar kind":

> "It cannot be asserted against the third party in an offensive rather than defensive way by an action equivalent to one for breach of contract, because that would disregard the fact that the third party is not a party to the contract and so cannot be sued for breach of the obligations contained in it."

103. We do not agree with this reasoning as we think it tends to conflate two ideas. The first is sound but the second is not. It is correct that, as Andrews and Falk LJJ said at para 253, the Club had no "independent" or "self-standing" right to require the States to arbitrate or to claim damages for their failure to do so. Because the States were not parties to the insurance contract, they were not bound by any of its terms unless and until they chose to enforce a right arising under it. It is only because the States chose to take the benefit of the contract by seeking to enforce such a right that, by doing so, they came under an obligation not to pursue their direct claims against the Club other than by arbitration. There is no question of the third party being liable for a failure to arbitrate if it does not accept the benefit of the contract. In that sense it is true that the conditional benefit principle operates in a "defensive" rather than an "offensive" way.

104. But it does not follow that, once the third party comes under an obligation by seeking to enforce a right under the contract, the only remedies available for breach of the obligation are an injunction to prevent the breach from continuing or a declaration. There is no principled basis for excluding monetary relief. It is wrong to say that such relief "would disregard the fact that the third party is not a party to the contract and so cannot be sued for breach of the obligations contained in it" (para 257). A third party who comes under an obligation by claiming a contractual benefit *can* be sued for breach of an

obligation contained in the contract. That is the basis on which an injunction (or a declaration) can be awarded against the third party.

105. It would be irrational to permit the coercive remedy of an anti-suit injunction to restrain breach of the obligation to arbitrate while denying the availability of damages if a breach is committed. If there were to be any restriction on the remedies available against the third party, logic would point the other way. Damages are a less intrusive remedy than an injunction, which is backed by coercive measures for non-compliance in the form of criminal and financial sanctions for contempt. But, as it is, there is no reason to treat the third party differently from a contracting party. As discussed at para 62 above, where the conditional benefit principle applies, the principle requires that the third party should be placed in the same position as a contracting party and certainly not in a better position in terms of liability for breach.

106. It is also wrong to say that "the relief granted by the courts in conditional benefit cases has been entirely negative or declaratory in nature" (para 253) and that the principle does not "enable a claim to be brought that requires positive action, such as the payment of money" (para 252). In *Aspden v Seddon (No 2)* the conditional benefit principle gave rise to an obligation to pay money. Andrews and Falk LJJ themselves mentioned other examples. They referred to *Halsall v Brizell* and *Thamesmead Town Ltd v Allotey* (1998) 30 HLR 1052 as cases recognising that non-parties to deeds of covenant would be required to pay money in accordance with the terms of the deeds if they wished to make use of roads and services by exercising rights under the deed (para 256). These cases show that the conditional benefit principle can found a claim for positive relief.

107. Andrews and Falk LJJ sought to distinguish cases such as *Halsall v Brizell* on the ground that they were not concerned with the consequences of a breach of duty but with "the enforcement of a condition or incident of the contract that the landowner was taken to accept" (para 256). This recognises that the conditional benefit principle can give rise to a primary obligation on the third party to pay money, yet denies the remedy of damages for breach of an obligation imposed on the third party because that would require the payment of money. That is not a coherent distinction.

108. The analysis is not altered by the fact that an injunction cannot be granted here because the parties in breach of the obligation to arbitrate are states. A state which is not immune from adjudicative jurisdiction is still generally immune from the enforcement jurisdiction of another state. The explanation for the immunity under section 13(2)(a) of the State Immunity Act 1978 from "relief … by way of injunction" is that the grant of an injunction engages the enforcement jurisdiction of the state through the coercive sanctions available for non-compliance, unlike an award of damages. As stated by Sir Geoffrey Vos MR in *UK P&I Club NV v República Bolivariana de Venezuela* [2023] EWCA Civ 1497; [2024] KB 399, para 50:

> "an anti-suit injunction is indeed coercive unlike an order for damages. An order for damages has no coercive effect until an enforcement process is initiated. An injunction has a coercive effect immediately it is ordered, because it says to the defendant that it will incur penalties if it takes any step in contravention of it."

109. Thus, the fact that an injunction cannot be granted here because of its coercive effect does not preclude an award of common law damages.

(2) Alleged inconsistency with equitable damages

110. The second reason given by the Court of Appeal for holding that there was no power to award equitable compensation was based on its analysis of section 50 of the Senior Courts Act 1981. This provides that "[w]here the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance".

111. Section 50 is a successor provision to section 2 of the Chancery Amendment Act 1858 (Lord Cairns' Act). The need for it arose from the historical divide between the common law courts and the Court of Chancery, whereby only the Court of Chancery could grant equitable remedies such as an injunction or specific performance, but only the common law courts could award damages for breach of contract or a tort (or other infringement of a common law right). A litigant seeking both damages for loss caused by a breach of contract and an injunction to prevent further breach therefore had to bring claims in two different courts. Similarly, if the Court of Chancery refused to grant specific performance of a contract or an injunction to prevent breach for a discretionary reason such as delay, any alternative claim for damages required a fresh action to be brought in the common law courts. Lord Cairns' Act was designed to remedy this serious deficiency in the law. The Act enabled the Court of Chancery to do "complete justice" by giving that court, in all cases in which it had jurisdiction to entertain an application for an injunction or specific performance, the power to award damages "in addition to or in substitution for" an injunction or specific performance - thus avoiding plaintiffs being "bandied about" from one court to the other (see *Ferguson v Wilson* (1866) LR 2 Ch App 77, 88).

112. The original need for the Act was overtaken when the Judicature Acts gave the High Court all the powers formerly exercisable by the Court of Chancery and the common law courts. But the Act remained relevant because the power to award damages under the Act was held to be wider than the power to do so at common law. Under the common law, damages can be awarded only where the cause of action has already accrued, and not in respect of future wrongs which have not yet been committed. The power under Lord

Cairns' Act / section 50 to award damages in substitution for an injunction (ie "equitable damages") has been interpreted as allowing the court to award damages in compensation for the injury which an injunction would have prevented. This enables damages to be awarded not only for prospective loss resulting from continuing infringement of a right but in substitution for a quia timet injunction where the wrong has only been threatened: see *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, 856-859; *Jaggard v Sawyer* [1995] 1 WLR 269, 276-277, 284; *United Utilities Water Ltd v Manchester Ship Canal Co Ltd* [2024] UKSC 22; [2025] AC 761, para 7; *Snell's Equity*, 35th ed (2024), para 20-049.

113. Here the Court of Appeal held that, because section 13(2)(a) of the State Immunity Act 1978 precludes giving relief against a state by way of injunction, there is no power under section 50 of the Senior Courts Act 1981 to award damages in substitution for an injunction against a state. It then reasoned that this means that there is no power to award equitable compensation against the States because to recognise such a power would "short circuit" (para 218), or "circumvent, and potentially render otiose" (para 219), the statutory power to award damages under section 50.

114. The fact that the power under section 50 is not available in this case means that damages cannot be awarded in substitution for a quia timet injunction in respect of a wrong which is anticipated but has not yet been committed. We noted at para 26 above that the Club's claim for compensation for future loss was put in the arbitrations on two alternative bases. One was that the relief claimed could be awarded quia timet as compensation for losses caused by future breaches of the obligation to arbitrate. As there is no power to award damages on that basis other than under section 50, that first basis falls away. It is settled law, accepted by the Club, that at common law damages cannot be awarded in respect of a future wrong.

115. But that still leaves the second basis on which the Club claimed compensation in the arbitrations for future loss: that the tribunal could and should award compensation for future losses likely to result from past breaches of the States' obligation. We will come back to the power to award damages on this basis. For now, it is sufficient to say that the existence of such a power is not affected by whether damages under section 50 are available. The purpose of Lord Cairns' Act was to confer a power to award damages which did not otherwise exist. It was not to remove or cut down the availability of damages where there is power to award them under the common law. The same could be said about the power of the court to award equitable compensation for past breaches of an equitable obligation.

116. The Court of Appeal appears to have treated its conclusion that damages cannot be awarded against the States under section 50 as having the consequence that compensation cannot be awarded under such powers as the court would have apart from section 50. Such an inference was unwarranted.

(3) The cause of the Club's losses

117. The Court of Appeal gave a third reason for holding that there was no power to award equitable compensation in this case. This was that the costs already incurred by the Club have not been caused, and losses flowing from any future enforcement of the Spanish judgment will not be caused, by the States' breaches of the obligation to arbitrate, but by the fact that the Spanish courts did not apply the "pay to be paid" clause (paras 208, 220, 221 and 267).

118. The decisions of the Spanish courts are plainly one cause of the Club's losses. But we see no justification for treating them as the sole cause and as having eclipsed the pursuit of the Spanish proceedings by the States in breach of their obligation to arbitrate as an effective cause of the Club's losses. Nor, so far as we are aware, have the States themselves ever made that suggestion.

119. Spain did make a related argument in the arbitration: that the sole effective cause of the Club's losses was its failure to appear in the Spanish proceedings on liability and invoke the "pay to be paid" clause. Sir Peter Gross rejected that argument. He found that the Club acted reasonably in the circumstances, which included the risk that defending the claim on the merits would be treated as a submission to the jurisdiction of the Spanish courts. He also found, as Mr Schaff had done, "a real or appreciable risk" that, even if the Club had appeared in the proceedings and relied on the "pay to be paid" clause, the Spanish courts would still have held that the clause did not afford a defence to the claims under article 117 of the Spanish Penal Code. Sir Peter Gross accepted that this risk was among the risks which the Club had bargained to avoid in agreeing that London arbitration would be the sole forum for the resolution of disputes.

120. The Court of Appeal did not criticise that reasoning, which seems to us unimpeachable and to apply equally, if not with even greater force, to any argument that the effective cause of the Club's losses was the fact that the Spanish courts decided the question of liability against the Club. Although the Court of Appeal's judgment describes this in several places as a "breach" of the "pay to be paid" clause (see paras 220, 221, 235), that clause did not impose any obligation on the insured, let alone on the States or the Spanish courts. So there was nothing to breach. It is unclear whether the Court of Appeal regarded the outcome of the Spanish proceedings as so unexpected that it broke the chain of causation. If so, that conflicted with the arbitrator's factual findings. If not, they did not explain why the risk of an adverse judgment fell outside the risks which the arbitration clause was intended to protect against – an analysis which accords with the approach of Scrutton and Atkin LJJ in *Ellerman Lines Ltd v Read* [1928] 2 KB 144 and the views of commentators: see D Foxton et al, *Mustill & Boyd: Commercial and Investor State Arbitration*, 3rd ed (2024), para 6.148; D Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement*, 3rd ed (2015), para 14.14.

121. There is, in any case, a more fundamental objection to this ground of the Court of Appeal's decision, raised by Ground 2 of this appeal. This is that the Court of Appeal erred by exceeding the statutory limits of an appeal from an arbitration award under section 69 of the Arbitration Act 1996.

122. The Supreme Court recently had cause to stress the limitations on the right to appeal under section 69 and the importance of respecting those limitations in *Sharp Corpn Ltd v Viterra BV (formerly Glencore Agriculture BV)* [2024] UKSC 14; [2024] 4 All ER 273. Lord Hamblen summarised them at para 51:

> "(1) A party may appeal on 'a question of law arising out of an award' (section 69(1)).
>
> (2) The question must be one 'which the tribunal was asked to determine' (section 69(3)(b)).
>
> (3) The application for permission to appeal must 'identify the question of law to be determined' (section 69(4)).
>
> (4) At the permission to appeal stage, the court must be satisfied (inter alia) that 'on the basis of the findings of fact in the award', the decision of the tribunal is 'obviously wrong' or 'the question is one of general public importance and the decision of the tribunal is at least open to serious doubt' (section 69(3)(c)).
>
> (5) When determining whether the tribunal made an error of law in relation to the question of law, the court must proceed on the basis of the findings of fact in the award."

123. Here the Court of Appeal appears to have lost sight of these statutory limits. We doubt that the question whether the Club's losses were solely caused by the failure of the Spanish courts to apply the "pay to be paid" clause can properly be regarded as a question of law arising out of the awards. But, even if it can, it is not one which, in either arbitration, the tribunal was asked to determine. It is not a question on which either France or Spain applied for permission to appeal. It is not a question which, at the permission to appeal stage, was held to satisfy the test for granting permission. The judge did not decide it, and it was not included in the States' grounds of appeal to the Court of Appeal. The Court of Appeal should not have considered it.

124. Counsel for the States submitted that the Court of Appeal's views on the cause of the Club's losses were not part of its "core reasoning" or its decision on the law. It is true that the Court of Appeal gave other reasons for its decision. But its view about causation was an independent reason given for the decision to set aside the awards. It was not a permissible ground for interference as it was not within the scope of the arbitration appeals.

(4) International comity

125. The same applies to considerations of international comity on which the Court of Appeal also relied. They held that, by awarding indemnities for any sums which the Club is ordered to pay if the Spanish judgment is enforced in other jurisdictions, the arbitrators were seeking to interfere with those enforcement processes by neutralising their effect (paras 222 and 268). The Court of Appeal drew an analogy with anti-enforcement injunctions, where the view has been taken that recognition and enforcement in a third country "is a matter which it is, intrinsically, for the relevant court to decide according to its applicable law": *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309; [2016] 1 WLR 2231, para 136.

126. We do not find the analogy persuasive. An anti-enforcement injunction, by preventing a judgment creditor from applying to the court of a third country, indirectly prevents that court from deciding whether to enforce the judgment under its local law. The arbitral awards do not prevent, even indirectly, a foreign court from recognising or enforcing the Spanish judgment. They require only that compensation is paid for any loss ultimately caused by obtaining a judgment in the wrong forum in breach of a contractual obligation owed to the claimant.

127. But, again, as raised by Ground 2 of this appeal, the Court of Appeal should not have considered this question at all, as it is not within the scope of the arbitration appeals. Spain did not argue in the arbitration that the relief claimed should be refused because it would interfere with enforcement processes in other jurisdictions by neutralising their effect. The arbitrator was not asked to determine that question; and it is not one for which Spain sought, or was granted, permission to appeal or which Butcher J decided on the appeal under section 69.

128. France did raise considerations of comity in the arbitration, but only in relation to the Spanish courts and not the courts of third countries. France argued that awarding compensation to neutralise the effect of a judgment of a Spanish court was problematic. Dame Elizabeth Gloster rejected this concern, stating, at para 113 of her First Partial Award:

> "A claim for compensation in circumstances such as the present, in respect of the judgment awarded by the foreign court, does not embarrass the foreign court or offend principles of comity. The foreign court does not have to decide how it should act following such an award. It has already made its decision. The compensation awarded does no more than indemnify a claimant in respect of the loss that it has suffered as a result of the breach by a defendant of the equitable obligation to observe the terms of the arbitration agreement."

129. The questions on which France sought permission to appeal under section 69 included "whether equitable compensation can be granted where its effect is to neutralise the effect of a foreign judgment which is granted recognition under English law". This, however, was not an argument based on comity. It was a different argument alleging inconsistency between recognition of the Spanish judgment in England and the awards of compensation made by the arbitrators. Butcher J found no such inconsistency, refused France an extension of time to advance this ground of appeal and held that it did not satisfy the test for permission: see Butcher J's France judgment, paras 72-84. In these circumstances any challenge to the award on the ground that it interfered illegitimately with a foreign judgment—whether for reasons of comity or otherwise—by neutralising its effect, is not within the scope of France's appeal.

130. Counsel for the States submitted that, although not a separate ground of appeal, the Court of Appeal was entitled to have regard to comity in deciding whether the arbitrators had the power to award equitable compensation for breach of the States' obligation to arbitrate. But considerations of comity were on any view irrelevant to the existence of such a power. At most, they might bear on whether, if the power exists, the arbitrators should have exercised it as they did on the facts of this case. That too is not within the scope of the appeals.

131. The Club also complains about various comments in the Court of Appeal judgments said to concern the "relative culpability" of the parties – in particular, the extent to which the States were blameworthy in bringing the Spanish proceedings. Making such comments risked giving an impression that the court was influenced by matters irrelevant to the legal issues. But the comments chiefly complained of, at para 209, were expressly described as "background". We accept the States' submission that they did not constitute new findings of fact or play any part in the court's legal reasoning.

7. The consequences of our analysis

132. We have concluded that none of the reasons given by the Court of Appeal and relied on by the States justified allowing the States' appeals from the arbitrators' monetary

awards. Had the assumption been correct that the States' obligation to arbitrate is an equitable obligation, the arbitrators and the judge could not be faulted for holding that there was power to award equitable compensation for breaches already committed - although not for threatened future breaches. But that assumption was wrong. The obligation is legal rather than equitable and the appropriate monetary remedy for breach is an award of common law damages.

133. Therefore, we must decide whether and, if so, how the mistaken assumption affected the relief granted by the arbitrators and what order the court should now make with respect to the awards. The relevant powers of the court are set out in section 69(7) of the Arbitration Act 1996, which provides:

> "On an appeal under this section the court may by order—
>
> (a) confirm the award,
>
> (b) vary the award,
>
> (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
>
> (d) set aside the award in whole or in part.
>
> The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

134. The possibility that the obligations of which the States were in breach arose under the common law rather than in equity was first raised (by the court) during the hearing of this appeal. In those circumstances, after the hearing, we invited further written submissions on what the consequences of this analysis, if adopted, would be. In particular, the parties were asked whether, if the court were to conclude that the obligations were owed under the common law, so that the primary remedy for loss caused by breach is common law damages and not equitable compensation, it would be necessary or appropriate (a) to set aside or vary any of the relief awarded by the arbitrators and/or (b) to remit any part of the awards for reconsideration. The parties were also asked, if they

proposed remission, to identify what arguments were said to be open to the States on such remission.

135. In response to this request, neither party sought to suggest that, because of the assumption on which the arbitrations and the proceedings below were conducted and this appeal was brought, it is not open to this court to reject the assumption that there was an equitable obligation to arbitrate and hold that the relevant obligation was owed under the common law. They were right not to do so. There has been no procedural unfairness and a court is not bound by a party's concession of a point of law which it considers to be erroneous, as the court's duty is to apply what it believes to be the law and not what the parties conceive the law to be: see eg *R v McCafferty* [2026] UKSC 20; [2026] 3 WLR 300, paras 16-17.

136. The Club's primary position is that the court should confirm the awards and that no remission to the arbitrators is required; still less should any of the relief granted be set aside or varied. Its basic argument is that the case for compensation for breach of a contractual obligation is stronger than one based on breach of an equitable obligation and certainly no weaker. Analysing the obligation to arbitrate as contractual rather than equitable, therefore, cannot justify a different outcome.

137. The States have made three submissions. First, they argue that Mr Schaff and the Court of Appeal in *The Prestige (No 2)* decided that the States were not parties to the arbitration agreement and were not in breach of contract. Consequently, that matter is res judicata by reason of issue estoppel. Thus, it was, and is, not open to the arbitrators to award common law damages based on a breach of the arbitration agreement. Second, and alternatively, the Club cannot now claim common law damages because it has consistently declined to advance a case that the States are in breach of contract and that the Club is entitled to damages for such breach. Third, if neither of those contentions is accepted, the question whether the Club is entitled to common law damages and, if so, in what measure should be remitted to the arbitrators as it has never been argued and the States should therefore be given the opportunity to address it.

(1) Issue estoppel

138. The States' assertion of an issue estoppel relies on statements made in the Schaff awards and in *The Prestige (No 2)*. When considering whether to grant declaratory relief, Mr Schaff said that it was "not a breach of contract" for the States to have brought direct claims against the Club, even though those claims "are (ex hypothesi) properly the subject of arbitration". As authority, he cited *Through Transport (No 1)*, paras 52, 65 and 93-95. This did not prevent him from concluding that he should grant declarations that the States were bound by the arbitration clause in the insurance contract.

139. The States also rely on a passage in the judgment of Moore-Bick LJ (with whom the other members of the Court of Appeal agreed) in *The Prestige (No 2)*. As explained above (see paras 14-16), one of the questions under discussion was whether the States had "agreed in writing" to submit the dispute to arbitration and were therefore excepted from immunity by section 9(1) of the State Immunity Act 1978. In the reasoning leading up to the conclusion that the requirement in section 9(1) for an agreement in writing was satisfied, Moore-Bick LJ said, at para 69:

> "Although in the present case the [States] must also pursue their claims by arbitration, they, like the claimant in *Through Transport*, are not parties to the arbitration agreement in the full sense. If they wish to pursue their claims they must do so in arbitration (see paras 60 and 63 of the judgment of the Court of Appeal in *Through Transport*), but commencing proceedings in Spain did not involve a breach of an agreement to arbitrate (see paras 65 and 95 of the same judgment). When the appellants began proceedings against the Club in Spain and the Club failed to concede the claim, disputes arose between themselves and the Club which were capable of being referred to arbitration and could only be validly determined in arbitration."

140. Both statements relied on by the States cited the passages in *Through Transport (No 1)* discussed at paras 83-85 above, where the Court of Appeal's reasoning went astray. In *Through Transport (No 1)* the fact that New India was not a party to the arbitration agreement was taken to mean that, although New India was bound by that agreement to arbitrate, a breach of its obligation to do so was not a breach of contract. It may be that the objection was merely one of terminology and that the Court of Appeal preferred to reserve the term "breach of contract" to a breach of an obligation owed by a contracting party. The Court of Appeal's own analysis in *Through Transport (No 1)* pointed to the conclusion that the claimant was bound by the arbitration agreement in relation to its claim just as if it had been a party to that agreement.

141. Issue estoppel is a rule of law that operates within narrow limits. It applies only to determinations by the earlier court or tribunal of an issue that was necessary for, and fundamental to, its decision: see *Skatteforvaltningen v MCML Ltd (formerly ED&F Man Capital Markets Ltd)* [2026] UKSC 19; [2026] 3 WLR 219, paras 38, 41, 44. Further, only the immediate foundation of the ultimate decision can give rise to an issue estoppel; reasoning leading up to that decision cannot: para 45.

142. Neither Mr Schaff nor the courts in *The Prestige (No 2)* had to decide, or did decide, whether the States' pursuit of their direct claims against the Club in the Spanish proceedings (1) was a breach of a contractual or an equitable obligation or (2) gave rise

to a remedy in damages (or equitable compensation). Those were not issues in the Schaff arbitrations or in *The Prestige (No 2)* and were not addressed at all, let alone decided by the arbitrator or the court. Nothing said in the Schaff awards or in the judgment of the Court of Appeal in *The Prestige (No 2)* can therefore create an issue estoppel in relation to those questions. There is no basis for the States' first submission.

143. In fact, the logic of the Schaff awards and the Court of Appeal's decision in *The Prestige (No 2)* supports the conclusion that the States' pursuit of the Spanish proceedings was, whether or not it is called a "breach of contract", legally equivalent to a breach of contract. As noted at para 12 above, Mr Schaff characterised the States' direct claims against the Club as claims to enforce a contractual obligation derived from the contract of insurance. It was implicit in his reasoning that the States' obligation to arbitrate was likewise contractual.

144. In *The Prestige (No 2)* Moore-Bick LJ accepted, at para 70, that the pursuit of claims in the Spanish proceedings amounted to "an adoption" by each of the States of the arbitration agreement and that this satisfied the requirement for an agreement in writing. That analysis treated the States as in an equivalent position to that of a contracting party in what Moore-Bick LJ called "the full sense". The logical implication is that a breach by the States of the obligation to arbitrate is equivalent to a breach of contract for which (common law) damages are therefore in principle an available remedy.

(2) Form should not trump substance

145. The submission that the Club has consistently declined to advance a case that it is entitled to damages for breach of contract is equally misplaced. All that has happened is that the Club - as well as the States, the arbitrators in the second set of arbitration proceedings and the courts below - have assumed that the relevant obligation was equitable, which led the Club to frame its monetary claim as one for equitable compensation. We have concluded that the obligation is legal rather than equitable, and that the breach therefore is (or is treated as being) a breach of contract and not an equitable wrong. But that is no reason to deprive the Club of relief unless that characterisation affects the substance of the relief which the arbitrators awarded. Denying relief to which a claimant was legally entitled because an incorrect classification was adopted would elevate form over substance.

(3) Should the awards be remitted?

146. The critical question is whether there is a possibility that, if the Club's claim had been framed as a claim based on breach of a contractual obligation, the arbitrators might have refused some or all of the relief which was challenged on the States' appeal under section 69 of the Arbitration Act 1996. If so, the awards should be remitted to the

arbitrators to reconsider whether the Club is entitled to the compensatory relief sought. But if it is inevitable that the relief awarded would have been the same, then there is no warrant for requiring the arbitrators to reconsider the matter. The appropriate course is to confirm the awards.

147. We noted earlier that the arbitrators awarded compensation for both past and future losses. It has not been suggested that, in respect of past losses, the relief granted might possibly have been refused if the claim had been framed as one for damages for breach of a contractual obligation.

148. We also explained (see para 26 above) that the relief awarded in respect of future losses was claimed - aside from section 50 - on two bases, either one of which, if valid, was sufficient to justify granting the relief. The first basis - that the arbitrators could award monetary relief quia timet to indemnify the Club against the consequences of threatened future breaches of the States' obligations - was not valid and cannot be sustained in the light of our conclusion that the obligations are contractual. As discussed at para 112 above, damages cannot be awarded under the common law in respect of a breach which has not yet been committed.

149. In its further written submissions the Club maintained that relief could be awarded quia timet in support of an unaccrued legal or equitable right and referred to its submissions in the France arbitration, accepted by Dame Elizabeth Gloster, which relied on cases where relief was granted quia timet when the unaccrued claim was a claim for damages for breach of a contractual indemnity: eg *In re Anderson-Berry* [1928] Ch 290; *Rowland v Gulfpac* [1999] Lloyd's Rep Bank 86; *Papamichael v National Westminster Bank plc* [2002] 1 Lloyd's Rep 332; *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T)* [2011] EWHC 3381 (Comm); [2012] 1 Lloyd's Rep 162, paras 37-38, approved on appeal at [2014] EWCA Civ 1010; [2014] 2 Lloyd's Rep 544, para 21. In none of these cases, however, was the relief granted an award of common law damages. It was an injunction which required the defendant to preserve assets against which the claimant could have recourse upon a breach of the defendant's promise of indemnity. Neither an injunction nor an award of damages in lieu under section 50 is available here. There is, in our view, no way around the point that, outside section 50, monetary compensation cannot be awarded in respect of future wrongs.

150. The position is different where the breach has already occurred. In the France arbitration the Club cited authorities showing that, where a cause of action for a breach of contract (or other common law obligation) has accrued which is likely to cause future loss, the court may make an order requiring damages to be paid if and when such loss arises. An example is *Household Machines Ltd v Cosmos Exporters Ltd* [1947] KB 217, where sellers failed to deliver scarce goods which they knew were intended for resale, exposing the buyers to likely liabilities to pay compensation to sub-buyers. The judge granted a declaration that the buyers were entitled to recover from the sellers such

damages as the buyers may be held liable to pay and/or may reasonably pay in respect of the discharge of their legal liability to the sub-buyers. See also *Total Liban SA v Vitol Energy SA* [2001] QB 643, 651-652, 663-664; *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2014] EWHC 3632 (Comm); [2015] 1 Lloyd's Rep 301, paras 37-41; *Trinity Logistics USA Inc v Wolff* [2018] EWCA Civ 2765; [2019] 1 WLR 3997, paras 53, 57.

151. The States did not dispute in either arbitration the existence of the jurisdiction to make a conditional order of this kind. Nor have they done so in this court. In their supplemental submissions they contend only that the awards should be remitted to allow them to argue that damages cannot be awarded in respect of breaches of contract which have not yet been committed. They, rightly, do not dispute that a court or tribunal may order a party to pay damages in the future as and when losses arise from a cause of action (such as a breach of contract) that has already accrued. In so far as this represents a departure from the general rule (see eg *Clerk and Lindsell on Torts*, 25th ed (2026), para 26-2 and *McGregor on Damages*, 22nd ed (2024), para 53-072) that common law damages must be awarded unconditionally, so be it. There is no convincing reason of principle or policy for denying such a conditional award in a case such as this.

152. The relief awarded in the arbitrations in respect of future losses is conditional in this way. The States were ordered, if and when the Club becomes liable to pay a specified sum of money to the State through enforcement of the Spanish judgment, to pay an equal and opposite amount to the Club: see the Second Partial Award of Sir Peter Gross, paras A(3) and (4), summarised at para 27 above, and the similar orders made in the France arbitration by Dame Elizabeth Gloster.

153. As noted earlier, in the France arbitration Dame Elizabeth Gloster decided, as one basis which she considered a sufficient basis for her decision, that all the relief granted in respect of future losses was justified as conditional compensation for future consequences of breaches of France's obligation to arbitrate which had already been committed. As the authorities relied on to illustrate the power to grant such relief concerned claims for damages for breach of common law obligations, her conclusion would inevitably have been the same if France's obligation had been analysed as a contractual obligation and the compensation classified as common law damages. It would not then have been necessary to apply the same approach to equitable compensation by analogy. It would have applied directly. Nor have the States suggested any further argument which they did not make, but might have made, to contest the award of compensation on this basis if the obligation had been analysed as contractual. Spain cannot be in any better position than France in this respect, having chosen not to contest the form of relief sought.

154. We conclude that there is no warrant for remitting the awards to the arbitrators to reconsider the relief granted in the light of the court's determination that the obligation of

which the States were in breach was an obligation arising under the common law and not in equity.

8. Conclusion

155. For these reasons, we would allow the appeal. Counsel for the Club suggested that the awards might usefully be varied by adding a recital clarifying the legal basis (ie breach of a contractual obligation) on which the Supreme Court has upheld the awards of monetary relief. We agree that this would be desirable and invite the parties to agree appropriate wording. Although no challenge was made to the declarations in Dame Elizabeth Gloster's Second Partial Award which refer to the breach of an "equitable" obligation to arbitrate, our analysis shows that the word "equitable" is inaccurate and should be deleted. Subject to these variations, the awards should be confirmed.