UNIVERSITY OF SOUTHAMPTON

THE FACULTY OF SOCIAL SCIENCES

SOUTHAMPTON LAW SCHOOL

SHOULD A THIRD PARTY, BRINGING A DIRECT ACTION AGAINST AN INSURER, BE BOUND BY DISPUTE RESOLUTION CLAUSES CONCLUDED BETWEEN THE INSURER AND THE INSURED?

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ABSTRACT

THE FACULTY OF SOCIAL SCIENCES
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Doctor of Philosophy

SHOULD A THIRD PARTY, BRINGING A DIRECT ACTION AGAINST AN INSURER, BE BOUND BY DISPUTE RESOLUTION CLAUSES CONCLUDED BETWEEN THE INSURER AND THE INSURED?

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An injured third party may not always have the opportunity to initiate proceedings against a wrongdoer for compensation due to various reasons. For example, in a maritime context, shipowners are likely to go bankrupt following a major shipping disaster. Consequently, those who suffer damages or injuries from a negligent shipowner (the assured) might find themselves in a very difficult position to recover, and may sometimes be left without compensation. However, there are mechanisms that enable an injured third party to bring a direct action claim against the tortfeasor's insurer. Nonetheless, an injured third party may not be able to bring their claim in their preferred jurisdiction due to a jurisdiction clause contained in the wrongdoer's insurance policy. Direct actions are permitted under various mechanisms in different jurisdictions, and thus the nature and scope of a direct action may vary from one jurisdiction to another. As a result, the effects of such jurisdiction clauses on third parties can differ under different circumstances. Although a recent CJEU judgment provided protection for the weaker party against such jurisdictional clauses, the legal framework is not as straightforward as it appears. Moreover, recent legal and political developments in the UK and Europe have added more uncertainty to this topic. Therefore, the aim of this paper is to understand the nature and scope of direct action in relation to jurisdiction clauses. The paper will begin by introducing basic contractual concepts to establish a legal foundation, then delve deeply into the characterization of direct action, various direct-action mechanisms, governing laws, and jurisdictional matters, to answer one simple question: Should a third party bringing a direct action against an insurer be bound by dispute resolution clauses concluded between the insurer and the insured?

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INTRODUCTION

1. Background

In the context of sea trade, shipowners face significant risks and potential legal liabilities, which can lead to bankruptcy. This situation places those suffering loss or injury due to the shipowner's actions (the tortfeasor) in a challenging position, as they might not be able to recover damages. However, under certain circumstances, an injured third party can directly claim against the Protection & Indemnity (P&I) Club, enforcing the tortfeasor's rights under the insurance policy between the insurer and the assured (shipowner).[1]

The scope and nature of such direct actions vary across jurisdictions, influenced by different legal mechanisms that enable the injured party to proceed against insurers. A key consideration is whether the third party's claim pertains to the assured's loss or their own. Additionally, the transfer of rights and obligations under the policy, especially regarding dispute resolution clauses, is a matter of national law and varies significantly due to diverse public policy reasons.

In English law, for example, direct actions against insurers are considered as contractual claims.[2] Under the Third Parties (Rights Against Insurers) Act 2010, if an insured incurs a liability covered by the policy to a third party and becomes insolvent, the insured's rights against the insurer are transferred to the third party.[3] This enables the third party to enforce these rights directly against the insurer. In line with this view, until recently, the English courts have held that third parties are bound by jurisdiction agreements and arbitration clauses in the insurance policy when bringing a direct action.[4]

[1] The members of the Club are both insured and insurers.
[2] *Through Transport Mutual Insurance Association v New India Insurance (The Hari Bhum) [*2005] 1 Lloyd's Rep 67; See also Dicey, Morris & Collins on The Conflict of Laws (14th edn, Sweet & Maxwell, 2006), [35.043].
[3] F Rose, *Marine Insurance: Law and Practice,* (2nd edn, Informa 2012), 151.
[4] *The Yusuf Cepnioglu* [2016] EWCA Civ 386; [2016] 1 Lloyd's Rep 641.

This stance was challenged by the European Court of Justice's (CJEU) decision in Assens Havn v Navigators Management (UK) Ltd (The Sea Endeavour I),[5] which granted protection to the weaker party (third party) and ruled that they are not bound by dispute resolution clauses contained in the insurance policy agreed between the assured and the insurer. This decision, while significant, should be limited to specific scenarios. For instance, if the direct action is brought by an insurer, they should still be bound by the jurisdiction agreement, as they are not considered a weaker party. On the other hand, an individual who has suffered in a road accident should be protected when bringing a direct action against the liability insurer of the tortfeasor. However, there is no proper guideline or explanation to describe who should be given judicial protection or who should not be bound by the dispute resolution clauses. Therefore, the conclusion will be highly fact-specific, depending on the parties involved and the mechanisms allowing for direct action.

2. Research Question and Objective

The objective of this research is to understand whether a third party initiating a Direct Action against an insurer is bound by a dispute resolution clause agreed upon between the insurer and the insured. Aforementioned, this research question had a relatively straightforward answer until 2017. However, the CJEU's decision in The Sea Endeavour I, details of which will be discussed later, introduced uncertainty. While this decision may hold true for the specific facts of the case, extending such weaker party protection to all third parties has created ambiguity not only in maritime law but also in various commercial scenarios where a third party to a contract attempts to sue a contracting party in their own jurisdiction, disregarding the dispute resolution clauses in the contract from which they seek to benefit.

[5] C-368/16 *Assens Havn v Navigators Management* (UK) Ltd (The Sea Endeavour I).

Therefore, it is crucial to provide a clear answer to this question to avoid uncertainties that could lead to not only a waste of time and money but also strain judicial resources. Moreover, having an answer to this research question will also facilitate access to justice. Often, injured third parties may end up without any remedy if the tortfeasor becomes bankrupt after the incident that caused harm. This is because initiating proceedings in a jurisdiction where third parties' rights are limited can be challenging.

On the other hand, addressing this research question is also crucial for insurance companies, even before an accident occurs, in order to comprehensively assess all the relevant risks. Not knowing where they might face potential litigation creates a significant unknown variable in their risk assessment. This uncertainty can burden the insurance market, which will eventually be reflected in policy pricing, leading to increased premiums.

Although these circumstances are likely to occur in various situations, from vessel collisions to road accidents, there is no proper guidance or comprehensive study explaining under what circumstances a third party can sue an insurer. In this regard, this work is unique and original as it encompasses all the related literature on direct action, which is limited, and explains the relevant legal frameworks. It presents the current judicial standpoints, providing a clear picture and guidelines for the relevant parties.

This thesis will analyse the research question within the maritime context, as direct-action claims are commonly seen against Protection & Indemnity insurers, i.e., P&I Clubs due to the nature of shipping business. Consequently, this area of law has developed significantly within the maritime sphere. Nonetheless, the research has broader implications, resonating in other areas of law and significantly impacting Private International Law and Insurance Law.

Furthermore, the thesis will primarily focus on English and EU law, examining the research question within these two legal frameworks. Nonetheless, there will be numerous areas where these frameworks overlap and, in fact, share similar approaches at certain times. However, this research began amidst Brexit, before a clear judicial roadmap emerged regarding the jurisdictional framework in the UK post-Brexit. Thus, the underlying objective of this thesis is to examine the research question within these two legal frameworks, highlighting their similarities and differences. Occasionally, there will be references to other jurisdictions and international conventions for comparative purposes, to understand how direct actions are treated in different judicial traditions. However, the main focus will remain on English and EU law.

3. Methodology and Structure

The thesis will be predominantly adopting a doctrinal research methodology due to several key reasons that align with the objectives and structure of the research. The primary objective of this research is to assess whether a third party bringing a direct action against an insurer should be bound by dispute resolution clauses concluded between the insurer and the insured. To achieve this objective, the research first aims to provide an in-depth and comprehensive exploration of the fundamental legal principles concerning contract law, which will serve as the pillars on which the research question is built. It will then cover all the primary sources, such as relevant UK and EU cases, legislation, and international conventions, as well as secondary resources like academic articles, books, reports, and commentaries. This is crucial for providing a detailed understanding of the different components of the research question as well as the rationale behind the judicial thinking.[6] The analytical rigor inherent in doctrinal

[6] Emerson Tiller and Frank B. Cross, "*What is Legal Doctrine*" (2005) Public Law and Legal Theory Papers, Working Paper 41.

research will allow the thesis to critically examine the components of the research question and evaluate legal doctrines and their application, offering a nuanced and sophisticated analysis that can contribute significantly to the legal literature on direct actions.[7]

The research question, 'Should a Third Party Bringing a Direct Action Against an Insurer Be Bound by Dispute Resolution Clauses Concluded Between the Insurer and the Insured?', encompasses four main components.

Firstly, the thesis will begin by exploring the most important contractual concepts to understand the origins of the research question and the necessity of discussing whether a third party should or should not be bound by a dispute resolution clause contained in a contract to which they are not a party. It will examine the literature and historical judicial reasoning behind fundamental principles like the doctrine of privity or conditional benefit, elaborating on their importance and essential role in the context of the research question. In other words, this initial chapter serves as the gateway to understanding the relevance and necessity of discussing the research question. This is why the normative nature of the doctrinal research fits perfectly to the objective of the thesis to understand the legal landscape, which is fundamental for any legal research.[8]

The second chapter, titled 'Characterization of Direct Action', aims to assess the first component of the research question: the nature of direct actions, to determine whether it constitutes an independent right separate from the contract. To achieve this objective, the chapter will first cover different doctrinal perspectives on characterization in both judicial and

[7] Ishwara Bhat, Idea and Methods of Legal Research (1st edn, Oxford Academic 2019), 143.
[8] Andrew Knight, Advanced Research Methods in the Built Environment (1st edn, Wiley 2008), 30; See also Sanne Taekema, (2018) 1 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice' Law and Method 1.

academic literature, spanning continental European and common law schools of thought. It will then apply these perspectives in the context of direct action to ascertain where direct action fits in. Subsequently, the chapter will compare various foreign direct-action statutes from regions with sophisticated insurance and maritime laws, as well as international conventions, to provide a broader view of how each of these jurisdictions are similar or different from one another. This chapter seeks to answer two questions: are direct actions contractual or statutory in nature, and are they independent of the insurance contract in question?

The second component of the research question, which will be discussed in chapter three, concerns the mechanisms that enable third parties to bring direct actions against insurers. These will be examined under two categories: internal mechanisms, which are contractual, and external ones, encompassing local and foreign statutes as well as international conventions. The aim of this chapter is to demonstrate how different mechanisms might lead to varying conclusions regarding the previously discussed nature of direct actions, and as a result, may change the way we answer the research question. Therefore, after discussing the nature of direct action, the following chapter will explore how the nature of direct action might vary depending on the mechanism enabling it, namely the source of the right for the direct action. Hence, the doctrinal research methodology will be effective in providing a better structure while systematically examining different legal mechanisms and identifying their differences.[9]

The third objective of the thesis is to understand which governing law should be applied while attempting to answer the research question. Understandably, different legal frameworks will yield different rights and obligations for third parties, as well as different defences available to

[9] Terry Hutchinson and Nigel Duncan (2012) 17 'Defining and Describing What We Do: Doctrinal Legal Research' Deakin Law Review 83.

insurers. Therefore, the aim of fourth chapter is to analyse the applicable legal frameworks under both UK and EU law. Since the EU legal framework regarding governing law is integrated into the UK legal system due to the universal nature of the relevant convention, this chapter is not affected by post-Brexit discussions.

The fifth chapter will examine the fourth and final component of the research question which is the weaker party protection in relation to jurisdictional grounds under the relevant jurisdictional frameworks. What adds complexity to this chapter, more so than the others, is the timing of this research in relation to Brexit. Initially, the research began while the UK was still under the EU legal framework. However, post-Brexit, it became necessary to delineate the common-law approach and the historical common law rules concerning jurisdictional grounds and protections under relevant legal frameworks. As a result, this chapter will start with an exploration of the genesis of weaker party protection to elucidate the main purpose of this concept and then examine its relevance to the research question, particularly in the context of insurance. Following a review of the literature and judicial perspectives within the EU legal framework, the chapter will then explore how this concept has been integrated into the UK legal system and what the historical common law approach was to such jurisdictional matters, including whether any jurisdictional protections for third parties were in place. Therefore, this chapter will adopt a combination of doctrinal research and comparative legal research methodologies. The latter methodology is especially essential for examining differences and similarities in various legal frameworks and understanding how respective systems have developed in the ways they did.[10]

[10] Mark Van Hoecke, (2015) 4 'Methodology of Comparative Legal Research' Law and Method 1.

Finally, in conclusion, the thesis aims to consolidate the research findings to provide a comprehensive outline and a roadmap covering all relevant questions concerning direct action. This includes exploring scenarios such as when a third party can initiate proceedings against their tortfeasor's insurer and under what conditions they can bring their cases. Are there any jurisdictional obstacles they might face when suing an insurance company in their own jurisdiction, as opposed to the location designated in the insurance contract or where the defendant is domiciled? What are the key issues third parties need to take into account before commencing proceedings against insurers? What options are available for insurers facing such direct-action claims?

4. Outcome

As a result of this thesis, we will receive an answer to the research question: 'Should a Third Party Bringing a Direct Action Against an Insurer Be Bound by Dispute Resolution Clauses Concluded Between the Insurer and the Insured?' The answer may not be as straightforward as one might wish, but it will definitely serve as the first comprehensive guide to determine under which circumstances the answer is yes or no. In fact, one of the underlying points and the central theme will be that there should not be a single answer to this research question. The right answer should be 'it depends.' It should depend on the parties commencing the proceedings, the mechanisms relied upon, the jurisdiction, and the governing law. Hence, the outcome will not be a complete yes or no to this research question.

Consequently, after reading the thesis, a third party bringing a direct-action claim against an insurer will know where to commence their proceedings under different circumstances, thereby avoiding lengthy jurisdictional battles. Additionally, they will understand their rights and obligations under the relevant legal framework. On the other hand, an insurer facing a direct

action can assess the potential litigation risks and identify the appropriate defences, if any, to employ for different scenarios. Ultimately, this thesis will assist both parties in avoiding excessive legal costs and time wastage by providing a roadmap for direct action claims in various circumstances.

CHAPTER I: CONTRACT LAW PRINCIPLES

1. Introduction

This chapter delves into essential contractual concepts to lay the groundwork for the research question, which centres on whether third parties should be bound by a dispute resolution clause to which they are not a party. It encompasses a review of relevant literature and historical legal analyses, focusing on fundamental principles such as the privity of contract, the principle of burden and benefit, and the doctrine of conditional benefit. Chronologically analysing the emergence of these legal concepts and the judicial decisions behind them will aid in examining the traditional viewpoint on how third parties interact with contracts they are not a party to, and how the rights and obligations of contractual parties are defined and perceived in a non-binary manner.

These fundamental principles of contract law are pivotal in understanding the formulation and ongoing relevance of this research question. In other words, the contract law principles introduced in this chapter will serve as the pillars upon which the research question is constructed. Therefore, this initial chapter is a crucial stepping stone for comprehending the importance and necessity of this thesis.

2. Privity of Contract

In the UK, there exists a robust doctrine of privity of contract, signifying that a contract cannot confer rights or impose obligations upon any individual who is not a party to the contract.[11] There are several fundamental reasons for the common law doctrine of privity, one of which is the notion of consent. However, the initial aspect of this general rule, which asserts that a contract cannot confer rights upon a third party, has led to unsatisfactory outcomes. This has

[11] *Tweddle v Atkinson* (1861) 1 B. & S. 393.

resulted in numerous exceptions and criticisms of the doctrine. For a considerable period, English courts have expressed a willingness to reconsider the extent of this rule.[12] Finally, the long-awaited reform arrived with the Contracts (Rights of Third Parties) Act 1999. However, its application is limited to a significant number of circumstances. Section 1 of the 1999 Act allows a third party to enforce terms in a contract in their own right, provided that the contract expressly states that the third party may do so, or if the term, subject to subsection (2), intends to confer a benefit on the third party. The issue is that the 1999 Act permits only the enforcement of benefits by third parties as specified in the contract terms, which were clearly intended for their advantage. The Law Commission Paper explicitly states that the Consultation Paper did not specifically address the implications for arbitration of reforming the third-party rule. It suggested that arbitration agreements and jurisdiction agreements should be excluded from the proposed reforms.[13] Eventually, the act included such agreement to the act. However, they did not properly fit into the act.[14]

Transferring the benefit without the burden does not make any sense in dispute resolution clauses because such agreements cannot operate satisfactorily unless any entitlement of the third party to enforce the jurisdiction agreement carries with it a duty on the third party to submit to the jurisdiction or to comply with the jurisdiction agreement.[15] If you rely on an exclusive jurisdiction or an arbitration clause, your accepting burdens as well as benefits.[16] Lord Goff recognised this problem about jurisdiction or arbitration agreements stating that *can be distinguished from terms such as exceptions and limitations in that it does not benefit only one party, but embodies a mutual agreement under which both parties agree with each other*

[12] *Beswick v Beswick* [1968] AC 58 at 72.
[13] The Law Commission Paper 242, [14.14].
[14] There are two very different CA judgments.
[15] The Law Commission Paper 242, 12.15.
[16] Especially, in arbitration cases, the Arbitration Act 1996 has to be taken into account.

as to the relevant jurisdiction for the resolution of disputes. It is therefore a clause which creates mutual rights and obligations.[17]

The critical issue is the impracticality of transferring only the benefit of an exclusive jurisdiction or arbitration clause. For instance, if a contracting party wants to arbitrate and obtains an anti-suit injunction to prevent the third party going to court in a foreign jurisdiction, then there is a possibility that when the arbitration proceedings are brought, it might deny the existence of an arbitration agreement between the parties. On the other hand, a third party may want to arbitrate but contracting party may refuse. Given that the third party is not a signatory to the original arbitration agreement, the question arises: can the third party obtain an anti-suit injunction in this context? Colman J suggests that *the transference by assignment of the substantive chose in action necessarily [involves] the transference of the procedural means of enforcement of it*.[18]

However, consider situations where there is no assignment, as in some P&I Club cases, where a statute grants a third party the right to directly sue a P&I Club. Clare Ambrose suggests that section 82(2) of the Arbitration Act 1996, which states, 'a party to an arbitration agreement includes any person claiming under or through a party to the agreement,' could resolve this issue. This is because the third party is claiming through a contractual party and, therefore, should fall within the 1996 Act.[19] Thus, it is crucial to understand the mechanism assigning the right to a third party to determine whether jurisdiction clauses will be enforceable against the party who is trying to bring a direct-action claim. This will be examined in detail later in Chapter III.

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[17] *The Mahkutai* [1996] AC 650, 666.
[18] *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2004] 1 Lloyd's Rep 38 QBD, [40].
[19] Clare Ambrose, *"When can a third party enforce an arbitration clause?"* [2001] JBL 415 at 419.

On the other hand, there is another statutory exception to the general rule, which partially answers our main question about the effects of exclusive jurisdiction and arbitration clauses on thirds parties bringing direct action claims against P&I Clubs. Under the Third Parties (Rights Against Insurance) Act 1930, if an insured incurs liability which is covered by the policy to a third party, before or after becoming insolvent, the insured's rights against the insurer are transferred to and vested in that third party.[20] This means that the third party can enforce them directly against the insurer according to section 1(1) of the Act.[21] The 1930 Act repealed by the 2010 Act, which alters nothing in respects of marine insurance. The language used in cases that are on the earlier 1930 Act such as *The Padre Island* (No. 1) states that the Act transfers not the claim but the contractual rights of the insured.[22] Therefore, the way in which the transferred right is enforced is determined by the agreement itself. In fact, Lord Justice Hobhouse made it very clear that it is not about a transfer of burden, but it is about benefits subject to conditions.[23]

3. The Principle of the Burden and Benefit

The decision of *Halsall v Brizell*,[24] which was also adopted in *The Yusuf Cepnioglu*,[25] established mutual benefit and burden doctrine. *Halsall v Brizell* is an equitable case about enforcing burdens against third parties. Upjohn J stated that *it is ancient law that a man cannot take benefit under a [contract] without subscribing to the obligations thereunder*.[26] Later, Longmore LJ said that the Commercial Court in *The Jay Bola* followed the path pioneered by

[20] Rose, *Marine Insurance: Law and Practice*, (2nd edn, *Informa* 2012), 151.
[21] However, the arbitration agreement regulates the means by which the transferred right is enforced, and it will be treated as transferred with the right so that the third party is bound by it in enforcing the right. See *The Padre Island* [1984] 2 Lloyd's Rep. 408, 414.
[22] *Socony Mobil Oil Co. Inc. v. West of England Shipowners Mutual Insurance Association*, (*The Padre Island*) [1984] 2 Lloyd's Rep. 408, 414.
[23] *The Jay Bola* [1997] 2 Lloyd's Rep 279 (CA), 286.
[24] [1957] Ch 169.
[25] [2016] 1 Lloyd's Rep 641.
[26] [1957] Ch 169 at 182.

the Chancery Division 40 years earlier in *Halsall v Brizell*.[27] In other words, *The Jay Bola* is the common law version of the equitable principle in *Halsall v Brizell*. This is about the mutual benefit and burden doctrine, which justifies more than the doctrine of conditional benefit.[28] Lord Templeman restricted the principle established in *Halsall v Brizell* to a "condition [which] must be relevant to the exercise of the right".[29] Therefore, just because a third party brings an action does not mean they should be subject to the burdens generally in the contract. Lord Templeman, who delivered the only judgement in *Rhone v Stephen*, stated that: "*It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right*."[30]

Then, the next question is whether a jurisdiction or arbitration clause is relevant to the exercise of the right. What is the nature of dispute resolution clauses? Are they the benefit as the name of the conditional benefit principle suggests or the burden? It can be argued that jurisdiction and arbitration agreements are both the benefit and the burden.[31] However, this does not explain the relationship of the arbitration and jurisdiction clauses with the substantive right being assigned. If they are merely procedural obligations, then they represent solely a burden that accompanies the substantive right. These procedural obligations may also serve to level the playing field for the parties involved. Therefore, it does not necessarily mean that these clauses are inherently a benefit or a burden. Although there are suggestions that the principle of the

[27] *The Yusuf Cepnioglu* [2016] 1 Lloyd's Rep 641, 648.
[28] There are certain situations where the third party is bound by the burden as well as benefit. Otherwise, the third party may pick and choose the bits they like.
[29] *Rhone v Stephens* [1994] 2 AC 310 at 322.
[30] Ibid.
[31] "The ordinary rule is that an assignee of a chose in action under English law cannot be better off than the assignor and so takes the chose assigned to him together with any restrictions attaching to it, including an exclusive jurisdiction clause." See *Glencore International AG v Metro Trading International Inc* [1999] 2 All ER (Comm) 899, 917, [1999] 2 Lloyd's Rep 632, 645.

burden and benefit still applies in rare circumstances such as deeds[32], the recent cases developed and distinguished this principle because it is too complicated and vague. This brings us to the doctrine of conditional benefit.

4. Conditional Benefit

Megarry V.C. in Tito v Waddell (No.2) distinguished the conditional benefit principle from the principle of benefit and burden.[33] A third party is bound by the restrictions of the same transaction that grants a benefit of which he wishes to take advantage, because these restrictions are an intrinsic part of the right which the third party has to take as it stands.[34] Therefore, it is a question of construction, whether or not the right created a conditional benefit or a burden annexed to it. These principles have been reviewed in *The Jay Bola*,[35] *The Hari Bhum,*[36] and *The Yusuf Cepnioglu* [37] in the maritime context. However, the inconsistency among the cases caused uncertainty about the law and principles in relation to the direct-action claims.

In *The Jay Bola*, the owners of a vessel chartered her to DVA, under a time charter for a time charter trip from South America to the Far East. DVA sub-chartered the vessel to the defendants, Voest, for a voyage from Brazil to Thailand. The head and sub-charters each contained a London arbitration clause. During the voyage, a fire broke out and the cargo was damaged both by the fire itself and the steps taken to extinguish it. The owners commenced a limitation action in the Admiralty Court. Voest's insurers commenced proceedings against both the owners and DVA in Brazil as subrogated insurers. The subrogated insurer also took an assignment of the assured's rights. Although they were not in breach of any contract, they were

[32] Christine J Davis, "*The Principle of Benefit and Burden"* (1998) 57(3) Camb LJ 522.
[33] [1977] Ch. 106, 290.
[34] Ibid.
[35] [1997] 2 Lloyd's Rep 279 (CA).
[36] [2005] 2 Lloyd's Rep 378 (QBD).
[37] [2016] 1 Lloyd's Rep 641.

restrained by an anti-suit injunction. Hobhouse LJ stated that "the assignee takes the assigned right with both the benefit and the burden of the arbitration clause".[38] Even if there was no assignment, under the subrogation principle, the insurer steps into the shoes of the assured and taking over the assured's contract and so the assured's rights both with the benefit and the burden of the arbitration clause. On the other hand, you cannot take a benefit of an assignment without taking the burden of the arbitration clause. Normally only benefits can be assigned. However, Hobhouse, LJ stated that: "*These authorities confirm that the rights which the insurance company has acquired are rights which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligation of the time charterers to pay that award. 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.*"[39]

In other words, it is not about imposing burden on the insurers. It is about making the benefit conditional. They are taking an assignment of a contract subject to equities. Therefore, the insurer is subject to same conditions that the original party would have been subjected to. The question arises as to whether the insurer is going to be liable if the arbitrates find that the charterers were in breach of the charterparty. If they are not, then how it is possible to have an arbitration where the insurer can only take the benefit and not the burden of an arbitration. This question has not been properly addressed yet.[40] On the other hand, the rule developed in *Halsall v Brizell* subjects the third parties to the procedural burdens of jurisdiction and arbitration

[38] [1997] 2 Lloyd's Rep 279 (CA), 285.
[39] Ibid, 286.
[40] It applies to assignment, subrogation, direct action. The problem is assignments are traditionally for benefits. Burden of a contract cannot be assigned.

clauses, if they bring an action. This means that they might face a cost order, if they lost the claim. In other words, according to the conditional benefit principle, a third party might be subject to the burden of the arbitration process.

5. Recent Application

In *Aspen Underwriting Ltd v Credit Europe Bank NV,* the Supreme Court confirmed that it is important to state that a mere equitable assignment would not transfer the obligations.[41] In the case, a bank was assigned the insurance policy as part of the refinancing. Later, the vessel was sunk and became a total loss. The insurer made a payment to the owners and managers under a settlement agreement. However, later in another proceeding, it was discovered that the vessel was deliberately scuttled. Hence, the insurer commenced proceedings against the owners and managers of the ship as well as the bank in the UK. The bank, however, challenged the jurisdiction. The important question is whether equitable assignment of the insurance policy also means the bank should be bound by the obligation too.

The bank argues that the bank was not a party to the settlement agreement. It simply got paid under the policy as loss payee and assignee. Therefore, the bank should not be bound by the jurisdiction clause "unless and until" it commenced legal proceedings against the insurer.[42] In other words, the bank's entitlement to receive the payment under the insurance contract cannot enforce contractual obligations onto the equitable assignee. Therefore, the so-called conditional benefit principle is interpreted in a way that it only kicks in if an assignee asserts a claim under the contract.

[41] *Aspen Underwriting Ltd v Credit Europe Bank NV* [2020] UKSC 11, [26].
[42] [2020] UKSC 11, [18].

The Supreme Court referenced to a Singaporean judgment, where the court adopted *the Jay Bola* to elaborate how the doctrine operates. In *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA*, the court considered whether an arbitration clause in a contract can be extended to bills of exchange issued in respect of that contract and their endorsee. This is a question of incorporation, which is not related to this thesis. However, the important part is the court's reasoning on when an assignee become a party to a contract. The court stated that "*this approach of entitlement rather than obligation may be more easily reconcilable with the consensual nature of arbitration. This is because the assignee is only taken to submit to arbitration at the point it elects to exercise its assigned right."*[43] In other words, a third party can only be bound by a jurisdiction clause contained in a contract provided that they commenced a proceeding to enforce a claim under the contract, i.e., when they try get a benefit out of it. This approach is in line with the earlier cases we discussed in this chapter. Therefore, in *the Asspen* case, it was the insurer who brought the claim against the bank. Hence, they were not bound by the jurisdiction clause, and thus the case must be brought in the Netherlands, where the bank is domiciled.

6. Conclusion

This chapter evaluated fundamental contractual concepts, illustrating why there is a question regarding whether third parties should be bound by dispute resolution clauses in contracts to which they are not a party. Traditionally, contracts cannot confer rights or obligations upon third parties. However, due to the impracticality of such an archaic principle, common law and subsequently the legislature addressed this problem, first through case law and later with the introduction of new acts as mentioned above. Initially, the burden and benefit principle emerged, approaching this research question in a binary manner. It viewed dispute resolution

[43] [2016] 5 SLR 455, [55].

clauses as burdens as opposed to benefits that a third party might rely on in a contract. However, characterizing dispute resolution clauses as either a benefit or a burden does not fully reflect the true nature of these clauses. Later, judicial tendencies evolved around the concept of conditional benefit, which is more a matter of interpretation. For instance, if a third party seeks a benefit from a contract they are not party to, that benefit is subject to a condition. This doesn't impose an additional burden on the third party, but rather acknowledges that if a third party wants to enforce a contractual right, they should also be aware of the conditions attached to that right.

This approach aligns well with the research question of whether a third party should be bound by a dispute resolution clause to which they are not a party, when they initiate a direct action against an insurer. This discussion smoothly transitions the thesis to examine the first component of the research question: the characterization of direct action. If direct action is inherently a contractual right, then certain conditions, such as a dispute resolution clause, should be attached to it. In other words, the third party can only exercise this right subject to the attached condition. However, if it is an independent right separate from the contract, then the right of direct action is not subject to any jurisdictional conditions. Consequently, the third party can commence proceedings in a jurisdiction other than the one designated in the contract between the insurer and the assured.

Hence, without these fundamental contract law principles, this research question would not even exist. The genesis of all discussions surrounding this thesis starts with these fundamental principles to justify whether a third party initiating a direct action against an insurer is bound by a dispute resolution clause agreed upon between the insurer and the insured.

CHAPTER II: CHARACTERISATION OF DIRECT ACTIONS

The question of characterisation forms the initial component of the research question: whether a third party initiating a direct action against an insurer is bound by a dispute resolution clause agreed upon between the insurer and the insured. Following the first chapter, it is now evident that if a claim is contractual, and a third party is attempting to enforce a contractual right, there might be conditions attached to it. Therefore, the first step is to identify the nature of the cause of action under the relevant law. Being able to characterise the claim allows parties to understand the legal rights and obligations of the third-party bringing the claim against a P&I Club. This is important because, depending on whether the claim is contractual or statutory, or whether the issue is procedural or substantive, the applicable governing law might change, as well as the manner in which courts approach the claim. Furthermore, once the character of an action is established, parties will be in a better position to understand their rights and obligations, as well as the defences available to each party, which will be covered at the end of this chapter.

Traditionally, there is neither unanimity nor extensive judicial discussion on the subject of characterisation in the English courts. In fact, there are only a handful of cases where the issue of characterisation is discussed in the context of direct action. Hence, this chapter will begin by presenting an overview of the literature on the doctrine of characterisation in private international law, as well as under English law. It will then examine how direct actions are characterised in light of this literature review. Both foreign direct-action statutes and international conventions will be considered to see how they define direct actions and how different wordings may lead to different interpretations. Each of these respective foreign statutes is selected from different jurisdictions that are well-known for their rich maritime history and sophisticated insurance laws, where direct actions have been developed.

In this chapter, both doctrinal and comparative legal methodologies will be used to examine how different jurisdictions approach direct action. Therefore, the main objective of this chapter is to answer two closely related questions: Are direct actions contractual or statutory in nature, and are they independent of the specific insurance contract in question?

1. Introduction

The doctrine of characterisation deals with either the nature of the cause of action or the nature of the legal issue. Depending on the claim being contractual or statutory, or an issue being procedural or substantive, the applicable governing law might change. Especially, in a direct-action claim, where a third party brings an action against an insurer, the most important question is the nature of that direct action. Whether it should be characterised as a contractual or statutory right? The answer given to this particular question will determine the legal framework of the claim. Therefore, this represents the first piece of the puzzle in finding the right answer to the research question. Once the nature of the claim is established, it will provide a roadmap to follow while analysing direct actions.

In order to understand which persons can benefit from a contract or be bound by one to which they are not a party, it is necessary to examine the nature of their rights. The nature and scope of direct actions may vary from jurisdiction to jurisdiction, depending on the different mechanisms that enable the injured party to proceed against insurers. It is important to determine whether a direct-action claim is a creature of statutes or a contractual right. Determining the true nature of direct actions will allow us to answer questions such as whether the third party is bringing the claim in respect of the assured's loss or their own loss, or whether the right of action against the insurer arises at the moment the third party suffers a loss caused

by the insured tortfeasor or at a later time. Once the nature of the action is established, then the next question is about the transfer of the rights and obligations under the policy, especially in relation to dispute resolution clauses. Therefore, the question of whether the terms of the insurance contract, i.e. the P&I Club's rules, bound the third party depends on the characterisation of direct actions. This will also determine the scope of dispute resolution clauses provided by the insurance policy, as well as the defences available to both the P&I Club and the injured third party.

These questions are "questions of national law"[44] and the preconditions it requires, which substantially changes from one jurisdiction to another. While some jurisdictions have a more protective approach over the injured weaker parties, other jurisdictions might have more restrictive approach towards direct action claims. However, I believe we should find a way to protect individuals without harming the insurance market. Higher risk for the insurance companies would also mean higher premiums. Therefore, it would eventually affect both sides of the equation.

Before analysing direct action statutes in various jurisdictions, this chapter will examine how judicial literature on characterization has developed. Understanding how courts deal with characterization will aid in comprehending the nature and scope of direct actions. Subsequently, the chapter will consider direct action claims under both English law and foreign direct-action statutes. Louisiana, Turkish, Spanish, German and Norwegian statutes are specifically evaluated in this chapter, as they are well-known for their rich maritime history and sophisticated insurance laws, where direct actions have been developed. Moreover, the

[44] *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] WLR 387, per Auld LJ; *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India. Assurance Co Ltd, The Hari Bhum* [2003] EWHC 3158 (Comm); [2004] 1 Lloyd's Rep 206, per Moore-Bick J.

wording and content of these statutes are essentially different, offering us an opportunity to understand how the wording used in legislation can affect the nature and/or scope of a similar right of action provided by the law. Later, the chapter will briefly discuss the wording of international conventions and how it differs from that of foreign direct-action statutes in terms of language used and the manner in which these wordings establish a right of action.

2. The Doctrine of Characterisation

When there is a case involving a foreign element such as an international dispute arising out of a maritime incident, the first question is to ask which law is to apply to the claim. In *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC*, Mance LJ stated that *"the identification of the appropriate law may be viewed as involving a three-stage process: (1) characterisation of the relevant issue; (2) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue"*[45]

Therefore, characterisation of the cause of action is an essential part of the mechanism that would help a court to determine the legal framework for the case. In other words, the court will have to identify the appropriate set of legal rules to understand the nature and scope of the rights and obligations of the parties. However, the answer to that question might change depending on whether the court decides it is a question of common law or some other foreign instruments like European Regulations or whether it is a question of contractual or statutory interpretation. Although there are numerous views on characterisation of the cause of action, they are mostly abstract and highly theoretical.

[45] [2001] EWCA Civ 68, [26].

Since the late 19th century, the question of characterisation has been discussed around continental Europe.[46] Later, the issue of characterisation was introduced into American literature by Lorenzen in 1920[47] and to English literature by Beckett in 1934.[48] While they underlined the importance of comparative law, they did not provide a detailed guideline about how to characterise a claim.

There are two main schools of thought, one favouring the *lex causae* and the other favouring the *lex fori*. The distinction between these two schools of thought is important because a case might fall under different legal categories depending on the characterisation process undertaken under a different foreign law in different jurisdictions. Before looking into these two schools of thought, it is important to underline that it is "a legal question" that is characterised. For example, when there is a direct action claim arising out of an oil pollution case caused by a collision, the court will only be interested in some parts of the fact to be able to characterise the legal question such as whether such a claim is an independent statuary right or a contractual claim in nature. In other words, the court would not be interested in facts *in vacuo*.[49]

a. The *lex fori* approach:

The predominant theory in the continental Europe is the *lex fori* approach suggesting that the characterisation of a legal question must be done according to the domestic law of the forum. For example, in a case where a claimant seeks to commence a proceeding relying on a Spanish statute in England, the court should characterise the legal question of this case under English

[46] Dicey, Morris & Collins on *The Conflict of Laws* (14th edn, Sweet & Maxwell, 2006), [2-001].
[47] Ernest G. Lorenzen, "*The Theory of Qualification and the Conflict of Laws*" [1920] 20 Col. L. Rev. 247, 262.
[48] W. E. Beckett, *"The Question of Classification ('Qualification') in Private International Law*" [1934] 15 BYIL 46.
[49] J. G. Collier, *Conflict of Laws* (3rd edn Cambridge University Press 2001), 15.

law. This would mean that the court would need to use analogies regarding relevant rules of law. In other words, legal questions will be characterised and given a meaning under English law.

The *lex fori* approach was advanced by the German and French writers Khan and Bartin.[50] The principal argument of this school is that conflicts rules are an inseparable part of the law of the forum and any legal question should be interpreted within the legal framework of that particular forum.[51] This is still the starting point of characterisation in modern conflicts systems.

This school of thought sees characterisation as a preliminary question and a part of the procedural issues. In other words, characterisation is considered as a question of procedure, not substance. Thus, the procedure must be governed by *lex fori* because it is part of the domestic law.

However, when there is no close analogy, this approach would not work. For example, some rules and concepts of English law does not exist in some civil law jurisdiction. For example, in *De Nichols v Curlier*, [52] the English court had to deal with a claim based on a foreign property regime that does not exist in English law. It would not be easy for a court to understand and characterise a legal question that does not even exist in that jurisdiction. Furthermore, this would also create problems in terms of interpretation of international law especially in the maritime context when the right of action is provided by an international maritime convention.

[50] Ibid; See also F. Kahn, 'Gesetzkelten', in Jehrings Jahrbucher vol. 30 (1891); Otto Kahn-Freund, *General Problems of Private International Law* (Sijthoff, NL-Leyden 1976); Ernest G. Lorenzen, "*The Theory of Qualification and the Conflict of Laws*" [1920] 20 Col. L. Rev. 247.
[51] Ernst Rabel, *The Conflict of Laws: A Comparative Study*, vol 1 (The University of Michigan Press 1945) 44; See also Étienne Bartin, "*La doctrine des qualifications et ses rapports avec le caractère national des règles du conflit de lois*", (1930) I Recueil des cours.
[52] [1900] AC 21.

There will be various different interpretations of same rules, creating a problem of characterisation. It can be even more complicated with the EU because relying on the *lex fori* principle while interpreting an international convention would go against the principle of uniformity.[53]

As a result of all these thoughts, the *lex causae* approach descended from dissenting opinions against the *lex fori* approach. This school of thought suggests that when there is a question of characterisation, it should be done according to the appropriate foreign law.

b. The *lex causae* approach:

This school of thought originated by F. Despagnet but later advanced by Pacchioni and Martin Wolff. They suggest that characterisation should be done according to the appropriate foreign law which governs the question. It was proposed that the law governing the relationship should be the law used in the characterisation process.[54] In other words, every legal quest should be characterised within the legal system which it belongs. For example, when a third party domiciled in Finland brings an action relying on a Finnish Statute against the tortfeasor's insurer in the UK, the courts should apply the Finnish law to characterise the action according to this school of thought.

One of the strongest arguments supporting the *lex causae* approach is that the court should not ignore the difference among the institution of different jurisdictions. For example, when a court in a civil law jurisdiction deals with a case concerning a trust under an Anglo-American law,

[53] See C- 59/85 *State of the Netherlands v. Ann Florence Reed* [1986].
[54] F. Despagnet, "*Des Conflits de Lois Relatifs a la Qualification des Rapports Juridiques*" [1898] 25 Journal du Droit International Prive & Jurisprudence Comparee 253; Martin Wolff, "*Private International Law"* (2nd edn Oxford Clarendon Press 1950), 150.

the court should consider the foreign law while characterising the case because the concept of a trust is not known by some civil jurisdictions.[55]

However, the purpose of characterisation is to determine the appropriate law governing the issue. Therefore, arguing that foreign law governs the process of characterisation before the characterisation process led to the appropriate legal system is to argue in circles.[56]

c. Substance vs Procedure:

After reviewing two main schools of thought, it becomes clear that the difference between substance and procedure is an important issue that can be seen as an initial question before moving into the characterisation stage. However, the difference between substance and procedure is not clear-cut. Hence, some issues which used to be considered wholly procedural is now considered procedural only in some respects.[57] The issues related to damages and limitation periods are good examples of the way in which courts' view on substance and procedure has changed. Traditionally, procedural issues are decided according to the *lex fori*, but the definition and the scope of procedural issues are not well defined by the courts. Simply stating that substantial issues will be governed by *lex causae* and procedural issues by the *lex fori* does not provide a definitive answer to the question of how to classify a matter as procedural or substantial. Furthermore, being able to understand the difference substance and procedure will also help to determine the right remedies available in a case, because while

[55] Veronique Allarousse, "*A Comparative Approach to the Conflict of Characterization in Private International Law*" (1991) 23 Case W. Res. J. Int'l L. 479, 485.
[56] J. G. Collier, *Conflict of Laws* (3rd edn Cambridge University Press 2001), 16.
[57] Dicey, Morris & Collins on The Conflict of Laws (14th edn, Sweet & Maxwell, 2006), [7.003]; Elsabe Schoeman, '*Rome II and the substance–procedure dichotomy: crossing the Rubicon*' (2010) LMCLQ 81; Janeen M Carruther, '*Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages*' (2004) 53 The International and Comparative Law Quarterly 691; George Panagopoulos, *'Substance and Procedure in Private International Law'* (2005) 1 Journal of Private International Law 69.

some remedies can be classified as procedural, other might be seen as a matter relating to substance.

As it is stated in several parts of this dissertation, the English courts did not only consider the wordings of the direct action statutes to examine the nature of the direct action. Instead of having such a literal approach, the courts considered the scope of the related law and decided whether it was to enforce a contractual right. Nonetheless, it does not mean that English courts have the same broad approach to define the difference between substance and procedure. On the contrary, in *Harding v Wealands* described the procedure as the mode or rules used to govern and regulate the conduct of the court's proceedings.[58] The English courts have a narrow definition of the term procedure. Even though the case might have been decided differently now under the Rome II Regulation, it is important to show how the English courts interpreted the matters of substance and procedure before the European regulations. Especially after Brexit, this might be even more important to understand the way in which the law might evolve.

In *Harding v Wealands*, an accident occurred in New South Wales due to the negligence of the Australian defendant, which is admitted by the defendant. The English claimant, who was a passenger in the car was severely injured. The English claimant commenced proceedings against the Australian insurer of the defendant in the UK. The House of Lords had to decide whether damages for personal injury caused by negligent driving in New South Wales should be calculated according to English law or the New South Wales law. In other words, the court had to decide whether matters relating to the assessment of damages should be regarded as a matter of procedure or as a matter of procedure substance. If the court decided is a matter of procedure, then it should apply the law of the forum, i.e., the English law. The idea that the

[58] *Harding v Wealands* [2006] UKHL 32, [4].

English law governs the matters relating to procedural matters is also recently confirmed in *Cox v Ergo Versicherung AG*.[59] This can defiantly lead to confusion time to time. For example, when the court needs to determine the damages, it needs to go through the heads of damages, which is linked to the substantive law, and then get back to the law of the forum again to make the calculation for damages. There is no such difference between substance and procedure under the Rome I and Rome II. Article 12(1)(c) of Rome I, for example, states that the law applicable to a contract under the Rome I will also govern the assessment of damages.

3. Characterisation under English Law

a. English Legal Framework

There are plenty of cases dealing with the issue of characterisation, but there is no consistency in any of those cases. The English courts adopted different approaches in different cases according to the facts of each case. Nonetheless, there are no extensive judicial discussions over the subject of characterisation.

Re Cohn[60] is one of the very first cases when the court had to deal with a problem of characterisation. The case is about a mother and a daughter, who were German nationals and at all times domiciled in Germany. They were killed in an air raid in London as a result of the same explosion. The daughter was entitled to movable property under the will of her mother but only if she survived her mother. However, it could not be determined which one of them died first. While the younger shall be deemed to have survived the elder under the English law, the deaths were presumed to have taken place simultaneously under the German law. The court,

[59] *Cox v Ergo Versicherung AG* [2014] UKSC 22, [12]-[17].
[60] *Re Cohn* [1945] Ch. 5.

therefore, had to characterise the rules relating to the presumption of survivorship under both jurisdictions.

Under English law, section 184 of the Law of Property Act 1925 states that "such deaths shall (subject to any order of the court), for all purposes affecting the title to the property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder." On the other hand, under the title of "General Principles", article 20 in the first book of German Civil Code states that if several persons perish in a common danger, it is presumed that they have died simultaneously. Later, in 1939, this provision was replaced by the following article: "If it cannot be proved that of several deceased persons or persons declared dead one has survived the other, it is presumed that they have died simultaneously."

When the court looked at the facts of the case, it made a clear distinction between two questions: "*Did or did not Mrs. Oppenheimer survive Mrs. Cohn?"* and "*Is the administration of Mrs. Cohn's estate to proceed on the footing that Mrs. Oppenheimer survived Mrs. Cohn or on the footing that she did not*?" The purpose of these questions is different because according to the English law, while the rules relating to movables is governed by the law of domicile, procedure is governed by the *lex fori*. In other words, the court stated that "the mode of proving any fact bearing on survivorship is determined by the lex fori."[61]

Therefore, it was held that English provision was not applicable because English provision was substantive and not procedural. The Court stated that: "*The fact proved in this case is that it is impossible to say whether or not Mrs Oppenheimer survived Mrs Cohn. Proof stops there.*

[61] Ibid, 7.

Section 184 of the Law of Property Act 1925 does not come into the picture at all. It is not part of the law of evidence of the lex fori, for the section is not directed to helping in the ascertainment of any fact but contains a rule of substantive law directing a certain presumption to be made in all cases affecting the title to property."[62] In other words, the purpose of section 184 of the Law of Property Act 1925 was to establish a rule on the distribution of the property under such unique circumstances, not to set a procedural guidance to decide who died first.

On the other hand, the court also decided that the German provision apply because it was also substantive and not procedural. After examining article 20 within the context of German Civil Law, the court held that the provision is part of the general substantive law of Germany and not part of its law of evidence i.e. procedural.[63] Therefore, the daughter did not take under the will. If it was characterised as procedural, then it had to be proved that the daughter survived her mother, which would not be possible. If the court characterised the English provision as procedural and the German provision as substantive, then the court would end up with two conflicting provisions and would have had to choose between them.[64] It is important to note that the provisions were characterised independently of each other.

Another example of a rule of law being characterised in accordance with the foreign law is *Re Maldonado,*[65]concerning a Spanish subject domiciled and resident in Spain, died intestate, leaving no next-of-kin. However, the property in question was in England. Thus, the court had to decide whether the Spanish Government or the British Crown is the true successor.

[62] Ibid, 7-8.
[63] Ibid, 8.
[64] Veronique Allarousse, "*A Comparative Approach to the Conflict of Characterization in Private International Law*" (1991) 23 Case W. Res. J. Int'l L. 479, 494.
[65] [1954] P. 223 (CA).

The relevant provision in the Spanish Civil Code states that "In default of persons having the right to inherit in accordance with the provisions of the foregoing sections the State shall inherit, the assets being devoted to institutions of charity and free instruction…"[66] The court characterised the rule under the Spanish Civil Code as a rule of succession. On the other hand, under the English law, the property goes to the Crown as bona vacantia, which is characterised as a confiscatory rule by the court. The court made a distinction between a taking as ultimus heres and the right of the State to bona vacantia. The court stated that: "*In examining the Spanish law in order to ascertain whether or not the State is a true heir according to Spanish law, I have accepted the Spanish conception of heirship, for it would be wrong in my view to apply the English conception when dealing with Spanish law; and even to try to apply the nearest English equivalent to the Spanish conception of heirship would only lead to confusion*."[67] Therefore, the question was decided in accordance with the Spanish law. Since the Spanish law declared the Spanish state as the final heir, it was entitled to the movables in England. The property did not go to the Crown as noa vacantia because it was never ownerless. It is important to underline that the Spanish government takes the property as a successor by the terms of the Spanish Civil Code. If the claim of the Spanish state was similar to the Crown as bona vacantia then the Crown would have taken the property.[68]

As in *Re Cohn*, the court characterised the rule of law rather than the issue in *Re Maldonado*. In other ward, the court used the *lex causae* to characterisation process. However, the decision of the court to use the foreign law in characterisation process is quite exceptional to these two cases. One of the inherent problems with these judgments is that in such cases, lawyers will need to consult an expert to understand the way in which a certain rule of law is characterised

[66] Article 956 of the Spanish Civil Code, before the amendment of January 13, 1928.
[67] [1954] P. 223 (CA), 231.
[68] See *In re Barnett's Trusts* [1902] 1 Ch. 847.

by the foreign system.[69] What would happen if the court had to characterise a rule of law that does not even exist in its jurisdiction?

Adams v National Bank of Greece and Athens SA[70] and *National Bank of Greece and Athens SA v Metliss*[71] are good examples of such cases where the court had to deal with matters unknown to English law. Both cases concerned the rights of holders of mortgage bonds issued by the National Mortgage Bank of Greece and unconditionally guaranteed by the National Bank of Greece. The bonds were governed by English law. During the war, payment of the sums falling due under the bonds ceased. Later, a Greek law imposing a moratorium passed for all the further payments. The bond holders were left without any remedy because English courts did not have any jurisdiction over the bank in question since it did not have any business in England. Furthermore, the bondholders would not be able to get anything in the Greek courts due to the moratorium legislation.

In 1953, the guarantor bank and a third Greek bank (hitherto unconnected with the bonds) were amalgamated into a new bank called the National Bank of Greece and Athens. The new bank was declared as the "universal successor" to the rights and obligations of the amalgamated companies by the Greek law. This would mean that the bondholder could go after the new bank. Nonetheless, the moratorium laws protected the new bank being used in Greece.

Metliss sued the new bank in England claiming that while the Bank of Athens's business being transferred to and carried on by the new Bank in England, the entire assets and liabilities of the guarantor bank, including its liability under the guarantee, had been assigned and transferred

[69] Dicey, Morris & Collins on The Conflict of Laws (14th edn, Sweet & Maxwell, 2006), [2-024].
[70] [1961] A.C. 255.
[71] [1958] A.C. 509.

to the new company as well. The House of Lords characterised the obligation of the bank as contractual since it was under a contract. Therefore, the moratorium legislation would not be able to affect an obligation under a contract governed by English law.

However, the Greek government amended the law under which the banks were amalgamated stating that the new Bank became the universal successor to the rights and obligations of the companies amalgamated "except for the obligation to which such companies were liable whether as principal or guarantor ... under bonds payable ... in gold or foreign currency, issued by limited liability companies."[72] As a result, under the Greek law, the amendment had a retrospective effect so that the new bank ceased to be liable on the obligations of the original guarantor bank in respect of the bonds. Subsequently, the new bank changed its name from the National Bank of Greece and Athens to the National Bank of Greece. Later, Adams commence new proceedings against the bank in England. The court had to characterise the new Greek law to decide whether the law allows the new bank to avoid its liability under the bonds.

This first question is to understand whether the right of the bondholder arose under Greek law or English law. *Metliss* case made it clear that the right of the bondholder is an English right under a contract governed by English law. The second question is the nature and the scope of the new Greek law. The purpose of this new law is clear. The Greek legislature wanted the new law to be characterised as relating to the amalgamation of the banks. Whereas, the House of Lord did not agree with that characterisation and gave judgment for Adams, stating that the purpose of the new Greek law was to operate as a law of discharge. The label given by the

[72] *Adams v National Bank of Greece and Athens SA* [1961] A.C. 255, 256.

Greek law was irrelevant. According to Lord Reid, the court must consider the substance and the effect of the new Greek law.[73]

Abovementioned, characterising a foreign rule of law within its legal system is problematic. English courts try to evaluate each case according to its unique facts and adopted different approaches to characterise a foreign rule of law. All the judicial discussions over the subject of characterisation emphasises that it is not the claim but the issue that the courts characterise.[74] The English courts also focus more on the substance than the form of a foreign provision.

b. Characterisation of Direct Actions

In principle, where an assured incurs liability to a third party, the third party's claim is only against the assured under English law because the third party has no direct cause of action against the liability insurer of the tortfeasor due to the doctrine of privity. The Third Parties (Rights Against Insurance) Act 1930 was enacted to remedy the injustice, where the injured third part would be left with no remedy if the assured became insolvent or declared bankrupt.[75] Section 1 of the Act enables the insured tortfeasor's rights to be transferred to and vested in the injured third part as long as the liability incurred by the third party is covered by the policy. In other words, the injured third party becomes the statutory assignee of insured's rights under the Act. The 1930 Act was later replaced by the Third Parties (Rights Against Insurance) Act 2010, but the direct-action position stays the same as it was under the 1930 Act.[76]

[73] Ibid, 283.
[74] See *Macmillan Inc. v. Bishopsgate Investment Trust plc (No. 3)* [1996] 1 WLR 387 (CA).
[75] K. Michel and S. Congdon, "*Third Party Rights Against Insurers*" [1989] LMCLQ 495; See also K. Michel, "*The Third Parties (Rights Against Insurers) Act 1930 in a Modern context*" [1987] 2 LMCLQ 228.
[76] The shortcomings of the 1930 Act are discussed in the first Chapter. See also; Mance LJ, Goldrein I, Merkin R, *Insurance Disputes* (3rd edn Informa Law from Routledge 2011), [16:86].

Although the statute gives the right to direct action to a third party, it stays silent about the nature and scope of direct actions. On the other hand, the Court of Appeal in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* held that a direct action against an insurer is an action which should be characterised as contractual.[77] The court had to characterise a direct-action claim before the Finnish courts under a Finnish statute. The statute states that "*A person who has sustained bodily injury, property damage or financial loss under general liability insurance is entitled to claim compensation in accordance with the insurance contract direct from the insurer if . . . the insured has been declared bankrupt or is otherwise insolvent*."[78] The wording of the statute clearly shows that the claim under the Act is not independent of the contract of insurance but in accordance with it. Therefore, the purpose of the claim is in substance one to enforce against the insurer the contract made by the insolvent insured. Since the court characterised an obligation under an insurance contract governed by English law, it did not take into account what would be the view of the Finnish court.

In English law, therefore, the direct-action claim has been characterised as a claim based on the insurance contract.[79] As explained in the first Chapter, if a third party is trying to pursue a claim directly against the insurer in order to obtain the benefit of the insurance contract, then the third party would be bound by the contractual burdens of the insurance contract, such as arbitration or pay to be paid clauses.[80] It is possible to argue that an injured third party is simply seeking to bring a claim against the insurer of the tortfeasor due to the right provided under the 2010 Act. However, the wording of the 2010 Act makes it clear that the injured third party is

[77] *The Hari Bhum* [2004] EWCA (Civ) 1598; [2005] 1 Lloyd's Rep 67. The detail of the case is explained under Chapter III.
[78] Section 67 of the Finnish Insurance Contract Act 1994.
[79] Dicey, Morris & Collins on The Conflict of Laws (14th edn, Sweet & Maxwell, 2006), [35.043].
[80] *The Jay Bola* [1997] 2 Lloyd's Rep 279 (CA), 286.

entitled to sue the insurer under the contract of insurance. Bennett also thinks that the Act simply transfers the rights of the assured under the contract and does not create new rights.[81]

On the other hand, section 165 of the Merchant Shipping Act 1995, concerning rights of third parties against insurers, is an example of a third-party action which is an independent right from the contract of insurance. Section 165(1) states that: "Where it is alleged that the owner of a ship has incurred a liability under section 153 as a result of any discharge or escape of oil occurring, or as a result of any relevant threat of contamination arising, while there was in force a contract of insurance or other security to which such a certificate as is mentioned in section 163 related, proceedings to enforce a claim in respect of the liability may be brought against the person who provided the insurance or other security (in the following provisions of this section referred to as "the insurer")."[82]

Unlike the 2010 Act, the wording of the section 165 does not provide a statutory assignment. Since it is a statutory right, the proceedings are independent from the terms of the insurance contract. For example, in an oil pollution claim, if an assured fail to pay out on a claim, that would not enable the insurer to avoid the liability imposed by the statute.[83]This would also mean that the third party would not be bound by the dispute resolution clause of the insurance contract.

It is important to underline that it is not only about the wording of the statutes but the substance of right. If the third party is trying to enforce a right provided by the insurance contract, then the claim can be characterised as a contractual claim. However, as in the oil pollution scenario,

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[81] Howard Bennett, *"The Law of Marine Insurance"* (2nd edition, Oxford 2006), 617; See also Nicholas Legh-Jones, "*MacGillivray on Insurance Law*", (11th edition, Sweet & Maxwell, Cornwall 2008), 890.
[82] Section 165 of the MSA 1995 states that the Third Parties (Rights against Insurers) Act 1930 is not applicable to insurance policies that are compulsory insurance against liability for pollution.
[83] *Landcatch Ltd v The Braer Corporation and Others* [1998] 2 Lloyd's Rep 552.

if the third party is trying to enforce a right provided by a statute then the claim can be characterised as a creature of statute. The 2010 Act and its predecessor made it clear that the content of the right to direct action is defined by the insurance contract. Although the source of the right is the statute, the substance of the right is determined by the insurance contract.

4. Foreign Direct-Action Statutes

The language used by direct-action mechanisms, which enable an injured third party to bring a claim against the liability insurer of the tortfeasor, can influence how it is characterized by the courts. Different direct-action mechanisms will be reviewed in Chapter 3, but first, this paper will examine various legislations that provide for a right of direct action. This examination aims to analyse the language used and determine how the wording chosen by policymakers can guide us to the correct characterization. Consequently, whether a direct action is a contractual right or entirely independent of the contract will depend on the wording of the relevant statute. It will also show how direct action, which might be a tort claim in nature, can be characterized differently under different statutes or conventions. Thus, the next part of this chapter will briefly review five different legislations from jurisdictions with a rich maritime history and sophisticated insurance law.

a) Louisiana Law

Louisiana's prominence in maritime law is deeply rooted in its unique civil law system, a legacy of the French Napoleonic Code, which sets it apart from other U.S. states that follow common law traditions. This legal uniqueness, coupled with its strategic position along the Gulf of Mexico, the bustling Port of New Orleans, and its central role in the oil and gas industry, makes Louisiana a pivotal centre for maritime legal matters. As a result, it was one of the first to enact

a direct-action statute as direct-action claims are within the scope of the state rather than federal laws in the US.[84]

Historically, Louisiana is the first state to enact a legislation protecting the rights of the third parties.[85] The Louisiana Direct Action Statute, R.S. 22:1269,[86] states that "*It is the intent of this Section that any action brought under the provisions of this Section shall be subject to all of the lawful conditions of the policy or contract and the defences which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state*."[87]

Similar to the UK, there had been a strong emphasis on privity of contract, leaving third parties without a remedy in the event of the tortfeasor's insolvency, until this issue was addressed due to public policy reasons. Traditionally, the issue was that indemnification was contingent upon the assured being found liable for their actions and then making payment. Only after these conditions were met would the insurer indemnify the assured for their liability.[88] These provisions are known as 'no action clauses' in the US, which are commonly referred to as 'paid to be paid' clauses.[89] This issue was addressed by the Massachusetts courts for the first time in the case of *Saunders v. Austin W. Fishing Corp*.,[90] where the core legal issue was whether the payment by the insured was a prerequisite for recovery under the insurance policies. After being unsuccessful in enforcing the judgment against the owner, the injured seaman, who

[84] Ronald R. Houdlett, "*Direct Action Statutes and Marine P. & I. Insurance*" (1972) 3 J. Mar. L. &. Com. 559, 561; See also *Wilburn Boat Company v. Fireman's Fund Insurance Company* (1955) 348 U.S. 310; John D. Kimball "*The Central Role of P&I Insurance in Maritime Law*" (2013) 87 Tul. L. Rev. 1147.
[85] *Ibid*, 566. The Louisiana Direct Action Statute of 1918.
[86] Formerly La.R.S. 22:655.
[87] 22:1269 (C).
[88] Alston Johnson, "*The Louisiana Direct Action Statute"* (1983) 43 La. L. Rev. 1455, 1457.
[89] See Raymond H. Kierr, '*The Effect of Direct Action Statutes on P&I Insurance and Various Other Insurances of Maritime Liabilities, and on Limitation of Shipowners' Liability''* (1969) 43 Tulane Law Review 648.
[90] Saunders v Austin W. Fishing Corp [1967] AMC 984; 224 N.E. 2d. 215.

suffered due to the owner's negligence, directly brought the case against the owner's insurer. The court held an insurer's liability becomes absolute once the loss or damage for which the insured is responsible occurs, rendering such a policy provision unenforceable.[91] Two year after this decision, in *Olympic Towing Corporation v. Nebel Towing Co.*, the Louisiana court decided non-action clauses are unenforceable.[92] As a result, the third party does not need to prove that the tortfeasor is insolvent.

This leads us to the question of characterization. If 'no action' clauses are unenforceable, what does this imply about the nature of direct action? Does it create an independent right such that it can disregard a contractual provision?

This question was answered by the Louisiana court in *Descant v. Admrs., Tulane Educ. Fund,*[93] which held that rather than creating an independent right, the statute permits a right of action against the insurer provided that the risk is covered by the policy. The case was about whether plaintiffs could sue a health care provider's insurer for damages above the statutory limit set by the Medical Malpractice Act. The Descants sued for injuries sustained by their daughter during childbirth. The court held that the liability limitation under the Act, which capped damages at $100,000, was also applicable to the insurer. It ruled that the plaintiffs could not pursue claims against the insurer beyond this statutory limit because the Act limited both the provider's liability and the total recovery from the insurer. As a result, the direct action statute did not permit the plaintiffs to claim excess damages from the insurer. The Supreme Court of Louisiana stated that "*The direct action statute does not create an independent cause of action against the insurer, it merely grants a procedural right of action against the insurer where the plaintiff*

[91] Ibid, [172].
[92] (1969) 419 F.2d 230.
[93] *Descant v. Admrs., Tulane Educ. Fund*, 639 So. 2d 246, 249 (La. 1994); See also *Authenment v. Ingram Barge Co* 878 F. Supp. 2d 672 (E.D. La. 2012).

has a substantive cause of action against the insured."[94] In other words, the third party only stands in the shoes of the insured and bound by the terms of the insurance contract.[95]

In other words, even if the right of action arises under the Louisiana Direct Action Statute, the substance of the claim is determined by the contract of insurance. Therefore, direct action claims are characterised as a contractual claim under the Louisiana law. It is important to underline that the statute gives an immediate right of direct action, which is also known as pure direct action. Unlike other direct-action statutes in the US such as the New York Direct Action Statute, requiring a judgment to be made against the insured tortfeasor as a precondition to commence a proceeding directly against the insurer, the Louisiana direct action statute grants the injured third party a separate right of action. However, this right is a procedural one and within the terms of the insurance policy. Therefore, the direct-action claim will be subject to the defences, which could be argued by the insurer against the insured, provided that the defence raised by the insurer is not personal to the assured.[96] In other words, like the English law, the Louisiana law provides merely a right to enforce the contract, even if it is defined as a separate right of action.

b) Turkish Law

Maritime and insurance law are highly developed in Turkey due to the country's strategic geographical location, which bridges Europe and Asia. Turkey's extensive coastline along the Black Sea, Aegean Sea, and Mediterranean Sea makes it a crucial player in international maritime trade. Consequently, Turkey also implemented new maritime codes that include

[94] Ibid, [3].
[95] Matthew J Pallay, *"The Right of Direct Action: Issues Proceeding Directly against Marine Insurers*" (2016) 41 Tul Mar LJ 57, 68.
[96] The types of the defences available to an insurer to resist a direct-action claim under the policy will be covered later in this chapter.

direct rights of action against insurers. This development aligns with a growing trend in international maritime law, where victims are granted the right to directly sue liability insurers. Article 1478 of the Turkish Commercial Code (the TCC) provides the right of direct action against the insurer. The article states that "*The victim may claim its loss up to the insured sum directly from the insurer provided that the claim is brought within the time period stipulated within the insurance contract.*"[97]

This article was reviewed by the English Courts in *The Yusuf Cepnioglu,*[98] where the vessel grounded off the Greek island of Mykonos in March 2014, resulting in a total loss. The vessel was carrying cargo under various bills of lading when the accident occurred. The charterers commenced arbitration in London against the owners but were unable to obtain security directly from the owners. Later they started proceedings in Turkey directly against the owners' P&I Club, relying on Article 1478 of the Turkish Commercial Code. However, the terms of the insurance provided for English law and London arbitration as well as a paid to be paid clause, which means the Club only to be liable if the owner has paid the claims against it.

As a result, the English court had to decide how to characterize the direct action in order to determine whether the charterers would be bound by the terms of the insurance contract and required to bring arbitration in London, or if it is an independent statutory right allowing them to bring their case in Turkey. Therefore, the answer to this question will significantly affect the outcome of this case because in the former scenario, 'pay to be paid' clauses are enforceable in the UK. As a result, when the ship owner goes bankrupt without making any payment, the third party cannot bring a direct action against the liability insurer. However, if the case is pursued

[97] Zarar gören, uğradığı zararın sigorta bedeline kadar olan kısmının tazminini, sigorta sözleşmesi için geçerli zamanaşımı süresi içinde kalmak şartıyla, doğrudan sigortacıdan isteyebilir.
[98] [2016] EWCA Civ 386; [2016] 1 Lloyd's Rep 641.

in Turkey under Turkish law, the 'pay to be paid' clause is not enforceable. Consequently, the charterers would be able to initiate a direct action against the P&I club regardless of whether the owners made any payment. In other words, this legal distinction between the jurisdictions of the UK and Turkey could significantly influence the outcome of the case and the ability of the charterers to seek remedy from the P&I club.

This brings us to the question of how to characterize a direct action and what the criteria or starting point for characterization are. The Court of Appeal stated that while characterising the nature of the right of direct action, the court looks at the content rather than the circumstances in which the right arose.[99] In other words, the substance of the right rather than the wording of the statute. Although the right is given by the statute, there is a link between the right of the third part and the insured tortfeasor. The article states the third party can only claim up to the insured amount and within the time period specified in the contract. The English court described it as a right to enforce the contract rather than enforcing an independent right of recovery.

Following this approach, when the TCC is reviewed, it is clear that there is no reference to exceptions or defences in relation to direct action claims. Moreover, Article 1479 indicates that the loss has to fall within the policy.[100] Therefore, these prove that the statute simply transfers the rights of the assured against the insurer under the contract and never intended to create new rights or obligations. Nonetheless, Turkish law may find some clauses of the insurance contract against the public policy. Does that mean the statute puts the third party in a better or worse

[99] Ibid, [40]-[47].
[100] Article 1479 of the TCC: The insurer may request information from the victim for determining the cause and the extent of the loss. The victim must provide all of the documents that can be reasonably provided. In the case the victim does not comply with this duty, the liability of the insurer shall be limited to the amount that it would have to pay had the duty been fulfilled, provided that the victim is notified of the situation in writing.

position than the assured under certain circumstances? If, for example, there is a pay to be paid clause and the insurer rely on it, would it render the right of the direct action provided by the statute ineffective? It means that the right of direct action does not entirely depend on the insurance contract. However, in order to determine the limits of the right to recovery from the insurer, the insurance contract is the only guidance. Clarke LJ analysed a similar provision under a Finnish statute restricting the right to recovery and concluded that "*The statute renders void those terms of the contract which have the effect of restricting the right to recovery in a way that is inconsistent with its terms and those provisions must, of course, be applied in any action before the Finnish courts. However, that does not in my view detract from the conclusion that the essential nature of the right created by s. 67 is to enforce the terms of the contract*."[101] Therefore, even if the statute renders the pay to be paid clause void, the substance of the claim is still contractual, not statutory. It is because the existence of the right solely depends on the validity of the contract under the TCC.

c) Spanish Law

Spain's prominence in maritime and insurance law stems from its extensive maritime history and strategic geographical position, bordered by important maritime routes. Its comprehensive legal framework, influenced by historical legacy and EU regulations, addresses various aspects of shipping and marine insurance. The Spanish legal system, particularly in insurance law, is therefore a great example of the influence of EU law at the national level.

Article 76 of the Spanish Insurance Contracts Act 1980 enables an injured third party to bring a direct action against the insurer of the tortfeasor stating that "*The injured or aggrieved party*

[101] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67, [59].

or their heirs shall be entitled to a direct action against the insurer to demand of him the fulfilment of the obligation to compensate, without prejudice to the insurer's right to recover from the insured in the event that the damage or injury to the third party was caused by the wilful misconduct of the insured. Direct action shall be exempt from the defences that the insurer may have had in respect of the insured. The insurer may, however, allege that the injured party is exclusively liable and may also raise the personal defences he may have in respect of the injured party. For the purposes of bringing direct action, the insured shall be obliged to inform the injured third party or their heirs of the existence of an insurance contract and the content of the same".[102]

Similar to the statutes we have considered so far, the Spanish statute also creates a right to enforce the insurance contract in substance. Unlike the Turkish Commercial Code, the Spanish legislation goes one step further and provides detailed guidance on exceptions, defences, and limitations. However, this does not mean that the right provided by the Spanish statute is statutory in nature, as the third party can only claim to the extent that the insurance contract covers.

The Spanish statute was analysed by the English court in *The Prestige*[103] case concerning P&I Club seeking to enforce arbitration awards for negative declaratory relief against Spain and France following loss of oil tanker Prestige. The Prestige, carrying a heavy cargo of oil,

[102] El perjudicado o sus herederos tendrán acción directa contra el asegurador para exigirle el cumplimiento de la obligación de indemnizar, sin perjuicio del derecho del asegurador a repetir contra el asegurado, en el caso de que sea debido a conducta dolosa de éste, el daño o perjuicio causado a tercero. La acción directa es inmune a las excepciones que puedan corresponder al asegurador contra el asegurado. El asegurador puede, no obstante, oponer la culpa exclusiva del perjudicado y las excepciones personales que tenga contra éste. A los efectos del ejercicio de la acción directa, el asegurado estará obligado a manifestar al tercero perjudicado o a sus herederos la existencia del contrato de seguro y su contenido.

[103] *The London Steam Ship Owners Mutual Insurance Association Ltd v The Kingdom of Spain And Another (The "Prestige") (No 2)* [2015] EWCA Civ 333. The Civil Liability Convention aspect of the case will be discussed under the international conventions.

encountered severe weather off the Galician coast. Its hull fractured, and the ship eventually split into two, spilling a large amount of oil into the sea. This caused extensive environmental damage along the coasts of Spain and France, affecting marine life and local industries. The environmental impact was so severe that the clean-up costs exceeded the thresholds set by the Civil Liability Convention (CLC).[104] This situation initiated a lengthy legal conflict between the vessel's insurer, The London Steam-Ship Owners' Mutual Insurance Association Limited (the Club), and Spain.

Initially, France and Spain, along with several other entities, commenced criminal proceedings against the vessel's owners and the Club. It is alleged that the owners and the Club were vicariously liable under the Spanish Penal Code. The Club acknowledged the right of direct action under the CLC but argued that any additional tortious claims should be subject to English law and London-based arbitration. As such, they argued that it is not possible to bring a direct action against them for non-CLC claims because the policy has a 'pay to be paid' clause, which means that the Club was not liable to Spain until after the ship's owners had first compensated Spain for the damages. Therefore, the London Club only provided a security amount up to the CLC limit in the Spanish legal proceedings. However, the Club initiated arbitration in London, seeking a negative declaratory judgment against any non-CLC claims brought by Spain and/or France. Neither Spain nor France participated in these arbitration proceedings, and the arbitrators ultimately issued awards in favour of the Club, granting the declarations it sought. Consequently, the Club applied to the High Court to enforce the awards.

[104] The Civil Liability Convention will be examined in detail later in this Chapter.

The English Court reviewed Article 76 of the abovementioned Spanish Insurance Contracts Act 1980, alongside Articles 109,[105] 116,[106] and 117[107] of the Penal Code to decide whether the statutes simply provide a right to enforce a contractual obligation or independent statutory right independent from the insurance contract. Comparing Article 117 of the Penal Code with Article 76 of the 1980 Act, the court highlighted that both articles are of the same nature and are subject to the same legal regime. As a result, the court, after considering the expert evidence, decided that the direct-action right under Spanish law is an independent right in origin which derives from law rather than contract but does not exist separately from the contract.[108] Therefore, the court characterized it in substance as a contractual claim. Even if the Spanish statute is broader and provides more detailed limitations than other foreign direct-action statutes, the third party still needs to examine the insurance contract to understand the extent of his or her rights.

d) German Law

Maritime and insurance law in Germany play a crucial role due to the country's significant maritime industry and strategic location for international shipping. With major ports like Hamburg, these laws ensure smooth commercial operations and risk management for one of the world's busiest shipping lanes. Insurance law complements this by providing robust coverage against diverse maritime risks, which is crucial for a nation heavily involved in global

[105] "Perpetration of an act defined as a felony or misdemeanour by Law shall entail, pursuant to the provisions contained in the laws, repairing the damages and losses caused thereby. In all cases, the party damaged may opt to sue for civil liability before the Civil Jurisdiction."
[106] "All persons held criminally accountable for a felony or misdemeanour shall also be held liable under Civil Law if the fact gives rise to damages or losses. If two or more persons are responsible for a felony or misdemeanour, the Judges or Courts of Law shall set the proportion for which each one must be held accountable ..."
[107] "Insurers that have underwritten the risk of monetary liabilities arising from use or exploitation of any asset, company, industry or activity when as a consequence of a fact foreseen in this code, an event takes place covered by the risk insured, shall have direct civil liability up to the limit of the legally established or contractually agreed compensation, without prejudice to the right to bring an action for recovery against who such may be appropriate."
[108] [2015] EWCA Civ 333, [26].

maritime trade. Furthermore, Germany's expertise in maritime law and insurance is vital for legal clarity and efficient dispute resolution in the highly globalized and risk-prone maritime sector.

In general, under German law, an injured third party does not have the right to bring a direct-action claim against the liability insurer of the tortfeasor. Hence, they can only sue the insured tortfeasor. However, the new German Insurance Contract Law (VVG) provides exceptions to this general rule.[109] Section 115 deal with direct claims against insurance companies.[110] The provision outlines that a third party is permitted to bring claims against the insurer in three specific situations: Firstly, in instances of liability insurance, particularly when there's an obligation to secure insurance as mandated by the Compulsory Insurance Act. Secondly, claims may be pursued if insolvency proceedings against the policyholder's assets have commenced, if there's a dismissal of an application for such proceedings due to insufficient insolvency estate, or if a provisional insolvency administrator has been appointed. Lastly, a third party can make a claim if the policyholder's whereabouts are unknown.

The section also states that the entitlement to a claim shall exist within the framework of the insurer's liability under the insurance agreement.[111] Therefore, a third party's claim will be subject to the same limitation period. The characterisation of this particular provision was discussed in *FBTO Schadeverzekeringen NV v Jack Odenbreit*, where a claimant brought a

[109] Versicherungsvertragsgesetz 2008.
[110] VVG 115(1): "Der Dritte kann seinen Anspruch auf Schadensersatz auch gegen den Versicherer geltend machen, 1. wenn es sich um eine Haftpflichtversicherung zur Erfüllung einer nach dem Pflichtversicherungsgesetz bestehenden Versicherungspflicht handelt oder 2. wenn über das Vermögen des Versicherungsnehmers das Insolvenzverfahren eröffnet oder der Eröffnungsantrag mangels Masse abgewiesen worden ist oder ein vorläufiger Insolvenzverwalter bestellt worden ist oder 3. wenn der Aufenthalt des Versicherungsnehmers unbekannt ist. Der Anspruch besteht im Rahmen der Leistungspflicht des Versicherers aus dem Versicherungsverhältnis und, soweit eine Leistungspflicht nicht besteht, im Rahmen des § 117 Abs. 1 bis 4. Der Versicherer hat den Schadensersatz in Geld zu leisten. Der Versicherer und der ersatzpflichtige Versicherungsnehmer haften als Gesamtschuldner."
[111] Ibid.

case in tort against a defendant domiciled in a Member State. [112] A German resident, Jack Odenbreit, was injured in an accident in the Netherland. The insurer of the person who is responsible for the accident is domiciled in the Netherlands. Mr. Odenbreit commenced proceedings against the insurer before the German court, i.e., where he was domiciled. However, the German court decided that it did not have the jurisdiction since the accident occurred in the Netherlands. The claimant successfully appealed this decision, and then the insurer appealed it to the Federal Court of Justice in Germany. The case was eventually referred to the ECJ for a preliminary ruling on whether the injured party may bring an action directly against the insurer in the courts of a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State.

The issue of protecting the weaker party will be discussed in detail below in the section on weaker parties. Another important question here was whether a claim brought by an injured third party can trigger the jurisdictional protections provided to weaker parties in insurance matters. The defence argued that German private international law characterises such claims as a right in tort and not as a contractual right under an insurance contract.[113] The CJEU stated that the aim of the relevant provision in Brussels regulation is to protect weaker parties and thus it can be extended to the injured parties following the existing case law.[114]

In the case, the claim is considered as a tort claim, but not an independent right from the contract. As section 115 of VVG suggested, the right only exists within the contractual framework of the related insurance policy. This case was a good example to show that the

[112] Case 463/06, *FBTO Schadeverzekeringen NV v Odenbreit* [2008] 2 All E.R. (Comm) 733.
[113] Ibid paragraph 13.
[114] Gerling Konzern Speziale Kreditversicherung AG v Amministrazione del Tesoro della Stato, Case 201/82 [1983] ECR 2503, Group Josi Reinsurance Co SA v Universal General Insurance Co, Case 412/98 [2000] ECR I-5925, [64], and Société financière et industrielle du Peloux v AXA Belgium, Case 112/03 [2005] ECR I-3707, [30].

claim might be in tort or contract, the characterisation of the direct action will depend on whether the right exist within the contractual limits or not.

e) Norwegian Law

Norway is an important player in the global maritime industry, with a rich maritime heritage and a strategic position along key North Atlantic trade routes. It leads in maritime law in various areas, including marine insurance. It's also a great example to understand the Scandinavian perspective.

The Insurance Contracts Act was established in 1930, but its provisions were not mandatory in nature, which consequently caused problems. It wasn't until the Skogholm case in 1954 that the Norwegian courts clarified that provisions related to direct action were mandatory and so the injured third parties can commence proceedings against the insurer when the assured is insolvent.[115] The cargo ship, Skogholm, sank en route from Bergen to England in 1949 due to being unseaworthy. The cargo's insurers compensated the owners of the cargo and then sought reimbursement from the ship's owner. However, since the shipowner became bankrupt, the cargo insurer pursued a claim against the P&I Club, Skuld, under the ICA 1930. Despite the pay to be paid clause, the Supreme Court of Norway ruled it non-applicable, asserting that direct action provisions contained in the Act were mandatory, thereby allowing third parties to directly claim against the insurer. This decision was later incorporated into the Insurance Contracts Act of 1989.

Section 7-8 of the ICA 1989 can be translated into English as following: "*When an insurance as mentioned under section 1-3, second paragraph, covers the liability of the Assured, the*

[115] Skogholm ND 1954, 445 (NH).

Insurer is liable towards the injured party for ensuring that the compensation is not paid out to the Assured until the latter provides evidence that the claim from the injured party has been covered. The Assured's claim against the Insurer cannot be made the subject of legal action for the recovery of claims other than the claim for compensation. In the event that the Assured is insolvent, the provisions of sections 7-6 and 7-7, cf. section 8-3, second and third paragraphs, shall apply. The provisions of this section cannot be departed from to the detriment of the injured party."[116]

It simply states that the right to direct action is a mandatory right under the Norwegian Insurance Contracts Act 1989, provided that the assured is insolvent. Therefore, from the wording of the act is clear that there are certain contractual limitations on the direct actions claim, even though it is a mandatory right.[117] Therefore, it is a contractual in nature and not an independent right. Norwegian case law indicates that how an action is characterised will determine the applicable law and thus the jurisdiction. The jurisdiction is governed by the Lugano Convention, which is parallel to the Brussels Regulations.[118] It also states that the right cannot be waived if it is to the detriment of the insured third party. As a result, paid to be paid clause cannot be used as a defence, if the assured is insolvent. Recently, this has been confirmed one again in *the Mineral Libin* by the Norwegian Supreme Court.[119]

[116] "Hvis forsikring som nevnt i § 1-3 annet ledd dekker sikredes erstatningsansvar, er forsikringsforetaket ansvarlig overfor skadelidte for at erstatningen ikke blir utbetalt til sikrede før denne godtgjør at skadelidte har fått dekning for sitt krav. Sikredes krav mot forsikringsforetaket kan ikke være gjenstand for rettsforfølging til dekning av annet krav enn erstatningskravet. Er sikrede insolvent, gjelder bestemmelsene i §§ 7-6 og 7-7, jf § 8-3 annet og tredje ledd. Bestemmelsene i denne paragrafen kan ikke fravikes til skade for skadelidte."
[117] Charles G. De Leo and LeRoy Lambert, '*Direct Actions, Declaratory Actions, Abstention, Interpleaders, and Other Practical Considerations*' (2013) 87 Tul. L Rev. 1129, 1134.
[118] Giuditta Cordero Moss, '*The Norwegian Approach to Private International Law- Illustrated by a recent Supreme Court decision on the direct action against the insurer'* in Einhorn and Siehr, *Intercontinental Cooperation through Private International Law – Essays in Memory of Peter Nygy* (TMC Asser Press 2002), 55-67.
[119] The Mineral Libin, HR-2020-257-A.

Hence, this provides a useful comparison with previous statutes, showing that even though it is considered a mandatory right, similar to the Turkish statute, which can void the 'pay to be paid' clause, it is still regarded as a contractual right since the right depends on the insurance contract itself.

5. Civil Liability Convention

There are a number of international conventions making the shipowners strictly liable for certain incidences such as pollution caused by a vessel.[120] These conventions require compulsory insurance and allow injured third parties to bring actions directly against the insurers providing the compulsory insurance policy. The 1969 Civil Liability Convention[121], later superseded by 1992 Protocol, is the first international convention establishing strict liability[122] for shipowners and creating a system of compulsory liability insurance.[123]

Article VII (8) of the CLC enables the injured third parties to bring claims for pollution damages directly against the insurer of the shipowner's liability for pollution damage. Article VII (8) of the convention states that: "*Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage. In such case the defendant may, even if the owner is not entitled to limit his liability according to Article V, paragraph 2, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner himself would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the*

[120] The International Convention on Civil Liability for Oil Pollution Damage 1992, and The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.
[121] Directive 2009/123/EC, art 4.1.
[122] But limited liability.
[123] Mans Jacobsson, 'Liability and Compensation for Ship-Source Pollution' in David Joseph Attard, Malgosia Fitzmaurice, Norman Martinez, and Riyaz Hamza (eds), *The IMLI Manual on International Maritime Law Volume III: Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 287.

owner himself, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him. The defendant shall in any event have the right to require the owner to be joined in the proceedings."

P&I Club may invoke defences that the shipowner would have been entitled to invoke and rely on the liability limits provided by Article V (2) but cannot rely on the policy defences other than wilful misconduct. Therefore, under the CLC, a club's position in any direct action cannot be any better than its members would have been if sued directly.[124]

The CLC provides purely an independent right of direct action. Like most of the foreign direct-action statutes it recognises the link between the contract and the right but also provides more than a right to enforce a contractual obligation. In substance, the scope and the nature of the direct-action claims under the CLC is broader than the statutes we have considered so far. The proceedings under the CLC are independent from the terms of the insurance contract. For example, actions for compensation may only be brought in the courts of the state where the pollution damaged occurred under the CLC.[125] In other words, the courts of the affected state will have exclusive jurisdiction over actions for compensation against the shipowner regardless of the dispute resolution clauses provided by the contract.

6. Pay to be Paid Clause

As we have seen in all the foreign statutes we have reviewed, direct actions may arise from contractual or tortious claims. However, if the right depends on the contract, it is irrelevant whether it occasionally voids certain clauses, such as pay to be paid, or provides better standing

[124] Steven J. Hazelwood, David Semark, *P. &. I Clubs Law and Practice* (4th edn Informa Law from Routledge 2010), [27:27].
[125] Article IX (1).

than the assured itself; the right remains contractual and does not exist outside the contractual framework, unlike in the CLC context.

The one of the main objectives of characterising a direct-action claim is to understand whether contractual defences, such as pay to be paid clauses, are applicable. As observed in several foreign statutes, pay to be paid clauses might be unenforceable in some jurisdictions, even if the nature of the direct-action claim is characterised as contractual. Therefore, once establishing the origin of the right, we also need to understand its limits, because pay to be paid clauses will eventually play a key role, especially for insurers as a defence, when the assured tortfeasor goes bankrupt before compensating the injured third party.

The pay to be paid clause is commonly found in insurance contracts, particularly in the realm of marine insurance, especially in the P&I Club policies. This clause essentially means that an insurer (or club) is not obligated to pay a claim to an insured party until the insurer has been paid first, either by reinsurance recoveries or other sources. Thus, it requires the assured to discharge its liabilities prior to seeking reimbursement from the Club. In other words, the assured cannot recover anything or make any claim against the underwriters until he has been found liable and so sustained a loss.[126]

On the other hand, it also has implications for injured third parties: they need to be aware that they may not be able to bring a direct-action claim because of this defence. This is why it is crucial to carefully review and understand the terms of an insurance policy, including any pay to be paid provisions, to ensure that the assured or the injured third party does not pick a wrong jurisdiction where they may not be able to avoid those clauses.

[126] *West Wake Price & Co v Ching* [1957] 1 WLR 45; [1956] 2 Lloyd's Rep. 618 (QB), 624.

Considering the nature and the scope of the risks involved and the potential claims in the sea trade, shipowners are likely to gone under bankruptcy due to the legal liabilities incurred in operating a vessel. In that case, it is important to characterise the action right and understand the jurisdiction and mechanisms enabling the injured third party to sue the liability insurer. Therefore, the person suffering loss or injury at the hands of a tortfeasor can be in a very difficult passion to recover and left without a remedy under some jurisdictions. This is, therefore, the biggest and most important defence in relation to a direct action. Hence, this chapter has covered different examples from prominent jurisdictions to cover various approaches to this particular defence to show that this clause plays a key role in direct action disputes. In most of the scenarios, the injured third-party steps into shoes of the assured via statutory assignment and sue the liability insurer. This mean the third party cannot be in a better position than the assured.[127]

The function of this particular clause is tied to the fact that P&I insurance stands for Protection and Indemnity insurance. It is sometimes mistakenly confused with liability insurance, as it also provides coverage for third-party liabilities. However, the biggest difference between these two concepts is the fact that the indemnity insurance requires the assured to indemnify a third party first to get paid by the insurer.[128] The pay to be paid clauses simply stops assureds to recover until it compensates the third party first. In *Rogers & Co v The British Shipowners' Mutual Protection, etc. Association Limited*, nicely stated the scope of the cover provided by the P&I Club as an insurance against any claim or demand that the assured i.e., the member should become liable for and be required to pay in respect of covered risks.[129] It can be simply

[127] *Post Office v. Norwich Union Fire Insurance Society Ltd* [1967] 1 Lloyd's Rep. 216, per Lord Denning M.R.
[128] Steven J. Hazelwood, David Semark, *P. &. I Clubs Law and Practice* (4th edn Informa Law from Routledge 2010), [20:01].
[129] *Rogers & Co v The British Shipowners' Mutual Protection, etc. Association Limited* (1896) 1 Com Cas 414; See also Rhidian Thomas, *The Modern Law of Marine Insurance*: *Volume 5* (1st Informa 2023), 44.

seen as a reimbursement. In fact, in *The Allobrogia*, the court described such obligation to pay first as a condition precedent for an assured to be reimbursed by the P&I club.[130] Hence, in circumstance where the tortfeasor got insolvent, the injured third parties will be stopped by the pay to be paid provisions and left without any remedy.

These clauses are permitted under several jurisdictions including the UK under the Third Parties (Rights Against Insurance) Act 1930, and now the 2010 Act.[131] This is the reason why the jurisdiction stage of a direct action claim is the most heated part of the proceedings most of the time, because the insurers may want to make sure that the case lands in a jurisdiction where they can be allowed such important defence, while the assured or third parties are hoping to find themselves in a jurisdiction where they would be given weaker party protection and a legal shield to avoid being struck down by a paid to be paid clause. There are still many jurisdictions like Turkey or Sweden arguing that such clauses are not enforceable because they defeat the purpose of introducing such mandatory liability insurance in the first place, i.e., they are against public policy.

In *the Yusuf Cepnioglu* case, this issue was critical, because the defendant charterers wanted to bring the case in Turkey. The relevant Turkish law, which was discussed in characterisation chapter, would not allow the pay to be paid clause to be enforced against the victim. In the case, the ship owner declared insolvent and did not make any payment to the victim beforehand. Therefore, if the liability of the insurer to the defendant is to be decided in the English court, the insurer would be able to use this defence against the third party bringing the direct-action

[130] The Allobrogia [1979] 1 Lloyd's Rep 190.
[131] See also *The Fanti and the Padre Island* [1990] 2 All E.R. 705.

claim. This issue might be even more complicated after the Brexit transition period, because now all the third parties will try to bring their cases in a European jurisdiction where they can avoid the way to be paid clause and get better jurisdictional protection as a weaker party. The same factual scenario was in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No.1),* if the governing law was English law, the case would have held a different result, but if it was under Finnish law, which is quite assured friendly, and would not allow such an insurance cause to be enforceable.[132]

The characterisation process and understanding direct action mechanisms become vital here because there are certain mechanisms enabling third parties to bring a direct-action claim which is not contractual in nature. Furthermore, some of these mechanisms in fact clearly states that the provisions like pay to be paid clauses are not enforceable. The CLC and the International Convention on Civil Liability for Bunker Oil Pollution Damage are great examples to those mechanisms under which assured can avoid pay to be paid clauses.

However, there are limits to such powerful defence. Section 9(5) of the 2010 Act states that the transferred rights are not subject to a condition requiring the prior discharge by the insured of the insured's liability to the third party in the case of a contract of marine insurance to the extent that the liability of the insured is a liability in respect of death or personal injury. However, this is such a narrow limitation because the P&I Club can still rely on pay to be paid defence in catastrophic level environmental pollution or collusion cases. This brings us back to the importance of characterisation and jurisdiction chapter because in a jurisdictionally very

[132] [2005] 1 Lloyd's Rep 67.

ambiguous scenario, the insurer may try to bring the case to a jurisdiction where they can try to rely on the pay to be paid clause to torpedo the whole case against them.

7. Conclusion

The question of characterization is essential for understanding whether a third party initiating direct action is relying on a contractual right or an independent right of action. This determination is crucial in deciding whether a third party should be bound by a dispute resolution clause when bringing a direct-action claim against an insurer. This is because when a third party to a contract attempts to enforce a contractual benefit, they must also accept the conditions attached to it, as discussed in the first chapter. Therefore, this chapter provides the first component of the research question and starting point to understand the origin of the direct actions. Therefore, this chapter sits perfectly between the first, which lays down the fundamental contractual principles, and the third, which looks into direct action mechanisms, because it indicates why there might be different answers to the same research question, depending on the characterisation of the relevant direct action.

As outlined in the previous chapter, a third party enforcing a contractual right is likely to be bound by the terms of the policy they rely on, including dispute resolution clauses. We have methodically reviewed how the concept of characterization has evolved and examined various foreign direct-action statutes and conventions. It’s apparent that the origin of the right doesn't always define the nature and character of a direct action; rather, it depends on the statute’s language and each case's unique circumstances. Some legislations explicitly provide a right to enforce the existing insurance contract on the assured's behalf, while others use the insurance policy to simply define parties and coverage limits.

The insurance policy documents the relationship between the insurer and the assured, serving as a starting point to determine if there's a policy covering the third party's loss. However, courts might disregard certain contractual provisions for public policy reasons, potentially altering the claim's nature. The scope of the rights might extend beyond the contractual framework, placing the parties in a different position than anticipated during contract negotiations. For instance, if courts disregard 'pay to be paid' provisions or jurisdiction agreements in a direct-action claim, can the claim still be characterized as contractual? Does such an approach align with the doctrine of conditional benefit? Literature indicates that characterization rules are unclear in most jurisdictions and should be decided on a case-by-case basis, revisiting the relevant provisions. On the other hand, it is evident that the Continental European and English statutes indicates that the content and limits of the cover in a direct action are designated by the insurance policy, regardless of the origin of the right. This makes it contractual in nature, unlike international conventions which explicitly provide for an independent right.

CHAPTER III: DIRECT ACTION MECHANISMS

The second component of the research question is the mechanism enabling direct action, because the answer to 'whether a third party initiating a direct action against an insurer is bound by a dispute resolution clause agreed upon between the insurer and the insured' depends on the mechanism that grants the right of direct action. As briefly explained in the characterisation chapter, the relevant legal framework might alter the nature of the direct action and, as a result, the rights and obligations of the parties, as well as the defences available in a direct action. Therefore, the objective of this chapter is to understand the various legal mechanisms that grant third parties the right of direct action, and how each of these mechanisms can alter the nature of the relationship between the parties.

This chapter will review various legal mechanisms that provide different avenues for injured third parties to initiate a case against the insurer of the tortfeasor. It highlights the importance of understanding how the way a claim is brought might affect its characterization, and consequently, the enforceability of jurisdiction and governing law clauses. Therefore, this chapter serves as a perfect bridge between the theoretical and practical aspects outlined in the preceding and following chapters, guiding us step by step through this transition.

Direct action mechanisms can be categorized into two types: internal and external mechanisms. The chapter will explore all possible ways to initiate a direct action and examine how each mechanism might yield different answers to the main research question of this thesis. Therefore, the doctrinal research methodology will be adopted to review each mechanism and the relevant case law, aiming to answer two primary questions: Which legal mechanisms grant the right of direct action, and how do these mechanisms influence the nature of direct actions?

1. Introduction

There are several different mechanisms enabling an injured third party to commence proceedings directly against the liability insurer of the tortfeasor and they are really well laid out in a chapter written by Peter MacDonald Eggers QC, who is also probably one of the most qualified people to speak in this field.[133] Nonetheless, this chapter will now humbly try to follow the road map provided by him and go over these different mechanisms one by one.

For the sake of categorisation, these direct-action mechanisms can be divided into two groups as internal and external mechanisms. Internal mechanisms include (i) a provision in the policy entitling a third party to get an indemnity payment or other benefits by the insurer, (ii) a contractual instrument like a guarantee issued by the insurer to a third party, and (iii) contractual or voluntary assignment of the assured's rights to a third party.

On the other hand, existing of a policy or contract is not always necessary for a direct action to be allowed. We have already reviewed several foreign statues in the characterisation chapter enabling injured third parties to commence proceedings directly against the insurance companies as a statutory right, independent of the existence of right to such action under a contract. Therefore, international conventions, foreign statues and laws, and a statutory assignment of the assured's rights to a third party are the external mechanisms providing the legal grounds for direct actions against the insurers.

The rights and obligations of an injured third party against an insurer depend on the mechanism giving the right of direct action. This is the reason why it needed to be discussed after the

[133] Peter MacDonald Eggers QC, '*Direct Action Against Insurers and P&I Clubs*' in Barış Soyer, Andrew Tettenborn (eds), *Maritime Liabilities in a Global and Regional Context* (Informa Law from Routledge 2018).

characterisation chapter to show that the way these mechanisms operate depends on the language used and before the governing law and jurisdiction chapter because the mechanism used for a direct action will also determine the effects of those clauses on third parties.

2. Internal Mechanisms

These internal mechanisms are crated during as a result of the contractual relations between the parties involved in a complex commercial transaction. For example, a bank who provided a loan for a shipping firm to purchase a new vessel might want the insurance policy taken on the vessel to be assign to the bank. It is a simple example of how a bank may want to protect its investment against the risk of the vessel being damaged or becoming a total loss. Alternatively, the third party might be someone who should be paid the insurance proceeds. The paper will cover all these different scenarios. Usually, internal mechanisms make people think that a direct action is a contractual claim in nature, which might be true for the claims brought under the internal mechanisms, but it is certainly not the case for all direct actions.

a) Provisions in the Policy

In insurance contracts, it is common to have a provision which acknowledges the interest of a third party or provide a right to eb indemnified in a relevant scenario. It should be confused with a co-insurance because there the co-assured can bring the claim as its own legal right, since it is a party to the policy.[134] This mechanism is for the cases where the third party is not actually a party to the insurance contract, but their interest is noted in the policy. For example, in an insurance context, the assured may want to include a third party into the policy as the loss payee, who is technically the party that will be receiving the insurance proceeds provided that

[134] Gilman et al (eds), *Arnould: Law of Marine Insurance and Average*, (20th edn, Sweet & Maxwell 2023), [8-13]- [8-14].

there is a recoverable claim. Abovementioned in the first chapter, the doctrine of privity normally should not allow a third party to enforce such a promise of payment since the third party is not a party to the insurance contract. Thankfully, this was fixed by section 1(1) of the Contracts (Rights of Third Parties) Act 1999, which allowed such promises to be enforce provided that the contractual parties unambiguously identified the third party in the contract.

In relation to this thesis, the relevant question whether a loss payee should be bound by the jurisdiction and governing law clauses. The answer to this question is given by the Supreme Court in *Aspen Underwriting Ltd & Ors v Credit Europe Bank NV*.[135] In the case a bank, based in the Nederland, provided a loan to a shipowner for a vessel and in return asked the shipowner to assignee the policy to the bank and nominate it as the loss payee. Once the ship became a total loss, the insurer made the payment. Later, it is discovered that the ship was scuttled deliberately, so the insurance company commenced proceedings against the parties who received the insurance proceeds, including the bank in the Netherland. The Supreme Court held that the bank simply got paid under the policy as loss payee. Therefore, the jurisdiction clause is not binding on the bank "unless and until" it brings proceedings against the insurer.[136] The court draw a distinction between an entitlement and an obligation and stated that until the bank actively try to rely on the insurance policy to enforce a contractual right, it being a loss payee does not make it a party to the contract. Thus, the contractual obligation in the insurance policy, i.e., the jurisdiction clause does not affect the bank. Therefore, the insurer should sue the bank where it is registered under the Brussels regulation, which is the Nederland.

[135] *Aspen Underwriting Ltd & Ors v Credit Europe Bank NV* [2020] UKSC 11.
[136] [2020] UKSC 11, [18].

b) Contractual Tools

In complex commercial transactions, especially in a maritime context, the insurers sometimes get into a contractual relation with a third party. This is most likely to happen in relation to disputes where a third-party arrests or threatens to arrest a ship, or apply for a freezing order, unless a P&I Club provides a security for the third party's claim.[137] As a result, the insurer or P&I club may provide an undertaking to the third party provided that the third party's claim is under the policy. For example, in *Aline Tramp SA v Jordan International Insurance Co (The Flag Evi)*, the cargo insurer commenced proceedings against the shipowner and their P&I insurer in Jordan.[138]However, the P&I Club and the shipowner applied for an anti-suit injunction on the bases that the contract of carriage for the goods and the letter of undertaking given by the Club both had exclusive jurisdiction clauses for the English courts. Although the shipowner succeeded in its application, the Club did not. The court held that the language used in the letter of undertaking is more like a unilateral submission, rather than a bilateral agreement. Hence, the jurisdiction clause on that undertaking did not bind the injured third party. However, the undertaking created a contractual relation where the insurer is obliged to make the payment if the third party brings a claim under the undertaking or guarantee.[139]

c) Contractual or Voluntary Assignment

Assignment in its simplest form means transfer of a right from one part to another. This is one of the most common mechanisms in insurance context, where the assured assigns the policy or the right of action to a third party. In other words, it is a critical way to avoid the effects of the

[137] Paul Myburgh, '*P & I Club Letters of Undertaking and Admiralty Arrests*' (2018) 24 Journal of International Maritime Law 201-212.
[138] *Aline Tramp SA v Jordan International Insurance Co (The Flag Evi)* [2016] EWHC 1317 (Comm); See also *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans* Forening (The Swedish Club) [2009] EWHC 716 (Comm).
[139] Peter MacDonald Eggers QC, '*Direct Action Against Insurers and P&I Clubs*' in Barış Soyer, Andrew Tettenborn (eds), *Maritime Liabilities in a Global and Regional Context* (Informa Law from Routledge 2018), 173.

privity of contract principle. It goes without saying that the assignment of a contractual obligation is not possible, without also assigning the benefit relevant to the burden.[140] There are three possible roads for such assignment to be affective in marine insurance context: (i) section 50 of the Marine Insurance Act 1906, (ii) section 136(1) of the Law of Property Act 1925, and (iii) equitable assignment.[141]

The following wording of the section 50 of the MIA 1906 provides the guidance on when and how policy is assignable: *"(1)A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss. (2)Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected. (3)A marine policy may be assigned by indorsement thereon or in other customary manner.*" The fallowing section also states that the assured should have an insurable interest to be able to assign a policy.[142] In other words, if the assignment is done before the loss, the third party will be required to prove insurable interest to be compensated for a loss, because there can be no affective assignment of the policy before the occurrence of a loss covered under the policy.

In *Williams v Atlantic Assurance Co Ltd*, for example, the policy in question insured the good against sea, fire and other perils for £8000.[143] However, as a result of a fire, the vessel became a total loss and so did the insured goods, which led to £7000 damages. At the time of the loss

[140] See the Conditional Benefit under the Chapter I.
[141] Ibid, 174.
[142] Section 51 of the Marine Insurance Act 1906; See also David Osborne, Graeme Bowtle and Charles Buss, *The Law of Ship Mortgages* (1st Informa Law 2001), [5.17].
[143] [1933] 1 K.B. 81.

a company known as Messrs. Constantinou, Valsamis & Co. were the owners of the goods and fully interested in the policy. The firm incurred a liability of £7000 to one W, and in settlement of his claim it was agreed that they should assign the policy to him and that he should pay them a certain sum unconditionally and a further sum of £1000 if, but only if, he should receive that amount or more from the insurers. However, the insurer failed to make the payment under the policy, and thus the plaintiff brought actions against the insurer. The court held that the assignment must be of the whole beneficial interest in the policy.[144] However, the plaintiff had only acquired the policy subject to an equitable interest therein to the extent of £1000 in the assignors. Since the assured still had interest in the policy, the court decided that the assignment was not effective.

The wording of the section 50 refers assignment as passing the beneficial interest, it does not say a part of it. Once the assignment is effective, the third party is entitled to bring a claim under its own name and the assignor will lose its power to invoke its rights.[145] This means they will be in the same position as the original assured, no batter no worse.[146] Hence, all the defences available against the assured will be applicable against the assignee. On the other hand, section 136(1) of the Law of Property Act 1925 provides a guideline for the requirements to qualify as a legal assignment: (i) it needs to be absolute, (ii) and the assignment must be of an existing one, (iii) it needs to be in writing and finally (iv) a proper notice should be given to the other parties.

[144] Ibid, 87.
[145] C. H. Tham, *Understanding the Law of Assignment* (1st Cambridge University Press 2019), 325-327.
[146] Peter MacDonald Eggers QC, '*Direct Action Against Insurers and P&I Clubs*' in Barış Soyer, Andrew Tettenborn (eds), *Maritime Liabilities in a Global and Regional Context* (Informa Law from Routledge 2018), 174.

The final way of such transfer is equitable transfer. The most important difference between the legal assignment and the equitable assignment is the fact that in the later the assignor only gets an equitable interest in the action.[147] Although the equitable assignee can bring an action as its own name, there is a rule of practice requiring the assignor to join the proceeding alongside the equitable assignee.[148]

3. External Mechanisms

External mechanisms, independent of the underlaying insurance contracts, provide for a right of direct action to the third parties. These mechanisms are the reason why sometimes the nature of a direct-action claims can be characterised as statutory rather than contractual because some of these mechanisms totally disregards the contractual terms or states they are unenforceable. Hence, the language used in these legal devices will provide us the necessary information on the scope and nature of a particular direct action in question.

a) Statutory assignment:

Shipowners are likely to have liability insurances to cover variety of risk including liabilities to third parties. However, a tortfeasor i.e., the shipowner is likely to go under bankruptcy due to the legal liabilities incurred in a marine incident. As a result, the injured third-party suffering loss at the hands of a tortfeasor i.e., the insured shipowner can be in a very difficult passion to recover due to the doctrine of privity of contract since it is not a party to the contract of insurance between the tortfeasor and the liability insurer. This is not in accordance with the ordinary concept of justice because the injured third party is likely to be left without a remedy

[147] Ying Khai Liew, *Guest on the Law of Assignment* (4th edn Sweet & Maxwell 2023), [3-01]; See also Fidelis Oditah, '*Equitable versus Legal Assignments of Book Debts*' (1989) 9 Oxford Journal of Legal Studies 513, 516; Hugh Beale, *Chitty on Contracts* (34th edn Sweet & Maxwell 2022), Chapter 22, Section 1(b).
[148] *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68; [2001] QB 825, [60].

in cases of bankruptcy of the tortfeasor. Therefore, the Third Parties (Rights Against Insurers) Act 1930, like in many other jurisdictions across the Europe, tried to fix this unfairness concerning liability insurances with a statutory intervention. The 1930 Act enabled third parties to sue the liability insurers of the tortfeasors by transferring the rights of action to the injured party.

Section 1 of the 1930 Act states that in the event of the insured becoming bankrupt, the assured's rights against the insurer under the contract in respect of the liability is transferred to and vest in the third party to whom the liability was so incurred. In other words, the injured third party becomes the statutory assignee of insured's rights under the Act. However, the Act requires the existence of legal liability and the insolvency of the assured as prerequisites to be able to initiate an action against the liability insurer. The Court of Appeal decided in *Post Office v. Norwich Union Fire Insurance Society Ltd*[149] that the third party can only sue the insurer directly provided that the liability of the insured to the injured third party is established by a judgment of Court, arbitration award, or an agreement. Once it is established that the assured is insolvent in accordance with the section 1 and rendered liable by a judgment of Court, arbitration award, or an agreement, then the third party becomes the statutory assignee of insured's rights of action under the Act. Lord Denning MR explained that:"*It seems to me that the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement. Until that is done, the right to an indemnity does not arise ... Under [the Act] it is clear to me that the injured person cannot sue the insurance company except in such circumstances as the insured himself could have sued the insurance company.*

[149] *Post Office v. Norwich Union Fire Insurance Society Ltd* [1967] 1 Lloyd's Rep. 216.

The insured could only have sued for an indemnity when his liability to the third person was established and the amount of the loss ascertained."[150]

The scope of the rights of the third party is defined under the Act. This statutory intervention is an important mechanism for the injured third party considering the fact that the injured third party would only be an ordinary creditor in an insolvency situation without the statutory assignment. In other words, the Act avoid the liability insurance money being added to the general pool available for all the creditors in case of an insolvency.

Section 1(4) of the Act clearly states that the insurer is under the same liability to the injured third party as it would have been to the insured under the policy[151]. Having stated that, the same action also enables the insurer to rely on the same defences that it would have been allowed to rely on against the assured.[152] However, the Act is silent about what should be done if there is no sufficient money for the third party claims. Whomever establishes the liability first will have the priority among multiple third parties.[153] This creates uncertainty and problems for belated claims from other injured third parties, if the money available under the liability policy is exhausted.

The hidden insurer problem was another shortcoming of the 1930 Act. Above-mentioned, the establishment of the liability is essential for the statutory assignment of the assured's rights of action. The third party, therefore, would not be able to have the necessary information until establishing the liability of the assured. However, the injured third party had to know whether the person against whom he is making a claim is insured or who is the insurer. The Court of

[150] Ibid, 219.
[151] *Farrell v Federated Employers' Insurance Association* [1970] 1 WLR 1400.
[152] The defences available to the insurers i.e., the P&I Clubs will be discussed in the last Chapter.
[153] *Cox v. Bankside Members Agency* Ltd [1995] 2 Lloyd's Rep. 437 at p. 467 per Saville J.

Appeal in *Re OT Computers Ltd (In Administration)*[154] held that: "*What a third-party claimant needs to know is whether the person against whom he is making a claim is insured and, if so, in what terms. If the proposed defendant has no insurance or only limited insurance or insurance to which it is a condition precedent that the insured shall have obtained an arbitration award (to take 3 examples), the third-party claimant may well think that it is not sensible or worthwhile to issue (or continue) legal proceedings. In this sense he needs to have information about the proposed defendant's insurance position if any and that information is 'such information as may be reasonably required' within section 2*."[155]

The Third Parties (Rights against Insurers) Act 2010 repealed the 1930 Act and tried to resolve the shortcomings of the Act. The 2010 Act came into force on 1 August 2016. Although the 2010 Act did not substantially change the law, it changed the procedure of the direct-action claims to fix the problems raised under the previous act.

Section 1(2) states that the rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred. Furthermore, section 1(3) enables third parties to bring proceedings to enforce the rights against the insurer without having established the relevant person's liability; but the third party may not enforce those rights without having established that liability. This section simplifies the procedure and makes the life easier for injured third parties under the 2010 Act. Following section provides the meaning of establishing liability and states that a third party may bring proceedings against the insurer to obtain one or both of the following declarations: a declaration as to the insured's liability to the third party; or a declaration as to the insurer's

[154] Lloyd's Rep. I.R. 669.
[155] Ibid [33].

potential liability to the third party. In other words, the injured third party can directly sue the insurer without establishing and quantifying his or her liability. This is going to help injured third parties to save time and money, especially where the tortfeasor is a defunct company.

The biggest problem under the 1930 Act was the requirement of establishing the insured's liability before being able to issue proceedings against the insurers. To be able to establish liability, the third party has to successfully sue the tortfeasor. It is the underlying tort action. However, the problem is that if there has been a time lap between the event and the action, the insured may no longer exist as a legal entity. In other words, if you are trying to sue a company, which has been liquidated, and no longer registered as a company, there is no defendant to sue.

In *Bradley v Eagle Star Insurance Co Ltd*[156] the court recognised this issue as the "disappearing" defendant problem. The injured third party had to take three separate legal actions. First, the third party had to bring a proceeding to restore the defunct insured to the Register of Companies. Then, the liability of the newly restored insured against the injured third party had to be established by another action. Lastly, the injured third party had to bring a final proceeding against the insurers to establish the insurers' liability under the policy.
Although the Companies Act 2006 made it easier to restore a company to the register, this order of events puts all the burden including the costs of long-lasting legal process on the innocent third party.

Above-mentioned, the 2010Act changed the procedure of the direct-action claims, without substantially changing the law. Under the new act, the innocent third party, as the statutory assignee of insured's rights can sue both the defendant i.e. the insured tortfeasor and the insurer

[156] [1989] AC 957, [1989] 1 All ER 961.

in one set of proceeding. This is going to make the whole process faster and cheaper for the innocent third parties. The statutory assignment mechanism not only gives the injured third party right to direct action, but also avoids the liability insurance money being added to the general pool available for all the creditors in case of an insolvency, where the injured third party would only be an ordinary creditor.

b) International Conventions:

There are a number of international conventions making the shipowners strictly liable for certain incidences such as pollution caused by a vessel[157], liabilities for personal injury to or death of passengers[158] and wreck removal expenses[159]. These conventions require compulsory insurance and allow injured third parties to bring actions directly against the insurers providing the compulsory insurance policy.

The 1969 Civil Liability Convention[160], later superseded by 1992 Protocol, is the first international convention establishing strict liability[161] for shipowners and creating a system of compulsory liability insurance.[162] The previous chapter has briefly touched upon this convention. The CLC was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships.[163] Article III(1) of the Convention states that a ship owner will be strictly liable for any

[157] The International Convention on Civil Liability for Oil Pollution Damage 1992, and The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.
[158] 2002 Protocol to the Athens Convention.
[159] The Nairobi International Convention on the Removal of Wrecks, 2007.
[160] Directive 2009/123/EC, art 4.1.
[161] But limited liability.
[162] Mans Jacobsson, '*Liability and Compensation for Ship-Source Pollution'* in David Joseph Attard, Malgosia Fitzmaurice, Norman Martinez, and Riyaz Hamza (eds), *The IMLI Manual on International Maritime Law Volume III: Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 287.
[163] International Maritime Organization on the International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969.

pollution damages.[164] The CLC also established compulsory insurance under Article VII (1) stating that "The owner of a ship registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund, in the sums fixed by applying the limits of liability prescribed in Article V, paragraph 1 to cover his liability for pollution damage under this Convention." Furthermore, Article VII (8) of the CLC enables the injured third parties to bring claims for pollution damages directly against the insurer of the shipowner's liability for pollution damage. Article VII (8) of the convention states that: "*Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage. In such case the defendant may, even if the owner is not entitled to limit his liability according to Article V, paragraph 2, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner himself would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the owner himself, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him. The defendant shall in any event have the right to require the owner to be joined in the proceedings."*

Therefore, the injured third party can directly sue the liability insurer of the shipowner without establishing liability of the shipowner in the first place. Unlike statutory assignment mechanism, the insured shipowner does not have to be insolvent for the injured third party to directly sue the liability insurer under the CLC. On the other hand, P&I Club may invoke

[164] Exceptions are stated in Article III (2)-(3)-(4).

defences that the shipowner would have been entitled to invoke and rely on the liability limits provided by Article V (2) but cannot rely on the policy defences other than wilful misconduct. Finally, it is important to note that actions for compensation may only be brought in the courts of the state where the pollution damaged occurred under the CLC.[165] In other words, the courts of the affected state will have exclusive jurisdiction over actions for compensation against the shipowner.

The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, which covers the gap left by the CLC, has identical provisions requiring compulsory insurance[166] and allowing third parties to bring proceeding directly against the liability insurer[167]. While the CLC applies only to spills of oil carried in bulk as cargo, and to spills from bunkers on tankers carrying such oil, the Bunkers Convention applies to bunker spills from non-tankers, such as bulk carriers and container ships. The Bankers Convention, like the CLC, give exclusive jurisdiction to the courts of the affected state.[168]

Both the CLC and the Bankers Convention have been ratified by the UK and implemented by the Merchant Shipping Act 1995. Section 165 of the MSA 1995 states that the Third Parties (Rights against Insurers) Act 1930 is not applicable to insurance policies that are compulsory insurance against liability for pollution. It creates inconsistency between English law and the international liability regimes about pay to be paid rule. The implications of this situation will be discussed further in the relevant chapter. However, it is important to underline that the mechanism used for direct action is important for characterizing the nature and scope of the action. In *London Steam Ship Owners Mutual Insurance Association Ltd v the Kingdom of*

[165] Article IX (1).
[166] Article 7 (1).
[167] Article 7(10).
[168] Article 9.

Spain and Another (The "Prestige") (No 2),[169] the London P&I Club acknowledged the direct action under the CLC in relation to the pollution costs. However, in relation to other claims, the Club relied on the pay-to-be-paid principle contained in the policy. In other words, direct action was not applicable to non-CLC claims due to the pay-to-be-paid clause. Furthermore, the Club commenced Arbitration in London for non-CLC claims. The Court of Appeal uphold the arbitration agreement and pay-to-be-paid provisions contained in the policy in relation to non-CLC claims.

c) Foreign Direct-Action Statues:

Under many jurisdictions, there is a doctrine of privity and thus contracts are only binding upon their parties. In other words, a contract cannot confer rights or impose obligations upon any person who is not a party to that contract. Hence, an injured third party might be left without any remedy if the tortfeasor is insolvent because the liability insurer is only liable to the assured. Due to public policy reasons, many jurisdictions tried to fix this unfairness concerning liability insurances with a statutory intervention allowing injured third parties to bring proceedings against the liability insurer of the tortfeasor.

Various states have laws providing rights of direct action either as a contractual right or as an independent right operating independently of the terms of the liability insurance. Some of these foreign statues are examined in earlier chapters. The nature and scope of an injured third party's right of direct action against an insurer largely depend on the national law of each state.[170] Whether a third party is trying to enforce a contractual obligation, or an independent

[169] *London Steam Ship Owners Mutual Insurance Association Ltd v the Kingdom of Spain and Another (The "Prestige") (No 2*) [2015] EWCA Civ 333.
[170] Vibe Ulfbeck, '*Direct actions against the insurer in a maritime setting: the European perspective.*' [2011] LMCLQ 293, 294; also see Matthew J. Pallay, '*The Right of Direct Action: Issues Proceeding Directly against Marine Insurers*' (2016) 41 Tul. Mar. L.J. 57, 67.

right given by a statue determines whether a jurisdiction or arbitration agreement is binding on the third party bringing direct action claim.

As discussed in the previous chapter, the Court of Appeal in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* held that a direct action against an insurer is an action which should be characterised as contractual.[171] Lord Justice Moore-Bick stated that: "*The issue in the present case is whether New India (the foreign court claimant and respondent to the London arbitration) is bound by the arbitration clause, which in turn depends on whether it is seeking to enforce a contractual obligation derived from the contract of insurance or an independent right of recovery arising under the Insurance Contracts Act. If in substance the claim is independent of the contract of insurance and arises under the Finnish legislation simply as a result of its having a right of action against an insolvent insured, the issue would have to be characterised as one of statutory entitlement to which there may be no direct equivalent in English law. In that case the issue would in my view have to be determined in accordance with Finnish law. If, on the other hand, the claim is in substance one to enforce against the insurer the contract made by the insolvent insured, the issue is to be characterised as one of obligation. In that case the court will resolve it by applying English law because the proper law of the contract creating the obligation is English law: see Adams v National Bank of Greece [1961] AC 255*."

Therefore, if a third party is trying to enforce a contractual obligation, which is subject to the terms of the liability insurance policy, then the third party is bound by the choice of law and the jurisdiction or arbitration clauses as well. On the other hand, if the third party is trying to enforce an independent right given by a statue, then the third party is not bound by the

[171] *The Hari Bhum* [2004] EWCA (Civ) 1598; [2005] 1 Lloyd's Rep 67.

contractual terms of the liability insurance. Therefore, it is important to understand the mechanisms enabling the injured third party to bring direct action claims against the liability insurers. Section 67 of the Finnish Insurance Contract Act 1994 provided that: "*A person who has sustained bodily injury, property damage or financial loss under general liability insurance is entitled to claim compensation in accordance with the insurance contract direct from the insurer if . . . the insured has been declared bankrupt or is otherwise insolvent*."

As it is stated by Lord Justice Moore-Bick in *The Hari Bhum*, the foreign statue i.e. the Finnish Insurance Contract Act 1994 in question was simply intended to enable claimants to enforce the contract of insurance against the insurer in place of the insured. Following same decision, the Court of Appeal in *The Yusuf Cepnioglu* decided that the charterers' right of action against the Club was not an independent right of action. On the contrary, the charterers were trying to enforce a contractual right provided by the Turkish legislation. However, it was argued that the legislation in question required compulsory liability insurance and thus clauses like pay-to-be-paid was not enforceable. In response to that the Court of Appeal stated that while characterising the nature of the right of direct action, the court looks at the content rather than the circumstances in which the right arose. As Hamblen J observed in *The Prestige (No 2)* that most direct-action statutes are likely to confer rights which to an extent follow the contract.[172] Therefore, the foreign statues in *The Hari Bhum, The Prestige (No 2)* and *The Yusuf Cepnioglu* pointed the contract to determine whether there is any right to recover from the insurer, because the injured third party is essentially trying to enforce the same contractual rights as those that could have been enforced by the insured, rather than a new and independent right.

[172] The Prestige (No 2), [92].

The language of the particular foreign statue is important to determine whether the statue in question creates a sperate right of action against the insurer independently from the contract or not. Neither Finnish nor Turkish statue create a new cause of action against the insurer, but simply they allow the injured third party to step into the shoes of the insured i.e. the tortfeasor. Hence, the injured parties were bound by the exclusive jurisdiction or arbitration clauses provided by the insurance policy, even if some of the clauses were not enforceable due to public policy reasons.

Having said that, as Peter MacDonald Eggers QC said, "*one wonders what the foreign direct action statue must provide in order for it not to operate as a statutory assignment such that the right if action is not contractual in nature*".[173] In most jurisdictions, including UK, US, Spain, Finland, Turkey, Norway and Germany, the foreign direct action statue, directly or indirectly, conditionally or unconditionally, enables the injured third party as a statutory assignee to sue the insurer of the tortfeasor in accordance with the insurance contract.

4. Conclusion

Understanding the legal mechanisms that enable a third party to bring a direct action is crucial for understanding the nature and scope of the third party's rights. After conducting an in-depth review of every mechanism allowing third parties to initiate direct action proceedings against insurance companies, it has become evident that the characterisation and jurisdiction will be determined within the legal framework established by the relevant mechanisms granting the right of action.

[173] Peter MacDonald Eggers QC, '*Direct Action Against Insurers and P&I Clubs' in Barış Soyer, Andrew Tettenborn (eds)*, *Maritime Liabilities in a Global and Regional Context* (Informa Law from Routledge 2018) 183.

The distinction between internal and external mechanisms was particularly important. Internal mechanisms often suggest that the contract is the starting point for direct action, but external mechanisms reveal that the journey of direct action extends far beyond this, sometimes even transcending the contract and disregarding its provisions. However, this does not automatically indicate the nature of the direct action. It simply provides us with a roadmap to the essence of the main question: whether the right within the relevant framework is an independent right or one that is contractual in nature.

Although the inherent mechanisms, as the name suggests, typically provide a contractual right, external mechanisms do not always necessarily yield an independent one. Particularly in the previous and current chapters, the paper has examined several foreign statutes which essentially provide for a direct action that is contractual in nature. However, this is highly dependent on the language used and the manner in which policymakers have drafted the relevant statutes. Even though they may all establish a contractual right, some of these statutes afford a stronger standing to the third party than others, while others provide better defences for the insurers.

These findings provide a practical framework for understanding how the source of legal basis in direct actions can influence outcomes in insurance disputes. Therefore, parties involved in a direct action should first closely examine the relevant mechanisms that gave rise to the dispute to understand their rights and obligations, as well as the options available to them to have a better legal strategy. As we move forward, the paper will revisit these sources of direct action, especially in the context of jurisdictional issues.

CHAPTER IV: GOVERNING LAW IN DIRECT ACTION DISPUTES

The third component of the research question, which concerns governing law, is critically important for providing a substantive answer to the research question, because the question whether direct actions are permitted is a question of the applicable law. The governing law, or the applicable law simply refers to set of legal principles that determine how an insurance contract, or a direct-action dispute is to be legally interpreted or resolved. As a result, parties can have a clearer understanding of their rights and obligations once they established the applicable law to a dispute. Consequently, once we have characterised the direct action and understood the mechanisms enabling it, this will naturally lead us to consider the question of applicable law. Therefore, the main objective of this chapter is to examine the ways to identify the applicable law for direct action claims.

This chapter will cover the legal framework concerning the governing law applicable to insurance contracts and tort claims. Since the EU's applicable law framework is integrated into the UK legal system, the chapter will focus on the two main regulations concerning applicable law: Rome I and Rome II. Later, the chapter will address governing law issues in relation to third parties, analysing how applicable law is determined in assignment and subrogation matters, making an analogy at the end with direct action claims. Therefore, the doctrinal research methodology will be adopted to review relevant primary sources and then the relevant cases to analyse how these rules are applied under different factual narratives. As a result, this chapter will revolve around two main questions: How is the governing law for an insurance contract determined and which law is applicable to a tort claim?

1. Introduction

As a result of the harmonisation process of the EU, the legal framework on the appliable law was adopted and integrated into the English common law. Previously there were several different directives providing guidance for appliable law in insurance context, but later they all concentrated into one single instrument, the Regulation (EC) No. 593/2008 of 17 June 2008 (Rome I).[174] It applies to contracts concluded on or after 17 December 2009. On the other hand, the Regulation (EC) No. 864/2007 of 11 July 2007 (Rome II) deal with non-contractual obligations. Therefore, the paper will firstly examine the EU regulations and case law around it.

It is important to note that applicable law framework is less effected by the Brexit, because the UK already incorporated Rome I and Rome II into the English common law via statuary instruments.[175] Therefore, the legal framework provided under these instruments will stay the same after the end of the Brexit transition period. In other words, English courts will still apply them when dealing with appliable law questions. Nonetheless, they are likely to fall back to the common law rules on jurisdiction, which is also stated as proper law of the contract in circumstances where the Rome I does not apply, such as while dealing with an arbitration agreement. Hence, the paper will also refer to the proper law of contract rules time to time.[176]

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[174] For further information on the history of the pre-Rome Convention rules please see: Mance LJ, Goldrein I, Merkin R, Insurance Disputes (3rd edn Informa Law from Routledge 2011), 15.1- 15.20.

[175] Giesela Rühl, '*Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?*' (2018) 67 International & Comparative Law Quarterly 99, 107; Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Court* (1st Oxford University Press 2022), 151; Mukarrum Ahmed, 'Private international law and substantive liability issues in tort litigation against multinational companies in the English courts: recent UK Supreme Court decisions and post-Brexit implications' (2022) 18 Journal of Private International Law 56, 77; Patrick Ostendorf, '*The choice of foreign law in (predominantly) domestic contracts and the controversial quest for a genuine international element: potential for future judicial conflicts between the UK and the EU?*' (2021) 17 Journal of Private International Law 421, 434.

[176] See also Aaron Yoong, '*Of principle, practicality, and precedents: the presumption of the arbitration agreement's governing law*' (2021) 37 Arbitration International 653; Myron Phua & Matthew Chan, '*The Distinctive Status of International Arbitration Agreements in English Private International Law?*' (2020) 36 Arbitration International 419.

The Rome I Regulation is applicable to all *"contractual obligations"* in the case of conflict of laws in commercial and civil matters. Article 7(2) of the regulation gives the parties a right to make a choice of applicable law to their insurance contract in accordance with Article 3 of Rome I, in situations where the risk qualifies as a "*larger risk".* However, the Rome I does not tell us anything about direct action in contractual claims. On the other hand, the Rome II Regulation applies to *"non-contractual obligations"*.

Article 18 of the Rome II states that a person who suffered damage may bring a direct-action claim against the liability insurer of the person *'liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides'.* Hence, this chapter will reference back to the importance of the characterization of direct-action claims in relation to governing law clauses. This is vital because depending on the characterisation of a claim, different conventions will apply to find the applicable law and thus one may get two different answers as a result.[177]

Then, the common law approach will be discussed. Therefore, before considering whether an applicable law clause in an insurance contract is binding on third parties, and before exploring subrogation, assignment, or direct action, this chapter will cover the basic rules of governing law clauses in relation to insurance contracts. This is because the question of whether direct actions are permitted is determined by the applicable law. Therefore, it is important to determine whether to apply the law of the forum or the applicable law to the contract, in accordance with the choice of law rules.

[177] Jenny Papettas, '*Direct Actions against Insurers of Intra-Community Cross-Border Traffic Accidents: Rome II and the Motor Insurance Directives'*(2012) 8 Journal of Private International Law 297, 309.

2. Appliable Law Legal Framework

In every case involving international parties, the first question is to decide what is the appliable law. Sophisticated legal parties usually negotiate and include a governing law in their contract for predictability and to avoid future problem. When they pick a governing law, they actually decide on the substantive law, which will affect their contract. Thus, it needs to be well thought because the rights and obligations of the parties might be different under different legal systems. Hence, having a choice of law will prevent having such uncertainty. They are usually drafted in the contract with jurisdiction and arbitration clauses, which defiantly indicates the intentions of the parties clearly. However, these clauses famously known as midnight clauses and not always drafted properly. Hence, if there is no express choice of law, then the court may try to understand whether there is an implied choice of law.[178] Furthermore, the scope of the Rome I and Rome II is not limited to the EU related matters. Article 2 of the Rome I emphasise this universal application stating that "any law specified by this Regulation shall be applied whether or not it is the law of a Member State." Hence, a decision between Turkish law and Spanish law also falls under the scope of both conventions.

If an insurance contract is made on or after 17 December 2009, Rome I will be applicable to decide the governing law of the contract. As a starting point, parties are always free to choose a governing law which they think fits the purpose of their business regardless of its connection to contracting states as stated in article 3 of the Rome I, in line with party autonomy and freedom of contract.[179] Article 3(1) says "*A contract shall be governed by the law chosen by*

[178] Hugh Beale, *Chitty on Contracts* (34th edn Sweet & Maxwell 2022), Chapter 33, section 3(e).
[179] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (Commission of the European Communities 15.12.2005) https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0650:FIN:EN:PDF accessed 26 May 2023; See also Hugh Beale, *Chitty on Contracts* (34th edn Sweet & Maxwell 2022), Chapter 33, section 3(d); S Kostova, 'Party Autonomy in a Modern Context: A Critical Analysis of its Scope under the Rome I Choice of Law Rules and Some Contemporary Considerations' (Centre for Private International Law, University of Aberdeen, Working Paper Series 1/2023).

the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract." Thus, parties must be really carful and clear with their intention when they draft the governing law clause because there is no room for ambiguity.

Otherwise, the courts will analyse the factual and legal matrix to decide whether there is an implied choice, according to article 4. Article 4 provides alternative interpretations for different contracts. The aim of the provision to find the law of the country with which the contract is most closely connected.[180] In *Compagnie d'Armement Maritime S.A. Appellants v Compagnie Tunisienne de Navigation S.A. Respondents,* for example*,* the court had to decide on the appliable law in a case where a Tunisian company chartered a ship via its broker's English agents from a French Ship owner on a standard English form.[181] In the case, Compagnie D'Armement Maritime SA, a carrier company, entered into a tonnage contract with Compagnie Tunisienne de Navigation SA, a shipping company, for transporting oil between Tunisian ports. Their contract, formed in English, adapted an English language charterparty to suit specific requirements. The contract stated that the law governing the contract would be that of the "Flag of the Vessel carrying the goods." On the other hand, the contract contained an arbitration clause specifying that any disputes would be resolved through arbitration seated in London. The dispute arose when the carrier stopped performing under the contract.

[180] Simon Atrill, "*Choice of Law in Contract: The Missing Pieces of the Article 4 Jigsaw*?" (2004) 53 The International and Comparative Law Quarterly 3, 549–77, 550; See also Symeon C Symeonides, Codifying Choice of Law Around the World: An International Comparative Analysis (1st Oxford University Press 2017), 226. Zheng Tang, "*Law Applicable in the Absence of Choice: The New Article 4 of the Rome I Regulation*." (2008) 71 The Modern Law Review 5, 785–800; Chukwuma Samuel and Adesina Okoli, "*The significance of a forum selection agreement as an indicator of the implied choice of law in international contracts: a global comparative perspective*" (2023) Uniform Law Review 1-29.

[181] *Compagnie d'Armement Maritime S.A. Appellants v Compagnie Tunisienne de Navigation S.A. Respondents* [1971] AC 572.

The dispute was referred to arbitration in London where they had to decide what is the governing law of the contract. The tribunal determined that French law governed the contract. However, this decision was later challenged. The court underlined that although there is a clause for arbitration in London, it is only one of the factors. It is a persuasive one, but not conclusive.[182] When there is no express choice, using contractual interpretation, the court must find the proper law which is closely connected. The court held that it was French law, because on the true construction of the contract, the relevant flag was French.

In *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, Lord Atkin said parties' intention will be determined by the intention expressed in the contract if any, which will be conclusive. However, if their intention is not expressed, then the intention will be presumed by the court from the terms of the contract and the relevant factual circumstances.[183] In this case, the dispute arose in relation to bonds issued in New York by the UK government. After these bonds were released, the US Congress enacted legislation to nullify gold clauses. The key issue in the case was determining the applicable law for these contracts. If it was ruled that New York law applied to the bonds, this would significantly reduce the UK government's financial obligations due to the elimination of the gold clauses. Initially, the UK courts ruled that the bonds were governed by English law, considering the UK government's involvement in the contract, despite strong connections to the US. However, the bonds were issued in the US, denominated in US currency, and primarily set for payment in New York, with their value estimated based on US coins. As a result, the House of Lords overruled the CA's decision and held that the New York law governed the bonds.

[182] Ibid, 605.
[183] *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500, 529; See also Hayk Kupelyants, *Sovereign Defaults Before Domestic Courts* (1st edn Oxford University Press 2018), 126.

It is also common in the insurance market that insurers use the standard forms. These standard forms are usually governed by or associated with certain legal systems and national laws. For example, in the marine insurance context, if a standard form of Lloyd's forms is used as a policy, then it is easy to imply that the English law is the governing law, or if a Norwegian standard form contracts is used, Norwegian law will be the implied law. In *Amin Rasheed Shipping Corp v Kuwait Insurance Co*, for example, the court had to decide whether to apply English law or Kuwaiti law.[184] A company from Liberia, based in Dubai, took out insurance on a ship with Kuwaiti Insurance & Co (KIC). The policy was drafted and signed in Kuwait. The language used in the policy closely resembles the standard template of the English Marine policy detailed in Schedule 1 of the Marine Insurance Act, 1906, commonly known as the Lloyd's Standard Marine policy or the Lloyd's S.G. policy. The vessel was seized and as a result the assured commenced proceedings against the insurer in the UK. The insurer challenged the jurisdiction saying that the Netherlands is the most appropriate forum. This case will be examined in the jurisdiction chapter again, but it is also great to show how governing law is important. In the case, the English court established its jurisdiction based on the governing law. While analysing the factual and contractual narrative, the court held that from the language used in the contract and the terms of the policy itself both point out the English law as the proper law of the contract, because not only the wording was a copy of the Lloyd's S.G. policy scheduled to the Marine Insurance Act 1906, but also the Kuwaiti code of marine insurance was not even in place at the time.[185] Therefore, to understand the appliable law, the general rules is to find the system or place with which is closely connected to the contract.

[184] *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50.
[185] Ibid, 69.

Now that we set the ground rules for the general framework to evaluate the governing law matter, the paper will move into the special provisions allocated for insurance matters, before getting into the third-party related cases.

3. Insurance Contracts and Governing Law- Where to begin?

In case of a direct-action claim, it is likely that the relevant insurance contract has links with more than one jurisdiction. However, it is not easy to navigate around the rules and regimes determining the governing law of an insurance contract. Before moving into detail, it is important to underline that the UK introduced legislation to incorporate Rome I into English Law.[186] Therefore, the principles which will be covered in this chapter will continue to apply after 31 December 2020.

Where do we have to look to understand the applicable law to an insurance contract? Article 7 of Rome I is the starting point to understand the governing law in relation to insurance contracts. In an insurance context it is normally important to understand where the risk is situated. Where the risk is situated is usually the first question to ask. This might be complicated because it might be situated more than one place. However, provided that Rome I is applicable, it is not a problem because article 7(1) states that this provision is also applicable to the risk situated outside EU Member States. This might be a good reason why the UK wants Rome I to continue to apply after the Brexit.[187] The courts already experienced the fact that locating where a non-large risk occurred is not always straightforward. For example, in *American Motorists Insurance Co. (Amico) v Cellstar Corporation, Cellstar (UK) Limited*, the

[186] The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.
[187] Rome I and Rome II will be applicable after the Brexit. They are not depended on reciprocity. In other words, if a contract provides for English governing law, an EU Member State will have to apply English law. On the other side, if an insurance contract provides for French law, then the UK courts will apply the French law.

assured was a Delaware registered company, operating in Texas and took a Global Transportation Policy, providing world-wide insurance cover.[188] The insurer was also in Texas. The court was trying to understand what the governing law of the contract should be. There was more than one governing law in this complicated factual scenario, and there had to be only one proper law according to the English courts. Hence, the court was trying to understand where most of the risk is located, inside or outside the EU. The court held that the risk was predominantly outside the UK and the EU. Therefore, the court decided that the most appropriate forum is Texas. These sorts of policies caused lots of uncertainty for the English courts. However, the problem is solved with Rome I, Recital 33, stating that "*Where an insurance contract not covering a large risk covers more than one risk, at least one of which is situated in a Member State and at least one of which is situated in a third country, the special rules on insurance contracts in this Regulation should apply only to the risk or risks situated in the relevant Member State or Member States*." Therefore, unlike the approach taken in *American Motorists Insurance Co. (Amico) v Cellstar Corporation, Cellstar (UK) Limited*, it is now possible to have multiple law applying separately to the relevant risks. It a good example of why integrating the Rome conventions into the common law was a very strategic and welcomed decision.

Article 7(2) states that "an insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation."[189] The article 7(2) directs us to article 3, which

[188] *American Motorists Insurance Co. (Amico) v Cellstar Corporation, Cellstar (UK) Limited* [2003] EWCA Civ. 206; [2003] Lloyd's Rep IR 295.
[189] It does not apply to reinsurance contract as stated in article 7(1), because insurance professionals do not need any protection. As far as reinsurance concern, article 3 will be applicable.

says the contract will be governed by the law chosen by the parties and the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. In practice, you must begin with Article 7(2) because if the risk is not one of the large risks covered, you would not go to article 3. In relation to direct action claims, i.e., insurance matters related to marine risks are large risks, and thus covered under article 7(2).

What would happen if the claim was in relation to a non-contractual obligation? Where do we have to look then? For example, if the insurer is entitled to avoid the insurance policy because the assured made a fraudulent misrepresentation,[190] prior to conclusion of the contract. Since this is not a breach of a contractual obligation, we should look at the Rome II Regulation[191], which applies to non-contractual obligations. Article 12 states that the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

What would happen if there were no choice of law in an insurance contract? We shall look at article 12, which will send us back to article 7 of Rome I, and then to article 3. If there is no choice of law stated expressly or demonstrated clearly, then we will look at paragraph 2 of article 7(2) of Rome I, which states "To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that

[190] Under English law, this would give the insurer right to avoid the insurance contract under the previous Marine Insurance Act 1906. The Insurance Act 2015 also enables insurers to avoid the contract if the misrepresentation was fraudulent.
[191] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II').

the contract is manifestly more closely connected with another country, the law of that other country shall apply."

Although most of the claims between the assured and the insurer are likely to be contractual in nature, there are also non-contractual claims, which are covered under the Rome II. General rules laid down in article 4 is that "*the law applicable to a non-contractual obligation arising out of a tort shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur*." Rome II has the same provision contained in Rome I, underlying the universal scope of the convention.[192] Therefore, the general rules stated in article 4(1) applies regardless of where the damage occurred, whether inside or outside the EU or the UK. Nonetheless, this broad and ambiguous scope of the article has inherent problems and different interpretations.[193] For clarity, it is important to have a guidance on what constitutes damage for the purpose of this article. In *Florin Lazar v Allianz SpA*, the court concerned with a traffic accident in Italy, which caused the death of a Romanian citizen.[194] The relatives of the victim who did not involve in the accident wanted to commence proceedings to seek compensation for material and non-material damages the father suffered due to losing his daughter in the accident. The material damages to cover the financial loss, assuming that his daughter could have supported him financially if she did not pass away. Therefore, the main issue was to understand whether the definition of damage is also including indirect consequences as well as direct damage. First of all, the wording of the article 2 of the Rome II states damages shall cover any consequences arising out of tort. The court also referenced to recital 17 which states "in cases of personal injury or damage to property, the

[192] Article 3 of Rome II.
[193] See for example: Adeline Chong, '*Characterisation and Choice of Law for Knowing Receipt*' (2023) 72 International & Comparative Law Quarterly 147.
[194] Case 350/14 Florin Lazar v Allianz SpA ECLI:EU:C2015:802.

country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively."[195] As a result, the CJEU stated that the family suffered the direct damage in Italy, where the accident happened, and so the tort is governed by the Italian law.[196] The court held that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union.[197] Otherwise, if the Italian national law decided on this question, the place where the father suffered the loss would have been in Romania.

Article 4(2) is an exception to article 4(1). It states that if the wrongdoer and the victim have the same habitual residence, then the governing law will be the law of the country where they both reside. Article 23 states that for the purposes of this Regulation, the habitual residence of companies is the place of central administration. However, the article has a similar language with the Brussels language for the damages caused by the operation of a branch. In that case, the habitual residence will be the habitual residence of the branch. The problem with this provision is that there is no definition of habitual residence for a natural person. The definition provided in article 23 is for a company or a natural person who is acting for the business.

In *Winrow v Hemphill*, the High Court came up with few crerarites to establish habitual residence for a natural person.[198] The case is about a UK citizen who got injured as a result of a traffic accident in Germany. She has been living in the country for eight years, before the accident, but intending to return to the UK in three years. The tortfeasor was also a UK national, who lived in Germany for almost two years. The second defendant, a company registered in

[195] Ibid, [24].
[196] Ibid, [26]-[29].
[197] Ibid, [21].
[198] *Winrow v Hemphill* [2014] EWHC 3164 (QB).

the UK, was the liability insurer of the tortfeasor. The tortfeasor was driving the car that the claimant was in, and the accident caused by the driver's negligence, as she admitted. Two year later, the claimant commenced proceedings in the UK against both defendants, arguing that the tort was more closely connected to the UK since she suffered the majority of the consequential losses in the UK. Under the article 4(3) the court required to examine where the tort clearly more closely connected to decide which law to apply to assess the damages, English or German law.

The case reviewed various of cases, especially in family law to formulize a guide to the question of habitual residence.[199] As a result the court came up with several factors connecting the tort with the German law, including the place of the accident, where the claimant got injured, the residency of the both parties at the time of the accident, and the fact that she said additional 18 month in Germany after the accident.[200] Although both parties are resident in the UK at the time of hearing and the claimant received some treatment in the UK too, these are not strong enough to connect the tort to the UK. The court provided the long-needed guidance on how to determine a natural person's habitual residence. In relation to the main theme of the thesis, another important outcome of the case is that if there is a direct-action claim, the court must also consider the insurer's habitual residency as well as the tortfeasor.[201]

Once the law applicable to an insurance dispute is established, the rights and obligations of the parties will be determined according to the governing law. Hence, whether they have right to direct action against the insurer will depend on the law applicable to the non-contractual obligation or the law applicable to the insurance contract. Furthermore, the applicable law will

[199] *Re LC (Children)* [2014] 2 WLR 124; *A v A (Children: Habitual Residence)* [2014] AC 1; Case 497/10 *Mercredi v Chaffe* [2012] Fam 22.
[200] *Winrow v Hemphill* [2014] EWHC 3164 (QB), [55]-[63].
[201] Ibid, [22].

also determine whether the insurers of the victim have subrogated rights against the defendant, as stated in article 19 of the Rome II. This is the reason why the characterisation chapter was a critical chapter of this thesis because depending on a claim being characterise as contractual or non-contractual, we will start either with Rome I or Rome II to understand the governing law and the rights and obligations of the parties. After revising the general framework, the paper will now look into governing law issues in relation to third parties.

4. Third Parties

a) Assignment

Assignment is simply transferring the benefits of a contract to a third party.[202] In insurance context, it is really common to see contractual rights being assigned. Especially in relation to a sophisticated commercial transaction, if a party involved in the project takes a loan from a bank, the bank is likely to ask the insured party, who took the loan, to assign the benefits of the insurance to the bank as a security. Therefore, it in its basic form involves a debtor, and assignor/creditor and an assignee. The key question in relation to assignment is what law governs this relationship triangle or whether third parties are bound by the governing law provisions. The paper will now deep dive into case law to show the practical effects of the assignment.

In *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC*[203], Five Star, based in Dubai, gets a loan from an Austrian bank, Raiffeisen Zentralbank Österreich (RZO) to buy a ship, the Mount I. The ship was insured with a French insurance company, but the policy was governed by English law. The loan agreement requires mortgage on the ship as a security.

[202] Hugh Beale, *Chitty on Contracts* (34th edn Sweet & Maxwell 2022), Chapter 33, section 3(j); see also Richard Plender and Michael Wilderspin, *The European Private International Law of Obligations* (5th edn Sweet & Maxwell 2019), Chapter 13.
[203] *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68.

Under the loan agreement Five Start is obliged to assign the benefit of the insurance to the bank. Therefore, Five Star assign the right to receive the insurance proceeds to the bank. Article 14 of Rome I states that "*the relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation*." Hence, the rights in relation to the assignment will be governed by the law applicable to the loan agreement. However, the law governing the assigned claim, i.e., the claim under the insurance contract, shall determine its assignability, i.e., whether it can be assigned or not. In other words, the relationship between the assignee and the debtor (the insurer who owes the money under the insurance contract), e.g., whether the insurer is obliged to pay that money to the assignee, will be governed by the law applicable to the insurance contract, under article 14(2).

In the case, the Mount I had a collusion with the ICL Vikraman. The ICL Vikraman, owned by a group of Taiwanese companies, became total loss. The cargo owners of the ICL Vikraman arrested the Mount I in Malaysia and wanted to sell the vessel to get all the proceeds from the sale. Later, the vessel was sold for USD 3 million, which was held by the Malaysian court until the priority dispute resolved. The problem is that USD 3 million was not enough to cover neither the Australian Bank's claim nor the loss suffered by the owners of the ICL Vikraman. Therefore, both of them attempted to obtain the benefit of the proceeds of claims under an English law marine insurance policy placed by Dubai owners of the Mount I with French insurers. While the Austrian bank claims that it had a first ranking claim as assignee of the benefit of the insurance policy, Taiwanese companies as owners of the cargo on the ICL Vikraman obtained provisional attachment orders in France, where the insurer is located.

English courts, therefore, had to decide which system of law to apply to the claim concerning rival attempts to obtain the benefit of the proceeds.

However, RZO was worried because in Malaysian law, their rights as a mortgagee of the vessel will be put as a lower priority then the cargo interest, unlike English law where the bank's mortgage will rank higher. As a result, the bank wanted the courts to confirm that the assignment is a valid assignment.

The court first had to characterise the claim first to decide which system of laws to apply the claim, because it is not clear whether the effectiveness of an assignment is a contractual or proprietary matter.[204] The bank was arguing that the claim is a contractual claim, and it has to be governed by English law, which is the governing law of the policy. On the other hand, the owners argued it is a proprietary issue and so it has to be resolved by lex situs (the law where the property is located) of the attached debt, i.e., French law.[205]

Since the question of characterisation is not a subject to the national law, the court had to refer to the relevant convention i.e., the Rome I, which deals with contractual issue. The effectiveness of an assignment is covered un article 14 (previously article 12) of Rome I as a contractual matter. The court held that the English law is the law applicable to the insurance contract to determine whether there is a valid assignment according to article 14 of Rome I and concluded that there is a valid assignment. Therefore, the bank was entitled to the insurance proceeds under the English law. In other words, the assignee stands in the shoes of the assignee and has the same rights as the assignor under the insurance contract governed by English law.

[204] The characterisation principals are discussed under the Characterisation Chapter; See also P.J. Rogerson "*The Situs of Debts in the Conflict of Laws – Illogical, Unnecessary and Misleading*" (1990) CLJ 441; M. Moshinsky "*The Assignment of Debts in the Conflict of Laws*" (1992) 109 LQR 591.
[205] [2001] EWCA Civ 68, [19].

This judgment highlights again the important of the governing law and characterisation of a claim to be able to understand the rights and obligations of the parties. Another important question raised in the case was what the law is governing the assignment. The usual starting point is the article 3 of the Rome I, if the parties already chosen a governing law. However, in the absence of a choice of law clause, then article 4 provides several alternative as mentioned in the general framework subsection. Following the language provided in article 14, the court decided that the assignability question should be decided according to the law governing the relationship between the assignor and the assignee.

The CJEU considered the scope of the rules in relation to assignment in *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA (TMCS)*.[206] In the case, a Germany company manufactured and sold goods to a French company, which then later sold it to another French company. The good were damaged and thus the final buyer wanted to bring an action against the German manufacturer directly in France. Here we see again the importance of characterisation, because such a claim under French law can be a contractual claim, while it can only be in tort under many other legal systems including English law. The CJEU, therefore, had to resolve the issue of characterisation to decide whether the last buyer can commence proceedings in France or not, because if it falls under contract then the claim fall under, what was then, article 5(1) of the Brussels, or if it is not contractual then article 5(3). The court decided that it needs to be interpreted indecently, without reference to the national law.[207]As a result, the court held that sub-purchasers are not covered under article 5(1), where there is no contractual relation between them. Even though, the claim is classified as contractual under the French law, it was considered as tortious for the purpose of the Brussels Regulations. Same

[206] Case 26/91 *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA (TMCS)* ECLI:EU:C:1992:268.
[207] Ibid, [10].

interpretation can be adapted in relation to Rome I and it may lead to different results.[208] For example, in relation to an assignment and debt payment scenario, who the debtor must pay or remedies available if it is not paid might change depending on the governing law.

b) Subrogation

Subrogation is another great example where we face similar questions in relation to governing law in third party context. However, assignment and subrogation are fundamentally different. In assignment cases, the claim arises from the relationship of the debtor and creditor, and it is later transferred to assignee. On the other hand, in subrogation cases, assignee steps into the shoes of the creditor in its relationship with the debtor. Since a subrogated action is brought on behalf of the assured, the insurer is bound by the all substantive a procedural duties, including governing law clauses.[209]

For example, in a bill of lading context, a shipowner provided a bill of lading to a shipper, but then an explosion occurs at the load port. The shipper goes to their cargo insurer to get their money. After indemnifying the assured, the insurer will go after the party who caused the damage to recover the amount it paid to the shipowner. In other words, it exercises its subrogated rights and brings a claim against the shipowner under the bill of lading. This is covered under article 15 of Rome I, which states that "*Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the*

[208] Trevor Hartley, "*Choice of law regarding the voluntary assignment of contractual obligations under the Rome I regulation."* (2011) 60 International and Comparative Law Quarterly 29, 42.
[209] Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (1st edn, Oxford Academic 2013), 117.

third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship." [210]

In the previous scenario, the creditor is the cargo owner who has a contractual claim under the bill of lading against the shipowner, i.e., the debtor. The third person who has a duty to satisfy the creditor is the insurer. The law which governs the third person's duty to satisfy the creditor is the law of the insurance contract. Therefore, the governing law of the insurance contract will determine whether and to what extent the insurer is entitled to exercise against the shipowner the rights which the cargo owner had against the shipowner under the law governing their relationship, i.e., the law of the bill of lading. In other words, if the cargo insurance is governed by English law, the English law will determine whether the insurer has subrogated rights against the shipowner. On the other hand, if the governing law of the insurance policy was Greek law, then the Greek law will decide will determine whether the insurer has subrogated rights against the shipowner.

What law governs the insurer's claim against the owner? It's the law applicable to the bill of lading. For example, if bill of lading is governed by Turkish law, then the insurer will have to sue the owner under Turkish law. Furthermore, if there is a jurisdiction provision under the bill of lading, they will be bound by that jurisdiction clause too.[211]

What would happen if the damage were caused by another ship? The subrogated insurer will now bring a claim against the owner of the ship II. However, the cargo owner does not have a contract with the debtor, i.e., the ship owner of the ship II. Therefore, the claim will be in tort,

[210] It is a legal subrogation, not a contractual subrogation. Normally in most states, there will be a right of subrogation by operation of law.
[211] This is covered in the Jurisdiction Chapter; See also *The Front Comor* [2005] EWHC 454; [2005] 2 Lloyd's Rep 257.

rather than in contract. Thus, this claim will be governed by Rome II. First, the general rule is stated in article 4(1) as following: "*Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*" In other words, if the collusion happened in Singapore waters, then the Singapore law will apply to the relationship between the cargo owner and the owner of the ship II because the damage occurs in Singapore. On the other hand, clause 19 of Rome II states "*Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship*." Therefore, the subrogated claim against the owner of the ship II will be governed by Singaporean law.

The general rules, therefore, is that the law governing the insurance contract will determine whether an insurer has subrogation right against the defendant. In *Ergo Insurance SE v If P&C Insurance AS,* the court had to decide whether Rome I or Rome II must be applied to establish the applicable law in a case concerning traffic accident.[212] The facts of the case might look straightforward, but the legal questions arose as a result of the accident is not so much. A tractor unit coupled with a trailer overturned on the road while performing a U-turn in Germany, due to the negligence of the driver, and caused property damage to a third party. ERGO, the Lithuanian insurer of the tractor, compensated the victim under the insurance policy. However,

[212] *Ergo Insurance SE v If P&C Insurance AS* [2016] ECLI:EU:C:2016:40; [2016] I.L. Pr. 451, at [52]–[53]

the trailer was also insured by another insurer and so ERGO sought to get a contribution from the other insurer. As a result, ERGO commence proceedings against the insurer of the trailer in Lithuania. The case later referred to the CJEU from the Lithuanian court to decided two important questions: whether to apply Rome I or Rome II to determine the governing law and which governing law to apply to decide on whether contribution should be made. The answer to contribution question is different under German and Lithuanian law so this case once again shows the importance of determining the appliable law. A contribution can only be sought under the German law but not Lithuanian law, which does not allow the liability to be shared.

The first issue was to establish the relationship among the parties, because ERGO has a contractual relation within the meaning of Rome I with the driver of the tractor, but not with the insurer of the trailer. The obligation to compensate the victim arose out of the road traffic accident, and so it is tortious in nature. Since there is no contractual relation between the ERGO and the other insurer, the Rome II must be used to determine the applicable law governing the relation between them, not the Rome I.[213] On the other hand, the very existence of the obligation to pay to the victim is also regarded as a non-contractual obligation in accordance with the Rome II. Hence, the law appliable to the obligation to pay must be determined under article 4 of the Rome II. Therefore, following the language of article 4, the law appliable to such relation is the law of the country where the damage is sustained. Therefore, the court held that "*it is in the light of the law of the place of the direct harm, in the present case German law, that the debtors of the obligation to compensate the victim and, if appropriate, the respective contributions of the owner of the trailer and of the owner or driver of the tractor unit to the damage caused to the victim must be determined*."[214] The following question is whether the

[213] See also *Pan Oceanic Chartering Inc. v. Unipec UK Co. Ltd. and Unipec Asia Co. Ltd.* [2016] EWHC 2774 (Comm), [152]- [161]; Andrew Dickinson, "*Towards an agreement on the concept of "contract" in eu private international law*?" [2014] LMCLQ 466.
[214] Ibid, [53].

second insurer is under any duty compensate the damages caused to the victim under the insurance policy between it and the assured. Since it is a contractual relationship, the law appliable to determine such obligation shall be determined by Rome I. Hence, article 7 of the Rome I states the law of the country where the insurer has his habitual residence should apply, i.e. Lithuania. Once all these are established then the first insurer can bring a subrogated claim against the second insurer which did not pay in accordance with German law. In other words, German law will determine the allocation of responsibility. The court, therefore, held if the owner of the trailer is liable under German law to compensate the victim, then ERGO could bring a claim against the insurer of the of the trailer, provided that the policy between the ERGO and the tractor also allows it.

This is defiantly highly complicated case with even more complicated factual narrative. However, it is a great example to show how things can get massy and even contradicting judgment might be reached if the appropriate applicable law is not determined correctly in insurance context.

c) Direct Action

A direct action can be simply defined as an action where the injured third party sues the insurer of the tortfeasor directly, rather than suing the tortfeasor who caused the harm.[215] As a result of a collusion, for example, the vessel I becomes a total loss, and the owner of the vessel II becomes insolvent. The subrogated insurer of the cargo owners on the vessel I wanted to sue the owner of the vessel II's liability insurer instead. As we covered in previous chapters, most states will have a foreign statute or different mechanisms giving right to direct action. In this

[215] Steven J. Hazelwood, David Semark, *P. &. I Clubs Law and Practice* (4th Edition, Informa Law from Routledge 2010), 17.1; See also Johanna Hjalmarsson, '*Direct Claims Against Marine Insurers in the English Legal System'* (2010) 18 Asia Pacific Law Review 259, 261; Dicey, Morris & Collins on The Conflict of Laws (16th edn, Sweet & Maxwell, 2022), Chapter 34, Section 4, [34-070].

scenario, neither subrogated insurer nor the shipowner has a contract with the liability insurer of the vessel II. For example, abovementioned, The Third Parties (Rights Against Insurance) Act 2010 give right to direct action in the UK.

If the underlying claim is in tort, Rome II has a provision on direct action, article 18, which states "*The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides*." It strikes a balance between conflicting interest by means of different private international law rules, where there can be various connecting factors to different jurisdictions.[216] However, it also reflects a problem between the English approach and the European approach. For example, this claim might be regarded as a non-contractual claim, while under English law such claim would be regarded as contractual, since it's under the insurance contract.[217]

Under article 18 of Rome II, there is a choice for non-contractual direct-action claims. However, Rome I do not say anything about direct action at all. For example, a shipowner, who has a liability insurance, causes loss to the cargo owner, and becomes insolvent. Here the underlaying claim is under the bill of lading contract. Hence, Rome II does not apply to this and Rome I does not say anything about direct action. What law will apply to the direct action? English lawyers are inclined to think that it has to be governed by the law applicable to the insurance contract. It's likely to be one of the options like Rome II. Thus, it also shows the importance of characterisation in direct-action claims to decide what will be the appliable law

[216] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Noncontractual Obligations (Rome II) (Commission of the European Communities 22/07/2003) https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0427:FIN:EN:PDF#:~:text=The%20purpose%20of%20this%20proposal,in%20the%20Community%20with%20the%20" accessed 19 May 2022.
[217] For more detailed discussion, please see the chapter on characterisation.

of the relevant claim, which I most likely to be decided according to the *lex fori*.[218]However, as covered in the characterisation chapter, even most of the European countries have different way of characterising direct-action claims, which leads to different conclusions.

For example, the famous trilogy, *The Hari Bhum (No 1),* [219]*The Yusuf Cepnioglu,*[220] *The Prestige,*[221]all confirmed that the English courts define direct action as a contractual right based on the insurance contract, regardless of the fact that it may be triggered by a statute.[222] This means that Rome I should apply to decide the choice of law. However, Rome I is silent on direct action claims. Article 7 of Rome I enables parties to choose the governing law as a general rule, but it does not help in this context because expecting a third party to be bound by a contract that they are not party to is a breach of doctrine of privity.[223] *In Keefe v Mapfre Mutualidad Compania de Seguros y Reaseguros SA*, Moore-Bick L.J. raised the same concern and criticism about letting the law applicable to the insurance contract to decide the existence of the right for direct action, since there is no contractual relation between the injured third party and the insurer.[224] Hence, Moore-Bick L.J advocates for the existence of a direct right of action against the insurer to be determined by the law of the place where the wrongful act of the insured occurred.

[218] All the relevant methods of characterisation have been examined in detail under the Characterisation Chapter.
[219] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2004] EWCA (Civ) 1598; [2005] 1 Lloyd's Rep 67.
[220] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu)* [2016] EWCA Civ 386; [2016] 2 All ER 851.
[221] *London Steamship Owners Mutual Insurance Association Ltd v Spain (The Prestige)* [2015] EWCA Civ 333; [2015] 2 Lloyd's Rep 33.
[222] Facts of these cases has been discussed in other chapters.
[223] Vibe Ulfbeck, "*Direct actions against the insurer in a maritime setting: the European perspective*", [2011] LMCLQ 293, 300.
[224] *Keefe v Mapfre Mutualidad Compania de Seguros y Reaseguros* SA [2015] EWCA Civ 598, [2016] 1 W.L.R. 905, [80].

Thus, there are also strong arguments to characterise a direct action as a tort claim in nature. For example, under Scandinavian legal systems, direct action claims are traditionally characterised as a tort claim.[225] It make it slightly easier to decide on applicable law in relation to non-contractual matters, because Rome II has a special provision on direct actions as abovementioned. However, the problem is article 18 of Rome II does not provide a clear road map. It refers to two different set of rules: the law applicable to the non-contractual obligation or the law applicable to the insurance contract. If there is no express choice of law, then the courts will examine both set of rules.

In *Prüller-Frey v Norbert Brodnig, Axa Versicherung AG*, the court had to decide on the applicable law in relation to a direct-action claim brought by an Austrian injured third party against an airline and its German liability insurance provider due to an airplane crash in Spain.[226] The civil liability insurance policy taken by the first defendant to cover the aircraft was subject to German law and contained a jurisdiction clause in favour of German courts. The claimant brought a direct-action claim in Austria based on Austrian law, which gives right to direct action against an insurer. Article 18 also allows direct action if the law applicable to the non-contractual obligation or the insurance contract so provided. The defendant challenged the jurisdiction of the Austrian court, arguing that Spanish law should be the appliable law and neither German nor Spanish law provided for a direct-action process. The CJEU, therefore, needed to decide whether the law applicable to non-contractual provided for direct action, but parties to insurance contract agreed on a different governing law.

[225] Svante O Johansson, '*Jurisdictional issues connected with direct actions against P&I Clubs under Scandinavian and European law'* (2004) 10 JIML 71, 76.
[226] Case 240/14 *Prüller-Frey v Norbert Brodnig, Axa Versicherung AG* ECLI:EU:C:2015:567, [2015] 1 W.L.R. 5031.

Advocate General Szpunar pointed out at point 75 of his opinion that Article 18 of Rome II does not constitute a rule in relation to the substantive law applicable to the determine whether the insurer or the tortfeasor is liable or not. It merely creates a mechanism enabling the third party to bring a direct-action claim where either the law applicable to the non-contractual obligation or the law applicable to the insurance contract gives right to direct action.[227] As a result, the court held that "*The right of the person who has suffered damage to bring a claim directly against the insurer of the person liable to provide compensation does not affect the contractual obligations of the parties to the insurance contract concerned. Similarly, the choice, made by those parties, of the law applicable to that contract does not affect the right of the person who has suffered damage to bring a direct action in accordance with the law applicable to the non-contractual obligation*."[228] Hence, the court decided that the injured third party can bring a direct action claim on the ground that the law applicable to the non-contractual relation allows a direct action claim, regardless of the fact that the law applicable to the insurance contract does not allows such actions. This is indeed a very welcomed direction by the CJEU to make sure that the injured third parties are not left without a remedy.

5. Conclusion

This chapter proved that understanding the applicable law in such complex cross-border transactions is not always straightforward. It is even more difficult when the contracting parties do not expressly state the governing law of the contract. Especially in the direct-action context, it becomes even more chaotic due to the international nature of the marine insurance disputes. Therefore, this chapter has been pivotal in unravelling the complexities surrounding the governing law in insurance contracts and direct-action disputes.

[227] [2015] 1 W.L.R. 5031, 5053.
[228] Ibid.

By exploring the legal principles involved and their applications in various scenarios, this chapter demonstrated how courts handle complex governing law questions when faced with uncertainties. This exploration was particularly important as the governing law of a contract might not always align with the law governing the dispute resolution clause or the action itself. Therefore, the primary objective of the chapter was to show that once an action is characterised, identifying the applicable law within the relevant legal framework, i.e. Rome I and Rome II, may become simpler. However, as noted in the characterisation chapter, it is not always straightforward to categorise an action as either contractual or tortious in nature.

Besides, it is difficult to say that Rome I and Rome II have provided the much-needed clarity and certainty. It is clear that the characterisation of a right of direct action against the insurer is important to determine the law applicable to the claim between the third party and the indemnity insurer. This is because the existence of such a direct-action right is directly linked to the applicable law. The main problem is that English courts characterise direct action claims as contractual. However, Rome I remains silent on direct action claims, and there is no proper guidance on deciding the applicable law in this context. Conversely, treating these claims as contractual may not be the right interpretation since there is no contractual relationship between the insurer of the tortfeasor and the injured third party. If a direct-action claim is characterised as tortious, then Article 18 of Rome II provides better guidance for claimants pursuing indemnity insurers. Nonetheless, since the characterisation might change due to the surrounding facts of a case, the applicable law for a direct-action dispute will consequently need to be determined on a case-by-case basis as well.

CHAPTER V: JURISDICTIONAL LEGAL FRAMEWORK FOR INSURANCE DISPUTES AND WEAKER PARTY PROTECTION

The jurisdictional matter is the last component of the research question: whether a third party initiating a direct action against an insurer is bound by a dispute resolution clause agreed upon between the insurer and the insured. Therefore, the main objective of this chapter is to identify the relevant jurisdictional framework and protections provided under special circumstances for the weaker parties.

This follows the natural progression of the thesis from the basic principles of contract law to characterization, then to direct action mechanisms and governing law, and finally building up to the last, but most important, element of the research. After revising all the previous chapters, the thesis finally brings us to the moment where we have enough information to dissect the jurisdictional component of the research question. Therefore, this chapter will try to answer questions like: Should third parties be bound by dispute resolution clauses and, if not, why are we providing them with such jurisdictional protections, commonly referred to as 'weaker party protection'?

The most challenging part of this thesis is addressing the ambiguity in the legal framework following Brexit. As a result, to provide a comprehensive coverage of all possible jurisdictional issues, this chapter will explore the special jurisdictional provisions provided under both EU and UK legal frameworks. It will then delve into the specific protections under each framework.

The genesis of weaker party protection originates from EU regulations, but the concept persists post-Brexit. Therefore, analysing EU law before examining current UK decisions is essential

for both chronological and analytical purposes. To achieve this, the thesis will adopt both doctrinal research and comparative methodology. This approach will first cover the literature on jurisdictional provisions and then examine recent judgments to understand the circumstances under which a third party bringing a direct-action claim against a P&I club should be bound by the jurisdiction clauses in an insurance policy, and when they can claim weaker party protection to sue a P&I Club in their domestic courts. Finally, the chapter will address anti-suit injunctions, discussing their applicability in scenarios where it is established that one of the parties decides to commence proceedings in a jurisdiction other than the one agreed upon.

1. Introduction

Both in Anglo-American and civil law jurisdictions, it is common to have rules and regulation to strike a balance between counterparties of a contract to protect the so called "weaker party". The reason behind such protection is the fact that parties might not have equal information, economic or bargaining power under some circumstances.[229] Traditionally, it is more likely to see those protective mechanisms in employment or consumer contracts, where one party has more bargaining power than the other. The essence of such protection is to avoid the more advantages party exploiting its less fortunate counterparty.

This principle has been one of the key principles of European contract law and evolved in the past century.[230] On the other hand, this overreaching new principle might be limiting and even

[229] Giesela Ruhl, '*The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy'* (2014) 10 J. Priv. Int'l L. 335.
[230] Ewoud Hondius, *The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis* (2004) 27 J Consumer Pol'y 245; Also see Brigitta Lurger, Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union (Springer Verlag 2002); Jan-Jaap Kuipers, '*Bridging the Gap: The Impact of the EU on the Law Applicable to Contractual Obligations*' (2012) 76 Rabel Journal of Comparative and International Private Law 562.

contradicting with another key principles and concepts such as freedom of contract, party autonomy and legal certainty. The biggest handicap of the concept is to identify who is the weaker party and the limits of this protection. In some circumstances, it becomes more than protecting.[231] As a result, the weaker party might find itself in a more favourable position than what is contractually provided. Further discussions and references for European literature can be found in Ewoud Handius's article and Brigitta Lurger's book, where they discuss the development of the concept in the European contract law and their respective jurisdictions.[232] However, we will primarily focus on insurance and International private law in this chapter.

An insurance contract is a typical example of such unique circumstances where there is a huge imbalance between the counterparties i.e., the assured and the insurer. In other words, parties do not have equal bargaining power. Although both parties are intending to create a legal relation, the assured has limited input during the formation of the insurance contract. The formation of the insurance agreements has changed in the last decade, and it's outside the scope of this paper.[233] However, it is common almost in all types of insurances policies that parties are likely to use basic standard terms as a starting point, where the insurers have the freedom to dictate their terms to the assureds within the regulatory framework. As a result, the classical view of the legislators is to create rules and regulations to protect so called weaker party, the assureds, in this scenario.

Furthermore, the weaker party protection even becomes more complicated in third party context. For example, a third party might want to go after the liability insurer of a tortfeasor who caused harm to the third party. In that scenario, would that third party get the same rights

[231] Elizabeth B Crawford and Janeen M Carruthers, '*Connection and Coherence Between and Among European Instruments in the Private International Law of Obligations'* (2014) 63 ICLQ 1, 21.
[232] Ibid 145.
[233] Colinvaux's Law of Insurance (13th Sweet & Maxwell 2022), section 4, para 1-059.

and protections against the liability insurer? Is that third part automatically considered as a weaker party? What if that third party is a multi-million-dollar company who had cargoes on a ship which was damaged by another ship and now suing the liability insurer of the other ship? Would the rights of the third party be any different if they were fish farmers from a little village in Spain where a vessel registered in Sweden caused environmental disaster and now the fish farmers try to sue the P&I club of the vessel, based in England, which caused the pollution?

The weaker party protection also extends into the international private law sphere as a jurisdictional defence. For example, the insurer in the multi-million-dollar example might have an exclusive jurisdiction agreement in the insurance policy. When the tortfeasor, i.e., the ship which caused the harm to the cargo of the multi-million-dollar company, declared bankruptcy, the multi mullion company has no option but go after the liability insurer. Imagine that the multi-million-dollar company is based in Germany, the tortfeasor is a shipping company registered in France and the insurer is based in Norway. The tortfeasor and the insurer had an exclusive jurisdiction clause stating any disputes to be resolved in the High Court of England and Wales. Can the multi-million-dollar company sue the liability insurer in Germany? If they can, would not that be a breach of the jurisdiction clause provided in the insurance policy? Can we truly say that the multi-million-dollar company is a weaker party that needs protection? Comparing it with the fish farmer example, is it fair to say that the legal position of the fish farmer in Spain is the same with the multi-million-dollar company in Germany. Considering the genesis of the weaker party protection, it seems disproportionate to say that they both should have the same weaker party protection. One must think inherent implications of such broad interpretation and application of the weaker party protection.

The protection provided for these so-called weak parties are not always very well defined and might go beyond the intended purposes so much that it contradicts with other fundamental contract law principles previously mentioned. Hence, it is vital to understand the legal basis of the weaker party protection to analyse the scope of this principle and understand who should benefit from this principle. If we gave the same protection to the multi-million-dollar company and the fish farmers, previously mentioned, it would put a huge economic pressure on the insurance market by exposing insurance companies to being sued in unexpected jurisdictions. In other words, allowing any third party to rely on weaker party protection as a defence will result in lengthy and costly jurisdictional challenges and then additional legal costs of litigations in unanticipated jurisdictions. It would increase insurers' risk analyses and thus the premiums. Eventually, the economic burden will be transferred as a premium to assureds in the end. Therefore, understanding the real purpose of the weaker party protections and maintaining the legal predictability is vital for all parties involved. The legal predictability for the application of the weaker party protection is even more important for the third party itself to identify the right jurisdiction to commence the proceedings. Otherwise, they are also likely to be exposed to inflated legal costs or even risk of being time bared. Briefly, it is important to mention that that the 2005 Hague Convention on the Choice of Court Agreements will not be covered in this thesis. It is outside the scope of this paper. On the other hand, the 2005 Hague Convention on the Choice of Court Agreements has no provisions dealing with direct action, so the English courts will apply the common law rules anyway.

2. Genesis of the Weaker Party Protection

While all EU Member States have different types of national mechanisms to protect the weaker parties from being exploited in their respective legal systems, the weaker party protection has

a more central role in European contract law and European private international law.[234] One of the main reasons behind the genesis of the weaker party protection in international private law is to avoid the stronger party, i.e. the insurer companies in this context, to dictate combination of governing law and jurisdiction clauses which might deprive the weaker party of any protection.[235] This is also vital for this thesis because depending on the jurisdiction, an assured or a third party might face different defences when they bring their claims against the insurance company.

For example, the focal point of this thesis is the direct-action claims brought against the P&I Clubs and paid to be paid clauses are the most likely defences against third parties suing the P&I Clubs. This defence will be analysed in the following chapters in detail. In simple terms, the pay to be paid rules states that the liability insurer is only liable to pay if the assured discharged its liability to the injured. However, the assured, i.e., the tortfeasor might get bankrupted due the incident. As a result, the injured third party might want to sue the liability insurer directly. Due to the pay to be paid clause, the liability insurers could avoid paying the injured parties. However, different jurisdictions have different approach on the validity of such clauses. In some jurisdictions pay to be paid clauses are unenforceable due to public policy reasons. Hence, an insurer is likely to dictate to have a jurisdiction clause where pay to be paid clauses are enforceable and likely to avoid other jurisdictions where they might end up being sued for a something which could have been avoided in another jurisdiction.

Therefore, there has been a gradual progress in European international law to provide specific rules and exceptions to the general principles to protect the weaker parties. The Brussels

[234] Martijn W. Hesselink, *Weaker Party Protection', Justifying Contract in Europe: Political Philosophies of European Contract Law* (Online edn, Oxford University Press 2021), 272.
[235] Symeon C. Symeonides, *Party Autonomy in Contract Conflicts', Codifying Choice of Law Around the World: An International Comparative Analysis* (1st edn Oxford University Press 2014), 153.

Convention 1968 was the first legal instrument in the Brussel Regime provided protective measures in favour of the insured parties as well as other weaker parties such as consumers and employees.[236] Later, the Brussels I Regulation (EC No 44/2001), which is replaced by the Brussels I Regulation ((EU No 1215/2012) (recast), and the Rome I Regulation enhanced the position of the weaker parties by providing more detailed legal framework and protection to the weaker parties. As it will be discussed in detail later, these regulations not only provided the protection but also put the weaker parties in a more favourable position. In other words, a weaker party is not only protected against any jurisdiction clauses which might deteriorate its rights, but also, they are given more jurisdictional options. The next part of this chapter will analyse the related EU regulations in detail to explain the current legal framework for insurance disputes and protections provided to third parties. Later, this chapter will deal with the existing framework under English law to understand the relevant jurisdictional framework for insurance disputes after 31 December 2020. It is important to examine both legal frameworks because most of the insurance disputes are likely to have cross boarder elements. In that case, it is necessary to understand which set of rules and regulations will be used to resolve the existing insurance matters and how the protections provided to third parties might change under different legal systems.

3. The EU Legal Framework

a. General Legal Framework

The key question in an insurance dispute involving international parties is to identify the right choice of forum. The regulatory framework dealing with jurisdiction issues have been examined in previous chapters for other aspects of insurance disputes. In this chapter, the

[236] Elizabeth B Crawford and Janeen M Carruthers, '*Connection and Coherence Between and Among European Instruments in the Private International Law of Obligations'* (2014) 63 ICLQ 1, 19.

general legal framework will be discussed to compare them with the alternative jurisdictional protections provided to third parties in insurance disputes. As previously mentioned, the EU has been harmonising the international private law rules within the EU. The Recast Regulation, which takes effect on or after 10 January 2015, is the key and most recent primary instrument to determine the jurisdiction between EU members.

It is important to underline from the beginning that article 1(2)(d) of the Recast states that this regulation "shall not apply to arbitration."[237] Therefore, if there is an arbitration clause within the insurance policy, it can be used as a defence by an insurance company when they are being sued by a third party, trying to bring a claim in a local court. This is one of the reasons why this thesis is important because if there are jurisdictional uncertainties around the effects of jurisdiction clauses, then the insurance companies, i.e., P&I clubs in our context, will prefer having arbitration clauses in their policies to avoid being sued in unexpected jurisdictions. The similar exception was also included in the predecessor of the Recast.

The Recast just added the recital 12 to explain the scope of the arbitration exception. Paragraph 1 of Recital 12 confirms that courts in each member state have the right to refer parties to arbitration, stay or dismiss proceedings, and examine the validity of an arbitration agreement.[238] Furthermore, paragraph 2 clarifies that a member state court does not have to wait for another court's decision on the validity of an arbitration agreement, even if the matter was referred to the other court first.[239] As a result, there have been a rapid increase in number

[237] Nicholas Legh-Jones, "*MacGillivray on Insurance Law*", (15th edition, Sweet & Maxwell, Cornwall 2022), [13-007].
[238] "This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law."
[239] "A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid

of contracts adding arbitration clauses to avoid the uncertainties caused by recent legal and political developments, which will be briefly mentioned later.

Section 3 of the Recast, from article 10 to article 16, contains special jurisdictional rules for matters relating to insurance, providing alternative jurisdictions to commence proceedings against an insurer. The purpose of these special provisions is to protect the weaker parties from jurisdiction clauses providing better standing point to insurers. Recital 18 states "*In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules*." Therefore, insurers as the strong parties cannot rely on these provisions. Article 14 (1) states that "*Without prejudice to Article 13(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary*." In other words, these special rules can only be triggered by the weaker parties.

The Recast, unlike its predecessors, also has article 26 (2) to make sure that if a weaker party, as the defendant, enters appearance before a court of Member State, the court, before assuming jurisdiction, must ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.[240] Otherwise, the court will have jurisdiction if the third part submits to its jurisdiction, provided that another court does not has exclusive jurisdiction by virtue of Article 24.[241] This is a significant addition to the provision because article 24 of the 2001 Brussels Regulation only states that "*Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before*

down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question."

[240] Article 26 (2) of the Recast.

[241] The rules governing the appearance will be determined according to the *lex fori*. For example, if the claimant submits to the English courts, the English court may have jurisdiction in accordance with CPR Part 11.

which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22."[242] Otherwise, the weaker party could have submitted to the jurisdiction by simply entering an appearance. Therefore, article 26 (2) of the Recast introduced additional layer of protection to make sure that weaker parties are not only protected from the exclusive jurisdiction clauses but also, they were aware of their right to contest the jurisdiction. It is indeed a very important nuance because article 26(2) can simply save time and limited resources of weaker parties by eliminating risk of litigation in an unfavourable jurisdiction.

Therefore, after making sure that the case is not under arbitration exception and the defendant did not enter appearance before a court of a member state, the next stage is to consider the special rules provided under section 3 of the Recast for matters relating to insurance. The main questions are which proceedings are considered as matters relating to insurance and who is a weaker party which can trigger these special rules in a matter relating to insurance? Thus, the identity of the claimant is crucial to understand which special rules to apply in a matter. After answering these questions, the paper will also analyse what the additional mechanisms are provided by the Recast in relation to defendants that are not domiciled in a Member State.

b. **Who is protected by these special rules?**

Before moving into the special protections provided from article 10 to article 16, it is important to establish who can benefit from these provisions. The general understanding is that these provisions provide protection to the policyholder, the insured or a beneficiary as stated in article 11(1)(b). However, the Recast is silent about the definition of these three categories of

[242] Reg 44/2001 Article 24, Lugano Convention article 24.

person. Schlosser Report indicates that the policyholder is the original contracting party to the insurance contract, i.e., the assured who signed the policy with the insurer, and not the assignee of the policy holder.[243] It follows that the heir of the policyholder, however, might be protected. Therefore, characteristic of the policyholder is important to understand whether the relevant party is protected by the special provisions or not.

Later, the CJEU made an addition to group of people protected under section 3 of the Recast, which is also essential for this thesis, because it is the injured third parties. In *FBTO Schadeverzekeringen NV v Odenbreit*, [244] the claimant, who was domiciled in Germany, had a traffic accident in Netherlands. The claimant wanted commence proceedings against the insurer of the driver in Germany, the court of the place of his domicile, relying on article 9 and 11 of the 2001 Brussels Regulation. However German courts declined the jurisdiction based on the fact that article 9(1)(b), what is now article 11(1)(b), only apply to a claim under the policy, and not to a claim in tort. However, the CJEU stated that: "*Thus, to interpret the reference in article 11(2) of Regulation No 44/2001 to article 9(1)(b) of that Regulation as permitting the injured party to bring proceedings only before the courts having jurisdiction under that latter provision, that is to say, the courts for the place of domicile of the policy holder, the insured or the beneficiary, would run counter to the actual wording of article 11(2). The reference leads to a widening of the scope of that rule to categories of claimant other than the policy holder, the insured or the beneficiary of the insurance contract who sue the insurer. Thus, the role of that reference is to add injured parties to the list of plaintiffs contained in article 9(1)(b).*"[245]

[243] Schlosser Report, page 117, [152].
[244] Case 463/06 Odenbreit v FBTO Schadeverzekeringen NV [2008] 2 All ER.
[245] Ibid, [26].

Therefore, the special protections provided under section 3 also applies to injured third parties, since article 11(2), which is now article 13(2), clearly extend the jurisdictional protection to injured third parties as an addition to ones stated in article 11(2) of the 2001 Brussels Regulation. On the other hand, a contrary decision would have been against the general motive behind the Brussels Regulations, since the whole purpose of the special jurisdictional provisions was to protect the weaker parties. Hence, the injured party was allowed the bring action against the defendant in their own jurisdiction. In other words, the injured third parties can trigger the special jurisdictional rules when they commence proceedings against P&I Clubs in their own jurisdiction, rather than the jurisdiction where the insurance company is domiciled. There are, therefore, two main criteria for an injured party to bring direct action. First, the relevant regulatory framework should allow direct actions. Secondly, the insurer of the tortfeasor must be domiciled in a Member State.

The CJEU is really strict about who can benefit from these special protections and does not extend it to groups for whom that protection is not justified. Nonetheless, the regulations are not fully clear about which group of people can benefit from protections. It seems like the policy makers left this subject to be discussed and analysed case by case. The definition and the scope of weaker party protection as well as who can be considered as weak party will be discussed later in this chapter. The special rules provided under Section 3 of the Recast, therefore, can be triggered by a policyholder, an insured, a beneficiary or an injured third party who brought a case against the insurer of the tortfeasor, i.e., the insured. However, the domicile of the parties is important to understand whether they can rely on these provisions. Once we established the claimant's domicile and whether they are entitled to rely on the special jurisdictional protections, we need to make sure that their claim is a matter relating to insurance.

c. Matters Relating to Insurance

In determining whether a claim falls under the special jurisdictional protections provided in section 3, the first question which arises is whether the claim is a matter relating to insurance. This section will try to analyse what kind of claims can be considered as matters relating to insurance and whether these rules apply to actions brought by insurers or between the insurers.

The most recent guidance was given by Mr Justice Burtcher in the famous Prestige Saga. As mentioned in previous chapters, the underlying dispute arose as a result of a marine pollution occurrence in coastline of Spain and France. The Prestige was insured by the Club against pollution liability. After the incident, there were criminal and later on civil claims brought by Spain and France. Meanwhile, the Club commenced arbitration in London and got a favourable award stating that Spain and France were bound by the Arbitration clause. The Club, later, brought an Award Claim against France and Spain for their failure to accept the arbitration award and a Judgment Claim against France and Spain for failing to abide by the Court of Appeal judgment enforcing the award.[246] Defendants contested the jurisdiction of the English court.

The first issue is to understand whether the claims fall under the arbitration exception as discussed previously.[247] If it does, then the common law will apply. The court held that since the Judgment Claims are based on obligations said only to arise by virtue of the judgments, not the first arbitrations or the awards, the essential subject matter of the Judgment Claims was not arbitration.[248] In other words, it was held that the Recast will apply to the Judgment Claims in

[246] *The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain* [2020] EWHC 1920 (Comm).
[247] See also Trevor Hartley, '*Arbitration and the Brussels I Regulation – Before and After Brexit'* (2021) 17 Journal of Private International Law 53.
[248] Ibid, [96].

the case. As a result, the court had to decide whether the Judgment Claim was a matter relating to insurance contract and whether this claim was within the special jurisdictional provisions provided in section 3 of the Recast.

Spain and France were arguing that the Judgment Claims are related to insurance because these claims are raised as a result of the direct-action claim brought against to them under the relevant statue based on the insurance contract between the Club and the shipowner.[249]On the other hand, the Club argues that the Judgment Claims are about breach of obligations to abide by judgments in English court proceedings.[250] Thus, these are not insurance disputes.

Both parties referred to *Aspen Underwriting Ltd v Credit Europe Bank NV*, where the insurer made payments under a settlement agreement to the bank which the ship had been mortgaged and assignee under the hull and machinery policy.[251] Later, the underwriters brough an action against the owners and managers and the bank in tort and unjust enrichment because it turns out that the ship was scuttled. The court had to decide whether underwriters' claims were matters relating to insurance within the section 3. If the claims considered as matters relating to insurance under section 3, then the underwriters can only commence proceedings in the Netherland, i.e., where the bank is domiciled, not in the English courts. It was argued that the underwriter's claims, in the Aspen case, were not about enforcement of a contractual rights or liabilities under the insurance contract. Instead, the claim is about a payment as a result of the Settlement Agreement, and so it was not a matter relating to insurance.[252]

[249] Ibid, [115].
[250] Ibid, [116].
[251] *Aspen Underwriting Ltd v Credit Europe Bank NV* [2020] 1 Lloyd's Rep 520; [2020] Lloyd's Rep IR 274.
[252] Ibid, [55].

In the Aspen case, Mr MacDonald Eggers QC referred to *Brogsitter v Fabrication de Montres Normandes EURL*, [253] where the court was analysing the meaning of matters relating contract, and submitted that matters relating to insurance encompasses claims where the purpose of the claim is to enforce a contractual right under the insurance policy.[254] On the other hand, Mr Steven Berry QC, instructed the bank, disagreed with this narrow approach and argues that the natters relating to insurance should be interpreted broadly. He referred to *Profit Investment Sim SpA v Ossi Case* and submitted that a matter relates to insurance, if there is no claim without the existence of insurance.[255] Mr Justice Teare followed the same thinking and underlined that fact that even though the case is about the Settlement Agreement and not about enforcement of a contractual right under the policy, the principle issue was the misrepresentation made about the loss of the vessel under the policy.[256]In other words, the underlying issue depended on the question of whether the underwriters were liable under the insurance contract or not. Thus, the court held that the subject matter of the claim relates to insurance and so falls under the special provisions. Later, the Supreme Court agreed with Mr Justice Teare. Lord Hodge, in the Supreme Court, also added that the underlying principle behind the section 3 is to deal not only with the rights of the contracting parties, i.e., the policyholder and the insurer, but also the rights of the non-contracting parties such as beneficiaries and injured third parties.[257] Furthermore, Lord Hodge also concluded that if we apply the Brogsitter test in the Aspen, the requirements of the test would be met anyway because the underwrites claim is that there has been an insurance fraud, and such breach naturally means a breach of the insurance contract since the obligation of utmost good faith is not only applicable in the pre-contractual stage but also applies afterwards according to *Versloot Dredging BV v HDI Gerling Industrie*

[253] Case 548/12 Brogsitter v Fabrication de Montres Normandes EURL [2014] QB 753.
[254] [2020] 1 Lloyd's Rep 520; [2020] Lloyd's Rep IR 274, [58].
[255] Profit Investment Sim SpA v Ossi Case C-366/13 [2016] 1 WLR 3832, [55].
[256] Ibid, 65.
[257] [2020] UKSC 11, [2021] AC 493, [36].

Versicherung AG (The DC Merwestone) [2016] UKSC 45, [2017] AC 1, para 8 per Lord Sumption.

Later in the Prestige Saga, Mr Justice Butcher formulated the following standards to assist the courts when deciding whether a claim involves a "matter relating to insurance".[258] Firstly, Section 3 of the Recast should not be interpreted restrictively. Secondly, 'matters relating to insurance' are not limited to matters relating to insurance contracts. Thirdly, assessment of the rights of individuals who were not parties to an insurance contract, including beneficiaries and injured third parties in the context of liability insurance, can be considered as matters relating to insurance. Fourthly, when considering whether certain proceedings are or involve matters relating to insurance, it requires an evaluative judgement. Merely including insurance forms part of the history or pathology of a claim does not necessarily make it a matter relating to insurance. Similarly, the presence of other legal connections between the parties does not necessarily prevent a claim from being classified as a matter relating to insurance. This was established in The Atlantik Confidence, where the Settlement Agreement was at question. Lastly, the court's evaluation should focus on whether the proceedings can be fairly and sensibly considered matters relating to insurance based on substance, reality, and common sense.

In other words, Mr Justice Butcher formulation suggest evaluating the nature of the cause of action while deciding if a claim is a matter relating to insurance. The same approach was also suggested by the Advocate General Bobek in *Landeskrankenanstalten-Betriebgesellschaft – KABEG v Mutuelles du Mans Assurance – MMA IARD SA*.[259] However as pointed out by the

[258] [2020] EWHC 1920 (Comm), [122].
[259] Case 340/16 *Landeskrankenanstalten-Betriebgesellschaft – KABEG v Mutuelles du Mans Assurance – MMA IARD SA* [2017] I.L.Pr 31, [26].

court in the Prestige (Nos. 3and 4), although it is important to take int account the cause of action while determining whether a claim is a matter relating to contract, it is equally important to make an evaluative judgment based on the overall substance and reality of the matter, using common sense.[260] Applying these principles, the court, in the Prestige, held that the Judgment Claims should be considered as matters relating to insurance. Although the Judgment Claims, in substance, are claims to undo the consequence of the Spanish Judgment, which is undoubtedly a matter relating to insurance,[261] they simply exist because the Spanish court decided that the P&I Club is liable for the pollution damage.

As a result, while assessing a claim to understand whether it is a matter relating to insurance or not, one must start with Mr Justice Butcher formulation and make a decision based on substance, reality, and common sense. There are also some English Court cases which considered the meaning of "matters relating to insurance" such as *Jordan Grand Prix Ltd v Baltic Insurance Group* [1999] 2 AC 127, *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* (No 2) [2000] 1 Lloyd's Rep 129 and *Mapfre Mutualidad Compania de Seguros y Reaseguros SA v Keefe* [2016] Lloyd's Rep IR 94. Unlike the CJEU, the English court had a narrow interpretation and focus on mere factual connection between the claim and the policy. However, these three cases are English cases, even though they considered the phrase matters relating to insurance, the true meaning of this phrase does not depend on the interpretation of the national courts.

This section clearly shows why the policy makers chose specific wording while drafting the special provisions. It is matters relating to insurance, rather than 'matters relating to contracts

[260][2021] EWCA Civ 1589, [135].
[261] Spain and France brought direct action claims against the liability insurer.

of insurance'. If the policy makers intention was to narrow down the wording, they could have done that, but instead they wanted to have a broader scope for this provision. Otherwise, the policy makers could opt for wording akin to that in section 4 or 5 of the Recast, which refers to jurisdiction over consumer contracts and jurisdiction over individual contracts of employment. However, such wording would indeed narrow down the scope of the special provision and the group of people who could benefit from section 3. Especially, this would affect the direct-action claims against insurers, because not all direct actions are contractual in nature. As a result, some of the injured parties, bringing direct actions against insurers, would not rely on the protections provided under section 3 and thus they would have limited jurisdictional choses. Thus, they would end up in defendant's jurisdiction or the jurisdiction stated in the insurance contract, which would increase the cost of litigation for the injured party.

Once it is established that the party trying to rely on the special provisions is entitled to special protections and their claim is a matter relating to insurance, the next question will be where the insurer is domiciled. It is important to establish that the insurer is domiciled or deemed to be domiciled in a Member State. Otherwise, the claimant has to fall back to their national laws to be able to the defendant in their own jurisdiction.

d. Where is the insurer domiciled?

i. Domicile

In the Brussels regime, the domicile of the parties is one of the main indicators to understand which set of rules apply to a dispute. As a result, article 10 of the Recast states that "*In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.*" According to Article 6, if the defendant is not domiciled in a Member State, the jurisdictional rules of each Member State, i.e., the national law will be

applicable, subject to subject to Article 18(1), Article 21(2) and Articles 24 and 25. This means that if a defendant is not domiciled in a Member State, the special provisions do not apply. Therefore, if a client based in France brings a claim against a P&I Club, domiciled in a non-Member State, such as Turkey, then the national law of France will be applicable to the dispute, not the Recast. Nonetheless, it does not mean that the matter falls outside the EU legal framework. Article 6 merely allows national law to govern as part of the overall EU regime on jurisdiction.[262] This is really important because it means the decision give based on the national law will still be enforced and recognised in other Member States.

On the other hand, the same regulation provides a broader and more favourable additional protection for consumer contracts. Article 18 (1) of the Recast states " *A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled*." Therefore, consumers are given additional right to commence proceedings in the courts of a Member State where they domicile, even if the defendant is not domiciled in a Member State. Article 17(1) defines a consumer as someone who concluded a contract for a purpose which can be regarded as being outside his trade or profession. Does it mean an assured can rely on this additional protection provided only for consumers? As Trevor Hartley suggested most of the insurance contracts fall within the definition of a consumer contract, such as a life insurance policy.[263] Hence, there is a possibility that an assured, who qualifies as a consumer according to article 17(1), might rely on the additional protection provided under the special rules if the defendant is not domiciled in a

[262]Richard Fentiman, *International Commercial Litigation* (2nd edn Oxford University Press 2015), 294.
[263]Trevor Hartley, *Civil Jurisdiction and Judgements in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (2nd Oxford University Press 2023), [11.35].; See also Crawford, Elizabeth B., and Carruthers, Janeen M, '*Connection and coherence between and among European instruments in the private international law of obligations.'* (2014) 63 International and Comparative Law Quarterly 1.

Member State.[264] Schlosser Report, however, states that "*Section 3 is a more specific provision than Section 4 and hence takes precedence over it. A contract of insurance is not a contract for the supply of services within the meaning of the 1968 Convention. Within Section 4, the provisions on instalment sales are more specific than the general reference to consumer sales in the first paragraph of Article 13*."[265] Nonetheless, it is not clear about whether an assured can rely on the rights provided for a consumer under the regulation if the defendant is not domiciled in a Member State. It simply falls back to article 6 as mentioned above and lets the national law to deal with the question.

ii. Deemed To Be Domiciled

Alternatively, if the defendant is not domiciled in a Member State, Article 11(2) of the Recast still allows the assured to bring a claim against an insurer, provided that the disputes arise out of the operations of the insurer's branch, agency or other establishment in one of the Member States.[266] In other words, the insurer is deemed to be domiciled in a Member State as a result of the operation of the relevant establishment operating in a Member State. Article 11(2) is a part of the mechanism crated by the article 7(5), which is also applicable to the matters relating to insurance as stated in article 10.

Therefore, there are two requirements to trigger this provision. Firstly, the relevant entity has to constitute a branch, agency or other establishments. Secondly, the claim has to arise out of the operation of that relevant entity. Therefore, the relevant insurance contract must be concluded by the relevant entity domiciled in a Member State. Otherwise, the insurer would not be deemed to a domiciled in a Member State. However, the regulation is not clear about

[264] Ibid.
[265] Schlosser Report, page118, [156].
[266] Article 11(2) of the Recast.

what constitutes a branch, agency or other establishments in an insurance context. In *De Bloos v Bouyer*, the CJEU stated that the key characteristic of a branch or agency is the fact of being subject to the direction and control of the parent entity, which is not domiciled in a Member State.[267] However, a mere independent representative would not be regarded as an agent for the purpose of this provision.[268] Therefore, the relevant entity has to act as an extension of that foreign entity, regardless of the fact that the two companies might be separate legal entities under relevant company law.[269] Hence, the case law indicates that it needs to be established that the relevant entity has to have the following four characteristics. First, the commercial activities of the branch should not be temporary.[270] Second, it has to be given a level of direction and control by the parent company.[271] Thirdly, it enjoys a certain level of independence.[272] Finally, it has to be authorised to bind the parent company in important transactions without having the to consult the parent company each time.[273]

Once it's established that the relevant entity constitutes a branch, agency or other establishments, the next stage is to show that the dispute arising out of the operation of that relevant entity. Otherwise, Article 11(2) of the Recast will not be triggered. The definition of the dispute arising out of the operation of the relevant entity is no clear. What disputes are covered under this is not clearly stated in the statue or in early case law. The court had to deal with this question for the very first time in *Somafer SA v Saar-Ferngas AG*. Although the case is within the EU legal framework and not related to non-EU parties, it's essential for the definition for "operation" for the purposes of article 7(5), which was article 5(5) back then. As

[267] Case 14/76 *De Bloos v Bouyer* [1976] ECR 1473, [20].
[268] Case C-139/80 *Blanckaert and Willems v Trost* [1981] ECR 819, 824-825.
[269] Case 218/86 *SAR Schotte GmbH, Hermer v Parfums Rothschild SARL* [1987] ECR 4905, paragraph 15.
[270] Case 33/ 78 *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183, 2188.
[271] Case 14/76 *De Bloos v Bouyer* [1976] ECR 1473.
[272] Case 139/80 *Blanckaert & Willems PVBA v Luise Trost* [1981] ECR 819, 821.
[273] Case 33/ 78 *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183, 2188.

stated before, article 11(2) is a part of the mechanism crated by the article 7(5). Hence it is essential for us to understand the definition of a dispute arising out of the operation of that relevant entity. In the case, a French demolition company was instructed via its representative in Germany. The German claimant have taken safety measures in the vicinity expecting that the defendant's representative based in Germany would reimburse the disbursements. As a result, the German defendant commenced proceedings in Germany against the French defendant to recover its costs. The court had to understand whether the dispute arose out of the operations of the German representative. The CJEU stated that "*This concept of operations comprises on the one hand actions relating to rights and contractual or non-contractual obligations concerning the management properly so called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there. Further it is also comprises those relating to undertakings which have been entered into at the above mentioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established and also actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above defined meaning, has engaged at the place in which it is established on behalf of the parent body.*"[274] This geography specific narrow interpretation is quite restrictive when it comes to understanding the way in which the relevant provisions work. In *Lloyd's Register of Shipping v Société Campenon Bernard*, however, the CJEU had another chance to examine the question in a dispute where a French company tried to sue a UK corporation in France relying on the fact that the contract was concluded via the defendant's French branch even though the dispute arose out of the operation of another branch of the parent company based in Spain.[275] The

[274] Ibid, 2192-2193.
[275] Case 439/93 *Lloyd's Register of Shipping v Société Campenon Bernard* [1995] ECR 961.

defendant even tried to use the arguments raised in *Somafer SA v Saar-Ferngas AG* arguing that operations of the branch includes the actions relating to undertaking which have been entered into by that branch in the name of the parent company.[276] Nonetheless, the court did not agree with that approached and held that the relevant provision does not necessarily presuppose that the undertaking in question entered into by a branch on behalf of its parent company are to be performed in the Member State where the branch is established.[277]

Therefore, the Recast and its predecessor enable a party domiciled in a Member State to commence proceedings against a defendant which is not domiciled in a Member State under article 11(2), provided that the insurer has a branch, agency or other establishment in a Member State and the claim arose out of the operation of that branch, agency or other establishment. If the requirements of the article 11(2) is fulfilled, then the insurer will be deemed to be domiciled in a Member State.

However, if any of the special provisions apply to an insurer not domiciled in a Member State, then the claimant will need to try on the national law of their country to be able to understand the legal framework to be able to commence a proceedings against a foreign defendant in the courts of their own country. This paper, therefore, will analyse the jurisdictional framework under the English law later.

iii. Not Domiciled in a Member State

Article 6 of the recast directs us to the national laws, if the potential defendant is not domiciled or deemed to be domiciled in a member state under the Brussels Regulation or the Lugano

[276] Ibid, 979.
[277] Ibid, 981.

Convention.[278] As a result, if a Member State does not have a jurisdiction under article 24 and 25, and the defendant is not domiciled in a Member State, the cases will be decided under national laws. Since the Recast legal framework allows national courts to deal with it within their own legal systems, a judgment rendered under such mechanism will be enforceable in another Member State. This means that the national courts still exercising jurisdiction under the Brussels Regulation, not as of right under their national sovereignty. However, after the UK's withdrawal from the EU, any cases, instituted after 23:00 on 31 December 2020, relating to jurisdiction will not be governed according to the Brussels Regulations. Therefore, English courts will deal such jurisdictional questions in accordance with the common law jurisdiction.

On the other hand, following the completion of Brexit at the end of January 2020 and the end of the transition period on December 31, 2020, the UK took steps to accede to the Convention in its own right.[279] The UK's accession became effective on September 1, 2020. This means that, post-Brexit, the 2005 Hague Convention continues to apply to exclusive choice of court agreements where the chosen court is in the UK, and UK judgments resulting from such agreements should be recognized and enforced in other Hague Convention countries (and vice versa). Therefore, this welcomed development will provide clarity in insurance related matter, considering the fact that most of the insurance contracts have exclusive jurisdiction clauses.

4. The Traditional Common Law

Unlike the Brussels regulations, the English common law does not have special rules for insurance related matters. Thus, the general national English law rules will apply to decide on jurisdiction. There are two important principles guiding the courts while determining whether

[278] Article 6 of the Recast unambiguously states that the general rule is subject to Article 18(1), Article 21(2), Article 24, and Article 25.
[279] Adrian Briggs, *Civil Jurisdiction and Judgments* (7th ed, Informa Law from Routledge 2021), [2.01].

an English court has jurisdiction over a defendant. First, the jurisdiction of the court depends upon procedural notions of service. Therefore, it is important to show whether a defendant has been served properly in accordance with the Civil Procedure Rules (CPR). Second, England must be the appropriate forum for that particular action, as stated in The Spiliada, because the exercise of jurisdiction is a discretionary power under the English law.[280] In this House of Lords decision, Lord Goff established the guiding principles on how to determine the most appropriate forum for a case, which will be discussed in detail later.

a. Service of the Claim Form in the UK

It is important to prove that a defendant has been served properly.[281] An English court will only have a jurisdiction over a defendant provided that the defendant is served with the claim form.[282] A claim form can be served upon a defendant, who is domiciled or physically present within the jurisdiction as of right.[283] The CPR even permits to service even if the defendant is temporally within the jurisdiction.[284] On the other hand, establishing the presence of a corporation might be more complicated than an individual.

CPR r 6 and Companies Act 2006 sets the legal framework for service on a company. There are two tests to establish that the company can be served properly in the UK. Firstly, section 1139(1) of Companies Act 2006 states that a document can be served on a company registered under the Act by leaving it at or sending it to by post to the address where the company is registered. [285] Thus, a company can be served if its registered office is in England. Secondly, if

[280] *Spiliada Maritime Corporation v Cansulex Limited* [1987] 1 AC 460.
[281] CPR r 6.3 provides the guideline on how to serve upon a defendant, an individual or a company.
[282] CPR Part 6.
[283] CPR Part 6, and Practice Direction 6A.
[284] See *Colt Industries v Sarlie (No.1)* [1966] 1 WLR 440 (CA*); HRH the Maharanee of Baroda v Wildenstein* [1972] 2 QB 283; These cases were decided before the Spiliada.
[285] Companies Act 2006, s.1139(1).

it's an overseas company, it can be served either at the registered address of any person resident in the United Kingdom who is authorised to accept service of documents on the company's behalf or at a place of business in the UK.[286]

In *Adams v Cape Industries*, the Court of Appeal clarifies the meaning and scope of the place of business.[287] In order to determine whether a company conducts business within a particular jurisdiction, there are three key criteria that must be met. Firstly, the relevant actions must have been carried out for a significant period of time. Secondly, these actions must have taken place in a fixed location. Finally, there must have been an individual who was responsible for carrying out business on behalf of the company within this jurisdiction.[288]

The place of business is quite fact sensitive criteria and can be interpreted quite widely. For example, the first requirement for substantial time is a quite vague concept. How long is long enough to consider a business as a resident within the jurisdiction? In *Dunlop Pneumatic Tyre Co Ltd v AG Cudell & Co*, a trade stand at a cycle show, used by a foreign company, for nine days was sufficient time to be considered as substantial period.[289] The defendant appealed arguing that the court does have jurisdiction. The court underlined that the substantial part of the defendant's business was selling their manufactures, which they clearly did during the show.[290] During that period, customers were able to inspect the defendants' products and prices were provided. The defendants also accepted orders for their products. Hence, the court concluded that "nothing more could have been done with regard to the sale of the defendants' wares at their place of business abroad. For these reasons I think the appeal must be

[286] Companies Act 2006, s.1139(2); See also *The Theodohos* [1977] 2 Lloyd's Rep 428.
[287] *Adams v Cape Industries* [1990] Ch 433.
[288] Ibid, 436.
[289] *Dunlop Pneumatic Tyre Co Ltd v AG Cudell & Co* [1902] 1 KB 342 (CA).
[290] Ibid, 348.

dismissed."[291] In other words, the definition of substantial time is a fact specific and interpreted widely.

The second criteria, a fixed place, might sounds more straight forward, but in a complex businesses like insurance, it is not always the case. As we already analysed under the EU section, foreign insurers sometimes act through a branch or an agent. In *South India Shipping Corporation Ltd v Export-import Bank of Korea*, a foreign bank opened an office in London for the sole purpose of gathering information and make contracts but concluded no financial transactions.[292] Since it did not conclude any business transaction, it even cancelled its registration under the Companies Act 1948. The claimant, an Indian shipping company, wanted to commence proceedings the Bank of Korea in the UK in relation to a letter of credit issued by the bank. The claim form was served on the London office, but activities of the London office had nothing to do with the letter of credit.

The judge at first instance decided that the bank had not been served properly because the London office was not a place of business. The Court of Appeal, however, stated that the fact that the bank does not conclude any banking transaction within the jurisdiction or banking activities with the general public, because the defendant bank operates as an import-export institution and not as a traditional high street bank.[293]It maintains both an establishment and employees within the jurisdiction. Furthermore, it engages in interactions with other financial entities and banks. Besides, it undertakes initial steps in granting and obtaining of loans. Thus, the court decided that these are enough to establish a place of business. This judgment indicates that the definition of business is interpreted broader than just simply act of trading or doing

[291] Ibid, 348-349.
[292] *South India Shipping Corporation Ltd v Export-import Bank of Korea* [1985] 1 Lloyd's Rep. 413.
[293] Ibid, 417.

transactions. Even if a company has an office just to engage with ancillary activities, it is still considered as doing business in the UK.

Amendments to the jurisdictional gateways for permission to serve out of the jurisdiction provided under Practice Direction 6B were approved by the Civil Procedure Rules Committee back in May 2022. These amendments are due to come into force in October 2022. Once they are in force, the court can rely on PD 6B paragraph 3.1(1) to determine whether an individual or company is domiciled within the jurisdiction. The provision directs the courts to use the test provided in sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982. Section 41(2) states that an individual will be considered as domiciled in the UK provided that (i) he is resident in the UK and (ii) he has a substantial connection with the UK[294]. On the other hand, for a company, section 42 requires the seat of the company to be in the UK. The seat is defined as the place of incorporation or where control over the company is exercise.[295] We are yet to see how the new test will be adopted.

These common law principles are equally applicable when a claimant is trying to bring a claim against a foreign insurance company. However, in the insurance sector, it is really common that most of the insurers act through an agent. In that case, it is important to understand the gateways provided in the CPR Part 6 to service outside the UK on an insurer.

[294] Sections 41 of the Civil Jurisdiction and Judgments Act 1982.
[295] Sections 42(3) of the Civil Jurisdiction and Judgments Act 1982.

b. Service Outside the UK

If a defendant is outside England and Wales, the claimant can still serve a claim form with the court's permission in accordance with CPR r 6.36 provided that the claim satisfies following three requirements:

i. The case has a reasonable prospect of success.[296]

ii. The claimant must show that they have a good arguable case.[297]

iii. The English court is the proper place to bring the claim.[298]

The main purpose of these questions is to determine the factual circumstances which establishes a connection between the English courts and the dispute. If a defendant who is served properly under CPR r 6.3 wishes to challenge the jurisdiction of the court or the service of a claim form out of the jurisdiction, CPR Part 11 provides guidance for disputing the court's jurisdiction. On the other hand, English courts may give permission for service on a foreign insurer outside the jurisdiction, if the claimant can invoke one or more of the provisions stated in CPR Practice Direction 6B, paragraph 3.1.[299] Here are the most commonly used grounds in insurance context:

- Paragraph 3.1(1A): a claim is made against a person in respect of a dispute arising out of the operations of a branch, agency or other establishment of that person within the jurisdiction, but only if proceedings cannot be served on the branch, agency or establishment.
- Paragraph 3.1(6): a claim is made in respect of a contract where the contract:

a. was (i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction;

[296] CPR r. 6.37(1)(b).
[297] See *Kaefner Aislamientos SA de CV v AMS Drilling Mexico SA de CV & Others* [2019] EWCA 10 (Civ), which provides guidance on the test for good arguable case.
[298] CPR r 6.37(3).
[299] CPR Practice Direction 6B.

b. was made by or through an agent trading or residing within the jurisdiction or

c. is governed by the law of England and Wales.

- Paragraph 3.1(7): A claim is made in respect of a breach of contract committed, or likely to be committed within the jurisdiction.
- Paragraph 3.1(9): a claim is made in tort where:

a. damage was sustained, or will be sustained, within the jurisdiction;

b. damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction; or

c. the claim is governed by the law of England and Wales.

Paragraph 3.1(1A) is recently added and will be used starting from 1 October 2022. It is defiantly one of the most important additions to jurisdictional gateways after the Brexit. As it can be noticed from the language of the provision, it resembles the language used in article 7(5) of the Recast Regulation. The English court are already familiar with the concept and gave several decisions under the Recast regulation analysing the meaning of a dispute arising out of the operations of a branch.[300] It is a welcomed addition because even though the contractual gateway includes to contract made by an agent, the scope of the paragraph 3.1(6) was interpreted in a way that it can only be relied on where the claim is to assert a contractual right or a right arisen due to breach of a contract. However, the scope of this provision does not include a claim brought by a defendant when the claim is directly related to the contract.[301]

In *Alliance Bank JSC v Aquanta Corp, a Kazakh Bank* wanted to bring its alleged conspiracy to defraud claims against multiple defendants in the UK, establishing that the UK courts are

[300] See "Deemed to be Domiciled" subsection.
[301] Alliance Bank JSC v Aquanta Corp [2012] EWCA Civ 1588.

the most appropriate forum for this dispute. However, the dispute did not have a connection to the jurisdiction, other than the fact that some of the contracts used during the alleged fraud process had English governing law clauses. In fact, some of these claims were non-contractual claims. As a result, the court held that the gateway provided in paragraph 3.1(6) does not include a claim in respect of a contract to which the defendant is not a party.[302] In other words, the claim must be directly related to the contract that is used for jurisdictional grounds. Otherwise, simply just arguing the contract is just a part of the factual matrix is not enough to rely on this gateway. The similar approaches been taken by the Court of Appeal in *Global 5000 Ltd v Wadhawan*, where a claimant wanted to commence a proceeding in relation to a guarantee and serve on a defendant outside the jurisdiction.[303] The contract in dispute, i.e., the guarantee did not have an express English governing law clause, but the contract in relation to which the guarantee was made was governed by English law. Rix LJ stated that a claim can only be in respect of a contract in true sense provided that it is sufficiently connected to the contract.[304]

Once a claim is brough under the contractual gateways, paragraph 3.1(4A) also enables the court to exercise jurisdiction for all claims arising against the defendant from the same or connected factors. However, even after establishing all these, it is at the discretion of the court to decide whether to exercise jurisdiction.

On the other hand, the gateways provided under paragraph 3.1(6) are the most frequently used jurisdictional gateways in practice. If a contract is made within the UK or governed by English law, a claimant might apply to serve a defendant outside the jurisdiction. Compering to the EU legal framework, these gateways are broader than the corresponding provisions in the

[302] Ibid; See also Ewan McKendrick, *Goode and McKendrick on Commercial Law* (6th edn Penguin 2020), 1234.
[303] *Global 5000 Ltd v Wadhawan* 1 Lloyd's Rep 239.
[304] Ibid, 249: See also *Cecil v Bayat* [2010] EWHC 641 (Comm), per Hamblen J.

Recast.[305] In fact, there is no equivalence of paragraph 3.1(6)(a) which may give jurisdiction on the basis of the fact that the contract was made within the jurisdiction. Following the recent amendments to gateways, the scope of this rule was extended to include contracts concluded by the acceptance of an offer, which offer was received within the jurisdiction. Undoubtedly, these questions are entirely questions of English contract law. Therefore, the courts will rely on the English contract law to assess whether a contract is made within the UK for the purpose of jurisdiction or whether an offer was actually received within the jurisdiction.

It is particularly challenging to prove whether a contract is made within the jurisdiction since some of the counterparties might be operating in different jurisdictions via sophisticated instantaneous means of communication such as email or telephone. As a result, the negotiation and drafting processes may take place remotely and so the acceptance might occur electronically. Under English law, a contract is formed where the acceptance is communicated to the offeror, which is also known as postal rule.[306] The classic definition of acceptance is a final and unqualified expression of assent, whether by words or conduct, to term of an offer.[307] Hence, it does not matter that several different parties involved from several different jurisdictions. On the other hand, as Pippa Rogerson suggested, it may not be easy to convince the English courts to exercise their jurisdiction just because simply a sophisticated international party accepted an offer while waiting for her transfer plane in Heathrow.[308]

As previously mentioned, most of the insurance contracts are made by or thorough an agent. Therefore, the second gateway under paragraph 3.1(6)(b) is important in relation to insurance contracts, which enables a claimant to bring a claim against a foreign defendant on a contract

[305] Pippa Rogerson, *Collier's Conflict of Laws* (4th edn Cambridge University Press 2014), 152.
[306] *Adams v Lindsell* (1818) 106 ER 250.
[307] Hugh Beale, *Chitty on Contracts* (34th edn Sweet & Maxwell 2022), [4-031].
[308] Pippa Rogerson, *Collier's Conflict of Laws* (4th edn Cambridge University Press 2014), 154.

concluded by an agent. This is different than the principles we examined under CPR r 6 to be able to serve a foreign defendant within the UK, because the gateway in paragraph 3.1(6)(b) already assumes that the defendant is not present in the UK. Furthermore, as in the previous gateway, it only allows the claimant to bring claims in connection to the contract. In *National Mortgage and Agency Co. Of New Zealand v Gosselin*, the court considered a claim in relation to a contract made through an agent.[309]It was held that a contract made by an agent entails that the agent has the authority to bind the principle. On the other hand, a contract made through an agent means the terms of the contract was negotiated and determined by the negotiation of the agent.[310] In both scenarios, a claimant can serve on a defendant outside the UK, relying on the fact that the contract even if the defendant is not present in the UK, it concluded the contact by or through an agent in the UK.

Another unique ground of jurisdiction, which has no equivalent in the Recast, is paragraph 3.1(6)(c), allowing the claimant to serve on a defendant outside the UK provided that the claim is in relation to a contract governed by English law. It is again a broadly interpreted gateway, which include contracts which has clear governing law clauses in favour of English law as well as the ones which does not have an express governing law clause. It is understandable that the underlying reason behind this gateway is the fact that there is no better place than the English courts to deal with a contract governed by the English law, which is also essential for an efficient administration of justice.[311] When courts try to interpret a contract governed by a foreign law, it delays trail and increases costs for the parties because the courts will rely on the expert opinion in relation to the foreign law element. Therefore, there is a public policy element of this approach as well. Otherwise, a foreign court might even have problem dealing with a

[309] *National Mortgage and Agency Co. Of New Zealand v Gosselin* (1922) 12 Ll.L.Rep. 318.
[310] Ibid.
[311] J Fawcett, "*Trial in England or Abroad: The Underlying Policy Considerations*" (1989) 9 Oxford Journal of Legal Studies 205, 221.

contract governed by English law simply because they may not have similar English law concepts.

Amin Rasheed Shipping Corporation v. Kuwait Insurance Co is the leading case to determine which laws govern a contract in the absence of an express clause and as a result whether to exercise discretion to service outside the UK.[312] In the case, a Liberian company resident in Dubai insured a vessel with Kuwaiti Insurance & Co (KIC). The Policy was issued and signed in Kuwait. The wording of the policy closely mirrored the statutory template of the English Marine policy found in Schedule 1 of the Marine Insurance Act, 1906, often referred to as the Lloyd's Standard Marine policy or the Lloyd's S.G. policy. The vessel was seized in Saudi Arabia for alleged smuggling. The claimant gave notice of abandonment of the vessel to K.I.C, but it was rejected by the insurer. As a result, the assured company tried to sue the insurer in the UK and requested to serve the defendant in Kuwait. The House of Lords, firstly, applied English conflict of laws rules to demine the applicable law. From the language used in the contract and the circumstances, the court tried to determine the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection. In other words, the court was not looking for the country, but rather the legal system with which the contract had its closest relation. Lord Diplock concluded that the facts clearly point our English law due to combination of several reasons, including the absence of Kuwaiti code of marine insurance until the three years after the policy was issued and the use of English language and sterling.[313] The applicable law issues are discussed in detail under the governing law chapter.

[312] *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co* [1983] 2 Lloyd's Report 365.
[313] Ibid, 369.

Once it is established that the governing law of the contract is English law, it is then up to the courts to decide to use their discretionary power to serve outside the jurisdiction.[314] Especially, in insurance law cases if the contract is written in the London market via a broker or the policy is governed by English law, the courts are likely to consider England as the natural forum.[315] However, after establishing all the gateways, the claimant still needs to prove that the England is the most proper forum to bring the case. Therefore, now the paper will look into the famous Spiliada judgement where the House of Lords provided a two-stage test to determine the most suitable forum. It became famous again to ascertaining the most appropriate forum especially after the Brexit.

c. The Spiliada Test and Forum Non Conveniens

The origins of the doctrine of forum non conveniens can be traced back to Scotland in the 19th century. In *Logan v Bank of Scotland*, the English courts only take the first step to adopt the doctrine in the 20th century.[316] The court didn't use an explicit language referring to the doctrine but rather stated that the claimant would have been put into judicially disadvantages position as a result of a stay. There was a gradual and slow adaptation of the doctrine from the Logan test to the Spiliada test.[317]

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[314] See also Shahar Avraham-Giller, '*The court's discretionary power to enforce valid jurisdiction clauses: time for a change?*' (2022) 18 Journal of Private International Law 209, 211.
[315] *Lincoln National Life Insurance Co v Employers' Reinsurance Corp* [2002] Lloyd's Rep. I.R. 853; *Markel International Insurance Co Ltd v La Republica Compania Argentina de Seguros Generales SA* [2005] 1 Lloyd's Rep. I.R. 90; *Axa Corporate Solutions Assurance SA v Weir Services Australia Pty Ltd* [2016] Lloyd's Rep. I.R. 578; *Overseas Union Insurance Ltd and Others v Incorporated General Insurance Ltd* [1992] 1 Lloyd's Rep. 439.
[316] *Logan v. Bank of Scotland* [1906] 1 K.B. 141; Adrian Briggs, '*The Staying of Actions on the Ground of Forum Non Conveniens in England Today*' (1984) LMCLQ 227; Joseph H. H. Weiler '*Forum Non Conveniens-An English Doctrine?*' (1978) 41 MLR 739.
[317] *St. Pierre v. South American Stores (Gath and Chaves) Ltd.* Per Scott L.J. l [1936] 1 K.B. 382; *Owners of the Atlantic Star v Owners of the Bona Spes* [1974] AC 436*; MacShannon v Rockware Glass Ltd* [1978] AC 795; *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50; *The Abidin Daver* [1984] AC 398.

The doctrine simply implies that if another court is more suitable for a case than the English court, the court should decline to exercise its jurisdiction and let the other court deal with the matter.[318] The discretionary power of the English courts now even more important than ever after withdrawal from the EU because the jurisdiction of the course is determined by the Brussels Regulations which we previously examined. However, since the Brexit, the doctrine restored its practical importance in relation to cases involving foreign defendants.[319]

Spiliada Maritime Corporation v Cansulex Ltd 352 (The Spiliada) is the leading case where the House of Lords provided the blueprint for addressing one of the most difficult challenges in this area: deciding on the most appropriate forum for international litigation.[320] The case emphasizes the importance of fairness and justice, ensuring that the doctrine of forum conveniens is used to serve the broader goals of justice. As a result, the Spiliada case has made a lasting contribution to English legal jurisprudence.

Before deep diving into the Spiliada, it is important to underline that in earlier cases the courts were trying to locate the natural forum. It is interpreted as the place where the action had the most substantial connection. [321]That's the reason why originally the courts were asking questions like where the contracts have been concluded or where the parties reside. However, in the recent cases, the courts start looking more than the geographical factual matrix. They start taking into account the nature of the dispute or the legal issues surrounding the factual matrix.[322]

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[318] Dicey, Morris & Collins on The Conflict of Laws (16th edn, Sweet & Maxwell, 2022), [12-002].
[319] See P Beaumont, "*Some Reflections on the Way Ahead for UK Private International Law after Brexit*" (2021) 17 Journal of Private International Law 1; R Mortensen, "*Brexit and Private International Law in the Commonwealth*" (2021) 17 Journal of Private International Law 18.
[320] *Spiliada Maritime Corporation v Cansulex Ltd 352* (The Spiliada) [1987] 1 Lloyd's Rep. 1.
[321] The Abidin Daver [1984] AC 398, 415; See also Richard Fentiman, *International Commercial Litigation* (2nd edn Oxford University Press 2015), 429.
[322] Pippa Rogerson, "*Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case*" (2013) 9 Journal of Private International Law 387, 403.

The Spiliada case concerned a shipment of sulphur from Canada to India. The Spiliada, the ship, was owned by a Liberian company but chartered to Cansulex, a Canadian Company. The ship was managed partly in Greece and partly in England. The contract of carriage was governed by English law. The Liberian company claimed that the cargo was wet when loaded and as a result it caused corrosion in the vessel. The claimant commenced proceedings against the Canadian defendant in the UK. Besides, the Canadian defendant was already a part of a case in a related matter, brought by an English claimant in the UK.

As previously mentioned, the contractual gateway in paragraph 3.1(6)(c) enables the courts to give permission to serve outside provided that it's a matter relating to contract, and it is governed by English law. Thus, the court gave permission to serve the claim form outside the jurisdiction. However, the Canadian defendant asked for stay. The burden of the proof is on the defendant to show that England is not the appropriate forum. In other words, a stay will only be granted if the defendant can satisfy the court that there is some other forum which is better suited for trial of this case.

The House of Lords came with the two limp test to ascertain the most appropriate forum for the trial. First, the court must be satisfied that there is another available forum, having competent jurisdiction, which is more appropriate forum in which to hear the claim. Secondly, the justice will be done in the available appropriate forum.[323] The court adopted a more holistic approach rather than a mechanic one. Hence, the court takes into account all the connecting factors including availability of witness, governing law, where the parties reside etc.[324]

[323][1987] 1 Lloyd's Rep. 1, 14.
[324] Brand and Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (1st edn Oxford University Press, 2007), 22.

Thinking about the facts of the case, one might think that the English court had to stay in favour of Canadian courts, since one of the parties was Canadian and the other one is Liberian. The cargo was loaded in Canada, and damage was done in somewhere else. The only connection is the fact that the contract was governed by English law, which is not normally enough. However, the House of Lords took in to account the defendant's pending case on a related matter in the UK, which later settled. The facts of that case were almost identical this one.[325] The court decided that the decision of that case might be determinative on the Spiliada since all the factual matrix, parties, witnesses, experts and even legal teams are the same.[326] Hence, the court allowed the English proceedings.

The test later adjusted in *VTB Capital plc v Nutritek International Corp*, where the court had to decide whether it has jurisdiction over a matter on the ground that the alleged tort, or damage to VTB occurred in the UK.[327] Although the law governing the claim was English law, the court declined to exercise its jurisdiction because it held that the dispute was substantially connected to Russia. The court underlined the fact that the procedural efficiency outweighed the fact that the English law applied to the claim. In other words, the procedure efficiency can be more important than the applicable law. The case was based on a lot of evidence located in Russia and so needed Russian experts. Especially, having the majority of the evidence in Russia was an important factor.[328] Although the minority focused on the fact that the tort occurred in the UK and applicable law being English law, the majority went for a more balanced approach. Lord Mance suggested that "*the governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things*

[325] The Cambridgeshire (not reported).
[326] 1987] 1 Lloyd's Rep. 1, 7.
[327] *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5.
[328] Ibid, [62].

being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum."[329] Furthermore, from the facts of the case it is clear that the great bulk of evidence is located in Russia and will come from Russian witnesses. Hence, the location of the tort and governing law becomes less important while examining the substantial claim.[330] Therefore, the court agreed that the location of the tort and applicable law are important indicators, but the court should consider the practical issues as well, because it is obvious that the case will revolve around the evidence located in Russia. As a result, the court decided that England was not the appropriate forum.

In the Spiliada, the significance of each factor taken into account while determining the most appropriate forum is not clear cut. Although in VTB Capital, the court suggested to have a more balanced and holistic approach, it is clear that the weight given to each factor might change from case to case. Therefore, the test provided by the House of Lords is fact sensitive. However, it is important to highlight that having a jurisdiction is different than exercising jurisdiction. Hence, while the claimant is trying to rely on gateways provided under the English law to prove that the English court is the proper place to bring the claim, it is at the discretion of the courts to exercise that jurisdiction. It certainly creates some level of uncertainty.[331] Nonetheless, the Spiliada test has been adopted in several common low jurisdictions, including the US, Canada and Singapore and still actively used.[332] After the UK's accession to the

[329] Ibid, [46].
[330] Ibid, [70].
[331] See Eleanor S. Yuen, *'Available Forum in the Spillada Test: The Ambiguity in Meaning and Practice*' (2014) 5 J Phil Int'l L 72.
[332] See Brand and Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (1st edn Oxford University Press, 2007), 101-120; Alexander Bickel, '*The doctrine of forum non conveniens as applied in federal courts in matters of admiralty'* (1949) 35 Cornell L Rev 12.

Brussels Regulations, the English courts only used the EU law to determine their jurisdiction in matters involving parties from Member States. Thus, the doctrine was only used for cases outside the EU legal framework. The next part of the paper will examine how the English courts interpreted the doctrine after the end of Brexit transition period.

d. Today in the UK

It is important to remind that the doctrine of *forum non conveniens* has been applied in a long line of English cases involving non-EU parties before the Brexit: for example *Harty v Sabre International Security Ltd (formerly SIS Iraq Ltd)*,[333] and *Pike & Anor v The Indian Hotels Company Ltd*.[334] However, recently for the first time after the Brexit, in *Al Assam & Ors v Tsouvelekakis*,[335] the High Court applied the doctrine and decided to decline jurisdiction on the ground that it is not the appropriate forum to hear the case. Although the case was commenced in October 2021, the application was brought after the end of Brexit transition period. Thus, the court applied the English common law, not the Brussels regulations.

The plaintiffs in this case include the creators of two trusts, the beneficiaries of those trusts, and the special entities formed in the British Virgin Islands and Panama that held the trust assets. These trusts were set up according to Cypriot law. The individual plaintiffs domiciled in Dubai or Cyprus. The defendant, based in England, gave investment advice to the trust's corporate trustee. As a result, the claimants served proceedings on him in England. The defendant, however, applied for a stay on the ground that Cyprus is a more appropriate forum for determination of the claim.

[333] *Harty v Sabre International Security Ltd (formerly SIS Iraq Ltd)* [2011] EWHC 852 (QB).
[334] *Pike & Anor v The Indian Hotels Company Ltd*. [2013] EWHC 4096 (QB).
[335] *Al Assam & Ors v Tsouvelekakis* [2022] EWHC 451 (Ch).

The factual matrix of the claim is about the unsuccessful investments in Cypriot firms operating in Greece. Both parties agreed that Cypriot law should govern four out of the six claims against the Defendant, while the remaining two should be under Swiss law. Even though the case is in its initial phase, the claimants expect the need for expert witnesses who are likely proficient in English but not in Greek. Several, though not all, witnesses are English speakers. The trial will necessitate the use of interpreters. The defendant also suggested that the court should take into account personal connections, factual connections, evidence, expense, applicable law and the overall shape of the litigation. Given these circumstances, the Defendant proposed that Cyprus, rather than England, is the more suitable venue, and therefore the English courts should decline to exercise their jurisdiction.

The court went through all the headlines the defendant suggested one bye one. It is a good judgment to read to see the thinking process of the court and the comparisons they did between the Brussels regulation and the common law rules. For example, the defendant being in the UK would have been a strong indication and in fact the ground to give the jurisdiction to the court under the Brussels Regulations. However, under the common law, the defendant being a resident is only relevant in relation to the factual narrative and evidential reasons. It is simply considered as one of many factors. The court underline the fact that the defendant is the key witness in this case and thus the entire case revolves around him.[336] The courts must now take into account several different factors at an early stage to decide on jurisdiction. Whereas it used to be more systematic and straight forward. At the end, the court decided that England is the most appropriate forum considering the fact that the key witness, who will be a major part of the trial, lives in the UK.

[336] Ibid, [35].

On the other hand, applicable law, being Cypriot law to the majority of the claims, was not a strong indicator in this case. While some of the claims were governed by Cyprus and Swiss law, none of them were governed by English law. The governing law is usually a positive factor since a national law can only be properly interpreted by the national courts of the relevant state, as Lord Mance suggested in *VTB Capital*. However, the relevant area of law in Cypriot law is quite similar to English law. Furthermore, English courts are used to applying foreign law, including Cypriot law. In fact, if the case is heard in Cyprus, the Cypriot courts would also need to apply Swiss law. Thus, applicable law was not also a strong factor in this case.

The court later considered the factual connection. As mentioned in *VTB Capital*, when the claim is in relation to a tort, the place where the tort occurred will be a strong connecting factor. In other words, when analysing the alleged torts, it is important to take into account where the events actually occurred rather than just where the evidence and witnesses are located. This is especially crucial since the place where the tort was committed serves as the starting point for determining the appropriate forum for a tort claim. However, considering the way how parties interacted with each other in this case, it is not straight forward to simply say the location is a crucial part of the facts. The Honourable Mr Justice Richards suggested that the focus of the factual enquiry will likely be an analysis of electronic communications and documents. Therefore, the judge was not entirely convinced that examining the location of these electronic communications will be particularly relevant or meaningful.[337] Again, it is clearly a more holistic and different approach compering to how the court would have handled it under the Brussels Regulations. Thus, the court said it considered several different factors and decided

[337] Ibid, [40].

that the defendant could not convince the court that Cypriot courts are clearly a more appropriate forum than the English courts. [338]

Although after the Brexit, there have been uncertainties about jurisdictional matter and how the courts will interpret forum non conveniens after the transition period, it is now clear that getting back to the old common law rules gave more space to the English court to interpret their jurisdictional discretionary power more broadly. For example, in *FS Cairo (Nile) Plaza LLC v Brownlie*,[339] the court had the chance to reinterpret and expand the tort gateway. As mentioned previously in *Al Assam & Ors v Tsouvelekakis*, following the *VTB Capital* judgment, the location where the tort occurred is seen as the starting point and strong connecting factor for jurisdiction. However, in *FS Cairo (Nile) Plaza LLC v Brownlie*, the Supreme Court decided that if someone is injured overseas and continues to suffer from the effects of that injury when they return to the UK, they may be able to bring a claim for damages. This includes both financial and non-financial effects of the injury.

In case, the claimant was seriously injured as a result of a car accident in Egypt and continued suffering the ongoing financial and non-financial effects in the UK. The transportation was arranged by the defendant, an Egyptian company. She commenced proceedings in the UK. However, the defendant challenged the jurisdiction of the English courts and argued that the UK is not the most appropriate forum since the accident occurred in Egypt. One of the questions the court had to examine was whether the claim in tort falls under the relevant tort gateway. Practice Direction 6B 3.1(9) gives jurisdiction in relation to a claim in tort provided that either damage was sustained, or will be sustained within the jurisdiction, or damage which has been

[338] Ibid, [60].
[339] *FS Cairo (Nile) Plaza LLC v Brownlie* [2021] UKSC 45.

or will be sustained results from an act committed, or likely to be committed within the jurisdiction. The defendant, therefore, argued that since the accident occurred in Egypt, the claim does not fall under this tort gateway. The defendant argued that the tort gateway was introduced to harmonize the English rules with the Brussels regulations, and thus the tort gateway should be interpreted in line with article 7(2) of the Recast (previously article 5(2)). The cases, dealing with the tort provision, interpreted the article in a way that the place where the damages occurred is only seen as the place where the tort occurred and where damages directly suffered by the incident, if they are different the same places: see for example *AMT Futures Ltd v Marzillier*, *AB flyLAL-Lithuanian Airlines v Starptautiska Lidosta Riga VAS*.[340] Hence, if the narrow approach is adopted by the court, the damage will be limited to the place where the accident occurred, i.e. Egypt, and so the claim would not fall under the tort gateway.

The court, however, made it clear that such comparison is not appropriate because the Brussels legal framework is designed to uniformly allocate jurisdiction among EU member states, allowing no room for discretion.[341] On the other hand, domestic regulations aim to apply in scenarios where no mutual agreement dictates jurisdiction between the UK and the state of the defendant's domicile, offering a more adaptable approach. As a result, the court decided to adopt a broader interpretation and held that any indirect or consequential damage suffered by the claimant in England or Wales would be adequate to confirm jurisdiction, provided it meets the *forum conveniens* criteria.

This is a critical landmark case after the Brexit, especially in relation to direct actions. As abovementioned, the Brussels Regulation allows an injured third party to bring a direct-action

[340] *AMT Futures Ltd v Marzillier* [2017] UKSC 13; [2018] AC 439, [15]; Case C-27/17*AB flyLAL-Lithuanian Airlines v Starptautiska Lidosta Riga VAS* [2019] 1 WLR 669, [31]-[32].
[341] [2021] UKSC 45, [180].

claim against the liability insurer provided that the relevant legal framework allows such actions. Thus, an injured third party who domiciled in the UK could bring a direct-action claim in relation to an accident occurred in a Member State. Now, the third parties can bring their direct-action claims even in cases where the incident occurred in abroad but the physical or financial consequences of the accident continued after the claimant return to the UK. This is a quite a big stretch compering with all the previous cases decided under the Brussels regulations. This also shows the willingness of the English courts to extend their protection to assist the weaker parties. Because it is clear that the weaker parties will suffer the most from the jurisdictional uncertainties following the failure of the UK to accede to the Lugano Convention, which has the similar protections provided under the Brussels framework. In fact, a recent report published by the European Parliament indicated that blocking the UK's accession to the Lugano Convention puts the weaker parties in a disadvantages position.[342] The next part of this chapter will examine who can be considered as a weaker party under the EU and UK legal framework.

5. Weaker Parties

Now, this section of the paper will analyse the final element of the jurisdiction components, which concerns the protection give to the weaker parties. The paper has reviewed all the jurisdictional frameworks in relation to insurance disputes and examined how courts decide on the jurisdiction questions. However, there are exceptions to these rules to protect the third parties. Therefore, the main objective is to understand who is considered a weaker party and why they should be afforded jurisdictional protections.

[342] European Parliament, '*Ensuring Efficient Cooperation with the UK in civil law matters*' (March 2023) https://www.europarl.europa.eu/RegData/etudes/STUD/2023/743340/IPOL_STU(2023)743340_EN.pdf accessed 24 September 2023.

Abovementioned, there are special rules which deals with matters relating to insurance contract in the EU regulations. Article 11 and Article 12 provide alternative jurisdictions to bring a claim against an insurer. However, article 12 may be departed from by a jurisdiction agreement as long as a contract of insurance covers any liability, 'other than for bodily injury to passengers or loss of or damage to their baggage, ... arising out of the use or operation of seagoing ships ...' as set out in Articles 15(5) and 16(2). Thus, the basic idea is to provide extra protection to the insured as the seemingly weaker party, provided that the insurance contract covers one or more of the risks set out in the regulation. Otherwise, as article 15 states these provisions might be departed from by an agreement which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 16. In other words, if the risk is a large risk such as Maritime or Aviation risks, then there is no need for a weaker party protection.

There are several cases from the Court of Justice of the European Union (the CJEU) on what constitutes a weaker party. The cases are important to understand where a claimant can sue and what kind of jurisdictional protections are provided to the weaker parties. The emphasis of the courts is usually on inequality on information or bargaining between the two parties. Thus, the jurisdictional protections do not apply action between insurers or to subrogated claims brought on behalf of insurers against third parties. However, it is also important for direct action claims to understand whether they should be bound by the jurisdiction clauses contained in the liability insurance of the tortfeasor, where an injured third party try to sue the liability insurer of the tortfeasor. After reviewing the EU case law on weaker party protection, the paper will analyse the UK cases. Since the origin of the concept of weaker party protection comes from the EU law, we'll look into the way how the English court adopted and applied the concept in the UK and how it might keep applying it even after the Brexit.

a. THE CJEU CASES on Weaker Party Protection

Groupement d'Interet Economique (GIE) Reunion Europeenne v Zurich Espana is one of the very first key cases where the court had the chance to examine the scope of the weaker party protection and decide the applicability of the article 6(2) of the Brussels Convention to third party proceedings between insurers.[343] S, a company based in France, stored new cars in a car park and insured them by the claimants, insurers who had their head office or a branch in France. Vehicles belonging to GMS and insured by a Spanish insurer, Z, the defendant, were stored in the car park. Later, some of those vehicles were damaged. As a result, GMS brought proceedings against S in Spain and got an undertaking from S to pay compensation. Meanwhile, S sued its insurer, the claimants, in France to be indemnified due to the consequences of the Spanish action. The claimant decided to join Z as a third party in the French proceedings because a provision of French law stated that in cases of multiple insurance, the amount of indemnification to be paid to the insured was to be divided proportionately between the various insurers. The defendant contested the jurisdiction of the French court, arguing that it is domiciled in Spain. The central dispute was over which court had jurisdiction over this insurance matter. The court had to decide whether a matter involving multiple insurance or co-insurance was a matter relating to insurance for the purposes of the Brussels Regulations and whether Art.6(2) was applicable when determining jurisdiction in the event of third-party proceedings between insurers. While claimant wanted to be sued in Spain, the defendant asserted that the matter should be dealt with in France.

The CJEU in *Groupement d'Interet Economique (GIE) Reunion Europeenne v Zurich Espana* held that the provisions of Section 3 of Chapter II of Brussels I are applicable only to relations

[343] Case 77/04 *Groupement D'interet Economique (Gie) Reunion Europeenne and others v Zurich Espana, Societe Pyreneenne de Transit D'Automobiles (Soptrans)* EU:C:2005:327, [2005] I.L.Pr. 33.

characterised by an imbalance between the parties and established for that reason a body of rules on special jurisdiction which favours the party regarded as economically weaker and less experienced in legal matters.[344] Therefore, Article 12(5) excludes insurance contracts in which the insured enjoys considerable economic power. In the case, both parties were insurance professionals. Hence, no special protection is justified where the claimant is a professional in the insurance sector because an insurer cannot be presumed to be in a weaker position. So, for example, if a subrogated insurer of the cargo owner sues the liability insurer of the shipowner, the subrogated insurer would not need to a weaker party protection and don't get the benefit of the wider choices provided by the regulation. In other words, they would be bound by the exclusive jurisdiction or arbitration agreement provided in the liability insurance contract because of the reasons provided in the previous chapters.

On the other hand, in *Vorarlberger Gebietskrankenkasse v WGV-Schwabische Allgemeine Versicherungs*,[345] the court had to consider whether a statutory health insurance body like Vorarlberger Gebietskrankenkasse can be regarded as a 'weaker party' under the Convention, given that the rules aim to protect the weaker party in insurance disputes and how the Brussel Conventions legal framework on jurisdiction in insurance matters should be interpreted, especially when dealing with direct claims by such bodies against insurance companies from another member state. The dispute involves Vorarlberger Gebietskrankenkasse (a statutory Austrian health insurance fund) and WGV-Schwäbische Allgemeine Versicherungs AG (a German insurance company). Ms Gaukel, who is domiciled in Germany, crushed her car into Ms Kerti's car. At the time Ms Kerti is domiciled in Austria but later domiciled in Germany. As a result of the injuries she suffered, Ms Kerti went through several medical treatments. Due

[344] *Groupement d'Interet Economique (GIE) Reunion Europeenne v Zurich Espana* [2005] I.L.Pr. 33, [22].
[345] Case 347/08 *Vorarlberger Gebietskrankenkasse v WGV-Schwabische Allgemeine Versicherungs AG* [2010] I.L Pr 2; [2010] Lloyd's Rep. I.R. 77.

to the accident, she became unfit for work and as a result the claimant, VGKK, the Austrian social security institution, provided benefits to her. The person responsible for the accident was insured with the German insurance company. The Austrian fund sought reimbursement of the medical expenses from the German insurer. When the Austrian fund initiated legal proceedings in Austria to recover the costs under its statutory rights of assignment, the German insurance company contended that the Austrian courts did not have jurisdiction, relying on the rules set out in the Brussels Convention.

The CJEU held that a social security institution which had paid benefits to an injured driver could not take the benefit of Article 11(2) when acting as the assignee of the injured woman to bring a direct action against an insurance company because they were not a weaker party. The purpose of the insurance provisions is to protect the weaker party by rules of jurisdiction more favourable than the general rules provide for. Thus, the jurisdictional protection should not be extended to ones for whom that protection is not justified. In that case, it was not argued that a social security institution such as the claimant was an economically weaker party and less experienced legally than a civil liability insurer.[346] On the other hand, if the statutory assignee who was bringing the claim on behalf of the injured party was also a weaker party, then the assignee could have relied on the jurisdictional protections.[347] For example, if a claim is brough by the heirs of an injured party, then they could relied on the weaker party protection as the injured party. Thus, the benefit of the insurance provisions could not be extended to the social security institution. This judgment, unfortunately, provides no guidance on how the courts should assess the weakness of a party. Hence, it creates ambiguity around the scope of the weaker party protection and who should be part of the protected group.

[346] Yvonne Baatz, '*Matters Relating to Insurance and Protecting the Weaker Party.'* [2018] LMCLQ 1, 3.
[347] [2010] Lloyd's Rep. I.R. 77, 83.

In *Landeskrankenanstalten-Betriebsgesellschaft - KABEG v Mutuelles du Mans assurances - MMA IARD SA*, the court had the chance to clarify whether a third party exercising its subrogated rights can be considered as a weaker party and rely on the jurisdictional protection while bringing direct action claim against an insurer or whether they should be bound by the jurisdiction clause contained in the insurance policy.[348] In the case, a cyclist, domiciled in Austria was injured as a result of a car accident in Italy. The employer of the injured party, KABEG, a public law institution paid his salary while he was off sick. Later, KABEG exercised its subrogated rights against the tortfeasor and its liability insurer, based in France to get reimbursed for the payments it made while the injured party was off sick. The court had to decide whether an employer seeking to exercise subrogated rights against a liability insurer of a driver who injured their employee can be considered as a weaker party. The court stated that: *"... in contrast to matters relating to employees and consumers, the notion of the 'weaker party' in insurance-related matters is defined rather broadly. It includes four categories of persons: the policyholder, the insured, the beneficiary and the injured party. As a matter of fact, these parties may be economically and legally rather strong entities. That flows from the broad language of the insurance-related provisions of Regulation No 44/2001 as well as from the types of insurance described therein*."[349]

Thus, the court preferred more purposive and broader approach to maintain predictability. Otherwise, the assessment of the weaker party might be highly facts sensitive. The case indicates that the court should focus on the relationship between the injured and the party bringing the subrogated claim. If it is not an insurance relation, then the party bringing the

[348] Case 340/16 *Landeskrankenanstalten –Betriebsgesellschaft-KABEG v Mutuelles du Mans Assurances IARD SA* [2017].
[349] Ibid, [47].

subrogated claim must have the weaker party protection. In other words, the court should not take into account the objective characteristic of the party bringing the claim or the contextual evaluation of their strength, knowledge or experience.[350]

This meant that KABEG, the employer, could sue and exercise its subrogated rights in the place of its domicile relying on articles 9(1) and 11(2) of Brussels I, which is now article 11(1) and 13(2) of the Recast Regulation. Surprisingly, an employer, which is a public law institution, paying out their employee, was treated as a weaker party and took benefit of additional choices given by Section 3. This was in contrast to the *Vorarlberger* case where a social security institution was treated like an insurer or an actual insurer who are not a weaker party.[351]

As previously mentioned in the origin of the weaker party protection, the reason behind such jurisdictional protection is the fact that parties might not have equal information, economic or bargaining power under some circumstances. Hence, they may find themselves in a disadvantages position against a more powerful opponent. However, both *Vorarlberger* and *KABEG* focuses on the relationship between the injured party and the party bringing the claim, rather than the objective assessment of the claimant. These cases simply assumes that if you are not an insurance specialist, then you can be considered as a weak party. This simple and one-dimensional approach do not take into account the real reason behind the jurisdictional protections and the commercial reality. A party might not be an insurance specialist, such as a big finance firm, but they may have more economic power and even sophisticated insurance products. Thus, it is more than capable of negotiating a contract, having access to necessary information and pursuing its legal battles. It seems like the origin of the weaker party protection

[350] Ibid, [66]-[72].
[351] Yvonne Baatz, '*Matters Relating to Insurance and Protecting the Weaker Party.'* [2018] LMCLQ 1.

has no impact on the modern interpretation of the concept. The courts have more purposive interpretation and try to avoid uncertainty. Nonetheless, this one-sided interpretation creates even more confusion because there is no clear explanation on why this approach has been taken other than the fact that this provides a simple test. The Schlosser Report also indicates that this simple approach was a result of the need to find a simple solution to a complex question. It states "*the problem was one of finding a suitable demarcation line. Discussions on the second Directive on insurance had already revealed the impossibility of taking as criteria abstract, general factors like company capital or turnover. The only solution was to examine which types of insurance contracts were in general concluded only by policyholders who did not require social protection*."[352] Therefore, the protection will be extended to a third party if the third party is not an insurance specialist. In a more recent case, where an injured party assigned his rights to damages to Mr Hofsoe, whose commercial activity was to assume responsibility for securing compensation from insurers to which an injured party may be entitled.[353] The court said again no protection is justified to parties who are professionals in insurance sector.

However, the CJEU in *KABEG* did not state any concrete criteria for assessing what is a weaker party. According to the simple test provided in *KABEG*, group of people who can be considered as a weak party is a wide spectrum of entities. In other words, these parties may be large cooperation, economically strong institutions, or legally sophisticated entities. On the other hand, in the EU legislation, there are economic criteria in relation to large risks for parties to qualify for protection according to the type of risk. However, the CJEU did not mention those economic criteria provided in the legislation. Thus, many parties are likely to be treated as weaker parties despite the fact that they are economically and legally big parties.

[352] Schlosser Report, [140].
[353] Case 106/17 *Paweł Hofsoe v LVM Landwirtschaftlicher Versicherungsverein Münster AG*, EU:C:2018:50.

The CJEU recently confirmed that a third party bringing a direct action is not bound by a jurisdiction agreement.[354] In *Assens Havn v Navigators Management (UK) Ltd (The Sea Endeavour I)*, the Swedish charterer of the tug Sea Endeavour I took liability insurance with the defendant insurer Navigators. The insurance policy contained English law and exclusive English court jurisdiction clauses. It is possible to have a jurisdiction agreement in such a policy in relation to marine risks because of Articles 15(5) and 16. After *The Sea Endeavour I* damaged key installations at Assens Havn, Assens Havn brought a direct action before the Danish courts relying on Danish law giving the right to bring direct action against the liability insurer when a policy holder goes into liquidation. The Danish courts dismissed the proceedings, but they referred the matter to the CJEU. The CJEU held that the third party bringing the direct action was not bound by a jurisdiction agreement and stated that: "*The view must therefore be taken that an agreement on jurisdiction made between an insurer and an insured party cannot be invoked against a victim of insured damage who wishes to bring an action directly against the insurer before the courts for the place where the harmful event occurred, as recalled in paragraph 31 of this judgment, or before the courts for the place where the victim is domiciled…*'[355] Although article 15 -16 of the Recasts regulation states that if the risk is a large risk, then the jurisdiction agreement is binding, the ECJ held that in a direct-action claim, a jurisdiction agreement in the insurance contract is not binding. The court held that it does not matter it is a large risk or not. The CJEU's decision in Assens Havn creates uncertainties about the position of the third parties such as statutory assignees or subrogated insurers of the cargo owners. This judgment also caused unpredictability as insurers may face claims from unknown parties in unknown jurisdictions, subjecting them to unknown

[354] C-368/16 *Assens Havn v Navigators Management (UK) Ltd (The Sea Endeavour I)*; See also C Mitchell and Stephen Watterson, *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (1st Bloomsbury Publishing 2020), 89.
[355] Ibid, 40.

procedural rules which were never contemplated in the insurance contract. This is going to led to multiple proceeding in multiple jurisdictions, which will cause massive costs and conflicting judgments.

In the Sea Endeavour, the victim, Assesn, is a weaker party, and therefore the decision of this case should be only limited to a situation where the claimant is a weaker party because Assens is not an insurance professional. If it was the subrogated cargo insurer, who was bringing the claim, it could be argued that the decision of the Sea Endeavour doesn't apply because an insurance professional is not a weaker party. If the decision in *Assens Havn* means that an exclusive court jurisdiction clause in a liability insurance contract is not binding, the consequence of that is that all insurers will put London Arbitration clauses in their contract[356] because it falls outside the Recast Regulation according to Article 1(2)(d).

b. The UK cases on Weaker Party Protection

If the proposed defendant is domiciled in a non-EU state or non-Lugano contracting state and does not have a branch in an EU Member State, then *Assens Havn* decision does not apply. In that scenario, it is a matter of English common law and the English courts have power to determine whether the third party is bound by the jurisdiction or arbitration agreement provided by the insurance contract.[357] It is important to mention that the 2005 Hague Convention on the Choice of Court Agreements could apply in certain circumstances, if other parties are in a Hague Convention contracting state, even after the Brexit. If the 2005 Hague Convention on the Choice of Court Agreements does not apply, then it is up to common law to decide the question.[358]

[356] Yvonne Baatz, '*Matters Relating to Insurance and Protecting the Weaker Party.*' [2018] LMCLQ 1, 9.
[357] The English courts would allow to serve proceedings out of the jurisdiction under CPR 6.36.
[358] In the second report, I am going to talk about insurance disputes and when an insurer can be sued as of right in England.

The English courts in *The Hari Bhum, The Prestige (No 2)* and *The Yusuf Cepnioglu* held that exclusive jurisdiction clauses and arbitration clauses are binding on third parties bringing direct actin claims, providing that the statue giving right to direct action does not creates an independent statutory right because a direct action against an insurer is an action which should be characterised as contractual. In English law, therefore, the direct-action claim has been characterised as a claim based on the insurance contract.

The main purpose of providing jurisdictional protection for the weaker party in insurance context is to protect small policy holder. However, this protection cannot be limited to cases where the policy holder is economically weaker. There are several cases where the English courts applied the weaker party protection under the EU legal framework. These interpretations will be still applicable but as we have seen the English court may also depart from them. They can still give us an idea how the courts generally approach the concept.

In *New Hampshire Ins Co v Strabag Bau AG*[359], the defendant firms, Strabag Bau AG and Bilfinger and Berger AG from Germany, along with Universale Hoch and Tief Bauaktiengesellschaft based in Austria, collaborated for a joint venture to construct the Basrah airport. They insured building risks with National Insurance Co of Iraq. They secured insurance from the London market, with the defendant, New Hampshire Insurance Company, serving as the primary underwriter. This insurance covered claims not covered by the NIC policy and those claims that, despite being covered, went unpaid for over six months. New Hampshire was domiciled in the United States and represented in London by American International Underwriters Ltd. Later, there was a corrosion damages on the construction project. Later

[359] *New Hampshire Ins Co v Strabag Bau AG* [1992] 1 Re LR 325.

payments were made but it turns out the policy was void due to nondisclosure. As a result, London insurers commenced proceeding in London against a German insured. The court held that the proceeding was required to be brought against the German insured in Germany according to Article 11 of the Brussels (article 14 of the Recast), regardless of the fact that insurers and insured had comparable bargaining power. In other words, a weaker party should not be defined in socioeconomical terms for the purpose of Section 3. Thus, the weaker party protection is to protect an insured who contracts with an insurer on the basis of a standard term policy or a situation where terms are offered by an insurer on a "take it or leave it" basis to a person of unequal bargaining power.

In *Aspen Underwriting Ltd v Credit Europe Bank NV (The Atlantik Confidence)*, the English courts had to consider whether a bank was a weaker party.[360] The Atlantik Confidence, the vessel had a hull and machinery risk insurance policy by the underwrites, Aspen Underwriting Ltd, and others. The policy had an exclusive jurisdiction clause providing the courts of England and Wales. A bank, Credit Europe NV, domiciled in the Netherlands, provided funding for the refinancing of the Vessel. As part of the refinancing, it took mortgage over the vessel and assignment of the insurance policy. After the vessel sank and became a total loss, the owners presented a claim for USD 22 million. A settlement agreement was agreed by the underwrites, the owners and managers, which also had an exclusive English jurisdiction clause. The payment was immediately made via the insurance broker. Later, in the subsequent hearing at the Admiralty court, the court held that the vessel had been scuttled by the owners and managers. As a result, the insurers commenced proceedings in the UK against the owners, managers and the bank to set aside the settlement agreement and recover the money it had paid.

[360] *Aspen Underwriting Ltd v Credit Europe Bank NV (The Atlantik Confidence)* [2020] UKSC 11; [2021] AC 493.

However, the Bank challenged the jurisdiction of the English courts in respect to the underwrites' claims against it and claimed that the actions can be brought against it only in the Netherland on the ground that article 4 of the Brussels regulation provides that a defendant domiciled in an EU member state must be sued in the courts of that member state. The bank also added that these claims concerned to a "matter relating to insurance" as outlined in article 14 of the Recast Regulation. According to article 14,"an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary"

Surprisingly, the Court of Appeal decided that a bank is not a weaker party and therefore the jurisdiction agreement was not binding, following the wording of the recital 18, which states "in relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules." Since the bank is not one of the professionals to whom the section 3 protection did apply or extend. In fact, the Court of Appeal said "*In the light of its shipping finance business, the Bank's professional activity included taking assignments of insurance rights. The Bank was not an economically weaker party than Underwriters and no authority bound the court to hold otherwise*."[361] Therefore, the bank is neither economically weak nor lack of legal capacity and experience. It seems in line with the original purpose of the weaker party protection. However, the case was appealed. The Supreme Court had to consider two impotent questions; first whether the dispute is a matter relating to insurance since the payment made under the settlement agreement and whether the bank falls under protections provided in section 3 of the Recast as a weaker party.

[361] [2018] EWCA Civ 2590, 238.

The Supreme Court confirmed that it is clearly a matter relating to insurance, because the source of the Underwriters' claim was that the owners and managers had committed insurance fraud, and for this, the Bank should bear vicarious responsibility. Therefore, the facts of the case satisfy the test put forward in the *Brogsitter v Fabrication de Montes Normandes EURL*,[362] which states that the subject matter of the claim had to relate to a breach of the insurance contract. The Supreme Court was also clear in its stance that the Bank, as the assignee and the entity designated to receive the insurance pay-out, was a "beneficiary" of the Policy. Following the wording of article 14, Lord Hodge highlights that the class of individuals whom the article aims to shield does include not just the policy holder and the insured (typically parties to the insurance agreement) but also a beneficiary, who ordinarily wouldn't be a signatory to the insurance contract.[363]

The Supreme Court also stated that evaluating on a case-by-case basis if a party is "weaker" or "stronger," especially when they belong to one of the categories already outlined in Article 14, contradicts the principle of legal certainty.[364] The court agrees with the decision and perspective of Advocate General Bobeck in the KABEG case, where the court suggest not to focus on individual characteristics of the claimant and rather check whether it is one of the protected classes. As a result, the court said the bank is not an insurance professional. Their business is wholly different and therefore they should be considered as a weaker party, following the latest judgment of the CJEU in KABEG and previous decisions in English courts.

This decision limits the purpose of weaker party protection as to protection of the small policyholder against a more powerful insurer. However, economically or legally big entities

[362] Case 548/12 *Brogsitter v Fabrication de Montes Normandes EURL* [2014] QB 753.
[363] [2020] UKSC 11, per Lord Hodge.
[364] Ibid, [54].

can be classified within a class of professionals to whom the weaker party protection apply because it is not a professional in the insurance sector. Therefore, it might seem like it provides clarity and predictability. Nonetheless, it defiantly goes against the original purpose of the weaker party protection and the commercial reality. For example, some banks can have highly sophisticated insurance products or in fact separate departments dealing with insurance related financial matters. Considering these multibillion-dollar commercial giants as a weaker party does not seem like the weaker party protection is implemented according to the original ethos of the doctrine.

On the other hand, post-Brexit, the Supreme Court's decision might have been quite different, under old common law rules, considering the fact that the settlement dispute had an English governing law clause. While challenging the jurisdiction, the Bank had to prove that England was not the appropriate forum. Considering the fact that the contracts provided for English governing law, it would easily satisfy the gateway under the paragraph 6(c) of the PD 6B. Furthermore, in terms of procedural efficiency, England also seems like the appropriate forum following the Spiliada case because there were already other proceedings in relation to the fraud allegation. In the Spiliade case, the court also considered the pending case against the same defendant and concluded that for procedural efficiency, England was the most appropriate forum. Thus, the governing law and the pending fraud case would have been strong connecting factor and thus the court would have decided that England is the most appropriate forum, not the Netherlands.

6. Anti-Suit Injunctions

Even if we determine whether a third party is bound by a dispute resolution clause in the policy, or if they should be given weaker party protection, there still remains a risk that one of the

parties may commence proceedings in a jurisdiction other than the one agreed upon. This part of the chapter will explain what options the other party has to avoid proceedings in a jurisdiction that is not agreed upon or designated, as a result of the rules covered previously.

Once it is established whether the jurisdiction clause is binding or not, if one of the parties decide to commence a proceeding in another jurisdiction then the one established, the other party can stop the proceedings in that court with an anti-suit injunction. An anti-suit injunction simply restrains the party who is in breach of jurisdiction clause from commencing or continuing with proceedings elsewhere. Hence, if the English courts decides that a foreign proceeding is vexatious or oppressive, the court can grant an anti-suit injunction under its general power provided in section 37 of the Senior Courts Act 1981.

This scenario occurs frequently in the context of P&I Club disputes. For example, the assured and the insurer is likely to have an exclusive jurisdiction clause providing for English courts, and the assured incurred liability against a third party. Then the injured third party brings direct action proceedings against the liability insurer in another jurisdiction under a different external mechanism, enabling direct action. Although the discretionary power of the English courts to grant anti-suit injunction has been curtailed in relation to matters related to the EU, it has been used as an effective mechanism by the English courts.[365]

The first question to ask is whether the claim brought is a statutory independent right of direct

[365] Case 159/02 Turner v Grovit [2005] 1 AC 101; [2004] ECR I-3565; Case C185/07 *Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) v West Tankers Inc (The Front Comor*) [2009] 1 AC 1138; [2009] 1 Lloyd's Rep 413.

action or whether it is contractual in nature. Abovementioned, the characterisation of a direct action will have an impact on the answer, because if it is characterised as an independent statutory right, then there is no ground for an anti-suit injunction. On the other hand, if it is characterised as a contractual right, then the English court will consider the nuclear option to stop the other party.

In relation to direct actions, the very first discussion for an anti-suit injunction arose in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No.1)*.[366] The facts of the case have been examined in detail under different chapter. In relation to this chapter, the two most important questions are whether the direct action under the relevant Finnish statute should be characterised as contractual right and whether the English court should grant an anti-suit injunction or not. In the case, the cargo which was insured became a loss. As a result, the insurer paid out and stepped into the shoes of the owner and brought proceedings against the carrier seeking compensation. However, later the carrier became insolvent. The cargo insurers commenced proceedings against the P&I Club in the Finnish courts. The main reason behind this was to avoid the pay to be paid clause because under the Finnish law such clauses are not enforceable. On the other hand, the Club sought an anti-suit injunction against the insurers to stop them continuing their proceedings in Finland, other than arbitration in England as stated in the policy. The court characterised the claim under the Finnish law as contractual in nature according to the English law. However, the court refused to grant an anti-suit injunction because it saw nothing oppressive or vexatious in the Finnish proceedings since the insurers were not party to the arbitration clause. The court was particularly cautious about anti-suit injunction because it was not clear whether it could be

[366] *The Hari Bhum* [2005] 1 Lloyd's Rep 67, per Moore-Bick J.

allowed under the Brussels Convention. However, this judgment is quite unfortunate because contradicting with the doctrine of conditional benefit, because the third party is bringing the case within the contractual framework, as discussed in the characterisation chapter. Therefore, it was not a right conclusion. However, post-Brexit, anti-suit injunction will be available in relation to cases involving parties from the EU as well.

Later, in *Markel International Co Ltd v Craft (The Norseman),* the court had to decide on another case with similar fact, but without the EU angle.[367] The case was brought by the family of the injured third party, who passed away in a ferry accident in Tunisia. The proceedings brought against the owners of the ferry and the liability insurer in Tunisia. The liability insurance contained an arbitration clause providing for London seat. The relevant Tunisian legislation provided an independent right of direct action unlike the equivalent legislation in the UK. Following the judgment in *The Hari Bhum*, the court held that the family was not a party to the contract, and thus they were not in breach of the arbitration contract contained in the policy. The court continued the same conservative approach and did not grant the anti-suit injunction. However, with *the Yusuf Cepnioglu* this conservative approach has changed, and the approach adopted in earlier judgments were questioned.[368]

T*he Yusuf Cepnioglu* case, above mentioned in other chapters, is another direct-action claim. In the case the direct action was derived from the relevant Turkish legislation. The pay to be paid clauses are not enforceable under the Turkish law. Following *The Hari Bhum,* the court first established that the claim was a contractual claim in nature, rather than being an

[367] *Markel International Co Ltd v Craft (The Norseman)* [2006] EWHC 3150 (Comm).
[368] *The Yusuf Cepnioglu* [2016] EWCA Civ 386; [2016] 1 Lloyd's Rep 641.

independent statutory right. However, unlike *The Hari Bhum* case, this time the court stated that it is oppressive or vexatious to allow proceeding in Turkey, because the pay to be paid clauses will not be recognised by the Turkish courts.[369] The court also stated that the way how a claim characterised should not play a role in the decision of whether to grant an anti-suit injunction, which is later adopted in *QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros*, where the court said that the problem with that approach is the fact that characterising a claim as tortious in nature does not give an indication whether the right given by the mechanism is to enforce a contractual right in substance or not.[370] In other words, it is important to understand what is the objective of the mechanism rather than the nature of the claim.

The court granted the anti-suit injunction and cited the case perfectly formulated the key principles for granting anti suit-injunction in wholly contractual context in *AIG Europe SA v John Wood Group plc*: (i) The authority of the court to issue an ASI against foreign lawsuits, when initiated or potentially initiated against a mandatory arbitration agreement, stems from section 37(1) of the Senior Courts Act 1981. The court will take action if deemed "just and convenient." (ii) The fundamental principle is based on the requirements of justice. (iii) Exercising the power to grant an ASI must be approached with care. (iv) The party requesting the injunction needs to demonstrate with significant certainty that an arbitration or jurisdiction agreement applicable to the relevant dispute exists. (v) Typically, the court will lean towards halting procedures that violate a forum clause, unless the defendant presents compelling reasons to decline such action. This is based on the precedent set in *Aggeliki Charis Compania*

[369] Ibid, per Moore-Bick.
[370] *QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros* [2022] EWHC 2062 (Comm), [63].

Maritima SA v Pagnan SpA (The Angelic Grace).[371] (vi) The responsibility of presenting compelling reasons falls on the defendant.[372]

On the other hand, the suit injunctions are also available for so called quasi-contractual scenarios, where the defendant is not a party to a contract in strict sense but should be bound by the jurisdiction clause as if the relationship was a contractual one.[373] The paper has already covered such cases where a third party takes a benefit from a contract, but does not want to be bound by the jurisdiction clauses, i.e. the burden of the contract. Having said that, if there is no jurisdiction agreement providing for a London seated arbitration or exclusive jurisdiction of English courts, then it is difficult to justify granting an anti-suit injunction, as suggested in *Société Nationale Industrielle Aérospatiale v Lee Kui Jak*, where the court said there should be a personal jurisdiction over the party against whom seeking the anti-suit injunction.[374]

7. Conclusion

Initiating proceedings in the wrong jurisdiction can have legal and financial consequences for both parties. Therefore, this chapter presents the relevant legal framework to establish jurisdiction under both the EU and UK legal frameworks, which is the first hurdle in every cross-border dispute. Especially, as covered in the previous chapters, different legal frameworks and mechanisms enabling direct actions may provide for different forums or dispute resolution mechanisms. Hence, in a direct-action claim, it is important to understand

[371] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87.
[372] *AIG Europe SA v John Wood Group plc* [2022] Lloyd's Rep IR 485, [58]; See also Thomas Raphael QC, *The Anti-Suit Injunction* (2nd Oxford University Press 2019), Chapter 4.
[373] Thomas Raphael QC, *The Anti-Suit Injunction* (2nd Oxford University Press 2019), Chapter 10.
[374] *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] UKPC 12, [1987] AC 871.

the legal framework under which parties can commence proceedings against the insurer of the tortfeasor.

There is no doubt that English common law provides a broader basis for English courts to establish jurisdiction. Especially after Brexit, the jurisdictional territory of the English court will expend more day by day. It seems like courts are ready to interpret their jurisdictional discretions broader than ever under the CPR and the *Spiliada*. In fact, many cases decided under the EU legal framework, would have been decided differently. In contrast, the EU legal framework, particularly in matters relating to insurance, is more structured and well-defined, offering exceptions that deviate from the general jurisdictional rule to protect third parties. The UK legal system later adopted this so-called 'weaker party protection' from the EU.

This chapter evaluated the special jurisdictional provisions, which provides alternative roads to the weaker parties under each legal framework. The main problem with this concept lies in the lack of a clear definition of who constitutes a 'weaker party.' It is evident from existing case law that all third parties, except insurance professionals, are seen as weaker parties. This is in contradiction with the ethos behind the genesis of weaker party protection, which aimed to level the playing field in terms of financial, informational, and bargaining power disparities between the parties. However, within the current legal framework, a large corporation, such as a bank, can be deemed a weaker party simply because it is a third party to a contract. It seems like the courts thought it would be extremally difficult to do case by case analyses and so they come up with a simpler solution where instead of focusing on the characteristics and factual narrative surrounding the parties, they rather focus on the relation between the parties.

As a result, in an insurance dispute, if a third party who is not an insurance specialist brings a direct-action claim, the court will consider them a weaker party, regardless of the claimant's economic power and legal experience. This presents a significant problem for P&I clubs, because all third parties initiating direct action claims are likely to be deemed weaker parties, unless they are insurers bringing a subrogated claim on behalf of their assureds. In other words, P&I clubs may face greater jurisdictional uncertainty than ever before. Therefore, this chapter suggests that courts should prefer a case-by-case approach and provide clearer guidance on the definition of a 'weaker party.' Imposing such a jurisdictional burden on the insurance market will ultimately only lead to increased premiums.

CHAPTER VI: COMPLETE GUIDELINE FOR DIRECT ACTIONS

This chapter aims to build bridges among the various components of the research questions addressed throughout this thesis. It seeks to provide comprehensive answers to these questions, thereby offering a guideline for direct actions and charting a path forward. The primary objective of this research has been to determine whether a third party initiating a Direct Action against an insurer is bound by a dispute resolution clause that was agreed upon between the insurer and the insured. This central research question is multi-layered, encompassing the characterization of the claim, the mechanisms enabling the claim, the governing law of the claim, and the jurisdiction over the claim. This chapter will adopt a normative approach rather than focusing on academic discussion. It will concentrate on the existing legal framework and provide practical guidance on how to navigate these disputes in real life.

In practice, when an incident occurs, a third party may initially attempt to pursue the tortfeasor. However, this process can be far from straightforward, particularly in intricate commercial contexts. These complexities underscore the importance of establishing clear guidelines for both third parties and P&I Clubs. Such guidelines are crucial for clarifying the nuances and procedures of direct-action claims, thereby facilitating a more efficient and equitable resolution process. Therefore, this part of the thesis will follow a thematic timeline and provide a step-by-step guideline. This allows for a more nuanced exploration of direct actions, offering a different perspective than a simple chronological timeline. It is a useful tool for highlighting how different aspects of the research are interconnected and how they have contributed to the overall narrative or findings of the thesis.

1. The Genesis and Nature of the Claim

The genesis of the claim encompasses the moment when the circumstances giving rise to the claim first arise, or when the claimant becomes aware of those circumstances and decides to pursue legal action. In the context of direct action, it is the moment when an assured incurs liability against a third party. However, it is not straightforward to determine whether the moment the tortfeasor's liability is crystallized is also the moment when the third party acquires the right of direct action. This issue is intrinsically linked to the nature of direct action. Therefore, properly characterising the claim is crucial for parties to understand whether the third party is bringing the claim in respect of the assured's loss or their own loss, and whether the right of action against the insurer arises at the moment the third party suffers a loss caused by the insured tortfeasor, or at a later time.

At this stage, there are only two options: either the direct-action claim is an independent right, in which case the right of action exists from the moment the tortfeasor causes the loss, or it is a contractual claim.[375] In the latter case, the right of direct action arises at a later time if the tortfeasor cannot discharge their liability, leading the third party to directly sue the tortfeasor's liability insurer.

The question of characterization is also directly linked to the second component of the research question, which concerns the mechanism enabling direct action. [376] As covered in Chapter II,

[375] See Chapter II above.
[376] See Chapter III above.

direct actions are predominantly characterized as contractual claims, although there is no contractual relation between the third party and the P&I Club. The language used in the relevant legal mechanism enabling direct action is key to understanding the nature of the action. Therefore, a third party must first identify the legal mechanism enabling them to bring their action against the P&I Club and then understand the nature of their claim, since this will help them comprehend their rights and obligations. Having said that, inferring the nature of the claim from the relevant legal texts is not always straightforward, as statutory interpretation is an art in itself, based on various legal principles and the relevant national law.[377] Nonetheless, these legal texts are the starting point for parties to identify the next steps.

The relevant legal text, whether it be a foreign statute or an international convention, usually indicates the nature of direct action in a very subtle way. After reviewing the foreign statutes in major maritime nations, it became evident that the majority of these statutes indicate direct actions are contractual in nature. The main indicator is the fact that these foreign statutes, while granting a right of direct action to third parties, the language chosen by the policymakers require them to examine the contract to understand the scope of their rights. This means that although the source of the right of action might originate from the statute, the statute ensures it does not exist independently. Hence, the right is tied to the insurance contract. In fact, some jurisdictions, like the UK, state that if the contract has a defence against the assured, it also applies to the third party. In other words, the third party cannot bring a direct action as in the examples given in the context of 'pay to be paid' clauses, where the policy first requires the assured tortfeasors to indemnify the third party. If the assured tortfeasor goes bankrupt before indemnifying the third party, then in jurisdictions like the UK, the third party cannot bring an

[377] See also Richard Calnan, *Principles of Statutory Interpretation* (1st Oxford University Press 2023).

action against the P&I Club. In jurisdictions following this approach, it is clear that the third party is not actually bringing a claim in respect of their own loss but rather trying to enforce a contractual rigth by attempting to assert the right of the assured.

On the other hand, while some European jurisdiction might adopt a different legal language, the ultimate outcome is essentially the same. For example, the Scandinavian or Turkish statutes state that so-called 'pay to be paid' clauses are not enforceable. They may not directly address the nature of the direct action, but they explicitly state that a specific clause in the insurance policy is not enforceable in a direct-action claim. This still does not change the nature of the claim because these foreign statutes direct parties to the insurance policy to understand the extent of their rights. Their rights do not exist independently of the insurance policy.

Contrary to the preferred language in foreign statutes, where the relevant legal texts create a link between the right of direct action and the insurance policy, there are other legal texts, such as Section 165 of the Merchant Shipping Act 1995 or the more commonly used Civil Liability Convention, which employ more definitive language. In these cases, the texts refer to the policy merely to identify the insurer but provide more than just the right to enforce a contractual right. They confer an independent right of action. Therefore, these legal mechanisms actually enable third parties to bring a claim directly against the P&I Club for the losses they have suffered. In other words, they are not enforcing a contractual right. This means that third parties asserting an independent right are likely to have a better standing because insurers cannot use contractual defenses or limitations against them.

Consequently, before bringing a direct action, the third party should identify the possible mechanisms they can rely on to initiate proceedings directly against the P&I Club rather than their tortfeasor. If the relevant legal mechanism provides a right characterised as contractual under the relevant law, then the third party may need to examine the relevant insurance policy to identify any possible defences or limitations that exist under the contract. If the P&I Club realizes that the third party is bringing a claim under a contract, they will rely on defences provided within the contract such as 'pay to be paid' clauses in jurisdictions that allow them to do so.

Hence, naturally, the first two questions to answer for the relevant parties, in order to come up with the right legal strategy, are to understand the relevant legal mechanism and the nature of their actions. If the relevant legal framework provides for a contractual claim, as most foreign statutes do, then the parties will need to examine the relevant insurance policy for the rest of the questions. However, if the legal framework provides an independent right, the third party might have a better chance and more flexibility, since they will not be limited by the relevant insurance policy.

2. The Scope of the Claim

Characterising the direct action under the relevant legal mechanism leads us to the next aspect: the scope of the claim, which includes the remaining two components of the research question – the governing law and the jurisdictional elements. The former component refers to the applicable law to the direct action, which might be straightforward depending on the relevant legal framework. Chapter IV covered the relevant EU legal framework, which has also been

adopted by the UK and integrated into UK common law, due to the universal nature of these conventions: Rome I and Rome II.

Identifying the applicable law is important for parties to understand how their rights and obligations will be interpreted by the court. In fact, the third party can only bring a direct action on the ground that the applicable law allows a direct action claim. Initially, courts tend to examine the insurance contract in question since, as mentioned above, most legal jurisdictions treat direct actions as contractual claims. However, surprisingly, not all contracts have proper governing law clauses that explicitly state the applicable law. Besides, as repeatedly discussed, direct actions are not always characterized as contractual claims.

Assuming a third party brings their case under the EU or UK legal framework, the first question, as previously mentioned, is the nature of their claim. If it is contractual, then Rome I will provide guidance for the applicable law. Otherwise, for tortious claims, Rome II offers guidance.[378] However, a complication arises here because Rome I remains silent about direct action claims, hence providing no proper guidance on how to decide the applicable law. This contrasts with Rome II, which offers slightly clearer guidance under Article 18 for direct action claims, referring to two different set of rules: the law applicable to the non-contractual obligation or the law applicable to the insurance contract. Thus, if there is no express choice of law, then the courts will examine both set of rules.

[378] See Chapter IV above.

Considering the scenario in which a direct-action claim is brought in a jurisdiction that characterises it as a contractual claim, the courts, in the absence of an express choice of law, will determine whether there is an implied choice of law by considering the factual and legal matrix. The purpose of this is to find the applicable law with which the contract is closely connected.[379]

As a result, once the applicable law is established following these principles, the next step will be addressing the final component of the research question. This involves answering two main questions: What is the relevant jurisdictional framework, and should third parties be bound by dispute resolution clauses? If not, why are we providing them with such jurisdictional protections, commonly referred to as 'weaker party protection'? Identifying the jurisdictional grounds and exceptions will provide us with the ultimate response to the research question.

The main complication arises due to the international nature of maritime trade. Imagine Ship A, flying the UK flag, collides with Ship B, bearing the Spanish flag, near a Greek island in the Aegean Sea, causing environmental damage to a fish farm off the coast of Turkey. This scenario presents several different legal mechanisms at play. To navigate from the incident to the appropriate jurisdiction, parties must follow the path laid out repeatedly in this thesis. First, properly characterise the claim and understand the mechanism enabling the right of direct action, as well as the law governing it. Then, determine the appropriate jurisdiction under the relevant legal framework and explore any alternatives if possible.

[379] Simon Atrill, "Choice of Law in Contract: The Missing Pieces of the Article 4 Jigsaw?" (2004) 53 The International and Comparative Law Quarterly 3, 549–77, 550; See also Compagnie d'Armement Maritime S.A. Appellants v Compagnie Tunisienne de Navigation S.A. Respondents [1971] AC 572.

In this example, let's assume that Ship A is 100% at fault. Since the harm occurred in Turkish waters, the owner of the fish farm wishes to commence proceedings against the owner in Turkey. However, the shipowner goes bankrupt. Thanks to the relevant Turkish Commercial Code,[380] as covered in *The Yusuf Cepnioglu* case, the third party – in this case, the fish farm owner – can commence proceedings directly against the liability insurer of Ship A, based in Norway. The policy between the owner of Ship A and the Norwegian insurer is governed by English law and contains an exclusive jurisdiction agreement favouring English courts.

Understandably in this example, the third party would prefer to commence proceedings in Turkey, not only because initiating a case in a foreign country might be costly, but also because if the proceedings were to start in the UK, the P&I Club could rightfully rely on the 'pay to be paid' clause to avoid any payment. On the other hand, if the case is brought in Turkey, as in some other Continental European jurisdictions, 'pay to be paid' clauses are considered against public policy and thus unenforceable. However, in this example, the relevant Turkish code characterises the direct action as a contractual claim. Therefore, the fish farmer would be bound by the terms of the insurance contract if they wish to enforce a contractual right. If they insist on pursuing the case in Turkey, the P&I Club could ask English courts to grant an antisuit injunction to prevent the third party from continuing the proceedings in Turkey, given the contract's provision for exclusive English jurisdiction.

On the other hand, if the third party, i.e., the fish farmer in this example, brings proceedings

[380] Article 1478 of the Turkish Commercial Code; See Chapter II above.

under the CLC, the P&I Club would not challenge the jurisdiction, since the convention allows third parties to initiate direct action in the courts of the place where the damage occurred. For example, in *The Prestige* case, the P&I Club acknowledged the right of direct action in Spain under the CLC.[381] However, the claim exceeded the CLC limits. As a result, for the remaining tortious claims, the P&I Club challenged the jurisdiction of the Spanish courts, arguing that the insurance policy provides for English jurisdiction.

Therefore, once the direct-action claim is characterised and the appropriate legal mechanism under which the direct action can be brought is identified, this will lead us to the proper jurisdiction. Considering the facts of this case, let's assume it is the UK since the insurance policy contained an exclusive English jurisdiction clause. However, this is not the end of the road for the third party.

As previously discussed, the UK has adopted the EU's principle of weaker party protection and integrated it into common law. Therefore, third parties who are not insurance specialists are considered weaker parties and are given jurisdictional protection.[382] In other words, the dispute resolution clauses contained in the relevant insurance policy are not binding on these third parties. However, if the fish farmer was compensated by its insurer and now its insurer steps into the shoes of the third party to bring a subrogated claim against the P&I Club, the jurisdiction question would be different. Since the subrogated insurer is not considered a weaker party, they would be bound by the dispute resolution clauses. Consequently, they would

[381] The London Steam Ship Owners Mutual Insurance Association Ltd v The Kingdom of Spain And Another (The"Prestige") (No 2) [2015] EWCA Civ 333; See Chapter II above.
[382] See Chapter V above.

need to bring the case in the UK. To sum up, the direct-action equation stands on four pillars: characterisation, direct action mechanisms, governing law, and jurisdictional aspects. Only then can parties fully understand their rights and obligations, including their eligibility for weaker party protection. The issue of weaker party protection has not evolved as expected, and the courts have decided to apply broader definitions rather than conducting case-by-case analyses. Therefore, if a direct action is commenced by anyone other than an insurance professional, they will be considered a weaker party regardless of their economic power or institutional capacity.

CONCLUSION

It has been a lengthy and challenging journey since the beginning of this thesis, marked by significant legal developments and changes. Now, the conclusion is reached, representing the culmination of a diligent navigation through its complexities. Since the beginning of this thesis, uncertainties surrounding direct action claims have increased. Undoubtedly, the law ought to be clear and unambiguous to effectively guide parties. However, the inability to join the Lugano Convention in the post-Brexit era has introduced an additional layer of complexity concerning direct action claims. Hence, the research remains highly important and relevant to this day, due to the ongoing changes in private international law. Consequently, this thesis has covered all relevant discussions and developments related to direct action claims to answer the research question: whether a third party initiating a Direct Action against an insurer is bound by a dispute resolution clause agreed upon between the insurer and the insured.

The main objective of this thesis was to provide guidance for both P&I Clubs and third parties bringing direct action claims against them. Their rights and obligations are not crystal clear under the UK and EU legal frameworks. Therefore, the aim of the thesis was to examine existing literature and case law to provide a comprehensive guideline explaining how direct actions works from the beginning.

Initially, the thesis began with fundamental contract law principles, which underpin the research questions' existence. This was crucial to understand the relevance and importance of these questions. The conclusion was that, historically, although there is a strong argument based on the doctrine of privity, if a third party attempts to rely on a contract to enforce a

contractual claim, they should be bound by the conditions attached to that right. Hence, Chapter I starts with a literature review of characterisation to answer the question of whether direct actions are contractual claims or independent actions. The initial conclusion was that they are usually defined as contractual in most legal systems, owing to the legal mechanisms that give rise to the right of action. They are predominantly formulated such that the right of action is tied to the contract. In fact, in some jurisdictions, certain contractual clauses, like 'pay to be paid', are unenforceable. Yet, even in those jurisdictions, direct actions are seen as contractual because third parties are believed to be trying to enforce a contractual right against the P&I Clubs.

On the other hand, Chapter III examined all possible mechanisms enabling third parties to bring cases against P&I Clubs. This chapter concluded that there are mechanisms providing for an independent right of action for third parties. These legal texts are drafted in a way that refers only to the insurance contract to identify the liability insurer, but they create a completely independent right of action, such as the CLC. This allows the third party to bring a case against the tortfeasor's liability insurer for the losses the third party suffered.

This illustrates how the chapters on characterization and legal mechanisms are interrelated. One must carefully read the legal texts enabling direct action to characterize the claim and determine whether the third party is bringing a contractual claim or an independent one for the losses they suffered. Only after identifying the correct legal mechanisms can the claim be properly characterised, allowing us to move to the question of applicable law. The question of applicable law is also tied to characterization because, once the right is characterised, the relevant conventions will assist in identifying the applicable law.

As covered in Chapter IV, the question of applicable law may not always be straightforward, especially in cases where contracts do not have express governing law clauses. However, the relevant conventions provide guidelines depending on the nature of the action. If the direct action is characterized as tortious, then Rome II offers better guidance, whereas Rome I remains silent about direct actions in contractual claims. The main conclusion of this chapter is that neither convention provides sufficient clarity on direct action claims. Nonetheless, identifying the correct applicable law is crucial because the existence of such a direct-action right is directly linked to the applicable law. Therefore, the thesis reviewed related case law which provides better guidance on how to identify the correct applicable law. Given that the majority of foreign statutes, including those in the UK, define direct actions as contractual, further clarification is needed.

This naturally brought us to the final component of the research. The primary objective of Chapter V was to identify the relevant jurisdictional framework and protections provided for weaker parties under special circumstances. Due to recent jurisdictional developments, it was crucial to separately cover both EU and UK legal frameworks. This allowed for a clear identification of the jurisdictional gateways and their application in the insurance context. After establishing the circumstances under which English and EU courts assume jurisdiction in matters relating to insurance contracts, the initial conclusion of this chapter was that English common law provides broader gateways for English courts to assume jurisdiction. On the other hand, the EU legal framework on matters relating to insurance is more structured. The weaker party protection, originating from the EU, has been incorporated into UK law. The chapter explored the genesis of this right and examined its evolution under both EU and UK law.

Consequently, the main conclusion of Chapter V was that if a third party is not an insurance professional, they are eligible for weaker party protections and, therefore, would not be bound by the jurisdiction clauses contained in the insurance policy while bringing direct action claims against the P&I Clubs. However, if the third party's insurer brought a subrogated claim against the tortfeasor's liability insurer, then the weaker party protection would not apply. As discussed throughout the thesis, this may not be the ideal outcome, considering the original intent of weaker party protection was to safeguard genuinely weak parties and level the playing field. However, the reality now is that even large corporations, such as banks, can benefit from this protection regardless of their economic power or size. Therefore, it would have been preferable for the courts to adopt a bespoke approach in each case, developing a case-by-case analysis for direct action claims, rather than applying blanket protection to all third parties.

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