Neutral Citation Number: [2020] EWHC 1223 (Comm)

Case No: CL-2020-000227

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: 15/05/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

DAIICHI CHUO KISEN KAISHA	**Claimant**
- and -	
CHUBB SEGUROS BRASIL S.A. **(formerly ACE SEGURADORA S.A.)**	**Defendant**

- -
- -

Natalie Moore (instructed by **Ince Gordon Dadds LLP**) for the **Claimant**
Tom Bird (instructed by **Birketts LLP**) for the **Defendant**

Hearing date: 7 May 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 15 May 2020 at 2:00 pm.

Mr Justice Henshaw:

(A) INTRODUCTION

1. This judgment follows the expedited hearing of the Claimant's claim for a final mandatory anti-suit injunction requiring the Defendant ("***Chubb***") to discontinue proceedings it has brought and continued to pursue in Brazil against the Claimant ("***Daiichi***") and a third party, Noble Resources International SA ("***Noble Resources***"), allegedly in breach of an undertaking ("***the Undertaking***") given to Daiichi on 5 December 2017.

2. At the end of the hearing before me on 7 May 2020, time did not permit the delivery of an *ex tempore* judgment. The indications from the parties were that it would be useful for a decision to be given then, with reasons to follow. I therefore gave my decision, namely that the claim succeeded, with reasons to follow a few days later.

3. For the reasons given below, I concluded that it was appropriate to grant the anti-suit injunction sought, in order to give effect to the Undertaking, having taken account of considerations of justice as between the parties and comity towards the Brazilian court.

(B) BACKGROUND FACTS

4. Chubb is a Brazilian insurance company. It was the insurer of a cargo being carried from Brazil to China on board the m/v "*Southern Explorer*" ("***the Vessel***") pursuant to two bills of lading dated 1 August 2014.

5. The underlying dispute arises from a collision in September 2014 involving the Vessel, as a result of which the cargo is said to have been damaged.

6. The Vessel's registered owner, Fair Wind Navigation SA ("***Fair Wind***"), was the contractual carrier of the cargo. Fair Wind had time chartered the Vessel to Daiichi for a period of 13 years. Daiichi had in turn voyage chartered the Vessel to Noble Chartering Ltd ("***Noble Chartering***"). Noble Resources, a related company, used the Vessel to perform a shipment under a contract of affreightment between Noble Resources and CSN Handel GmbH.

7. On 29 March 2016 cargo interests, including Chubb, commenced London arbitration proceedings against Fair Wind under the bills of lading, which were owners' bills issued on behalf of Fair Wind. It was common ground in the proceedings in England between Chubb and Fair Wind/Mizuho Sangyo Co Ltd ("***Mizuho***"), to which I refer below, that the bills of lading incorporated an arbitration clause, providing for London arbitration, from either the Daiichi/Noble Chartering charterparty or the Noble Resources/CSN Handel contract of affreightment.

8. However, rather than pursuing those arbitration proceedings, on 11 November 2016 Chubb brought a claim in Brazil against Mizuho (the managers of the Vessel), Daiichi and Noble Resources in respect of losses arising out of the cargo damage and salvage expenses. The claim including interest is for something in the region of US$2.7 million.

9. On 22 August 2017 Fair Wind and Mizuho issued an arbitration claim form in this court seeking an anti-suit injunction restraining Chubb (then named Ace Seguradora S.A.) from pursuing the Brazilian proceedings against Mizuho. One of the principal issues in that action concerned the true nature of the claim being pursued in Brazil. The evidence of Daiichi's expert in Brazilian law is that, whilst Daiichi and Noble Resources are not parties to the bills of lading, Chubb's claims in Brazil are brought under and by reference to the contracts contained or evidenced in the bills of lading.

10. Chubb argued in the Fair Wind/Mizuho proceedings that the claim was not contractual but tortious, and two days before the final hearing of that arbitration claim, Chubb's then solicitors notified Mizuho/Fair Wind of Chubb's intention to apply to amend the claim in Brazil to clarify that it was advanced in tort only.

11. After hearing oral arguments on 27 October 2017, Knowles J granted an anti-suit injunction ("***the Knowles Order***"). This injunction restrained Chubb from pursuing the claim "*as currently formulated against [Mizuho] in the [Brazilian proceedings]*" (§ 5) and ordered Chubb not to "*commence or pursue, or procure or assist the commencement or pursuit of any claim of a contractual nature arising out of or in connection with the Bills of Lading against [Mizuho] other than by way of arbitration in London*" (§ 6). The Knowles Order thus left open the possibility of Chubb pursuing a non-contractual claim against Mizuho in Brazil.

12. On 22 November 2017 Daiichi's solicitors wrote to Chubb's then solicitors demanding an undertaking restraining it from pursuing the claim "*as currently formulated against Mizuho Sangyo Co Ltd*". Daiichi claimed to be in materially the same position as Fair Wind and Mizuho. The evidence shows that Daiichi had on 17 November 2017 instructed its solicitors to seek an anti-suit injunction, and in its open communications of 22 November and 1 December 2017 Daiichi threatened to apply for such an injunction unless an undertaking were given. The correspondence indicates that Chubb made clear that it wished to avoid a court hearing in circumstances where it said it intended to pursue only non-contractual claims. After further correspondence, Chubb provided the Undertaking which – mirroring the Knowles Order – provided:

> "2. [Chubb] irrevocably undertakes that:

> (a) [Chubb] (whether by itself or by its directors, officers, employees or agents) will not pursue, or procure or assist the pursuit of the claim as originally formulated against Daiichi Chuo Kisen Kaisha ("Daiichi") and/or Noble Resources International SA ("Noble Resources") in the proceedings brought in the 5th Civil Court of the Judicial District of Santos, Brazil with process no. 1034919-05.2016.8.26.0562 ("the Brazilian Proceedings").
>
> (b) [Chubb] (whether by itself or by its directors, officers, employees or agents) will not commence or pursue, or procure or assist the commencement or pursuit of any claim of a contractual nature arising out of or in connection with the Bills of Lading against Daiichi and/or Noble Resources other than by way of arbitration in London.
>
> For the avoidance of doubt, this undertaking does not give consent and should not be construed as giving consent to the proposed amendments to the claim in the Brazilian Proceedings as filed by Ace on 29 November 2017.
>
> This undertaking shall be governed by and construed in accordance with English law and any disputes arising out of or in any way connected with this undertaking shall be submitted to the exclusive jurisdiction of the English High Court."

13. Although it is not stated on the face of the Undertaking, it is common ground on the witness statements before me (see, in particular, §§ 1 and 49 of the statement of Mr Macfarlane on behalf of Daiichi and § 13 of the statement of Ms Holsgrove on behalf of Chubb) that the Undertaking was given in consideration of Daiichi refraining from applying for an anti-suit injunction. That would in any event be the natural inference from the contents of the Undertaking and the circumstances in which it was given as outlined above.

14. It was not disputed before me that the Undertaking was intended to be binding, as is evident from its contents (including the law and jurisdiction clause it contains) and the circumstances in which it was given. It is also fair to infer that Daiichi acted on the Undertaking by refraining from seeking its own anti-suit injunction.

15. The Undertaking did not expressly require Chubb to take positive steps to discontinue the Brazilian proceedings, no doubt because Chubb had indicated that it intended to pursue non-contractual claims in Brazil by way of an amended claim. It remained open to Chubb to seek to make such an amendment, and equally open to Daiichi to oppose any such amendment, the terms of the Undertaking (as quoted above) having made clear that Daiichi did not consent to the proposed amendments. The submission made on behalf of Chubb at the hearing before me that Daiichi's opposition to the proposed amendments, having obtained the Undertaking and in the light of the Knowles Order, was an unfair tactical manoeuvre, is baseless. Daiichi had reserved its position on the proposed amendments perfectly clearly.

16. Chubb did then proceed to apply to amend its claim in the Brazilian proceedings to advance non-contractual claims, and Mizuho and Daiichi filed objections to Chubb's application on 15 December 2017. On 30 January 2018 Noble Resources noted that

Mizuho and Daiichi's objections were sufficient to dispose of the application, which required all three defendants' consent.

17. After an initial dismissal and two appeals, the Brazilian Superior Court of Justice finally rejected the amendment application in a decision that became final and unappealable on 26 June 2019. From that moment on, there was no scope for amending the Brazilian claim, and any claim by Chubb in those proceedings could proceed only on its original statement of case. It is common ground that when considering Chubb's allegation that Daiichi's present claim should be rejected on the grounds of delay, only the period since 26 June 2019 falls to be considered.

(C) SUBSEQUENT EVENTS

18. After 26 June 2019, neither side sought actively to pursue proceedings in Brazil until the change of tack by Chubb in March this year to which I refer below.

19. Following the Brazilian Superior Court of Justice's decision, Daiichi reported the outcome to the first instance judge by a document dated 28 June 2019. This document reported the outcome of the Superior Court's deliberations and then stated:

> "This Superior Court of Justice decision was made final and unappealable on 06/27/2019, as per the attached STJ procedure follow-up statement. This means that the decision rendered in the bill of review lodged with the São Paulo State Court of Justice — against the intended change to the cause of action — was also made final and unappealable on 06/27/2019. Thus, this proceeding continues to be an action that is contractual in nature (rather than extra-contractual).
>
> In light of all of the foregoing, the Petitioner requests that the proceeding can continue regularly as it was before the appeal was lodged."

20. The evidence of Daiichi's Brazilian law expert, Mr Olympio José M L de Carvalho e Silva, a partner in Castro Barros Advogados, is that the above document responded to a notification from the court asking the parties to update it about the status of Chubb's appeal on the amendment issue, and was "*a usual practice in a situation as this one*". I accept that evidence.

21. On 16 July 2019 Daiichi's solicitors emailed Chubb's claims handlers, Barbuss, saying:

> "As you are aware, the Brazilian Court has rejected all your clients' appeals and your clients are now time barred from filing any further appeals.
>
> Accordingly, your clients are now left with the original claim which has been found to be of a contractual nature by the English Court and so in breach of the London arbitration clause incorporated in the Bills of Lading. Taking any further steps in relation to this original claim in Brazil will put your

> clients/their directors and officers (i) in breach of the anti-suit injunction and so in contempt of the English Court; and (ii) in breach of the undertaking provided by your clients dated 5 December 2017.
>
> Please urgently confirm that your clients are now taking appropriate steps to withdraw the proceedings in Brazil immediately and provide evidence of the same without further delay."

22. Barbuss responded:

> "Whilst I'm waiting for Chubb's appointed lawyer input over this matter, kindly confirm what is your proposal towards below referred claim, so that I can wrap up the whole thing on a single discussion with Chubb."

23. The parties agreed to hold 5-way settlement discussions, with the Brazilian proceedings stayed in the meantime, rather than Daiichi applying for an anti-suit injunction: see the evidence of Chubb's English solicitor Ms Sarah Holsgrove, a senior associate in Birketts LLP:

> "20. However, rather than apply for injunctive relief, in July 2019 the parties agreed to stay the Brazilian Proceedings with a view to discussing settlement on a five-party basis …." (my emphasis)

24. The joint stay application included the following passage:

> "2. Based on this, the parties jointly, and without prejudice to any of their rights (including, in relation to the defendants, the right to challenge the Brazilian court's jurisdiction, in view of the arbitration clause contained in the Bills of Lading and Charter Party, as already recognized by the English justice system in the matter of Anti-Suit Injunction no. 2017-000532), request that this proceeding is stayed, including the period to express a position on a conciliation hearing, for a period of 6 (six) months, as allowed by Art. 313, II, of the CPC, where any of the parties, after the lapse of 3 (three) months from the filing of this petition and upon prior notice of 2 (two) weeks to the other parties, can terminate the stay of this proceeding."

25. Chubb submits that this indicated the parties' intention to allow the Brazilian court to decide the issue of jurisdiction. However, the reservation quoted above extends to *"any of [the parties'] rights"*, and it is evident that the parties' joint application for a stay was intended as a mechanism to put the Brazilian proceedings on hold pending settlement discussions in order to avoid the need for Daiichi to apply for an anti-suit injunction. In that sense, the stay was regarded as being in lieu of an anti-suit injunction, and Daiichi could reasonably take the view that Chubb was neither in breach of nor threatening to breach the Undertaking. In these circumstances, I do not consider it fair to criticise Daiichi, as Chubb now seeks to do, for not insisting on the

outright withdrawal of the Brazilian proceeding if it were to refrain from applying for an anti-suit injunction. An application at that stage would no doubt have been met by the objection that it was premature and/or unnecessary, and would have given rise to a substantial and apparently wasteful expenditure of legal costs and court time.

26. Ms Holsgrove sets out the immediately ensuing events as follows:

> "21. Mr Carvalho explains, at paragraph 23 of his first statement, that on 10 July 2019 the Judge ordered the parties to inform the Court of whether they still wished to proceed with a conciliation hearing.
>
> 22. On 24 July 2019, and in view of their above agreement, all of the parties jointly applied for a stay of the proceedings for 6 months …, but that application was rejected on or around 7 August 2019 and the defendants were required to file a defence within 15 business days ... The parties jointly appealed that decision on 20 August 2019, and the proceedings were provisionally stayed by the Court of Appeal on 22 August 2019 ...
>
> 23. On 26 August 2019, the parties then took further steps to seek to delay the proceedings by jointly applying to the court to extend the procedural timetable to provide the Claimant, Noble Resources and Mizuho with additional time to challenge jurisdiction. That application was refused by the First Instance Court on 27 August 2019, and was jointly appealed on 20 September 2019 ..." (my emphasis)

27. The 26 August 2019 joint application requested changes in the procedural timetable, including varied deadlines for the defendants' jurisdiction challenges and for filing defences if the motion to challenge jurisdiction were rejected, and stated at § 10:

> "The intention of the parties is that whether or not the Brazilian courts have jurisdiction is decided first and, in case the ruling is in favor of that jurisdiction, to avoid the need for the Defendants to incur significant expenses to file defences in light of English law (as the Defendants deem applicable) and for translation of the many documents written in a foreign language, besides obtaining legal opinions from English lawyers about the various questions (and even from lawyers from Panama and Singapore, given the specificities of the case), in light of such complexity."

The footnote to § 10 contained this reservation:

> "The Defendants make the reservation that nothing in this petition represents waiver of their rights under any aspect, in particular those resulting from the anti-suit injunction granted by the English Justice System."

28. On 5 September 2019, Daiichi, Mizuho and Noble Resources each applied to challenge the Brazilian court's jurisdiction. In addition to its jurisdiction challenge, Noble Resources filed a substantive defence.

29. Chubb suggests that the text of the 26 August application, quoted above, indicates that Daiichi was seeking more time for the purpose of making its jurisdiction challenge in the Brazilian court and, hence, was content to let that court determine the challenge and abide by the result. However, Ms Holsgrove's evidence quoted above very fairly makes clear that the parties' actual intention, in making the application, for additional time for the jurisdiction challenge, was further to delay the proceedings in Brazil. In that sense, it remained consistent with Chubb's Undertaking and with the parties' agreement to delay the Brazilian proceedings to allow time for discussions, in lieu of the defendants having to seek an anti-suit injunction.

30. In relation to the steps taken both on 26 August and 5 September 2019, Mr Carvalho explains that the First Instance court's 7 August rejection of the stay application came as a surprise, and that the 26 August application was made in view of that rejection and *"in order to reach a similar outcome … as an alternative method of slowing down the progress of the proceedings".* Likewise, he says the defendants' joint challenge to the Brazilian court's jurisdiction was filed out of an abundance of caution, and Noble Resources also filed a substantive Defence (which, Mr Carvalho states, under Brazilian procedure did not constitute a submission as it was accompanied by a challenge to jurisdiction). By way of elaboration he states:

> "The parties only filed those documents out of an abundance of caution because at the date of filing they were concerned that there was a chance that the Court could hold, in the future, that the provisional stay from the Court of Appeal did not stay the term to file a defence or to challenge jurisdiction (which is a preliminary point in a defence, under article 337(II) of the Civil Procedure Code), as it is still not clear whether such term can be stayed by the parties. Further, even if it could, it was not clear whether the term would have elapsed in case the Court dismissed the appeal and revoked the provisional stay. ... Under the Civil Procedure Code 1973, parties could stay proceedings up to 6 months, but this would not stay what is called peremptory terms, which are terms set by the Code, including the one to file a defence or to challenge to jurisdiction. It meant that, during the stay agreed between the parties, they had to file a defence during the timeframe provided for by the Code as if no stay was in place, so as to avoid default judgment. I understand that the law has changed with the Civil Procedure Code 2015, but it is not clear, as this is an issue not settled by the Courts under the new law yet. Thus, out of an abundance of caution, the defendants filed a joint challenge to the jurisdiction on the last day of the 15 business day term, counted as from the date they were notified of the Court's decision of 07 August 2019, which denied the joint request for a stay and ordered that "*it is to run the 15-day term for defendant to submit defence, so as to avoid default judgment. Such term will be counted from*

> *acknowledgement of this decision by its lawyer"*. And all parties (including Chubb) filed a separate application on the same day explaining what defendants were doing, showing their agreement on that path. Noble took an even more risk averse view and also filed a combined defence and jurisdiction challenge."

31. The filing of the jurisdiction challenge and, in Noble Resources' case, a substantive defence can in these circumstances fairly be regarded as protective measures, not amounting to a submission to the jurisdiction, that were considered necessary in order to continue to give effect to the parties' agreement referred to in §§ 23 and 29 above.

32. The parties' appeal from the court's decision of 27 August 2019 refusing the extension of the procedural timetable was dismissed by the Brazilian Court of Appeal on 3 October 2019, the court stating that *"the appellants, by common agreement, have the possibility of reaching the intended settlement in the period when the suspension of the case was granted, in exceptional form, precisely based on the contrary interpretation of this same precedent, under the terms already expressed in the single judge decision that granted the injunction staying the case…"*. The parties filed a motion for clarification of that decision on 14 October 2019.

33. On 23 October 2019, the parties' joint appeal from the court's refusal of the stay was allowed by the Brazilian Court of Appeal, but on 7 November 2019 the parties jointly filed a motion requesting clarification or alteration of the duration of the stay. On 27 November 2019, the Court of Appeal rejected the request for clarification, stating that there was no defect with the original ruling. The Court of Appeal appears to have held that the stay was for three months, because a previous stay of three months had been agreed in 2017 (from 29 August 2017 to 29 November 2017) and the law apparently only allowed stays to be agreed for a total period of six months. Daiichi has interpreted that clarification as meaning that the stay had already expired by 27 November 2019, whereas Chubb's Brazilian representatives regarded it as meaning a stay was in force until 6 March 2020. The latter view appears to gain support from the terms of the Brazilian Court of Appeal's subsequent rejection on 29 January 2020 of the parties' motion for clarification of the court's dismissal of the application to extend the procedural timetable, which stated:

> "there is no way to speak of urgency, since the case is already stayed"
>
> and:
>
> "the main case is suspended, and the parties can reach the settlement that best suits their interests, with that solution being submitted to the lower court judge for ratification and closing the case, if the parties do not intended [sic] to continue the dispute."

34. The parties engaged in without prejudice discussions between December 2019 and February 2020 regarding the Brazilian proceedings.

35. On 28 February 2020, in the light of recent events in Brazil including the Brazilian court's decision of 29 January 2020, Fair Wind and Mizuho made a further application to the English court as part of the 2017 proceedings, exercising the liberty to apply set out in the Knowles Order, for an anti-suit injunction. I note at this stage that, not having been party to those proceedings, Daiichi would not have been able to proceed in this way, having instead to commence and obtain permission to serve out a new claim form.

36. In his witness statement in support of the Fair Wind/Mizuho application, Mr Macfarlane of Ince Gordon Dadds ("***Ince***") (who also act for Daiichi) explained that the Brazilian court's decision of 29 January 2020:

> "can be appealed, but the proceedings are very unlikely to be stayed pending any appeal. Out of an abundance of caution and in order to mitigate the risk that the Brazilian court does not permit Mizuho to file a full defence (on the basis that the time for filing a defence as expired) when it requires the parties to take steps to progress the claim, Mizuho has decided to file an appeal and is liaising with the other parties' lawyers to see if they wish to lodge a joint appeal.
>
> 38. The upshot of all this is that at some point in the next month or so the Brazilian Court will observe that the stay is no longer in place and will most likely decide that matters need to progress.
>
> 39. There are several options at that point:
>
> a. The Court could invite the parties to propose and take next steps to advance the case. If Chubb, the claimant in Brazil, does nothing, the Court may well strike out its case, but this is not a given.
>
> b. Another possibility is that the Court may order the parties to attend a conciliation or mediation hearing a few months later, though this is less likely.
>
> c. The most likely step is that the Court will invite a response to the documents that are currently in play - namely Noble's defence and the defendants' joint jurisdiction challenge. The Court would most likely require Chubb to respond within 15 business days. If Chubb does not respond within the specified time limit, the Court will likely determine the jurisdiction challenge within another 2-3 weeks.
>
> d. If the Court rejects the jurisdiction challenge there are several possibilities:
>
> i. The Court could determine the merits of Chubb's claim at that stage of its own volition. This is not likely, but is possible.

> ii. More likely is that the Court gives the parties time (5/10/15 business days) to explain the evidence on which the merits should be determined. If the parties do not respond or put in any evidence, the Court will likely proceed to determine the case on the merits 2-3 weeks later.
>
> iii. There is a real risk that the Court will make a finding on the merits and enter judgment against Mizuho for the sums claimed."

37. Mr Macfarlane referred to correspondence between the parties, culminating in Ince's letter of 3 February 2020 to Barbuss asking Chubb to discontinue the Brazilian proceedings, and Barbuss's open response that they had no further instructions in the matter. As a result, Mr Macfarlane said:

> "42. As explained above, there is a real risk that if the Brazilian proceedings against Mizuho are not discontinued, the Brazilian Court will ultimately proceed to issue a judgment against Mizuho, irrespective of whether Chubb takes any further active steps in the proceedings.
>
> 43. It is therefore becoming increasingly urgent for Chubb to discontinue the Brazilian proceedings against Mizuho.
>
> 44. Chubb's application to amend the Brazilian claim in order to introduce further causes of action has been finally rejected. There is no possibility for Chubb to amend the Brazilian claim and no way for it to pursue the Brazilian proceedings consistently with the terms of the Injunction. As outlined above and in the Third Witness Statement of Olympio Carvalho, there is a real risk that if the Brazilian proceedings are not withdrawn or discontinued, judgment will nonetheless be granted against Mizuho even if Chubb takes no further steps in the proceedings.
>
> 45. Accordingly I believe that, in order for Chubb to comply with the requirement in paragraph 5 of the Injunction that they do not "pursue, or procure or assist the pursuit of the claim as currently formulated' against Mizuho, the Brazilian proceedings should be withdrawn and discontinued forthwith against Mizuho. The Claimants seek a clarification to that effect.
>
> 46. Chubb have persistently refused to take steps to discontinue the Brazilian claim against Mizuho despite repeated and increasingly urgent requests. Clarification is necessary in order to make it definitively clear to Chubb that they must take action or risk contempt.
>
> 47. Alternatively, insofar as the Court considers that this is not the effect of the Injunction, I believe that it is just and

> convenient in all the circumstances to vary the Injunction or make a new injunction so as to expressly require that Chubb positively discontinue the Brazilian proceedings as against Mizuho. In light of the developments in the Brazilian proceedings, namely the final dismissal of Chubb's application to amend and the possibility of judgment being entered against Mizuho in the future, this is necessary to give practical effect to the Injunction and the only way to protect the rights to which Knowles J gave recognition."

38. Fair Wind/Mizuho also filed a witness statement from Mr Carvalho, which similarly made clear that what was most likely to happen in Brazil was that the court would ask Chubb to respond to the jurisdiction challenges; and that whilst there was a real risk that the court would then decide those challenges and the merits of the claim at the same time, it was more likely that if the court assumed jurisdiction then it would give the parties 5, 10 or 15 days to comment on what factual and expert evidence should be produced in order to determine the merits.

39. On 2 March 2020 the parties lodged a joint appeal in Brazil from the court's decision of 29 January 2020. The filing included the following passages:

> "3. Precisely because of the international nature and particularities of the case, all the parties, on both sides, here the Appellants, entered into the following judicial agreement to chance the procedure (pp. 55-61), based on Arts. 190 and 200 of the CPC, as well as the jurisprudence and doctrine, to specify "changes in the proceeding to adjust it to the specific features of the case" (Art. 190 of the CPC):
>
> *[details were then set out in a table of the agreed revised deadlines for various steps including one for the defendants to file a jurisdiction challenge (21 February 2020) and to file a defence if the motion to challenge jurisdiction were rejected or if a party served notice requesting early return to the regular procedural course]*
>
> 4. They further agreed that, if during the course of the proceeding, any of the parties desists from the agreement to change the procedure hereby formalized, as set forth in the last line above, it must: (i) request this Court to resume the normal course of the proceeding as set forth in the CPC; and (ii) notify all the other parties, by sending an email to the electronic addresses indicated on p, 60.
>
> …
>
> 14. Besides this, the validity of the deal between the parties for the change of venue motion (lack of jurisdiction) to be judged in the first place, and for the time limit for defense only start after its possible (but improbable, in the Defendants' opinion) rejection, also is a question that obviously cannot be considered

only in a regular appeal. After the verdict, all the phases will have run their course, so that there will be no utility of judging the validity of that procedural arrangement.

15. What the parties intend at this point is to follow the line of the previous CPC/1973 (i.e., that a change of venue motion suspends the time limit to present a defense), leaving it clear that that provision does not violate public policy, and avoids huge expenses that the Appellants Mizuho and Daiichi would have to answer the suit, such as sworn translation of various documents from English to Portuguese, obtaining legal opinions from English lawyers (and perhaps Panamanian and Singaporean ones as well), etc., as demonstrated in the arguments of the Interlocutory Appeal.

…

21. In fact, the reasons for the suspension of the proceeding by agreement of the parties (negotiations to reach a settlement, which has not yet come to pass) are not the same as those involving the specificities of the case that led the parties to enter into the judicial procedural arrangement in question (described in paragraphs 3 and 4 above).

…

54. In the case here, the danger in delay results from the fact that if the progress of the original suit, except for the time frames agreed by the parties, is not stayed until a final decision of this appeal, the objective of the judicial agreement to change the procedure (as per paragraph 12 above) will certainly be totally futile.

55. In other words, there will be a risk of failure to observe the time limit for response of Chubb to the change of venue motion filed by Mizuho, Daiichi and Noble (pp. 65/91), as well as the time limit to comment on that response, also causing the risk of having to submit answers accompanied by all the necessary evidentiary documents, before judgment of the motion for change of venue (jurisdiction) filed, which would represent a waste and would be totally counterproductive, because in the change of venue motion the Appellants are seeking dismissal of the suit without prejudice, based on the position that Brazilian courts do not have jurisdiction over the case due to the arbitration clause, and even if this did not exist, because the suit's subject matter does not fall within national jurisdiction.

56. Furthermore, the preparation of all the documents necessary to accompany the answers would imply sworn translation of various documents from English to Portuguese, obtaining legal opinions from English lawyers (and perhaps Panamanian and

> Singaporean ones as well), etc. – all in vain and in unequivocal violation of the principle of procedural economy (Art. 5, LXXVIII, of the Federal Constitution), besides the mentioned Arts. 190, 200, 6 and 3 of the CPC.
>
> 57. The granting of staying effect to this Appeal will also avoid the need for efforts by the court clerk's office to notify the lawyers of the parties to present answers, activities that, as known, despite being routine, are voluminous during the course of the case and demand considerable resources from the Judicial Power.
>
> 58. Therefore, in homage to the principle of procedural economy, whose function is "to obtain less judicial activity and more results", the useful result of this case should be given priority, meaning unequivocal presence of danger in delay."

A footnote to § 56 contained the following reservation:

> "Reservation is made here that the defendants additionally believe that the Brazilian Justice System does not have jurisdiction to judge the case, be it due to the arbitration clause contained in the bills of lading (which stipulate arbitration in London), be it because all the defendants are foreigners and domiciled abroad and the dispute is not the result of an act of fact that occurred in Brazil. The plaintiff, however, disagrees with that position."

40. Chubb draws attention to the statement in § 21 that the reasons for seeking variation of the procedural timetable were not the same as those for seeking a stay. Nonetheless, the filing contained a clear reservation of the defendants' position, and I see no reason to believe it to be anything other than another measure designed to give effect to the parties' agreement referred to in §§ 23 and 29 above.

41. Also on 2 March 2020, however, Chubb filed in Brazil a substantive Reply to Noble Resources' defence and jurisdiction challenge, alleging *inter alia* that the arbitration clauses in the bills of lading did not apply to Chubb as subrogated insurer. Mr Carvalho states in relation to Chubb's Reply:

> "Chubb asserts that its claim against Noble Resources is "extra-contractual". Notwithstanding this assertion, I can confirm that the claim which Chubb is pursuing against each and every defendant in Brazil is the original claim which was brought against all defendants on the same basis and which the English Court has found to be a contractual claim (at least in relation to Mizuho). As explained above, Chubb's attempt to amend its claim to replace the original contractual claim against all defendants with a non-contractual claim against all defendants was rejected by the Superior Court of Justice on 29 May 2019 and that decision is now final and unappealable."

Chubb has not adduced any evidence from its (or any) Brazilian lawyer in contradiction to that evidence.

42. Chubb's Reply concluded by stating:

> "Based on these reasons, the preliminary arguments can only be found wanting and the small thesis of the defendant on the merit defeated, so the plaintiff asks that the suit be ruled warranted"

43. On 13 March 2020 Andrew Baker J granted an anti-suit injunction on Fair Wind/Mizuho's application, requiring Chubb to discontinue the proceedings in Brazil, reciting that his order was *"clarifying what, in the present factual circumstances is already required by the Knowles Order and in any event being necessary, ancillary to the Knowles Order, to ensure its effectiveness."* Thereafter, Chubb on 26 March 2020 filed an application in Brazil to withdraw against Mizuho but maintain its claims against Daiichi and Noble Resources.

44. By its Reply dated 2 March 2020 and its 26 March application, Chubb – for the first time since before June 2019 – resumed its active pursuit of its claims against Daiichi and Noble Resources in Brazil, in clear breach of the Undertaking. Chubb accepts for the purposes of the present application that those claims should be regarded as contractual: and on that basis, their pursuit breaches § 2(b) of the Undertaking. Moreover, the claims currently pursued are the same as originally formulated (and which the courts of Brazil have refused to allow to be amended), with the result that their resumed pursuit is also in breach of § 2(a) of the Undertaking.

45. The 2 March 2020 Reply was the first positive breach of the Undertaking vis a vis Noble Resources, and the 26 March 2020 application the first positive breach vis a vis Daiichi. Chubb now contends that it was in fact in breach from June 2019 onwards, by failing actually to withdraw the Brazilian proceedings, with the result that the present claim is far too late. I do not accept that submission. The Undertaking did not in terms require the withdrawal of the Brazilian proceedings, and as explained above Chubb positively acquiesced and participated in processes designed to put the Brazilian proceedings on hold in lieu of any need for a contested application for an anti-suit injunction. I note that the recital quoted above from Andrew Baker J's 13 March 2020 order indicated that it was the *"present factual circumstances"* which made actual withdrawal necessary in order to comply with the Knowles Order.

46. Daiichi's concerns were increased by Mr Carvalho's discovery on 10 March 2020 of a new update in relation to the Brazilian proceedings on the Brazilian court's website, showing that, as from 3 March 2020, the records of the case were "*Conclusos para Sentença*", meaning with the judge for a judgment to be issued ("*sentença*" meaning judgment, the final decision to put an end to a suit). Mr Carvalho explains that an update of this kind can sometimes be made by a court servant and not reflect the view which the judge in due course takes, but that "*because Chubb had filed a reply to Noble Resources' Defence, it was more likely than before that a judgment would be issued in the very near future*".

47. As a result, Daiichi on 30 March 2020 called on Chubb to discontinue its claims in Brazil, otherwise it would issue a claim for an anti-suit injunction. In the absence of a

substantive response, Daiichi issued the present claim on 21 April 2020 seeking a mandatory anti-suit injunction. On 23 April 2020 Teare J granted permission to serve Chubb by alternative means, and ordered an expedited trial.

48. The current position in the Brazilian proceedings is that, following an order made by the court on 23 April 2020, the defendants have until 25 May 2020 to respond to Chubb's latest submissions. Thereafter, Mr Carvalho states:

> "A decision on the withdrawal request against Mizuho and who should bear the costs will probably be issued after 25 May. It could be anytime from a couple of days later to a few weeks later. There is a chance that the Court will order Chubb to comment on Mizuho's submissions, but this is less likely.
>
> As regards the remaining claim against Daiichi and Noble Resources, the Court may order Chubb to comment on the joint challenge to jurisdiction submitted by the defendants and/or it may order the parties to comment as to whether they wish to adduce any further evidence and/or it may ask the defendants to comment on Chubb's Reply to Noble Resources' defence. However, there is still a real risk that a judgment may be issued right after 25 May – any time from a few days to a couple of months after 25 May."

(D) APPLICABLE PRINCIPLES: GRANT OF ANTI-SUIT INJUNCTIONS

49. The Court has the power to make an anti-suit injunction under s 37(1) of the Senior Courts Act 1981 where it is just and convenient to do so:

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

This includes anti-suit injunctions in arbitration cases: see *AES UST-Kamenogorsk v Ust-Kamenogorsk JSC* [2013] 1 WLR 1889 and Raphael, *"The Anti-Suit Injunction"* (2nd ed, 2019) §§ 3.01-3.08.

50. Where an anti-suit injunction is sought to enforce an exclusive London arbitration agreement, the *Angelic Grace* principles apply. The court will ordinarily exercise its discretion to grant an anti-suit injunction to restrain a party from commencing or continuing with foreign proceedings in breach of the arbitration agreement, unless the injunction defendant can show strong or good reasons why the injunction should not be granted: see *The Angelic Grace* [1995] 1 Lloyd's Rep 87 and Raphael §§ 7.13-7.16. As Daiichi points out, the Undertaking is in substance an agreement to pursue Chubb's original and/or contractual claims against Daiichi and Noble Resources only by arbitration.

51. If a prohibitory injunction may not be enough to ensure that the injunction is practically effective (e.g. where the foreign action has a life of its own), a mandatory injunction requiring the injunction defendant to discontinue the foreign proceedings may be granted in an appropriate case: see e.g. *Ecom v Mosharaf* [2013] 2 All ER

(Comm) 983 at §§ 37-38; *Evergreen v Fast Shipping* [2014] EWHC 4893 (QB) § 19. More recently the court has recognised that there is no rigid dividing line between mandatory and prohibitory relief: a mandatory injunction requiring discontinuance may merely spell out the inevitable consequence of a prohibitory injunction (see, e.g., *Mobile Telecommunications v Abdulaziz* [2018] EWHC 1469 (Comm) at § 19).

52. The conventional rule of equity, that the Court has no discretion to refuse an injunction to enforce a clear negative covenant, does not apply to injunctions to restrain foreign proceedings because of the tensions with comity which are inherent in the indirect interference with the foreign court which the anti-suit injunction involves: see Raphael § 7.13, fn. 15.

53. The case law indicates that applications for anti-suit injunctions must be made promptly, in interests of both fairness to the respondent and comity towards the overseas court. In *The Angelic Grace* Millett LJ stated:

> "… if an injunction is granted, it is not granted for fear that the foreign court may wrongly assume jurisdiction despite the plaintiffs but on the surer ground that the defendant promised not to put the plaintiff to the expenses and trouble of applying to that Court at all. Moreover, if there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign Court, far less offence is likely to be caused if an injunction is granted before that Court has assumed jurisdiction than afterwards, while to refrain from granting it at any stage would deprive the plaintiff of its contractual rights altogether.
>
> In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced." (p96)

54. A failure to seek relief promptly can of itself be a strong reason not to grant an anti-suit injunction: see *Donohue v Armco* [2002] 1 Lloyd's Rep. 425, per Lord Bingham: "*a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct*" (§ 24). Delay is an "*extremely relevant factor in the exercise of discretion whether to grant relief*" (*Toepfer International GmbH v Molino Boschi SrL* [1996] 1 Lloyd's Rep. 510, 515 per Mance J).

55. In *The Skier Star* [2008] EWHC 213 (Comm), [2008] 1 Lloyd's Rep. 652 Teare J refused to continue an anti-suit injunction to restrain proceedings brought by the cargo interests in Antwerp in breach of a London arbitration clause. The owners had participated in a court survey process in Antwerp in 2005, at the same time serving recourse proceedings and positively disputing the jurisdiction of the Antwerp court. They were still disputing the Antwerp court's jurisdiction when they applied for injunctive relief in 2007. Teare J stated:

> "… a party who wishes to enforce a jurisdiction clause should apply promptly once he is aware of a breach of the arbitration clause …"
>
> "The statement of principle by Millett LJ in *The Angelic Grace* that an anti-suit injunction should be sought "*promptly and before the foreign proceedings are too far advanced"* is clear and should be understood and applied in a common sense and straightforward manner." (§§ 37 and 46)

56. In *Essar Shipping Ltd v Bank of China Ltd (The Kishore)* [2015] EWHC 3266 (Comm), [2016] 1 Lloyd's Rep. 427 Walker J refused to grant an injunction to restrain proceedings before the Qingdao Maritime Court on the ground that the claimant (ESL) had failed to act promptly. ESL had lodged a jurisdiction challenge in Qingdao seven months before seeking the injunction. By the time of the hearing before Walker J, the Qingdao court had considered and dismissed ESL's jurisdiction challenge, albeit an appeal had been filed from that decision. Walker J said:

> "40 Nearly two months elapsed after the start of the bank's Qingdao proceedings before ESL lodged its jurisdiction challenge in Qingdao. ESL's decision to issue that challenge in Qingdao, rather than to seek an anti-suit injunction here, would make sense if ESL were content to abide by such decision on jurisdiction as might be made by the Qingdao court.
>
> 41. … There are two immediate concerns. First, the result of that decision is that ESL has now issued proceedings here nine months after commencement of the bank's Qingdao proceedings and seven months after ESL's Qingdao jurisdiction challenge, a course of action which Leggatt LJ in *Angelic Grace* described as 'not only invidious but the reverse of comity'. Second, on ESL's case it had an entitlement not only to say that proceedings should not have been brought in Qingdao, but also to insist that the bank refrain from opposing ESL's Qingdao jurisdiction challenge: see the opening sentences of the citation in section C above from the judgment of Millett LJ in *Angelic Grace*. The decision taken by ESL not to insist on this entitlement might well be thought to expose ESL to the danger that a subsequent application for an injunction here would be refused for lack of promptness.
>
> 42. ESL submitted that in the passage cited in section C above Millett LJ identified two provisos that are related. What is important in my view is that they are cumulative provisos: the court need feel no diffidence provided that the injunction is sought promptly and provided that, even if the application cannot be criticised for lack of promptness, the foreign proceedings are not too far advanced. In my view there can be no doubt that lack of promptness alone may justify refusal of an anti- suit injunction. In this regard the bank drew attention to the decision of Knowles J in *Ecobank Transnational Inc v*

> *Tanoh* [2015] EWHC 1874 (Comm). In that case a submission that delay does not include periods when jurisdiction was challenged in the foreign court was rejected, as was a submission that delay alone (without detrimental reliance) would not suffice."

Walker J noted at § 51 that what is or is not 'prompt' is fact sensitive.

57. In *ADM Asia-Pacific Trading Pte. Ltd v PT Budi Semestra Satria* [2016] EWHC 1427 (Comm) Phillips J dismissed an application for injunction to restrain Indonesian proceedings, holding that the claimant had failed to make the application either promptly or before the foreign proceedings were too far advanced. After considering the relevant authorities he said:

> "The task for the Court is not to look at periods of delay and attribute blame for them, but to consider whether the application was made promptly and how far and with what consequences the foreign proceedings have progressed. Whilst ADM was plainly entitled to challenge the jurisdiction in Indonesia, doing so did not remove the need to apply promptly for an anti-suit injunction, if one was to be sought at all. Further, ADM cannot expect the Court to ignore the fact that the steps it decided to take in Indonesia, instead of applying for an injunction, resulted in BSS pursuing an appeal (and now in ADM pursuing its own appeal)." (§ 54)

58. In *Ecobank Transnational Incorporated v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231, a claim for an anti-enforcement injunction, Christopher Clarke LJ addressed considerations of comity as follows:

> 133. Injunctive relief may be sought (a) before any foreign proceedings have begun; (b) once they have begun; (c) within a relatively short time afterwards; (d) when the pleadings are complete; (e) thereafter but before the trial starts; (f) in the course of the trial; (g) after judgment. The fact that at some stage the foreign court has ruled in favour of its own jurisdiction is not per se a bar to an anti-suit injunction: see the AES case. But, as each stage is reached more will have been wasted by the abandonment of proceedings which compliance with an anti-suit injunction would bring about. That being so, the longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force.
>
> 134. Whilst a desire to avoid offence to a foreign court, or to appear to interfere with it, is no longer as powerful a consideration as it may previously have been, it is not a consideration without relevance. A foreign court may justifiably take objection to an approach under which an injunction, which will (if obeyed) frustrate all that has gone before, may be granted however late an application is made

> (provided the person enjoined knew from an early stage that objection was taken to the proceedings). Such an objection is not based on the need to avoid offence to individual judges (who are made of sterner stuff) but on the sound basis that to allow such an approach is not a sensible method of conducting curial business."

59. Delay in seeking an anti-suit injunction, and related considerations of comity, were considered in *Team Y&R Holdings v Ghossoub* [2017] EWHC 2401 (Comm) by Laurence Rabinowitz QC sitting as a Deputy Judge of the Commercial Court. The application was in fact made promptly in that case, though it came on for hearing only after considerable delay, apparently arising from difficulties in serving the respondent abroad eventually leading to an order for service by alternative means. The respondent submitted that there had nonetheless been a total of six months' unexplained delay, including a two-month delay in applying for an alternative service order. After considering the evidence, the judge concluded that there had been no failure to act with sufficient urgency, even if there were periods where it was possible to imagine matters might have progressed more quickly, nor any 'two bites at the cherry' strategy of awaiting the outcome of the stay application abroad before pursuing the application for an anti-suit injunction. In addition:

> "Furthermore, whilst the fact that resources of both the Hong Kong and the English court have been taken up dealing with this matter is regrettable, in the circumstances of this case - where the only matter with which the Hong Kong court has had to deal is the stay application itself and the proceedings have not progressed much further substantively - I do not accept that this should count as a factor against the grant of anti-suit relief if that would otherwise be appropriate." (§ 110)

60. In *Qingdao Huiquan Shipping Co v Shanghai Dong He Xin Industry Group Co Ltd* [2018] EWHC 3009 (Comm); [2019] 1 Lloyd's Rep. 520 Bryan J identified the following three relevant principles relevant to delay:

> "(1) There is no rule as to what will constitute excessive delay in absolute terms. The court will need to assess all the facts of the particular case: see *Essar Shipping Ltd v Bank of China Ltd (The Kishore)* [2016] 1 Lloyd's Rep 427 at paras 51 to 52 per Walker J.
>
> (2) The question of delay and the question of comity are linked. The touchstone is likely to be the extent to which delay in applying for anti-suit relief has materially increased the perceived interference with the process of the foreign court or led to a waste of its time or resources: see *Ecobank Transnational Inc v Tanoh* [2016] 1 Lloyd's Rep 360 at paras 129 to 135 per Christopher Clarke LJ; *The Kishore* at para 43; and see also *Sea Powerful II Special Maritime Enterprises (ENE) v Bank of China Ltd* [2017] 1 HKC 153 at para 21 per Kwan JA.

> (3) When considering whether there has been unacceptable delay a relevant consideration is the time at which the applicant's legal rights had become sufficiently clear to justify applying for anti-suit relief: see, for example, *Sabbagh v Khoury* [2018] EWHC 1330 (Comm) at paras 33 to 36 per Robin Knowles J." (§ 29)

61. Raphael summarises the principles in this way:

> "The significance of delay will depend on all the circumstances of a particular case. But some principles have been identified in the case law. First, even where there is a binding exclusive forum clause, the injunction should be sought promptly, and before the foreign proceedings are too far advanced. Second, the questions of delay and comity are linked. The more closely that the foreign court has become involved with the matter due to delay, the greater the interference with foreign court that an injunction is likely to produce, and so the stronger the factors against the grant of an injunction. Third, prejudice to the injunction defendant due to delay is significant, and if delay is not prejudicial it may be given significantly less weight. But delay is not necessarily immaterial in the absence of prejudice to the injunction defendant. The need to avoid delay arises from a variety of reasons including, in addition to prejudice to the injunction defendant, waste of judicial resources, the need for finality, and comity towards the foreign court. Fourth, and perhaps most importantly, the courts will take into account the extent to which the delay was justifiable or excusable in the circumstances; and will weigh delay against the importance of enforcing the forum clause. Even delay that can be criticized will often not be sufficient to justify refusing an injunction and thus permitting a breach of contract to continue. It seems that time taken in challenging the foreign court's jurisdiction does not in itself justify delay in applying for an anti-suit injunction." (§ 8.21)

62. Chubb also drew attention to the submission made to the Brazilian court, as part of its 26 March 2020 application, that in specialised legal literature the topic of anti-suit injunctions:

> "generates indignation in the legal literature because it inevitably leads to a situation of vulnerability, and more than this, an imposition from one sovereign entity on another. This means to say, in the case at hand, that English jurisdiction is inserted as an agent that is superior to Brazilian jurisdiction, having as the base for deciding that no jurisdiction in the world has competence to decide a dispute put forward for analysis except the English justice system."

Such indignation is, Chubb submitted, likely to be exacerbated by a late application for an anti-suit injunction. It should be recalled though that, as Millett LJ pointed out in *The Angelic Grace*, the basis for granting an anti-suit injunction is not any kind of assumption of superiority over the foreign court (against which the injunction is in any event not directed), but rather to hold the defendant to its binding promise not to put the claimant to the cost or trouble of having to apply to the overseas court at all; and more generally to give effect to the claimant's contractual rights against the defendant.

(E) ANALYSIS: GRANT OF ANTI-SUIT INJUNCTION

63. Chubb submits that no injunction should be granted because (in summary):

i) Daiichi has known since July 2019 that Chubb had no intention of withdrawing its claims against Daiichi or Noble Resources, and their pursuit from then onwards was bound to be in breach of the Undertaking. If Daiichi wished to apply for anti-suit relief, that was the time to do so.

ii) Instead of applying promptly for an injunction, Daiichi and Noble Resources chose to challenge jurisdiction in Brazil, thereby indicating that they were content to abide by such decisions on jurisdiction as might be made by the Brazilian court. To grant Daiichi injunctive relief to prevent the Brazilian court from deciding Daiichi's own jurisdictional challenge would be "*not only invidious but the reverse of comity*", as Leggatt LJ put it in *The Angelic Grace* at p.95.

iii) Noble Resources went one step further and lodged a substantive defence, also consistently with the position that it is for the Brazilian court to determine whether it has jurisdiction and, if so, to determine the merits.

iv) The prospect of settlement discussions was no good reason for the delay. Daiichi and Noble Resources "*fully engaged with and participated in the Brazilian proceedings in the 9-month period between July 2019 and the issuance of the present claim on 20 April 2020*", and delayed seeking relief after the Brazilian Court of Appeal's decision of 27 November 2019. Further, Daiichi could have issued its claim at the same time as Mizuho sought a further injunction.

v) If the Court were to grant an anti-suit injunction at this late stage, the practical effect would be to write off all of the judicial time and resources that have been spent by several courts dealing with the various applications and appeals in Brazil.

vi) As noted earlier, anti-suit injunctions have provoked indignation in Brazilian legal literature, and the greater the delay, the greater the perception that the English court is interfering with and exercising a supervisory jurisdiction over the process of the Brazilian court.

vii) Chubb has continued to incur legal costs in the Brazilian proceedings since 26 June 2019 and has therefore relied to its detriment on Daiichi's delay in issuing this claim for injunctive relief. If Chubb were ordered to withdraw the claim, not only would these costs be wasted, but Chubb would also be exposed to the risk of having to pay significant costs to Daiichi, Noble Resources and/or their respective lawyers as a consequence of the discontinuance.

viii) The Brazilian proceedings are at a very advanced stage. Daiichi sought a substantially abridged timetable and an expedited hearing of the present claim on the basis that the "*case was with a judge for judgment to be issued*"; and has allowed the Brazilian proceedings to progress to a stage where judgment is

imminent. Daiichi's delay in bringing this claim means that it is seeking an injunction that would effectively snatch the pen from the judge's hand.

64. However, it is a significant feature of the present case that, unlike in the authorities cited, during the period from June 2019 onwards when Chubb now alleges Daiichi ought to have sought an anti-suit injunction against it Chubb had already provided an express Undertaking not to pursue its claims in Brazil, which it had provided in lieu of, and in order to avoid Daiichi having to apply for, an anti-suit injunction. Chubb was, from June 2019 until 2 (alternatively 26) March 2020 actively co-operating with Daiichi to defer any further substantive proceedings in Brazil, and thus could reasonably be regarded by Daiichi as neither breaching nor threatening to breach the Undertaking. Equally, during that period Daiichi could reasonably take the view that it would be unnecessary and wasteful to seek a mandatory anti-suit injunction, particularly in circumstances where Chubb had already provided the Undertaking.

65. Chubb cannot in these circumstances reasonably have relied on Daiichi refraining from seeking an anti-suit injunction as indicating that Daiichi was content for the Brazilian proceedings, including any jurisdiction challenge, to take their course. On the contrary, the joint strategy of keeping the Brazilian proceedings on hold had been conceived as a way of avoiding the need for an anti-suit injunction; and the defendants expressly reserved their position in the joint filings of August 2019 and 2 March 2020 in the manner quoted earlier.

66. Daiichi and Noble Resources were not, in any substantive sense, actively engaging in the proceedings in Brazilian but rather, with Chubb's express and active support, seeking to defer them. Such positive steps as were taken were taken only out of necessity or on a precautionary basis. It must have been clear to Chubb at all material times that such steps did not indicate that Daiichi or Noble Resources were content to allow the Brazilian court to decide the jurisdiction issues and, if relevant, the merits.

67. Further, any relevant legal expenditure by Chubb in Brazil – none has been quantified – must have been limited (with, by contrast, more significant expenditure from March 2020 onwards having resulted from Chubb's decision positively to pursue the Brazilian proceedings, in breach of the Undertaking).

68. In these circumstances, it is inapt to characterise the present claim, as Chubb now does, as a 'last minute bid' to halt the Brazilian proceedings, or as being unduly late. Nor is the present case comparable to the situation of a party who simply allows foreign proceedings to take their course, subject to making a jurisdiction challenge, when faced with a claim brought in breach of a jurisdiction or arbitration agreement. Here, Chubb had specifically agreed, by the Undertaking, not actively to pursue the Brazilian proceedings, and until March 2020 gave Daiichi reason to believe that it intended to comply with its promise.

69. On the contrary, it would be unjust to allow Chubb, having sought and obtained Daiichi's agreement or acceptance of the delay strategy in lieu of an anti-suit injunction, now to rely on that very strategy as a means of escaping from its obligations on the ground of delay.

70. I note in passing that, as Daiichi points out, Chubb's representative Barbuss made the point on 6 March 2020 in the Mizuho proceedings that *"[w]e were surprised, to say*

the least, that in the middle of these out of court discussions, the other side is now rushing us with a petition to the Court to continue with the anti-suit injunction. It has been more than two years from the previous anti-suit injunction and we have been negotiation the claim since. We do not understand why the urgency at this moment in time to rush both Claimants and Defendants into another hearing without adequate time to prepare for it". Whilst as Chubb points out, its complaint there was in part of inadequate time to respond to the application, it was also in part a complaint that the application was made at all when the parties had remained in negotiations for the previous two years.

71. I also do not consider there has been any material delay on Daiichi's part since the developments in early March 2020 to which I refer above. Following Chubb's Reply on 2 March 2020, Mr Carvalho became aware of the apparent change in the case's status *per* the court website on 10 March, and Chubb on 26 March made clear its intention to proceed against Daiichi itself. Daiichi sent its letter before claim only a few days later, on 30 March. Following Chubb's failure to provide a substantive response, Daiichi (unlike Mizuho) had to prepare fresh proceedings and an application for permission to serve them on Chubb by an alternative means; and issued the present claim on 21 April.

72. As noted earlier, if Chubb discontinues, it will probably be ordered to pay adverse attorney fees to Daiichi's and Noble Resources' Brazilian lawyers based on a percentage of the total value of the claim. However, as Daiichi points out, any resulting prejudice (a) is caused by Chubb's pursuit of the claim in a non-contractual forum and (b) is outweighed by the prejudice Daiichi and Noble will suffer if judgment is issued against them for the total value of the claim, plus interest, court costs and lawyers' fees. Andrew Baker J granted mandatory relief to Mizuho notwithstanding the prospect that Chubb might be ordered to pay adverse attorney fees.

73. For these reasons, justice as between the parties in my judgment clearly favours the grant of the relief sought.

74. However, it is also necessary to consider carefully whether considerations of comity towards the Brazilian court weigh against the grant of such relief. Chubb makes the point that the various steps taken since June 2019 to stay the proceedings and vary the procedural timetable, and the reasons given for them, would have indicated to the Brazilian court that the parties were willing to allow that court to determine all questions of jurisdiction. Moreover, the proceedings are (Chubb says) now at an advanced stage, with a risk of judgment on the merits very soon, so to grant an anti-suit injunction would in effect be to 'snatch the pen' from the Brazilian judge's hand.

75. Against that, however, the position remains that since June 2019 the only step taken in relation to the substantive merits has been the precautionary filing of Noble Resources' defence in September 2019 and Chubb's reply of 2 March 2020. The Brazilian court has not yet assumed jurisdiction over any of the defendants: cf the comments of Millett LJ quoted in § *The Angelic Grace* quoted in § 53 above, and contrast the position in *Essar Shipping* where the overseas court had by the time of the hearing in England already ruled on the jurisdiction issue. There is no question of Daiichi (or Noble Resources) taking a 'two bites the cherry' approach by awaiting the outcome of a jurisdiction challenge in Brazil before seeking an anti-suit injunction.

Moreover, the parties' joint filings on 29 August 2019 and 2 March 2020 contained the defendants' general reservations of position quoted in §§ 27 and 39 above. Such time and resources as the Brazilian courts have expended on the case will have related to the parties' joint applications for a stay and/or procedural deferral, as opposed to the substantive merits of the claims. Whilst Mr Carvalho considers there to be a risk of a decision on the merits in the near future, this remains unclear. It cannot be said that the Brazilian court here is poised to pass judgment on the merits.

76. As to Chubb's point that it would be contrary to comity to grant Daiichi an injunction to prevent the Brazilian court from determining its own jurisdiction challenge, where proceedings are wrongfully brought or pursued in an overseas court, it will sometimes be necessary for the foreign defendant to issue a jurisdiction challenge in order to avoid submitting to the foreign court's jurisdiction, even if it also seeks an anti-suit injunction in the contractual forum (or, in arbitration cases, the relevant court). A jurisdiction challenge had, for example, been initiated in the foreign court in *Team Y&R Holdings* prior to the hearing of the anti-suit application in this court but was not treated as a reason for refusing relief. (It also appears from *Enka Insaat v Chubb* [2020] EWCA Civ 574 §§ 113-116 that attempts to get the Moscow Arbitrazh court to hold the respondent to its bargain were not considered as precluding the grant of an anti-suit injunction.) The case law makes clear that time which elapses during a jurisdiction challenge in the foreign court is still relevant when considering delay. It does not follow, however, that the mere making of a jurisdiction challenge in the foreign court (as distinct from the 'two bites' strategy of awaiting its outcome before seeking an anti-suit injunction) makes any subsequent anti-suit injunction inconsistent with considerations of comity.

77. Viewing the matter in the round, and after taking account of considerations of comity, I conclude that the balance clearly favours the grant of the injunction sought.

(F) SCOPE OF THE INJUNCTION: NOBLE RESOURCES

78. It was not in dispute that were I to conclude that an anti-suit injunction should be granted, it should be in mandatory form. The current position in the Brazilian proceedings means that in order to give practical effect to the Undertaking and/or any prohibitory injunction enforcing it, it is necessary for the order to require Chubb to discontinue, as there will otherwise now be a real risk that the Brazilian court will proceed to judgment on the merits at some stage after 25 May.

79. The Undertaking was given to Daiichi but relates to the pursuit of proceedings against both Daiichi and Noble Resources. Noble Resources has not made a corresponding application, though it has made clear that it does not object to the grant of an injunction. Daiichi wishes the injunction to extend to proceedings against Noble Resources, because it fears that otherwise Noble Resources will seek to pass any liability 'up the line' to Daiichi.

80. In order to enforce the Undertaking insofar as it relates to Noble, Daiichi needs to have sufficient interest in doing so, meaning "*some prejudice, however speculative, and more than an academic interest in enforcing the covenant not to sue*" (*The Marielle Bolten* [2010] 1 Lloyd's Rep 648 § 60 per Flaux J). The judgment of Aikens LJ (with whom the other members of the court agreed) in *RBS v Highland Financial Partners* [2013] 1 CLC 596 § 178] suggests that *"a legitimate interest in*

upholding a contractual agreement" would be a sufficient interest, though I do not consider it necessary in the present case to rely on that way of expressing the point.

81. Mr Macfarlane says:

> "The Undertaking was given to Daiichi alone, but covered both Daiichi and Noble Resources. Daiichi has a clear and sufficient practical interest in enforcing the Undertaking insofar as it relates to Noble Resources because, even if the Brazilian court issues judgment against Noble Resources alone, Noble Resources will no doubt seek to pass that liability up the charterparty chain and Daiichi will still be faced with a claim. There is therefore a real possibility that Daiichi will suffer financial loss unless the Undertaking is enforced in relation to the Brazilian proceedings against both Daiichi and Noble Resources."

82. Chubb did not file any contradictory evidence, but submitted that Mr Macfarlane's evidence quoted above provided insufficient evidence of any relevant interest.

83. In my view Mr Macfarlane's evidence does indicate a sufficient interest in enforcing the injunction as regards claims against Noble Resources. As outlined earlier, Daiichi voyage chartered the Vessel to Noble Chartering, and Noble Resources used the Vessel to perform a contract of affreightment. Though the precise arrangements between those two members of the Noble group are not known, it is not unlikely that some form of contractual arrangement exists under which Noble Resources could pass up to Noble Chartering, and hence to Daiichi, any liabilities which as between owners and charterers would fall on owners. It is not difficult to envisage potential claims that might be made by voyage charterers against owners/disponent owners arising from a collision, for example in relation to seaworthiness or instructions said to have been given to the Master. Whether or not any such claims would be meritorious, or even viable, in practical terms it is obvious that to allow the proceedings in Brazil to continue against Noble Resources would create a risk of Daiichi at the very least becoming embroiled in a dispute with Noble Chartering. That prejudice would arise as a result of Chubb's breach of its obligations which Daiichi seeks to enforce. I am satisfied in these circumstances that Daiichi has sufficient interest in enforcing the Undertaking as regards both itself and Noble Resources.

(G) CONCLUSION

84. For these reasons I conclude that Daiichi is entitled to the anti-suit injunction it seeks. The parties agreed a form of order following my indication of the outcome at the end of the hearing before me.

85. I am grateful to both counsel for their clear, concise and helpful submissions.