Neutral Citation Number: [2020] EWHC 805 (Comm)

Case No: CL-2020-000171

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2020

Before :

MR JUSTICE JACOBS

- -

Between :

(1) CLEARLAKE CHARTERING USA INC. **Claimant**

(2) CLEARLAKE SHIPPING PTE LTD

- and -

Defendant

PETRÓLEO BRASILEIRO S.A.

- -
- -

Robert Thomas Q.C. and Ben Gardner (instructed by **Kennedys Law**) for the **Claimants**
Henry Byam-Cook Q.C. (instructed by **White & Case LLP**) for the **Defendants**

Hearing dates: 30th March 2020

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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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MR JUSTICE JACOBS

Mr. Justice Jacobs :

The Application

1. The Claimants seek an urgent mandatory injunction compelling the Defendant ("Petrobras") to provide security to enable the release of the m/t MIRACLE HOPE ("the Vessel") from arrest in Singapore or, alternatively, substitute security to replace that which may have been put up to secure the Vessel's release. I shall refer to the Claimants collectively as "Clearlake", and individually as "CUSA" and "CSPL". The basis of the application is that Petrobras is contractually obliged to provide the security sought, but has so far failed to do so.

2. This application follows an application made by Trafigura Maritime Logistics Pte Ltd ("Trafigura") in claim CL-2020-000159 for equivalent relief against CSPL. On 24 March 2020, following an urgent application, Henshaw J. granted the following operative relief in favour of Trafigura:

    i) The Defendant must provide forthwith such bail or other security as may be required to prevent such arrest or detention or to secure the release 2 of the Vessel. For the avoidance of doubt, the Defendant is required to provide the aforementioned bail and/or security directly to the Bank.

    ii) 2. Upon a demand to do so from Head Owners, the Defendant is to supply directly to Head Owners sufficient funds to defend any proceedings brought by Natixis against Head Owners in connection with the delivery of the Cargo.

3. The bank referred to in that order was Natixis, Singapore branch ("Natixis"). The proceedings by Trafigura against CSPL, and now by Clearlake against Petrobras, result from the commencement of proceedings in Singapore by Natixis against the registered shipowner, Ocean Light Shipping Inc. ("Ocean Light") for alleged misdelivery of a cargo of oil which had been carried from Brazil to China in the latter part of 2019. Natixis claim to be the holders of bills of lading in respect of that cargo. The contractual charterparty chain relating to the voyage from Brazil to China comprised (i) a time-charter between Ocean Light and Trafigura on an amended Shelltime 4 form dated 29 April 2019, (ii) a voyage sub-charter from Trafigura to CUSA on an amended Shellvoy 6 form dated 21 August 2019, and (iii) a back to back voyage sub-charter, also dated 21 August 2019, from CUSA to Petrobras. As described below, the role and involvement of CSPL in this contractual chain is a matter which is to some extent in dispute.

4. An order having been made against CSPL on 24 March, the Claimants now seek an equivalent order against Petrobras who were at the bottom of the charterparty chain. The operative relief sought is as follows:

    i) The Defendant must provide forthwith such bail or other security as may be required to prevent such arrest or detention or to secure the release of the Vessel, or if such bail or other security has already been provided by another party, to provide forthwith such substitute security to replace security that may have been provided by another party to prevent such arrest or detention or secure the release of the Vessel. For the avoidance of doubt, the Defendant is required to provide the aforementioned bail and/or security directly to the Bank.

ii) Upon a demand to Trafigura Maritime Logistics Pte Ltd or the Claimants to do so from Head Owners, the Defendant is to supply directly to Head Owners sufficient funds to defend any proceedings brought by Natixis against Head Owners arising out of or in connection with the discharge or delivery of the Cargo, or alternatively to supply such funds to the Claimants if any of Trafigura Maritime Logistics Pte Ltd or the Claimants has provided such funds to the Head Owners.

5. Petrobras were not given formal notice of the application when it was issued by Clearlake on Friday 27 March 2020, but they were given informal notice (albeit less than one day). Clearlake therefore recognised that a duty of full and frank disclosure arose. However, I was shown correspondence which indicated that Petrobras had previously been given notice of Clearlake's potential claim as well as developments in the proceedings brought by Trafigura. Because of the urgency of the case, I ordered that the application should be heard on Monday 30 March 2020. By the time of the hearing, Petrobras had been able to serve a short witness statement with a small number of relevant documents exhibited, and skeleton argument in opposition to the application. At the hearing (which was a remote hearing conducted by the Skype for Business video conferencing platform) Mr. Byam-Cook was able to make detailed submissions for approximately half a day as to why the interim relief should not be granted.

Factual background

6. The relevant factual and contractual background to present proceedings is largely set out in the judgment of Henshaw J and it is not necessary for me to repeat his description in detail. Certain aspects of the factual background had, however, not been the subject of focus in the application before Henshaw J. and were relevant to the parties' arguments. What therefore follows below is a broad summary which incorporates the particular factual matters relevant to the parties' arguments.

7. The Vessel was arrested by Natixis Bank, Singapore Branch ("Natixis"), the holders of bills of lading in respect of a trade of 1m US barrels of Lula Crude Oil from Brazil to China ("the Cargo"). The Vessel is still currently on time charter to Trafigura from her Ocean Light pursuant to the time charter dated 29 April 2019 on an amended Shelltime 4 form ("the Head Charter"). In contrast, the two voyage charters have been performed.

8. Trafigura sub-chartered the Vessel on an amended Shellvoy 6 form to CUSA on 21 August 2019 ("the Clearlake Charter") for carriage of crude oil from Brazil to the Far East. By an addendum to the Clearlake Charter dated 2 December 2019, after the Cargo had been discharged, it was agreed between Clearlake and Trafigura that the Clearlake Charter would be amended so that the charterer was CSPL (the Second Claimant).

9. Clearlake's case is that CUSA was originally named in the Clearlake Charter by mistake and that the intention had been for CSPL to charter in tonnage, for a back-to-back booking note to be agreed with CUSA and for CUSA to charter out tonnage to Petrobras. That this was the intention is borne out by an internal Clearlake email dated 29 August 2019 (i.e. not long after the Clearlake charter had been concluded and long before any dispute had arisen) from Mr. Ryan Lynch to a colleague:

> So here is what we will need on this

> 1- Recap : Trafigura -> CSPL
>
> 2- Booking note CSPL -> CCUSA
>
> 3- Recap (below is ok) CCUSA -> Petrobras
>
> Can you do an addendum/ revision with Trafigura change charterer to CSPL, and send us a booking note for CSPL -> CCUSA
>
> Whom is doing ops? Would suggest Vikas or Gareth given the LOIs etc will need back to back and we need to make sure it works

10. This intention was to some extent accomplished, in that the addendum was drawn up and executed in December 2019 substituting CSPL for CUSA under the Clearlake charter. But Clearlake omitted to draw up a back-to-back booking note between CSPL and CUSA. It is this omission that has provided the foundation of one of Petrobras' arguments that there has been a 'break in the contractual chain', such that no relief should be granted to Clearlake. The substance of the argument is that any liability on the part of CSPL towards Trafigura (or those further up the contractual chain) cannot be passed down the contractual chain to Petrobras; because it is CSPL which may have liabilities up the contractual chain, but only CUSA which has claims against Petrobras, and (because of the break in the chain) CSPL's liabilities cannot be passed down to CUSA. The Claimants' case is that, for present purposes, the precise relationship between the Clearlake parties is in relation to the Vessel does not matter.

11. Also on 21 August 2019, CUSA entered into a sub-charter with Petrobras, ("the Petrobras Charter"). The Petrobras Charter was on materially back-to-back terms with the Clearlake Charter. Both Charters provided at clause 33(6) of the amended Shellvoy form:

> "Notwithstanding any other provision of this Charter, Owners shall be obliged to comply with any orders from Charterers to discharge all or part of the cargo provided that they have received from Charterers written confirmation of such orders.
>
> If Charterers by telex, facsimile or other form of written communications that specifically refers to this clause request Owners to discharge a quantity of cargo either:
>
> (a) without bills of lading …
>
> then Owners shall discharge such cargo in accordance with Charterers' instructions in consideration of receiving ~~the~~ **an LOI as per Owners' P&I Club wording to be submitted to Charterers before lifting the "subs"**. Following indemnit [sic] deemed to be given by Charterers on each and every such occasion ~~and which is limited in value to 200 per cent of the C.I.F value of the cargo on board~~
>
> ~~(i) Charterers shall indemnify Owners, and Owners' servants and agents in respect of any liability loss or damage of whatsoever nature (including legal costs as between attorney or solicitor and client and associated expenses) which Owners~~

~~may sustain by reason of delivery such cargo in accordance with Charterers' request.~~

~~(ii) If any proceedings is commenced again t Owners or any of Owners' servants or agents in connection with the vessel having delivered cargo in accordance with such request, Charterers shall provide Owners or any of Owners' servants or agents from time to time on demand with sufficient funds to defend the said proceedings.~~

~~(iii) If the vessel or any other vessel or property belonging to Owners should be arrested or detained, or if the arrest or detention thereof should be threatened,~~

~~by reason of discharge in accordance with Charterers' instructions as aforesaid, Charterers shall provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such vessel or property and Charterers shall indemnify Owners in respect of any loss, damage or expenses caused by such arrest or detention whether or not the same may be justified.~~

~~(iv) Charterers shall, if called upon to do so at any time while such cargo is in Charterers' possession, custody or control, redeliver the same to Owners.~~

(v) As soon as all original bills of lading for the above cargo which name as discharge port the place where delivery actually occurred shall have arrived and/or come into Charterers' possession, Charterers shall produce and deliver the same to Owners, whereupon Charterers' liability hereunder shall cease. Provided however, if Charterers shave not received all such original bills by 24.00 hours on the day 36 13 (thirteen) calendar months after the date of discharge, then this indemnity shall terminate at that time…

(vi) Owners shall promptly notify Charterers if any person (other than a person to whom Charterers ordered cargo to be delivered) claims to be entitled to such cargo and/or if the vessel or any other property belonging to Owners is arrested by reason of any such discharge of cargo.

(vii) This indemnity shall be governed and construed in accordance with the English law and each and any dispute arising out of or in connection with this indemnity shall be subject to the jurisdiction of the High Court of Justice of England."

12. The above quotation sets out the deletions from the standard form which appear in the amended charterparty. The words "**an LOI as per Owners' P&I Club wording to be submitted to Charterers before lifting the "subs"** were in bold in the text of the charter. It was common ground, however, that the Owners' P&I Club wording was not in fact submitted to Petrobras before the "subs" were lifted and the charter became unconditional. That wording was, however, supplied in October 2019, in the following circumstances.

13. On 11 October 2019, Ms. Afonso of Petrobras (Vessel Operations) e-mailed Mr. Harvey Baldwin of Simpson Spence and Young ("SSY"), who had fixed the charter. She said:

> "We are considering a possibility to discharge one parcel of cargo at Yosu, South Korea.

> This area is covered by CP but the Bill of Lading was issued with China ports as destination.
> As per CP clause 33 we need to issue and sign a LOI to vessel discharge cargo at a port that is different from Bill of Laading.
> So, please ask Owners to revert with their comments and a wording for the LOI. Please note this is not a firm instructions yet. Is just a query for now."

14. This request therefore originated from the possibility that Petrobras wished to change the contractual destination, rather than an intention to discharge cargo without production of bills of lading. Clause 33 (6) covered both possibilities in sub-clauses (a) and (b). The e-mail shows that Ms. Afonso recognised that Petrobras had not previously been given the wording of a letter of indemnity, and at that stage she was under the impression that Petrobras would need to issue and sign a letter of indemnity.

15. Mr. Baldwin responded on 11 October 2019 as follows:

> "Good day Camila, Many thanks for your below email; as per Shellvoy 5, Clause 33 (6), duly amended, Owners are deemed to have been Indemnified by Charterers for discharge of cargo without presentation of Original Bills of Lading and/or at a discharge port which is different from that stated on the Bills of Lading."

16. His email then went on to quote from Clause 33 (6). Mr. Baldwin was therefore making the point that it was not necessary for Petrobras to issue a letter of indemnity, because the Shellvoy form ("duly amended") provided for a deemed indemnity. That is certainly true of the terms of unamended Shellvoy Form. Henshaw J. was of the view that this was also the case under the amended Shellvoy Form which contained the sub-charter to Petrobras: see paragraph [48] of his judgment:

> "Clause 33 (6) viewed as a whole envisages that the indemnity arises under the clause itself, without the need for any separate letter to contain the indemnity".

I consider that Henshaw J. was, on this issue, right for the reasons which he gave.

17. Mr. Baldwin was also pointing out that Clause 33 (6) covered two matters: the discharge of cargo without presentation of original bills of lading, and discharge at a port different to that stated in the bills. As matters transpired, it was the former rather than the latter which became relevant to the performance of the voyage.

18. Ms. Afonso replied to Mr. Baldwin as follows:

> "Thanks for your promptly reply.
>
> We are aware of this clause. We need now to receive the P&I LOI wording to check the contect [sic] before to decide to schedule the discharge to YOSU.
>
> Kindly ask Owners to send the wording of LOI once available"

19. In consequence of this request, Mr. Baldwin sent an email to Mr. Hope at Clearlake:

"Good day Mike,

Thanks yours; please kindly also revert with Owners LOI wording for discharge of cargo without presentation of Original Bills of Lading and Owners combined wording for discharge without Bills of Lading and change of destination."

20. A request in similar form was then sent up the line to Trafigura: see paragraph [12] of Henshaw J's judgment. This resulted in the wording of the International Group of P&I Clubs ("IG") being passed down the line to Clearlake and then to Petrobras. Mr. Baldwin thus emailed Ms. Afonso on 14 October 2019 as follows:

> "Good day, Camila
>
> Thanks for your below e-mail; attached please find Owners combined LOI wording for discharge of cargo without presentation of Original Bills of Lading and change of destination. Kindly advise whether anything further required at this stage"

21. Petrobras did not raise any questions about the wording then, or at any other stage. On behalf of Petrobras, it was submitted that SSY were the agents of CUSA rather than Petrobras, and that Mr. Baldwin had no authority from Petrobras to request anything other than the wording for a change of destination. It is of course not possible to resolve at the present stage any question as to whether SSY was the agent of Clearlake or Petrobras or both. It is true that, at this stage, Petrobras were interested in a change of destination rather than discharge without presentation of bills of lading. However, it is difficult in my view to see how Mr. Baldwin can be criticised for asking for the wordings that he requested, given that Clause 33 (6) covered both situations and that the amendments to the clause envisaged that the P&I Club wording would have been provided at an earlier stage. To my mind, however, the most significant points are that: the P&I wording for discharge without bills of lading was indeed provided; that Petrobras were therefore aware of it at the time when – some days later – they requested discharge without presentation of bills; and that Petrobras at no stage raised any queries about it.

22. On 30 October 2019, Petrobras issued discharge orders to CUSA under the Petrobras Charter. The documents do not show whether it was Ms. Afonso herself who gave these instructions. But at all events, the orders were passed on by Mr. Baldwin of SSY. The orders included the following:

> "LOI INVOCATION: Charterer's, Petrobras, hereby request Owners to discharge their cargo as per this Voyage Orders without presentation of Bill of Lading. In lieu of an LOI Charterer's hereby invoke Part II, clause 33 (6) of the Charter Party dated 21.08.2019".

23. It is clear from these orders that Petrobras was taking the view (consistently with the decision of Henshaw J and my own view) that it was not necessary for a separate LOI to be issued, since clause 33 (6) itself provided for an indemnity. Thus, Petrobras did not offer a separate LOI, but instead stated that clause 33 (6) applied "In lieu of an LOI".

24. On receiving these discharge orders, Clearlake Operations passed the discharge orders on to Trafigura under cover of an email stating: *"We, Clearlake Shipping Pte Ltd, hereby invoke Clause 33 of relevant CP to discharge as per below orders from Charterers w/o prod of OBL"* This email was therefore sent on behalf of CSPL. Clearlake contends that this was because CPSL was the intended charterer under the Clearlake Charter, but that ultimately this is not a point which matters.

25. Natixis seems to have been the financing bank behind a trade between Hontop Energy (Singapore) Pte Ltd ("Hontop") and another Petrobras entity, Petrobras Global Trading BV ("Petrobras Global"), for the sale of the Cargo. According to the affidavit filed by Natixis in the Singapore arrest proceedings, whilst Natixis paid some US$65m to Petrobras Global on Hontop's behalf under a letter of credit, Hontop has not reimbursed Natixis It also appears from Natixis' affidavit that Petrobras Global endorsed and delivered the Bills to Natixis after the Cargo had been discharged.

26. No complaint was raised by Petrobras or Petrobras Global when the Cargo was discharged by Ocean Light in early November 2019 (or at any time since). It can therefore be inferred that the Cargo was discharged in accordance with Petrobras' instructions.

27. Subsequent to Petrobras Global endorsing and delivering the Bills to Natixis, Natixis wrote to Ocean Light as carriers / owners of the Vessel to demand delivery of the Cargo in their asserted capacity as lawful holders of the Bills. Ocean Light did not respond and so Natixis inferred that Ocean Light no longer had possession of the Cargo. Natixis then arrested the Vessel on 12 March 2020 and requested security of US$76,050,000 to secure the Vessel's release. As already described, these matters have led to the proceedings by Trafigura, the order of Henshaw J, and now the proceedings and application by Clearlake.

Principles

28. In paragraphs [26] – [32] of his judgment, Henshaw J. set out the relevant legal principles which are applicable to the grant of the injunction sought in the present context. I consider that these paragraphs accurately state the principles which apply.

29. Indeed, there was no substantial dispute about these principles. Mr Byam-Cook drew attention to a passage from the judgment of Hoffman J. in *Films Rover Ltd. v Cannon Film Sales* which was cited in the *Zockoll* decision referred to by Henshaw J. This sets out the reasons why mandatory injunctions generally carry a higher risk of injustice if granted at an interlocutory stage. I bear those comments in mind, but they do not seem to me to affect the principles to be applied.

The parties' arguments

30. In summary, the Claimants submitted that the injunction should be granted, for essentially the same reasons that Henshaw J. granted mandatory relief to Trafigura. The Petrobras charter was on back to back terms with the Clearlake charter to which Trafigura was a party. As far as contractual terms were concerned, there was no difference in substance between the position of Trafigura vis a vis CSPL, and CUSA vis a vis Petrobras. Henshaw J. was satisfied to the level of a high degree of assurance that Trafigura would succeed on its claim on the merits, and the court should form the

same conclusion in relation to the claim by CUSA. CUSA was entitled to enforce the contractual Petrobras obligations to provide security or funding irrespective of whether or not CUSA could claim an indemnity in respect of liabilities to CSPL. Damages were not an adequate remedy. The balance of convenience favoured the grant of injunctive relief, particularly bearing in mind that the original request for discharge without presentation of bills of lading had emanated from Petrobras.

31. On behalf of Petrobras, a number of arguments were advanced.

a) Neither Clause 33 (6) nor the subsequent dealings between the parties gave rise to contractual obligations on Petrobras to comply with the terms of the IG wording. The court cannot be satisfied to the necessary high degree of assurance that the claim will succeed. Whilst Petrobras's request to CUSA for discharge without presentation of bills of lading might give rise to a claim to be indemnified against losses arising in consequence of complying with that order, it did not follow that there was any agreement on the terms of the IG wording.

b) There was no continuous chain of contracts: there was a gap in the chain of charters, so that no claim against CSPL by Trafigura could flow down to Petrobras. CSPL itself could not enforce rights under the IG wording.

c) Damages would be an adequate remedy to CUSA. The principal reason for this was the break in the contractual chain. This meant that any losses suffered further up the chain by Trafigura or CSPL could not flow down to CUSA. Since CUSA would suffer no damage, it followed that damages would be an adequate remedy.

d) The balance of convenience did not favour the grant of an injunction. If security were ordered, this would be provided ultimately to Natixis, who were not party to the present proceedings. If this were done, and the vessel were then released, it would in practice be impossible to unwind matters consequent either upon the discharge of the interlocutory injunction at the inter partes stage, or if it were ultimately held that the injunction should not have been granted.

e) Specifically in relation to defence costs, the injunction should be refused in any event. It was premature to make any order, since no demand had yet been made by Ocean Light, and it was uncertain as to what the demand would be for and hence as to whether and to what extent it was a valid demand.

Discussion

(a) Clause 33 (6)

32. I consider that much of the ground on this issue has already been covered by the judgment of Henshaw J. This judgment was given following a hearing at very short notice, and it will be subject to an inter partes hearing in due course. Accordingly, this is not a case where I am not required to reach the same conclusions as Henshaw J. unless there is powerful reason not to do so (c.f. *Willers v Joyce* [2016] UKSC 44, per

Lord Neuberger at [9]). However, having considered his analysis of Clause 33 (6), I agree with the essential conclusions that he has reached.

33. I therefore agree with his conclusion in paragraph [15] that reading the relevant clauses of the IG wording together with sub-clauses (v) to (vii) of clause 33 (6), so as to produce the overall terms of the agreed indemnity, makes perfectly good sense. If wording had been provided prior the lifting of the "subs", this is how clause 33 (6) would have been construed. It makes no difference, in my view, that the wording was provided some weeks later.

34. As already indicated, I also agree with his conclusion in paragraph [48] that the agreed indemnity (i.e. reading the relevant clauses of the IG wording together with sub-clauses (v) – vii)) arises under the clause itself, without the need for any separate letter to contain the indemnity. I also consider that his conclusion in paragraph [49] as to waiver and estoppel is equally applicable as between CUSA and Petrobras.

35. Against this background, I am satisfied to a high degree of assurance that CUSA will succeed on its claim that Petrobras was, in relation to the discharge of the Cargo without production of bills of lading, bound by the terms of the IG wording read together with sub-clauses (v) – (vii). There are two separate reasons for reaching this conclusion.

36. First, applying ordinary principles of contractual construction to clause 33 (6), the parties intended that the "Owners P&I Club wording" would be applicable in lieu of the standard form clauses which were deleted. Although the wording was not submitted to Petrobras before they lifted the "subs", this does not mean that it somehow became inapplicable. Rather, it means that Petrobras were content to lift the "subs" prior to receipt of the relevant wording, thereby waiving their right to receive it at that time On the evidence before me, there is dispute as to what the "Owners P&I Club wording" was, at the material time, in relation to the discharge of cargo without bills of lading or discharge at a place other than that named in the bill of lading: it was the IG wording "C". Petrobras in its submissions has not identified any other potentially applicable wording. In these circumstances, I consider that – irrespective of the events that transpired in October 2019 subsequent to the conclusion of the contract – the contractually applicable wording was the IG wording "C".

37. Secondly and in any event, as described above, the applicable wording was provided to Petrobras on 14 October 2019, and did not provoke any comment let alone challenge. I do not consider that it is of any significance that the occasion on which the wording was originally provided was that Petrobras was considering a change of discharge port, rather than delivery without bills of lading. What matters is that: Petrobras knew that P&I wording was applicable to Clause 33 (6); were told in October what the wording was; made no comment or objection to the wording; and then invoked Clause 33 (6) when instructing discharge without production of bills of lading. It seems to me that the matter can be analysed in a number of different ways: the parties proceeded on the mutual basis that this was the applicable wording, and that therefore Petrobras is estopped by convention from contending that the wording was inapplicable; thatPetrobras waived any right to contend that the wording supplied was inapplicable to Clause 33 (6); that the provision by CUSA of the terms for discharge without presentation of bills, coupled with Petrobras instruction to discharge without bills, gave rise to an agreement by conduct that the terms were applicable. Each analysis leads to the same conclusion.

38. The contrary argument is, first, that Petrobras provided no indemnity at all against the consequences of complying with orders to discharge without the original bills. This argument in my view has no merit for the reasons given by Henshaw J. in paragraph [50] of his judgment. Mr. Byam-Cook displayed little enthusiasm for this primary argument. His main and alternative point was that there was an implied indemnity, but that this was not on the terms of the "C" wording, and therefore did not carry with it any positive obligations to be found in that wording. It was simply an implied indemnity arising as a matter of construction of the charterparty: see *Cooke et al: Voyage Charters* paragraph 18.240. Whilst this argument may seem marginally more attractive, in my view it too has very little merit and in any event does not dissuade me from having the requisite high degree of assurance. I consider that once it is recognised (as the alternative argument recognises) that the request to discharge without bills of lading did carry with it some obligations (i.e. some form of indemnity), and that these are derived from the charterparty, it is not difficult to identify what those obligations were: they were the obligations identified in Clause 33 (6) namely those contained in the "Owners P&I Club wording". That conclusion is reinforced by the subsequent events, already described, relating to the provision of the relevant wording.

39. Mr. Byam-Cook suggested that it was relevant to look at the terms of the Head Charter between Ocean Light and Trafigura. Those terms were materially different to Clause 33 (6) as amended in the Petrobras charter. The Head Charter contemplated the provision of a separate LOI. The Petrobras charter, for reasons already given, did not. What matters, in my view, are the terms of Clause 33 (6) in the Petrobras charter and the dealings between Petrobras and CUSA. There is no evidence that either of them knew anything about the terms in the Head Charter. But in any event, I do not see how those different terms, agreed between different parties, can have any bearing on the issues which I have to decide.

40. Mr. Byam-Cook referred me to the decision of the Court of Appeal in *The Songa Winds* [2018] EWCA Civ 1901. That issue in that case was whether a limiting term in a charterparty, relating to LOIs, could be read into separate LOIs which were subsequently provided but which did not contain the limiting term. The Court of Appeal held that the LOIs were self-contained documents and the limiting term was inapplicable. I did not consider that this case had any relevance to the present charter, where the indemnity arises under the clause itself and where there are no separate LOIs.

41. Accordingly, I am satisfied to a high degree of assurance that CUSA will succeed on its claim that Petrobras was, in relation to the discharge of the Cargo without production of bills of lading, bound by the terms of the IG wording (read together with sub-clauses (v) – (vii)).

(b) The alleged gap in the contractual chain

42. CUSA put forward three distinct arguments in response to Petrobras's reliance on the alleged gap in the contractual chain.

43. CUSA's primary argument is that the terms of the IG wording are not confined to the provision of an indemnity in respect of losses or liabilities which flow down to CUSA. The relevant wording is as follows:

> "In consideration of you complying with our above request, we hereby agree as follows:-
>
> 1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of [the ship proceeding and] giving delivery of the cargo in accordance with our request.
>
> 2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with [the ship proceeding and] giving delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.
>
> 3. If in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such inference, whether or no such arrest or detention or threatened arrest or detention or such interference may be justified"

44. I consider that this primary argument is correct. It is true that Clause 1 provides for an indemnity against liabilities and losses, and that the concluding words of Clause 3 ("and to indemnify you …") also provide for an indemnity. However, Clause 2 contains an express obligation, to provide sufficient funds on demand, arising if certain events occur. Similarly, the first part of Clause 3 contains an express obligation ("to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference") arising if certain events occur. These obligations are, in my judgment, additional to the indemnity obligations contained elsewhere. They are obligations which Petrobras has agreed to perform, and are not dependent upon CUSA showing that it has suffered actual or threatened loss.

45. Mr. Byam-Cook argued that, in effect, for a restrictive construction of the relevant language because it arose in the commercial context of indemnification provisions. He argued, in relation to clause 3, that the requestor was required to put up security because it was intended and anticipated that the claim which is being secured will pass down the line to the requestor. The logic of requiring the requestor to put up bail fell away if no liability could be passed down the chain.

46. I do not accept this argument. The language of clauses 2 and 3 must be given its ordinary meaning; i.e. there are obligations which arise if certain events occur. I see no reason to confine the language in the manner proposed by Petrobras.

47. It follows that the alleged break in the chain of contracts does not provide a reason why the obligations in the IG wording should not be performed by Petrobras.

48. It is therefore unnecessary to deal in detail with CUSA's other two arguments. It suffices to say that I was far from persuaded CSPL would be unable to claim an indemnity from CUSA, and that therefore there was no liability that could flow down to Petrobras. There is on any view a serious issue to be tried (to put it at its lowest) on these questions. The internal e-mail of 29 August 2019 indicates that it was the intention within Clearlake for there to be a complete contractual chain involving both CSPL and CUSA, albeit that the documentation comprising the chain was not fully completed.

(c) Adequacy of damages

49. The question of adequacy of damages has been considered in a number of cases in a context similar to the present: see *Harmony Innovation Shipping Ltd v Caravel Shipping Inc* [2019] EWHC 1037 (Comm) (Sir Ross Cranston) at [30]; *The Bremen Max* [2009] 1 Lloyd's Rep. 81 (Teare J) at [22] – [23]; and *The Laemthong Glory (No.2)* [2005] 1 Lloyd's Rep. 632 (Cooke J) at [51] - [52]. The former case involved an application for an interlocutory injunction. The latter cases involved the final determination of issues. But in both contexts, the courts have held that contractual obligations such as those arising in the present case should be performed and not negated. I agree with the approach of Sir Ross Cranston who said:

> Mr Young then submitted that damages would be an adequate remedy. In the circumstances this would be contrary to the authorities, in particular Cooke J's judgment in *The Laemthong Glory* [2004] EWHC 2738 (Comm); [2005] 1 Lloyd's Rep. 632. To take a contrary view would to my mind also undermine the very purpose of a letter of indemnity. Clause 3 is an additional provision to the indemnity provided for in Clause 1. Its purpose is to ensure that security is advanced so that a vessel which has been arrested can be released to continue trading.

50. Nor do I consider that there is any substance in the argument that damages are an adequate remedy in the present case because CUSA would suffer no loss because of the break in the contractual chain. There is, as I have said, a serious issue to be tried as to whether there really was a material break in the contractual chain. But I also consider that this argument, even if valid, would reinforce the case for an injunction. If a party seeks to enforce a contractual obligation in circumstances where it might be difficult for that party to establish a damages claim, that would be a reason for contending that damages are not an adequate remedy and that therefore an injunction should be granted.

(d) Balance of convenience

51. I have no doubt where the balance of convenience lies. For the reasons already given, I have a high degree of assurance that CUSA will succeed on its claim on the merits. Petrobras, which was the party whose request gave rise to the discharge without

presentation of bills of lading, should have complied with its obligations some time ago. The risk of injustice favours the grant of an injunction in order to enable the vessel to sail, with security being provided by the party who made that request. I consider that it would be most unjust if CUSA or CSPL, parties who are or may be in the middle of the contractual chain, should have to shoulder the considerable cost of providing the security which Petrobras has agreed to provide.

52. I have now been provided with evidence which indicates that the Claimants are part of a substantial group which currently has net assets of approximately US$ 2 billion. A parent company guarantee should be provided in order to fortify the cross-undertaking in damages of the Claimants themselves. If it transpires, either at the return date or at the ultimate hearing, that the injunction should not have been granted, Petrobras will be compensated for any expense and losses which they have incurred by reason of providing security which it may prove difficult, once granted, to unravel.

(e) Defence cost

53. Given that Petrobras has previously (and in the present hearing) denied any obligations pursuant to the IG wording, I do not consider it premature to grant relief which will ensure that its obligations under clause 2 will be performed. The precise wording of that relief, and any other issues as to the wording of the order, can be the subject of further submissions.

Conclusion

54. In principle, and subject to further consideration and submissions on the wording proposed by the Claimants, I am willing to grant the relief sought by the Claimants pending a further return date. I also consider it desirable that the return date should be at the same time as the return date of the Trafigura injunction.