Claim No: 2013 Folio No 1248

Neutral Citation Number: [2014] EWHC 3632 (Comm)

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

Rolls Building,

110 Fetter Lane,

London EC4 1NL

Tuesday, 14 October 2014

BEFORE:

MR JUSTICE COOKE

BETWEEN:

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COMPANIA SUD AMERICANA Cl

- **and** -

HIN-PRO INTERNATIONAL LOGISTICS LIMITED Def

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(Official Shorthand Writers to the Court) Tuesday, 14 October 2014

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MISS P MELWANI QC (instructed by Stephenson Harwood LLP) appeared on behalf of the Claimant.

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Judgment

(Please note that due to the poor standard of recording it has not been possible to produce a high quality transcript in this case)

MR JUSTICE COOKE:

1.
This is the trial of the claimant CSAV's claim for a permanent anti-suit injunction and for declarations and damages in respect of alleged breaches of the defendant, Hin-Pro, of a jurisdiction clause contained in bills of lading, by taking proceedings in China. Hin-Pro has not attended the trial. It has chosen to ignore the proceedings, and indeed the related action in 2012, and is in breach of various court orders. In the context of the 2012 action, it was found to be in contempt of court. Some 2 weeks ago, on Friday 25 September, solicitors acting for the defendant served an application seeking an adjournment of today's trial. On 28 September the defendant purported to file an acknowledgment of service, some 10 months out of time. The application for an adjournment was heard on 3 October, and

dismissed. Permission was given to Hin-Pro to file an acknowledgment of service late and to make submissions at the trial, provided it satisfied various conditions. All, save one of those conditions, were not met. On 8 October, some 3½ months after it were due to do so, Hin-Pro served an affidavit of assets, that affidavit having been ordered by Walker J when granting a worldwide freezing order in June 2014. In essence, what was said in that affidavit relating to assets was that the only assets that Hin-Pro had were the sums paid by CSAV in respect of a judgment in China, and various rights of action in other Chinese actions against CSAV.

2.
I have considered the particulars of claim, which are verified by a statement of truth, and evidence put before me under the Civil Evidence Act, which consists of 5 witness statements, including two from Mr Wang, the claimant's Chinese lawyer, one from Mr Rigden-Greene, a solicitor acting for the claimants in Hong Kong, and statements from the Venezuelan lawyer who gave evidence in China in some of the proceedings there. I have also read the statement of Mr Nelson Bolivar of Logistica Maritima, the claimant's port agents in Venezuela, which relates to the compulsory practice of discharging cargo to the authorised nationalised storage agents at Venezuelan ports, absent an application for direct discharge to receivers, which could only be justified in specific circumstances, which are of no application here.

3.
The evidence before me shows that Hin-Pro is a freight forwarder registered in Hong Kong. The disputes between CSAV and Hin-Pro concern allegations of mis- delivery. Hin-Pro alleges that CSAV wrongly delivered cargo without production of original bills of lading in various ports in Venezuela. The bills of lading in question were all CSAV bills, showing shipments from China to Venezuela, either to the port of Puerto Cabello, or the port of La Guaira. The bills were straight bills naming Raselca Consolidadores CA as consignee. Some of those bills named Hin- Pro as shipper, but others named different companies, namely Hefei Hauling Co Limited and Moonlight Trading. For those bills of lading Hin-Pro nonetheless claims in China to be an original party to the contract of carriage contained in the bill. Copies of the 70 bills of lading in respect of which Hin-Pro has commenced proceedings in China have been produced in evidence to this court.

4.
It is CSAV's position in the Chinese proceedings that no mis-delivery took place, because Venezuelan law required that cargo should be delivered to the storage provider authorised by the Venezuelan Government. The exception to the rule arises where a direct discharge or urgent shipment request is made, but that did not occur here, and the goods did not in any event qualify for such direct discharge. Thus, in the absence of that occurring, CSAV were legally obliged under Venezuelan law to deliver the goods to the authority which then had sole control over the goods. The bills of lading issued by the claimant specifically provide for this eventuality and the claimant's case is that not only was delivery so made, but that all the goods were in fact on-delivered to Raselca, the claimant's agents in Venezuela, and then on-delivered by them to the buyers of the cargo.

5.
It is, of course, not for this court to make any determination in relation to the substance of the dispute between the parties as matters stand, since what is sought from this court is an injunction in relation to the Chinese proceedings, which are said to have been begun in breach of the jurisdiction clause.

6.

A schedule summarising the bills of lading and claims made by Hin-Pro in China has been put before me. The amounts claimed involve the value of the cargo carried under the bills, the freight which Hin-Pro claims it was entitled to receive, and a figure in Chinese currency claimed as an exchange rate loss, port and other charges and attorney's costs. The biggest sum by far is the alleged value of the cargo at approximately $24 million.

7.
Hin-Pro are, as I have already said, freight forwarders. It is hard, therefore, to see how they could be the sellers of the goods, or to have suffered the loss claimed in respect of the value. It is the claimant's case that the actual sellers were Chinese companies, who sold on a C & F basis, and who have in fact been fully paid for the goods. The claim made in China is, therefore, said to be dishonest.

8.
In 2012 Hin-Pro commenced proceedings in the Wuhan Maritime Court against CSAV under 5 bills of lading. CSAV had already intimated that to do this would be a breach of the jurisdiction clause in those bills, which took the same form as that which is in issue before me. Hin-Pro said that they would withdraw the Wuhan proceedings if the sum of $1.8 million was paid, that sum representing the amounts it was entitled to by way of unpaid freight across all 75 bills of lading, so it was said. In November 2012, CSAV commenced action 2012 Folio No 1519 in this court, seeking an anti-suit injunction prohibiting Hin-Pro from pursuing or taking any further steps in the Wuhan proceedings on the basis of a breach of the jurisdiction clause in the bills of lading. Burton J granted an ex parte interim injunction, and that was continued as an inter partes hearing by order of Andrew Smith J at the end of November 2012. Hin-Pro did not in fact attend the inter partes hearing in London, and did not comply with the order. Instead, it progressed the matter in Wuhan. In consequence, there was a committal hearing here on 21 March 2013, at which it was found that both Hin-Pro and its sole director, Miss Sui Wei were in contempt of court. Miss Wei was sentenced to imprisonment for 3 months, and permission was given for writs of sequestration to be issued against Hin-Pro. Miss Wei has not, so far as is known, set foot within this country, and has not been apprehended.

9.
Between May and July 2013, regardless of this prior history, Hin-Pro commenced 23 sets of proceedings in Guangzhou, Qingdao, Tianjin, Ningbo and Shanghai in respect of a further 70 bills of lading. The statements of claim in those matters have been put before the court. In each, Hin-Pro alleges that it is the named shipper on the bill, or, alternatively, that "Although not specified as the shipper on the bill, it is the statutory and actual shipper" (this, of course, in translation). It asserts a contract with the defendant on the terms of the bills of lading. CSAV challenged the jurisdiction of the court in China, but its challenges have so far been dismissed, since Chinese courts apparently disregard agreed jurisdiction clauses where the circumstances of the case have little or nothing to do with the agreed jurisdiction.

10.
The current action in this country was then begun by CSAV, and permission to serve out of the jurisdiction was granted. A claim form was served at Hin-Pro's offices in Hong Kong on 10 October 2013. The time limit for service was 31 days. As I have already indicated, no acknowledgment of service was filed within that time, nor until a point just recently in connection with the application made to the court for an adjournment of today's trial.

11.

On 10 October an application notice was served on Hin-Pro seeking an inter partes anti-suit injunction in relation to the 2013 proceedings commenced in China. No response was received to the application notice, and no evidence filed by Hin-Pro. On 29 November 2013 Blair J granted an inter partes anti-suit injunction in this action. Once again, however, that injunction has been ignored

12.
On 27 May 2014 the Ningbo Court issued a judgment in one of the cases before it. That came as something of a surprise to CSAV, which had only recently been provided with documents which it considered were fraudulent, and it had understood that there would further disclosure of evidence and further submissions in relation to them before any judgment was given. However, the Chinese court awarded damages for the value of the cargo claimed, some $360,000, and legal costs in Chinese currency of 100,000. However, the court disallowed Hin-Pro's claim for freight on the basis that they were sellers on C & F terms. The sums awarded by the court in that action have been paid by CSAV to Hin-Pro. The decision, and that of an appeal court, is subject to challenge in the Chinese courts.

13.
An ex parte worldwide freezing order was granted by Walker J on 13 June 2014. When granting it on the claimant's application, he said:

"I have read and considered the second and third affidavits of Mr Kaiser and the affidavit which has been signed (but not yet sworn) by Mr Pizzolante. For the reasons given by Ms Melwani QC in her written skeleton arguments, I am satisfied that there is good reason for concern that Hin-Pro's activities in China involve a fraudulent bringing of proceedings and there are good grounds to fear that they may result in execution in China so as to force CSAV to pay a sum which, when combined with costs in this country, would total something in the region of USD27,845,000. Similarly I am satisfied that there are strong grounds for thinking that a cause of action has accrued now, even though a substantial part of the damages may not be suffered until sometime in the future ... Great care has been taken by those advising CSAV to ensure that appropriate proceedings are brought here and in Hong Kong."

14.
The order froze assets worldwide up to the sum of $27.835 million and required disclosure of worldwide assets and a verifying affidavit. Hin-Pro failed to provide that information or the affidavit until just recently.

15.
On the return date Hin-Pro did not attend, and the freezing order was continued by Eder J on 27 June. At about the same time, a freezing order was sought and obtained on an ex parte basis in Hong Kong. Hin-Pro is a Hong Kong registered company, and the assistance of the Hong Kong court was considered necessary to seek to preserve Hin-Pro's assets there. The Hong Kong order was served on 17 June, and once again time limits passed without Hin-Pro complying with the order for disclosure of information or an affidavit as to assets. Hin-Pro did not attend on the return date in Hong Kong on 20 June.

16.
In those circumstances, the claimant sought and obtained the appointment of a receiver in Hong Kong on 17 July, and it was following that that Hin-Pro appointed lawyers in Hong Kong to act for it, and commenced attempts to stay or set aside the Hong Kong freezing order and the appointment of the receiver. A hearing took place in relation to that on 11 September, but judgment has apparently not

yet been handed down. On 5 August Hin-Pro finally served an affidavit of assets, some 6 weeks later than the ordered date, but that affidavit was incomplete and deficient.

17.
In July 2014 a case management conference was heard in this country, and a trial date fixed for today. A further judgment was then handed down by the Ningbo court on about 10 September, and a sum of $652,936 was awarded in respect of cargo value, with legal costs in local currency of 100,000 again. The claim in respect of freight was once more disallowed, and this judgment is under appeal and is not yet enforceable in consequence of that appeal. It has not yet been paid.

18.
As Walker J remarked in the context of granting a worldwide freezing order, there are good reasons for considering that the claims brought in China by Hin-Pro are dishonest claims, based on false documents purporting to show contracts in the form of a master agreement and sales confirmations between Hin-Pro and Raselca. On the evidence, and in particular that of Mr Wang, Hin-Pro is a freight forwarder, and, as it has recognised itself in correspondence in 2012, would not suffer any loss in relation to the value of the cargo unless the seller for the cargo remained unpaid and then sued Hin-Pro for its value. Initially that was how Hin-Pro described its potential claim in a letter of complaint sent on 8 June 2012.

19.
In October 2012 Hin-Pro also agreed to withdraw the Wuhan proceedings if CSAV paid $1.8 million by the end of the month, and stated that it would not file any law suit against CSAV for the shipments so long as nobody lodged claims against it in respect of mis-delivery.

20.
The claims in China which were issued thereafter, however, did seek to claim the value of the cargo. The statements of claim put forward the position that “a foreign client” commissioned Hin-Pro to “arrange for the shipment of some purchased cargo” from China to Venezuela, with the role of Hin-Pro being described as “booking space and arranging for shipment”. Hin-Pro thus described itself in classic terms of freight forwarding.

21.
In April 2014, however, Hin-Pro disclosed in the Ningbo court a master sale agreement supposedly dated 20 January 2011 between Hin-Pro and Raselca. That showed an intention for Hin-Pro to sell, and Raselca to buy, various different types of product ranging from shoes, to industrial parts, to medical instruments and supplies, up to a total value of US$45 million. The master sale agreement noted that quantities and individual prices were to be specified in separate orders, and provided for bills of lading to be sent to the buyer when Hin-Pro received payment of the purchase price. The agreement purported to contain a signature on the part of Raselca, but with no stamp from Raselca or any indication of the identity of the signatory. Furthermore, some 79 sales confirmations were produced by Hin-Pro which again purported to show Hin-Pro as seller and Raselca as buyer of the various cargoes which were the subject matter of the bills of lading. The sales confirmations take much the same form as each other, providing for payment by cash on delivery, with the buyer being obliged to pay the price 10 days after the cargo arrived at destination. The option for payment by a letter of credit had not been utilised, but the ensuing clause which set out documents required to be submitted for banks for negotiation and collection was completed. The sales confirmations purported to contain a signature on behalf of Raselca, but without any stamp from Raselca or indication of the signatory.

22.
In China, Hin-Pro in due course alleged that the master agreements and sales confirmations which they had produced were signed on behalf of Raselca by Mr Salazar. Mr Salazar has confirmed to the claimants that he did not sign these documents or enter into any such sale contracts with Hin-Pro at all. Mr Lopez of Raselca signed a similar statement stating there were no sale contracts between Raselca and Hin-Pro, and that Raselca did not sign the documents produced by Hin-Pro. In fact, house bills of lading were issued, as is often the way when the ocean bill of lading names freight forwarders as shippers. Those house bills were issued by an affiliated company of Hin-Pro called Soar International. They had the same registered office in Hong Kong, and Miss Wei is the sole director of both these companies. The Soar bills name various Chinese companies as shippers and various Venezuelan companies as consignee. Contact has been made with a limited number of the companies in China whose names appear on the Soar bills, who have indeed confirmed that they were sellers of goods direct to Venezuelan buyers, and that they have been paid for the cargo. Moreover, they say that they have never heard of Hin-Pro. CSAV has also obtained copies of various documents relating to cargoes shipped under the bills, which show that the sellers were not Hin-Pro. These include invoices from the Chinese companies on the Soar bills addressed to the Venezuelan companies appearing on those bills. Evidence has also been obtained showing that these invoices have been paid. In some of the Chinese proceedings the courts themselves are seeking various documents, such as custom documents and export documents from official quarters, which should reveal the true position as to the identity of sellers and buyers. CSAV thus believes that the documents produced by Hin-Pro do not evidence genuine transactions at all, and that the actual sales were between the various Chinese and Venezuelan companies whose names appear on the Soar bills of lading. Thus, it is said that Hin-Pro's assertions in the Chinese proceedings that they are unpaid sellers entitled to claim the price of cargoes are false and fraudulent and based on forged documents. As matters stand, Hin-Pro continues to claim for over $25 million as an unpaid seller, and has two judgments in its favour in relation to specific cargoes.

23.
Clause 23 of the bills of lading reads as follows:

"Law and jurisdiction.

This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London. If, notwithstanding the foregoing, any proceedings are commenced in another jurisdiction, such proceedings shall be referred to ordinary courts of law. In the case of Chile, arbitrators shall not be competent to deal with any such disputes and proceedings shall be referred to the Chilean Ordinary Courts."

By the first sentence of this clause each party agrees to submit to the jurisdiction of the English High Court and to the application of English law as the governing law of the contract contained in, or evidenced by, the bill of lading. The question which arises is whether or not the parties have agreed to the exclusive jurisdiction of this court, with the result that proceedings taken elsewhere, such as those in China, amount to a breach of contract. If the first sentence of the clause stood alone, it would, by reference to a body of authority, constitute an exclusive jurisdiction clause. In Svendborg v Wansa [1997] 2 Lloyd's Rep 183 the clause read as follows:

"Wherever the Carriage of Goods by Sea Act 1936 (COGSA) of the United States of America applies ... this contract is to be governed by United States law and the United States Federal Court Southern

District of New York is to have exclusive jurisdiction to hear all disputes hereunder. In all other cases, this Bill of Lading is subject to English law and jurisdiction."

Staughton LJ, with whom the other members of the Court of Appeal agreed, said this, referring to his own earlier judgment in the Court of Appeal decision in Sohio Supply Co v Gatoil [1989] 1 Lloyd's Rep 588:

"It can be argued that the express mention of exclusive jurisdiction in the first part of the clause excludes any implication that the second part provides for exclusive jurisdiction. On the other hand it can be argued that the author wished to provide for exclusive jurisdiction throughout, and did not think it necessary to repeat the word "exclusive" in the second part... I conclude that the clause does confer exclusive jurisdiction on the English courts. My reasons are in substance, first those which I stated in Sohio Supply Co v. Gatoil (USA) Inc (1989) 1 Ll R 588 at pp. 591-2, and in particular that I could think of no reason why businessmen should choose to go to the trouble of saying that the English Courts should have non-exclusive jurisdiction. My second reason is that the parties in the second part of the clause were plainly saying that English law was to be mandatory if the American Carriage of Goods by Sea Act did not apply; it seems to me that they must have intended English jurisdiction likewise to be mandatory in that event."

24.
I do not myself find the first reason advanced by the court entirely persuasive, because parties may wish to provide for a neutral court to have agreed jurisdiction, where they wish to be able to institute proceedings, whilst accepting that other courts may also exercise jurisdiction by reference to their own connection to the dispute and their own procedural rules. The second reason is, in my judgment, more compelling, namely that, in agreeing to English law as the governing law, and ex hypothesi therefore the mandatory governing law which allows of no other law being applied, the parties must be taken also to have intended that the English courts should have exclusive jurisdiction. Self-evidently, English courts would be seen by the parties as best able to apply the provisions of English law which the parties agreed to be applicable in the circumstances. The form of the clause is clear in providing for application of different law and different jurisdictions in the circumstances outlined in it on an exclusive basis as found by the court.

25.
In British Aerospace v Dee Howard [1993] 1 Ll R 368, Waller J (as he then was) considered a clause which read as follows:

"This agreement shall be governed by and be construed and take effect according to English law and the parties hereto agree that the courts of law in England shall have jurisdiction to entertain any action in respect hereof..."

He also referred to the Sohio decision and Staughton LJ's comment that he could think of no reason why parties should go to the trouble of saying that the English courts should have non-exclusive jurisdiction, but could think of every good reason why the parties should choose that some courts should have exclusive jurisdiction, so that both sides could know where all cases were to be tried. He went on to say:

"In the instant case the parties have expressly agreed English law and there would be no need to expressly agree that the English court should have jurisdiction or the English court to have non-exclusive jurisdiction. The English court would in any event have such jurisdiction, and by expressly

agreeing to English jurisdiction they must be seeking to add something, i.e. that the English court should have exclusive jurisdiction."

26.
Once a party has agreed that English law applies, the English court has, in accordance with the provisions of CPR 6, a good ground for giving permission to serve out of the jurisdiction. This does not, however, mean that the court is bound to accept jurisdiction, although it would usually do so in the absence of evidence of some more appropriate competing order. The agreement to an English forum, therefore, does add something above and beyond the parties' agreement to English law, whether or not that is an exclusive jurisdiction to which they agree. Nonetheless, the tenor of these decisions and Austrian Lloyd Steamship Company v Gresham Life Assurance Society [1903] 1 KB 249, and other decisions to which I have been referred, is clear. An agreement to English law and jurisdiction, absent any other relevant provision in the contract, is generally to be taken not only as an agreement to the mandatory application of English law, but also to the exclusive jurisdiction of the English court.

27.
Under clause 23 of the relevant bills of lading "Any claim or dispute arising under such bills of lading 'shall be subject to English law and the jurisdiction of the English High Court'". This is, on its face, clear and applies to all such claims and disputes. The parties are agreed that they are to be determined in the English High Court, and, by necessary inference, agree that they should not be determined elsewhere. The clause is not simply an agreement to submit to the jurisdiction of the English court, which could be read as allowing proceedings to be brought elsewhere, but requires that claims and disputes be determined in accordance with English law by this court. It is, therefore, not simply permissive or intransitive.

28.
The issue which arises, however, is whether the clause as a whole, and this sentence when read with the second and third sentences, effectively provides for different courts to have jurisdiction in different circumstances in a manner akin to the provision in Svendborg v Wansa.

29.
In Import Export Metro Limited v CSAV [2003] 1 Ll R 405, the parties and the court proceeded on the basis that clause 24 of the CSAV bills, which was in materially the same terms as the current clause 23, provided for the non-exclusive jurisdiction of the English courts. In that case, Metro had commenced proceedings in England under 11 bills of lading, but having missed the time bar here, commenced proceedings under 14 bills of lading in Chile, which, by virtue of its adherence to the Hamburg Rules, had a longer time limit, namely 2 years. Self- evidently, therefore, Metro had no interest in arguing that the clause provided for exclusive English jurisdiction. CSAV sought a stay of the English proceedings in favour of Chile, because, it would appear, of provisions of the law of Chile relating to the discharge of performance there, which were more favourable than its view of English law. Self-evidently, it too had no interest in arguing that the clause represented an exclusive jurisdiction clause in favour of the English court. Gross J (as he then was) said this at paragraph 5(iv) and (v):

"(iv) As to proceedings in Chile, the following facts were not in dispute: First, that claims for loss of or damage to cargo are subject to mandatory arbitration ; contractual clauses (such as the final sentence of cl.24 of the bills of lading) purporting to provide for the reference of such proceedings to the Chilean Courts have been declared by the Chilean Courts to be void. Secondly, under Chilean law, the

provision contained in cl.24 of the bills of lading for English law and jurisdiction will be deemed null and void; the Metro Chilean claim will be determined in accordance with Chilean substantive law. Thirdly, if CSAV's application succeeded then, if Metro so chose, its claims under the bills of lading could be heard by the same arbitrator already appointed to hear the Metro Chilean claim.

(v) Reverting to cl.24 of the bills of lading, it was not in dispute that it provided for English law and non-exclusive English jurisdiction. The second sentence recognised that in certain jurisdictions (for example where the Hamburg Rules are applicable), the English jurisdiction clause might be disregarded. On the material before me, it appears that the third sentence represented an ineffective preference for the Chilean Courts over Chilean arbitration; as already noted, such clauses have been held by the Chilean Courts to be null and void."

30.
Miss Poonam Melwani QC does not quarrel with anything said by the judge, save insofar as, without argument, he accepted that the clause was a non-exclusive jurisdiction clause. The bills of lading in the current action provided in clause 2 for a clause paramount and for the application of the Hague Rules, save in three situations. First, where as a matter of English law and the English Carriage of Goods by Sea Act 1971 the Hague-Visby Rules are compulsory applicable. In such circumstances, those Rules would fall to be applied. Secondly, where there are shipments to and from the United States of America, US COGSA is to apply. Thirdly, where the bill of lading was subject to legislation which makes the Hamburg Rules compulsorily applicable, then those rules would apply "Which shall nullify any stipulation derogating therefrom to the detriment of shipper or consignee".

31.
The terms of clause 23 of the bills and the exclusive jurisdiction clause (if that is what it is) must be seen in the light of this provision. There can be no doubt that the second and third sentences of the clause envisage and provide for the situation where proceedings are brought elsewhere than England. The third sentence specifically refers to Chile, the country where CSAV is incorporated. Chile is a party to the Hamburg Rules. Whereas neither the Hague nor the Hague-Visby Rules make any provision about jurisdiction, the Hamburg Rules, by contrast, do. Article 21 essentially provides that the claimant, at his option, may institute an action in a court within the jurisdiction of which (a) the defendant has his principal place of business or habitual residence; (b) the contract was made; (c) the cargo was loaded or discharged; or (d) any additional places designated by the contract of carriage. Article 23 then provides that any stipulation in the contract is null and void to the extent that it derogates from the provisions of the Convention. An exclusive jurisdiction clause is, therefore, to be of no effect, to the extent that it does not permit actions to be brought in the places designated in Article 21.

32.
Having struggled with the terms of the clause for some time, and in particular the second and third sentences, which provide that proceedings elsewhere than England "shall be referred to ordinary courts of law" and "the Chilean ordinary courts" respectively, I have come to a clear conclusion. It seemed odd to me that if the clause was intended to provide for the exclusive jurisdiction of the English courts, it should then go on to provide in the second and third sentences for any breach to be restricted to courts rather than arbitration. The explanation for this lies in the terms of clause 2, the paramount clause of the bill of lading. It is recognised in the bills themselves that, notwithstanding the choice of English law and English jurisdiction, US COGSA or the Hamburg Rules may have application in certain circumstances. If, for example, proceedings are brought by a claimant against CSAV in Chile, as the place where CSAV is incorporated and where the Hamburg Rules will be

applied, the first sentence of clause 23 providing for English law and jurisdiction will be null and void under Article 23 of those rules, and Article 21 will be applied to allow suit in Chile under Chilean law.

33.
As was submitted to me, I am persuaded that the words “If, notwithstanding the foregoing”, which follow the first sentence of the clause and precede the second and third sentences, do indeed take effect as if the clause expressly read “If, notwithstanding the parties agreement that all claims or disputes arising under the bill of lading shall be determined in accordance with English law and by the English High Court”, any proceedings commenced elsewhere shall be determined by ordinary law courts and not by some other mechanism such as arbitration. In short, the second and third sentences do provide a fallback defence, where it is known that the first sentence will be ineffective in some foreign courts. It is the second line of defence, even though it appears, as Gross J said, that the third sentence is actually ineffective as a matter of Chilean law.

34.
The result is, in my judgment, however odd it might appear, that proceedings begun by a claimant in Chile against CSAV would be brought in breach of clause 23, and CSAV would be entitled to seek an anti-suit injunction, subject to consideration by the court of all other relevant factors. The inconsistent stance adopted by CSAV before Gross J is, when construing the contract, nothing to the point. Thus, proceedings brought in China by the defendants in this action are, in my judgment, brought in clear breach of clause 23, as was held in this court on an interim basis by Blair J and Andrew Smith J in the 2012 proceedings of a similar kind.

35.
The principles to be applied when proceedings are brought in breach of an exclusive jurisdiction clause are those laid down by the Court of Appeal in The Angelic Grace [1995] 1 Ll R 87, a case followed on many occasions since. In essence, an anti-suit injunction will be granted where there is a breach of an exclusive jurisdiction clause unless there are strong reasons not to do so. In this case there are no strong reasons not to grant an injunction, and every reason why such an injunction should be granted. It is pointed out that proceedings in this country would now be time barred. The 1-year time bar expired in about June 2013, but before that expiry Hin-Pro knew that CSAV relied on clause 23 as an exclusive jurisdiction clause and knew that the English court had been satisfied that it was an exclusive jurisdiction clause for the purpose of granting an anti-suit injunction in the 2012 proceedings, and knew that the English court regarded Hin- Pro’s conduct in continuing in China as contempt. Nonetheless, it commenced 23 actions in China in May to July 2013 in breach of the clause. That was its own deliberate decision with knowledge of this court’s view. Thus, the falling of the time bar cannot amount to a reason, let alone a good reason, to refuse an anti-suit injunction in such circumstances. It would only be where a defendant acted reasonably in not protecting its claim in a contractual forum that it would become a relevant factor.

36.
As I have already indicated, this court is not concerned with the substance of the dispute between the parties as such. The court is satisfied that there is a good arguable case that fraud is being perpetrated in China. The prosecution of the action in China in that context rather than the contractually agreed forum certainly has the effect of putting unfair pressure on CSAV. In my judgment, the claimants are clearly entitled to a permanent mandatory injunction.

37.

I turn to the claim for damages. Costs incurred in foreign proceedings brought in breach of an exclusive jurisdiction clause are recoverable as damages for breach of contract. That is clear from a number of authorities to which I need not refer. Furthermore, CSAV claims damages in respect of the substantive sums claimed against it in China, including sums which have been paid, sums for which it has been found liable to pay, and sums which may yet be awarded against it in China. Such sums will have to be paid by CSAV to avoid arrests or other disruptive enforcement procedures in relation to its ships. CSAV is not claiming sums which will put it in pocket. It is claiming sums equivalent to those which it has already had to pay or will have to pay. Damages fall to be assessed to put CSAV in the same position that it would have been if Hin-Pro had not broken the contract. The question arises then as to whether the counterfactual assumes that Hin-Pro had failed to sue at all, or assumes that Hin-Pro had sued in England in accordance with the jurisdiction clause. If the latter, then it might be the case that CSAV would have to show that there was no liability, as a matter of substantive law, in order to recover damages in relation to anything other than costs.

38.
In my judgment, it is clear that the breach which has occurred is the breach committed by Hin-Pro in bringing foreign proceedings at all. The breach does not consist in failing to bring them in the English courts. The relevant comparison with the no-breach situation is therefore a situation in which no proceedings were brought at all. That point, it appears to me, is the necessary concomitant of what Lord Mance described as the “negative promise” in an exclusive jurisdiction clause in Hydropower v AES [2013] 2 Ll R 281. Hin-Pro has contracted not to seek relief in any forum other than England. In breach of that obligation it has sought relief in China. If it had complied with its obligations there would be no current or future judgments in China at all. Absent any claim against CSAV in England, CSAV’s loss and damage arising from Hin-Pro’s breach amounts to all the sums awarded to Hin-Pro in China. The court will not engage in considering the hypothetical question of what might be the result if Hin-Pro had brought a claim here. That stance has been approved by the Court of Appeal in its second decision in the Alexandros T [2014] EWCA (Civ) 1010 at paragraphs 19 and 20.

39.
Thus, CSAV is entitled to the sums awarded in China and, in the absence of Hin- Pro’s advancement of its claims here, the court will not engage in consideration of what hypothetically might happen if the claims had been brought here. If Hin-Pro had in fact brought a claim here, then CSAV’s claim for damages in the amount of the judgments payable in China might be reduced by a set-off or counterclaim by Hin-Pro if Hin-Pro could show that there was liability on CSAV in the English proceedings. The fact is that Hin-Pro has deliberately disregarded England as a forum to make its claims, and indeed has disregarded the orders made by the English court in relation to the proceedings it has brought elsewhere. It is pointed out by Miss Melwani that the court here would be faced with enormous difficulty in deciding hypothetical issues in relation to liability without the benefit of disclosure, cross-examination and the like. That, of course, is not an insuperable barrier, because this court often has to decide matters in the absence of one party and in the absence of that party disclosing relevant documents.

40.
There are dicta that have suggested that where a party brings proceedings abroad in breach of an exclusive jurisdiction clause, consideration of the damages to be awarded would involve a consideration of what would have happened had the claims been brought here in accordance with the clause. The dicta in the Alexandros T, in my judgment however, tally with the principles which I must apply. Even were the court to consider what liability the claimants might have to Hin-Pro in

proceedings brought in these courts in accordance with the clause, the result would not avail Hin-Pro. The reason is that all its claims are now time barred. I have already referred to clause 2 of the bill of lading and the clause paramount, where the Hague Rules would bring in Article 3 Rule 6 and the 1-year time bar. There is also an additional clause 18 in the bills of lading which provide for a discharge from claims in relation to loss or damage, freight charges or expenses, or any claim of whatsoever kind, nature or description with respect to, or in connection with, the goods if suit is not brought within one year of delivery or the date when delivery should have taken place.

41.
For these reasons, it is clear that CSAV is, in my judgment, entitled to damages in the amount of any sums awarded in China, and no credit or consideration needs to be given to claims Hin-Pro might have brought here had it sought to exercise its rights to do so, because those claims are time barred. In such circumstances, I will make an order in the terms sought, both in relation to a permanent anti-suit injunction and in relation to a continued worldwide freezing order.