Neutral Citation Number: [2024] EWHC 993 (Comm)

Case No: CL-2020-000714

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29/04/2024

Before :

MR JUSTICE JACOBS

- -

Between :

(1) MAERSK GUINÉ-BISSAU, SARL **Claimant**
(also known as "MAERSK GUINEA-BISSAU SARL"
or "MAERSK GUINEE-BISSAU SARL")
(2) MAERSK A/S

- and -

Defendant

ALMAR-HUM BUBACAR BALDÉ S.A.R.L.

- -
- -

Paul Henton (instructed by **Holman Fenwick Willan LLP**) for the **Claimants**
The Defendant was not in attendance.

Hearing dates: 16th – 17th April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 29th April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

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A: Introduction

The parties and the claims

1. These proceedings arise out of contracts of carriage between the Second Claimant ("Maersk A/S") and the Defendant ("Almar Hum"). The contracts were ultimately evidenced by 13 bills of lading which were issued, on behalf of Maersk A/S, by the First Claimant, Maersk Guinea-Bissau ("Maersk GB") which is the company which ran Maersk A/S's operations in Guinea-Bissau in West Africa. (Where it is unnecessary to draw a distinction between Maersk A/S and Maersk GB, I shall refer simply to "Maersk" or "the Claimants")

2. Maersk GB began operating in Guinea-Bissau in 2003, and it had an office of 15 people working closely with a number of different customers in that country. The Customer Service Team Lead in Guinea-Bissau was Mr Telly Beavogui, who gave evidence at the trial. The operations of the Claimants in Guinea-Bissau focused predominantly on cashew nut export, which is Guinea-Bissau's primary export. Maersk GB ceased operating there in January 2021, and there is evidence that this was a consequence of the events with which this trial was concerned and the substantial litigation in that country which was pursued by Almar-Hum against Maersk GB.

3. The shipment in the present case was a containerised cargo of timber shipped by Almar-Hum to customers in China. The ultimate port of destination was Huangpu, China. The individual who ran Almar-Hum's business was Mr Alassana Baldé ("Mr Baldé").

4. The Claimants seek damages or an indemnity to be assessed for alleged breaches of contract by Almar-Hum. As a result of an order of Foxton J, the present trial was concerned only with liability issues. The Claimants' claim for damages or an indemnity is based, at least principally, on an exclusive jurisdiction clause (or "EJC") in favour of the English courts, and a "Himalaya" clause. The Claimants' main claim is for losses suffered in consequence of the litigation commenced by Almar-Hum in Guinea-Bissau. The Claimants contend that such proceedings were in breach of the EJC, and that (amongst other reasons, because of the Himalaya clause), both Claimants can claim in respect of the losses which they have suffered. These two clauses form part of Maersk A/S's standard terms and conditions ("Maersk's standard terms") and, for reasons discussed in more detail in Section D below, were incorporated into the contracts of carriage. In addition to their claim for damages and an indemnity to be assessed, the Claimants also seek declarations that they have no liability to Almar-Hum in respect of those contracts of carriage and the disputes which have arisen in relation to them. This claim gives rise to the need to consider other clauses of the contracts of carriage, as well as the underlying facts.

Procedural background

5. The claim form in the present proceedings was issued on 30 October 2020. This was shortly after service on Maersk GB of Almar-Hum's claim in the main substantive proceedings which it had commenced in Guinea-Bissau. Particulars of Claim were

served in June 2021. At that time, Almar-Hum were represented by London solicitors, Tatham & Co. A detailed defence was drafted by counsel from a well-established commercial/ shipping set of chambers, and this was served in August 2021. A detailed responsive reply was then served in September 2021. On 30 November 2021, at a time when the parties' solicitors were preparing for the case management conference, Tatham & Co ceased to act. Almar-Hum has never appointed solicitors in their place. On 10 December 2021, I gave case management directions, after taking into account a number of e-mails that Mr Baldé had sent.

6. The position thereafter can be summarised as follows. Mr Baldé on behalf of Almar-Hum has engaged with the proceedings intermittently. In recent months, however, there has been no significant engagement by Mr Baldé and Almar-Hum. On behalf of the Claimants, Mr Henton referred me to some of the correspondence sent by the Claimants' solicitors, HFW, to Mr Baldé: for example, sending copies of their disclosure certificate, witness statements, expert evidence, and the proposed index for the trial bundles. This correspondence received no response. Indeed, in the 9 months prior to trial, there was very limited correspondence from Mr Baldé at all. In an email dated 17 March 2024, he referred to not having been able to defend himself in 2023, but that he had now found an English lawyer. He asked HFW for an update on the current state of the proceedings, to which HFW responded on the following day, 18 March 2024. That response included an offer to engage with Almar-Hum's new representatives, to ensure that they had the necessary documents and could prepare for trial. No new representative, however, made any contact with HFW.

7. Mr Baldé then advised HFW, on 21 March 2024, that he was meeting with the proposed representatives in Dakar on 9 April 2024 "to sign the contract". He asked HFW/the Claimants to "stop everything". HFW declined to do so, describing the proposed meeting (so close to the trial) as a cynical attempt to disrupt the London proceedings. On 25 March 2024, HFW then sent copies of the hearing bundles to Mr Baldé, and provided a detailed explanation of the hearing arrangements. The only further communication from Mr Baldé was on 15 April 2024 (the reading day of the trial), when he had said that he had met with his lawyers in Dakar as explained in his earlier e-mail, and that they were "examining my documents before contacting you since I have already given them your contact". He said that he had been reassured that they would contact HFW "and submit their proxy for representation to the British Commercial Court no later than Tuesday April 30, 2024, for my defense".

8. In the event, no representative acting for Almar-Hum made any contact with either HFW or the court. The trial therefore proceeded in the absence of Almar-Hum. CPR 39.3 expressly permits the court to proceed with a trial in the absence of a party. The court's approach in these circumstances is discussed in the *White Book* paragraph 39.3.1, citing *Williams v Hinton* [2017] EWCA Civ 1123:

> "It is of course of the first importance that a party is afforded a fair opportunity to present its case to the judge. It is also, however, of great importance that judges, as a matter of case management, act robustly to bring cases to a conclusion. In the present context, CPR 39.3 furnishes a safeguard in the event of mishap".

9. There was in my view no reason why the trial should not proceed. The proceedings had been started some years earlier. Case management directions for the trial had been given in December 2021 (as described above), and these were modified in July 2023 when Foxton J gave directions bifurcating the trial. In relation to both sets of directions, the court had considered correspondence from Mr Baldé. It is clear that, through him, Almar-Hum has been aware of the proceedings throughout their course, including in the 9 months prior to trial when HFW was corresponding with him (albeit without any real engagement on his part). Almar-Hum had had a fair opportunity of presenting its case, and there was in my view no reason why the case should not be brought to a conclusion. Any other approach would be seriously prejudicial to the Claimants, who were seeking to establish their rights in (what they contended to be) the agreed contractual forum.

10. I should note that CPR 39.3 also enables the court to make orders striking out a defendant's defence, where a defendant does not attend a trial. The Claimants did not, however, apply for such an order, and indeed they had not previously applied for any orders (for example debarring Almar-Hum from defending) because of prior procedural defaults. The Claimants' position was that they wished to have the merits of their claims determined at trial, rather than having a judgment which was based in whole or in part on procedural failures by Almar-Hum.

11. Where a trial is undefended, the required approach of the court, and the legal representatives of the represented party, is explained in a number of recent authorities: *CMOC Sales & Marketing Ltd v Persons Unknown* [2018] EWHC 2230 (Comm) (HHJ Waksman QC, as he then was); *Lakatamia Shipping Co Ltd v Morimoto* [2023] EWHC 3023, paragraph [13] (Foxton J). The court must be satisfied, on the balance of probabilities, that the claim is made out. The represented parties bear "an obligation of fair presentation which is less extensive than the duty of full and frank disclosure on a without notice application" such that they must draw to the attention of the court "points, factual or legal, that might be to the benefit of [the unrepresented defendant]".

12. In the present case, the identification of points which might be of benefit to Almar-Hum was assisted by the fact that there was a detailed defence drafted by counsel. Mr Henton in his written skeleton argument identified and addressed the arguments which were there advanced. He also addressed them in the course of his oral submissions. At the end of the first day of the hearing, at which point the evidence had concluded, and Mr Henton was in the course of making his submissions, I asked him to carry out an overnight review of Almar-Hum's defence with a view to ensuring that all of the pleaded points had been addressed. As a result of that review, Mr Henton identified one point in the defence which he had not previously addressed: the point was relevant to an argument (see Section E2 below) concerning the alleged *res judicata* effect of a judgment (in favour of Almar-Hum) in Guinea-Bissau. Mr Henton had spotted a point of detail about Almar-Hum's argument in that regard, and he then addressed it. Overall, Mr Henton presented the case very fairly and in my view fully complied with the duties identified in the above case-law.

The witnesses and the course of the trial

13. The Claimants had served written evidence from a number of witnesses, both factual and expert. No witness evidence had been served by Almar-Hum. The Claimants' witnesses were as follows.

14. Mr Telly Beavogui was, at the material times, the Customer Service Team Lead at Maersk GB. He is now Managing Director of Maersk Liberia, and he gave oral evidence at the trial by video-link from that country. His evidence covered the procedures for booking and shipping cargoes which were operated by Maersk GB and which were followed in this case. This evidence was particularly relevant to pleaded issues as to whether Maersk's standard terms were incorporated into the contracts of carriage. He explained these procedures in his written evidence, and (at my request) Mr Henton took him through the important documentation concerning these procedures so that I could understand the detail. Mr Beavogui also described the course of events in Guinea-Bissau leading up to shipment and subsequent events in that country, including the circumstances (described in more detail below) in which the bills of lading were issued and seized by the Judiciary Police. He also described, by reference to the available documentation, the causes of subsequent delays in the carriage. I thought that Mr Beavogui was a very good witness, who was clearly seeking to assist the court to the best of his recollection, and who gave evidence which was consistent with the documentary record. I see no reason to doubt any of his evidence.

15. Mr Abdul Carimo da Silva Baldé ("Mr Silva Baldé") was formerly the Senior Customer Service Agent at Maersk GB. He is no relation to Mr Baldé of Almar-Hum. Mr Silva Baldé provided a first-hand account of the seizure of the bills of lading by the Judiciary Police. Mr Silva Baldé was not called to give oral evidence, but his statement was submitted under the Civil Evidence Act. This is appropriate, particularly in the context of a case where a party (here Almar-Hum) fails to appear at trial: see *Lakatamia* paragraph [12]. There was no reason to doubt any of his evidence.

16. Ms Jacy Jing Li was Senior Customer Experience Consultant at Maersk Guangzhou. Her statement addressed the events in China on arrival of the containers, including transhipment via Nansha (and other ports), delays due to non-presentation of documentation, accrual of detention/demurrage, delivery of the goods to consignees at Huangpu. Her statement was also submitted under the Civil Evidence Act, and she did not give oral evidence at trial. Again, there was no reason to doubt any of her evidence.

17. Daniel Rosario is an attorney at Miranda & Associados ("Miranda"). Miranda is a law firm based in Lisbon, and it acted for Maersk GB (via local alliance offices) in the Guinea-Bissau proceedings. Mr Rosario's evidence described the relevant developments in the proceedings which Almar-Hum had brought in Guinea-Bissau. He provided a very helpful chronological account of the proceedings there. The Appendix to this judgment, which describes the course of those proceedings, is substantially based on his statement. Mr Rosario attended the trial, and gave oral evidence. This primarily consisted of his responding to a number of questions which I asked him. He was an impressive witness, and I accept his evidence.

18. The Claimants also called an expert witness on Guinea-Bissau law, Professor Dário Moura Vicente, Professor at the University of Lisbon (Civil Law, Civil Procedure

Law, Private International Law and Comparative Law). He has extensive experience of the law of various "Lusophone" (i.e. Portuguese-speaking) countries, and whose legal systems (such as that of Guinea-Bissau) are based on Portuguese law. Professor Vicente also attended the trial, and there were a number of topics on which I asked for his views. He gave his answers clearly and with real authority, and I have no hesitation in accepting his evidence.

B: Factual background

19. This section of the judgment sets out my conclusions as to the facts, based upon the documentation in the hearing bundles and the evidence called by the Claimants.

B1: Maersk's booking procedures.

20. The present dispute concerns contracts of carriage between Almar-Hum as shipper and Maersk A/S as carrier to ship 150 containers of madeira wood ("the Cargo") from Guinea-Bissau to Huangpu. The contracts were made in December 2018, when Almar-Hum used the Maersk A/S online booking procedures described by Mr Beavogui in his evidence. Almar-Hum had shipped with Maersk A/S previously and, as Mr Beavogui said, was familiar with Maersk A/S's booking processes. In order to make the bookings in December 2018, Almar-Hum had to register as an on-line account customer, and this had been done in relation to dealings prior to December 2018.

21. In summary, the Maersk A/S booking process for containerised cargo involves the following steps:

    i) Booking Creation: The customer completes Maersk A/S's online booking form and submits it to Maersk A/S. (The process bears some similarity to making an online flight booking with which most people will be familiar). The customer provides booking details and selects a schedule. Customers are required to tick a box confirming that they agree that Maersk's standard terms will apply to the carriage. They cannot proceed with the booking without so agreeing. In order to click the button "Submit Booking", the customer has to tick a box under which the customer agrees to the Maersk standard terms. The text immediately above the "Submit Booking" states: "By clicking submit booking you agree that the [hyperlinked] terms and conditions will govern your booking." Clicking on the hyperlink leads to a website which displays Maersk's standard terms. The online process is further described in Section D below.

    ii) Booking Confirmation: Once Maersk A/S receives the booking application with all relevant information, it will provide a booking confirmation. This will often be provided immediately.

    iii) Shipping Instructions: Once the booking is confirmed, shipping instructions are provided by the customer, which includes the shipper name, consignee name, cargo description, port of origin, port of discharge, and payment terms. They are usually provided prior to the cargo being shipped, the deadline being three days before vessel departure, though in some cases cargo may be shipped with incomplete information so long as the discharge port is known. Shipping instructions can be entered on Maersk A/S's website, or the relevant

information can be provided by email to Maersk GB who would then match that information to the relevant bookings.

iv) Creation of Draft Bills of Lading: The shipping instructions enable Maersk A/S to produce draft bills of lading, known as "Verified Copies". If the customer subsequently amends the shipping instructions, new draft bills of lading are created.

v) Approval of Freight Release ("AFR"): Maersk A/S provides an AFR once the customer has paid the "origin charges". The "origin charges" are those which are payable at the place of shipment. They might include freight charges (if freight prepaid bills are required), although the system gives the customer of choosing freight to be paid at destination. The origin charges must be paid prior to the issue of the original bills of lading.

vi) Final Bill of Lading Approval: The customer must provide final bill of lading approval by approving the draft bill of lading and confirming that an original bill of lading can be printed. Given that an original bill of lading cannot be printed without approval being given, it is in the customer's interest to provide approval quickly, at least if it wishes to obtain the original bills promptly. It is at this time that the customer will make the payment of the local origin charges.

vii) Issuing Original Bill of Lading: The original bills of lading are issued once charges are paid and final approval is given by the customer. Once this has happened, the bills of lading can be issued immediately.

B2: The bookings made by Almar-Hum, and the movement of the Cargo.

22. On 11 October 2018, Almar-Hum was sent a "rate sheet" by email. The e-mail was sent by Maersk's "Ratesheet Team". The document, which was a lengthy spreadsheet, set out the carriage charges for the forthcoming season from West Africa to Far East & Oceania. The front page of the spreadsheet, attached to the covering e-mail, stated that quotations could be accepted by making a booking, and that unless otherwise stated, all bookings and carriage would be "subject to Carrier's Terms for Carriage, including in particular its choice of law and jurisdiction, available at [website links provided]". The "Carrier" was described at the top of the page as "Maersk Line".

23. Almar-Hum created bookings on Maersk A/S's website on 4 December 2018. There are no screen-shots available which show the actual bookings made by Almar-Hum on that day. However, it is clear from the evidence of Mr Beavogui as to nature and details of the on-line system, and example screenshots that have been produced, that Almar-Hum must (when making its bookings) have checked the tick-box to confirm its acceptance of Maersk's standard terms. As both Mr Beavogui and Ms Li explained: Almar-Hum would not have been able to make a booking without confirming that they agreed to the standard terms of carriage. The bookings were confirmed by Maersk A/S on the same day. Booking numbers were created for each booking, which ultimately became corresponding bill of lading numbers.

24. On 5 December 2018, Almar-Hum sent emails to Maersk GB attaching lists of container numbers and requesting that these be linked to the bookings which had been

made. Maersk GB confirmed receipt of the request on 6 December 2018. This is a common request for a customer to make, and the "booking link" was then made.

25. Between 6 to 11 December 2018, Almar-Hum lodged draft shipping instructions against the various booking numbers. The instructions indicated that there would be certain origin charges to be paid in relation to "Taxa de Documentação" but that most of the charges including freight would be paid at destination. The total number of containers to be shipped, across the 6 booking numbers, was 210.

26. The Cargo described in the booking documentation was "Timber Sawn" and "Madeira Wood". Madeira Wood is subject to certain export restrictions, and cannot be exported without a valid "CITES" certificate. CITES is the acronym for the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The evidence was that CITES certificates needed to be presented in order for such goods to be imported into China. There was also some evidence that certificates were required for export, but in the event it appears that the shipment from Guinea-Bissau went ahead without Almar-Hum having obtained such certificates.

27. The Cargo was loaded onto the "RAQUEL S" at the Port of Bissau. When the vessel departed on 31 December 2018 with the Cargo, shipping instructions had not been finalised by Almar-Hum, nor had the bills of lading been issued or the origin charges paid. However, the destination port (Huangpu, China) was known. Mr Beavogui's evidence was that Maersk was willing to load and ship cargo for customers who have not finalised the documentation (and did so on this occasion) because it usually did not present a problem: the documents would normally be finalised before the cargo arrived at the destination. In this case, however, his evidence was that the documents were not finalised before the Cargo arrived in China at least partially due to events occurring in Guinea-Bissau. I will return to this in due course.

28. After the RAQUEL S departed, Almar-Hum continued to make amendments to the shipping instructions, such as by combining or splitting booking numbers. The Maersk system indicated that some booking changes were being made by Almar-Hum in January and indeed as late as March 2019, i.e. well after the RAQUEL S had sailed.

29. An unusual feature of the story is that Almar-Hum did not in fact give final bill of lading approval in respect of any of the bookings, even for those where it was not requesting changes. The position as at mid-February 2019, therefore, was (on Mr Beavogui's evidence) that all of the bookings remained in draft, pending completion by Almar-Hum. I accept that evidence, which is consistent with the documentary record. There is no documentary evidence of final approval having been given by Almar-Hum for the bills of lading. Original bills of lading were, however, issued on 21 February 2019 and (in respect of two bills of lading) on 4 March 2019, in the circumstances described below.

30. It is common for containerised cargo to be the subject of transhipment; i.e. movement from one container-carrying vessel to another. In the present case, the Cargo arrived at the transhipment ports of Nansha and Hong Kong on various dates in March 2019, where they remained for some time because the consignees could not produce the documents required to take delivery, in particular the bills of lading and CITES certificates. The Cargo was then delivered to Huangpu on various dates between April 2019 and July 2019. The Cargo incurred detention or demurrage charges because of

the delay in taking delivery. Delivery of the Cargo was eventually taken and all outstanding charges paid by the consignees. There is therefore no claim by Maersk A/S for outstanding charges.

B3: December 2018 – February 2019: events on the ground in Guinea-Bissau

31. The above description of the bookings made by Almar-Hum, and the movement of the cargo from Guinea-Bissau to China, tells only a small part of the story concerning this shipment. At the same time, there were significant disputes between Almar-Hum and the Guinea-Bissau authorities, and indeed a conflict between different organs of the state. As Mr Henton colloquially put it, in late December 2018/ early January 2019, there were two organs of the state which were seeking to "get their hands" on the bills of lading: the tax authorities and a Guinea-Bissau court (the Civil Chamber of Bissau District Court or "CCBDC"). Whilst some of what was happening was known to the Claimants at the time that it was happening, some important documentation – which throws light on the events – only became available to the Claimants subsequently.

32. A number of contracts made between 2003 and 2016 show that Mr Baldé and/or one of his companies had historic dealings with the government of Guinea-Bissau. The most significant contract, for present purposes, was concluded on 29 December 2016 with the Government of Guinea-Bissau, through the Interministerial Commission for the Sale and Monitoring of Timber Export Process. The contract was for the export of 1,000 containers of timber from national logging companies, in exchange for an undertaking to pay a specified price per container. The price was XOF 4,500,000 per container (USD 7,500 per container at an exchange rate of around XOF 600 = USD 1). It was to be paid, according to the translated version of the contract, "before they are loaded onto the ship and through compliance with all formalities previously established". It is clear from subsequent developments that this money was not paid in accordance with the contract.

33. Sometime in or around early December 2018, Mr Baldé, on behalf of another of his companies ("Ancora"), commenced interim proceedings against the state of Guinea-Bissau before the CCBDC. Ancora sought urgent relief restraining the state from interfering with its alleged right to export 289 containers of timber. Ancora's argument, in substance, was that it was not in a position to pay the amounts due under the 2016 agreement described above, and should not have to do so in light of other monies allegedly owed by the state in relation to earlier dealings. The relief sought was urgent; because if the goods were not exported by the end of the year, an absolute ban under CITES would come into force and thereby prevent shipment.

34. The CCBDC granted relief on 12 December 2018 ("the December 2018 Order") in favour of Ancora. The Order was received by Maersk GB on 13 December 2018 as evidenced by the Maersk GB stamp on the document. The relevant part of the Order states that "the shipping companies, in particular MAERSK … is ordered to refrain from carrying out any acts that violate the applicant's [i.e. Ancora's] right or prevent the export of the applicant's 289 containers of timber."

35. As Professor Vicente correctly pointed out, the December 2018 Order did not specify any positive action to be taken by the addressees; in particular, it did not require bills of lading to be delivered to any specific body or organisation. On the evidence, there was nothing that Maersk GB did which amounted to a breach of that order. In

particular, Maersk GB did not do anything which violated the right of Ancora (or for that matter Almar-Hum) to export the timber. On the contrary, the containers all left Guinea-Bissau before the end of the year.

36. Similarly, Maersk A/S did nothing to violate the order. Indeed, it appears to be common ground on the pleadings that "Maersk" in the December 2018 Order refers to Maersk GB, not Maersk A/S. None of the rulings or orders made by the Guinea-Bissau courts were addressed to or served on Maersk A/S. Almar-Hum's defence states: "No claim has been made by the Defendant as against the Second Claimant", i.e. Maersk A/S.

37. On 28 December 2018, Almar-Hum and another company (Oriental Trading Bissau SARL) entered into an agreement with various authorities in Guinea-Bissau involved in the timber export control process: the Presidency of the Commission, the Public Treasury, and the Ministry of Justice and Human Rights. This agreement was called a "Termo de Responsabilidade", translated as "Statement of Liability". It was a short document which contained the following terms:

> "By this act, the company ALMAR-HUM Bubacar Baldé SARL and the company ORIENTAL TRADING BISSAU SARL, represented herein by Alassana Baldé and Famara Turé, hereby undertake for all legal purposes deemed appropriate, before the Public Authorities involved in the timber export control process, and in particular, before the Presidency of the Commission,
>
> the Public Treasury and the Ministry of Justice and Human Rights, that since it has not been possible for them to make immediate payment to the State of the amounts relating to the export of 150 (one hundred and fifty) containers of timber, before shipment, it will pay the corresponding amount immediately afterwards and within 15 days from the date of shipment.
>
> In order to ensure, reinforce and guarantee the fulfilment of the responsibility assumed herein, they also undertake to leave the Bills of Lading, Certificate of Origin, Phytosanitary Certificate and CITES Certificate corresponding to the aforementioned containers of timber in the possession of the Public Treasury, and may only retrieve them once they have paid the corresponding amount.
>
> On payment, the Companies undertake to instruct the Buyer to pay the State's share of the price by deposit to the account titled Conta Madeira opened in the books of Banco da União (BDU).
>
> For the record and to fulfil their obligations in all respects, the Companies sign this STATEMENT OF LIABILITY, which has been signed by the Presidency of the Commission, the Public Treasury and the Ministry of Justice and Human Rights, thus

> enabling the shipment of the aforementioned containers of timber to proceed."

38. It is again clear, from subsequent developments, that these monies were not paid by Almar-Hum, contrary to the agreement which had been made. As also appears, Almar-Hum's undertaking to leave the bills of lading in the possession of the Public Treasury, only to be retrieved once the corresponding amount had been paid, was an undertaking which Almar-Hum later sought to thwart and avoid.

39. Professor Vicente's evidence was that the December 2018 order lapsed 30 days after issue, because no substantive proceedings to support that interim order had been issued within that time period. This is true. However, it is less significant than the fact that (as discussed above) the goods were in fact exported and there was for that reason no breach of that order. Furthermore, the December 2018 Order had not been obtained by Almar-Hum. Accordingly, for a variety of reasons, the December 2018 Order is not significant in this case and was not breached.

40. On 16 January 2019, the Guinea-Bissau Ministry of Justice Judiciary Police wrote to Maersk GB requesting it to hand over the bills of lading relating to the Cargo "[i]n the context of an enquiry underway at this institution". It appears likely that this request was made in the light of the Termo de Responsabilidade, to which the Ministry of Justice was party. The Judiciary Police were here acting, as they did later in the story, for the Guinea-Bissau authorities, rather than for the CCBDC. It appears that Maersk GB did respond to that letter.

41. On 18 January 2019, Maersk GB was served with a CCBDC Order ("the January 2019 Order") under cover of a letter. The Order was made by Judge Alberto Leão Carlos (who features heavily in the story of the later litigation described in Section E and the Appendix). Maersk GB was ordered to "hand over" and "deliver" the bills of lading of 150 containers of timber relating to the Cargo to the Court Office within 48 hours. The "CITES Representative", namely the representative at the Ministry of Agriculture, was also ordered to deliver CITES Certificates for the Cargo to the Court Office within 48 hours.

42. I draw attention to a number of features of this Order.

43. First, it was obtained in direct violation and breach of the Termo de Responsabilidade, under which Almar-Hum had given an undertaking that the bills of lading would be left in the possession of the Public Treasury until payment by Almar-Hum had been made. However, the basis of the Order was that the bills should be given to Almar-Hum, so that it could complete the sale and delivery of the timber.

44. Secondly, the January 2019 Order recognised that it was not simply the bills of lading that were required in order to complete the sale and delivery. The CITES certificates were required as well. Here, too, an undertaking had been given in the Termo de Reponsabilidade that the certificates would remain with the Public Treasury and would only be retrieved when payment was made.

45. Thirdly, the factual position at this point in time is (see above) that Almar-Hum had not in fact given final approval for the bills of lading to Maersk GB. There were, therefore, no original bills of lading which – at this point in time – had been drawn up

and thereby come into existence. Mr Beavogui now thinks (with good reason in my view) that the failure of Almar-Hum to give final approval, thereby enabling the bills of lading to be drawn up, may well have been due to the ongoing dispute with the government, and the obligation that the bills of lading should be delivered to the Public Treasury.

46. At all events, Maersk GB did not deliver the bills of lading to the Court Office. Mr Beavogui's evidence was that Maersk GB took the view that because final approval had not been given, and since no bills of lading had been issued at this time, there were no bills of lading which it could deliver to the CCBDC. This line of reasoning was supported by the expert evidence of Professor Vincente.

47. On 19 February 2019, the CCBDC made a further Order ("the 19 February 2019 Order"), which stated that since "the company MAERSK and the CITES representative refused to comply with the [January 2019] order", "the Police are ordered to request the competent authority to force the defendants to hand over the aforementioned documents (the BLs for 150 containers of timber and the CITES declaration held by the representative of that international organisation at the Ministry of Agriculture)." At this time, final instructions had still not been given, and no bills of lading had been issued. Maersk GB again took no action at this point.

48. 21 February 2019 is a critical date. The events of the day were addressed by Mr Beavogui and Mr Silva Baldé.

    i) In the morning, agents from both the CCBDC and the Judiciary Police entered Maersk GB's premises and demanded bills of lading. According to Mr Silva Baldé, they were in opposition; both sides wished to acquire possession of bills of lading and prevent the other from doing so.

    ii) A meeting was held with the agents. Mr Silva Baldé and Mr Frederico Sanca ("Mr Sanca"), another employee of Maersk GB, attended. They told the agents that Maersk GB had not issued the bills of lading and could not do so without Almar-Hum's approval, which had not been forthcoming.

    iii) The agents left afterwards. The Judiciary Police agents asked Mr Sanca to follow them to the police station, which he did. Mr Sanca remained there for around six hours.

    iv) After work hours, Mr Silva Baldé received a phone call from Mr Sanca asking him to return to the Maersk GB office. Mr Silva Baldé did so with his brother. The Judiciary Police were present at the office, along with Mr Sanca and another Maersk GB employee, and Maersk GB's lawyer.

    v) The Judiciary Police threatened the Maersk GB employees with imprisonment if the bills of lading were not delivered to them. Upon being informed of the situation over telephone, the Maersk GB manager, Mr Nunes, authorised the release of the bills of lading to the Judiciary Police. Both witnesses emphasised that this was in accordance with Maersk's Code of Conduct relating to its treatment and protection of employees.

vi) Mr Silva Baldé accordingly attempted to print all 13 bills of lading. In order to do so, he had to override the Maersk system, which would ordinarily only issue original bills of lading where final approval had been given. Only 11 bills of lading were printed; the remaining two could not be printed due to a system error.

vii) The Judiciary Police took possession of the 11 bills of lading and left. The Maersk GB employees followed them to the police station and obtained a signed document entitled "Auto de Apreensao Dos BLs" (Record of Seizure of Bills of Lading) on the letterhead of the Judiciary Police acknowledging the seizure of 11 bills of lading. This document was circulated to some Maersk GB employees by Mr Silva Baldé later that day.

49. There is another CCBDC Order dated 21 February 2019 ("the 21 February Order") ordering the police to "force delivery of the BLs and the aforementioned CITES Declaration to the Civil Court Secretariat", and warning Maersk GB that their failure to comply with the order was an imprisonable offence. It is not clear whether or not the 21 February Order was made at a time before or after the seizure of the 11 bills of lading by the Judiciary Police. It seems likely that this order was made after those attempting to obtain the bills of lading for the CCBDC had returned from Maersk GB's offices without the bills, but it may be that the court did not know that the Judiciary Police had later returned and seized 11 bills of lading. In response to this order, Maersk GB wrote to the CCBDC setting out its account of what had happened the previous day, including that its personnel had been forced to hand over bills of lading to the Judiciary Police.

50. On 1 March 2019, the CCBDC made a further order, which demanded delivery of the remaining two bills of lading. These bills of lading were issued on 4 March 2019 and delivered to the CCBDC that day.

51. Accordingly, by 4 March 2019, all the bills of lading (representing all the containers) were now in the possession of the Guinea-Bissau authorities: 11 with the Judiciary Police, and 2 with the CCBDC. However, the evidence indicates that the CITES certificates were unissued, or at least were not in the hands of Almar-Hum. Even if the consignees had the bills of lading, they would not be able to take delivery of the cargo without the CITES certificates.

B4: March – July 2019, and delivery of the cargo

52. According to Ms Li's evidence, the various containers arrived at Nansha and Hong Kong at various dates in March 2019. On 15 March 2019, Mr Beavogui e-mailed Almar-Hum to advise of the containers' arrival and accruing of demurrage charges. The response from Almar-Hum on 20 March 2019 stated that "we are facing some problems, and we promise to resolve these issues and we will assume all delays and detention of the containers". At this point in time, therefore, Almar-Hum was accepting responsibility for the delays and detention. Indeed, there is no document prior to this time in which Almar-Hum writes to Maersk complaining about Maersk's performance of the contracts of carriage, or which suggests that Maersk has any responsibility for any delay.

53. Further correspondence between Maersk GB and Almar-Hum followed whereby Maersk GB threatened to return the Cargo to Guinea-Bissau in light of the demurrage charges which remained unpaid. Almar-Hum responded on 17 April 2019 blaming the Guinea-Bissau government for holding the bills of lading and causing the delay but stating that "all costs relating to this case will be paid at the destination". Again, no blame was attributed to Maersk.

54. Almar-Hum's position shifted only in late May 2019. On 27 May 2019, Mr Baldé emailed Maersk providing a copy of a CITES Certificate for some of the containers, and for the first time requested an 85% discount on the demurrage charges. He repeated the request for a discount on 30 May 2019. Later on the same day, Maersk GB responded that Almar-Hum had been blacklisted as a customer and insisted on payment of the full charges, or else a cargo abandonment letter. Almar-Hum's reply on 31 May 2019 for the first time blamed Maersk for the delays in delivery, arguing that Maersk GB should not have delivered the bills of lading to the Judiciary Police.

55. As the dispute between Almar-Hum and the Claimants was ongoing, Almar-Hum executed a Debt Settlement Agreement on 8 April 2019 with the Guinea-Bissau Ministry of Economy and Finance acknowledging a debt and undertaking to discharge it within eight days. To facilitate payment, the Ministry of Economy and Finance agreed to release bills of lading for 46 of the 150 containers and take the necessary steps with the Ministry of Agriculture with a view to issuing the corresponding CITES Certificates and other documents. Once the debt had been settled, the Ministry of Economy and Finance undertook to do the same in respect of the remaining containers.

56. The evidence indicates that the debt was not paid: the Ministry of Economy and Finance commenced enforcement proceedings against Almar-Hum before the Tax Courts of Guinea-Bissau on 17 April 2019. On 22 April 2019, Almar-Hum was summoned to the Tax Court and ordered to pay the outstanding amount within 10 days or to contest the sum.

57. The matter was referred to the Public Prosecutor, who on 30 April 2019 stated that Almar-Hum committed a criminal offence in failing to pay export taxes, and that if the outstanding debts were not discharged criminal proceedings would be instituted. The amount owed for export taxes was XOF 675,000,000 corresponding to around USD 1,125,000.

58. An initial release of bills of lading in respect of 70 containers was, in the meantime, permitted by the Guinea-Bissau authorities on around 26 April 2019.

59. On 10 June 2019, a company known as Rotterbi Lda ("Rotterbi") wrote to the Prime Minister and the Ministry of Economy and Finance of Guinea-Bissau with a proposal whereby Rotterbi would discharge Almar-Hum's debt, divided into an immediate payment and payments in tranches thereafter. In exchange, the bills of lading would be released to Rotterbi in order for it (or, as it turns out, the consignees) to take delivery of the Cargo. A letter by Mr Baldé on the same day consents to Rotterbi's proposal. A Memorandum of Understanding between Rotterbi and Almar-Hum assenting to this arrangement was also executed on the same day.

60. It appears that the state or government of Guinea-Bissau assented to this proposal. The containers were all in due course on-carried from Nansha or Hong Kong to the destination port of Huangpu, where they arrived between April and July. Ms Li's evidence was that the consignees ultimately paid all the detention and demurrage charges that had accrued, and that the containers were released to the consignees.

B5: The proceedings in Guinea-Bissau

61. A series of legal proceedings were initiated by Almar-Hum from March 2020 to April 2021 against Maersk GB, among others, before the courts of Guinea-Bissau, chiefly the CCBDC but apparently also the Enforcement Chamber of Bissau District Court and the Criminal Chamber of Bissau District Court. These resulted in a series of injunctions and other orders against Maersk GB, including orders for seizure of its bank accounts and physical assets. The principal proceedings were dealt with comprehensively in the witness statement of Mr Rosario of Miranda. They are described in detail in Section E below and the Appendix, and this section introduces the main events.

62. The key substantive case for current purposes is CCBDC Case No. 175/020. It is these proceedings which have given rise to a judgment in favour of Almar-Hum against Maersk GB. Almar-Hum relies upon this judgment as giving rise to a *res judicata* in its favour. In its Statement of Case filed with the CCBDC dated 25 May 2020, Almar-Hum claimed substantive monetary relief against Maersk GB, other Maersk entities (but not Maersk A/S), and the consignees in the sum of USD 10,151,000. This claimed loss seems to comprise the Cargo price of USD 5,151,000 alleged to be owed by the consignees to Almar-Hum and USD 5,000,000 for "moral damages and commercial and financial losses caused, which will be proven in due course". Other heads of loss were alleged by Almar-Hum but they do not appear to be relevant to the final sum claimed.

63. Maersk GB was served with the Statement of Case on 15 October 2020. It filed its Statement of Defence on 3 November 2020, which included a challenge to the jurisdiction of the CCBDC. The fate of this Statement of Defence is described in Section E.

64. On 5 March 2021, the CCBDC gave judgment against all named defendants, including Maersk GB, in the sum of USD 10,151,000 for which they were jointly and severally liable. The judge had previously ruled that, in the absence of a Statement of Defence, Maersk GB was deemed to admit Almar-Hum's allegations.

65. Almost all of the relevant rulings issued by the CCBDC in these disputes from the December 2018 Order onwards were made by the same judge, a Judge Alberto Leão Carlos. On 3 June 2020, Maersk GB filed a claim with the Superior Council of the Judiciary complaining about the Judge's actions, requesting that he be suspended and disciplinary proceedings opened against him. The Superior Council is the body which oversees Judiciary conduct. As described in Section E below, the Superior Council did in fact take action, suspending Judge Carlos from the CCBDC with effect from 8 December 2021 and replacing him with Judge Lassana Camara. On 23 February 2023, the latter judge annulled certain decisions of Judge Carlos authorising the seizure of Maersk GB's assets and ordered their return.

C: The bill of lading terms

66. The relevant terms of the contracts of carriage were referenced (i) in the rate sheet table provided by Maersk in October 2018 and (ii) in the subsequent online application process. They were also set out in (i) the draft "verified" bills of lading provided to Almar-Hum, prior to shipment, as part of the process which was aimed to culminate in the final (or original) bills of lading which were to be issued, and (ii) the bills of lading which were eventually issued on 21 February 2019 and 4 March 2019 and which ultimately became available to Almar-Hum and its consignees.

67. The material terms of the contracts of carriage were as follows.

> **Terms for Carriage**
>
> **1. Definitions**
>
> **"Carriage"** means the whole or any part of the carriage, loading, unloading, handling and any and all other services whatsoever undertaken by the Carrier in relation to the Goods.
>
> **"Carrier"** means Maersk A/S of 50 Esplanaden, 1263 Copenhagen K, Denmark.
>
> **"Goods"** means the whole or any part of the cargo and any packaging accepted from the Shipper and includes any Container not supplied by or on behalf of the Carrier.
>
> **"Merchant"** includes the Shipper, Holder, Consignee, Receiver of the Goods, any Person owning or entitled to the possession of the Goods or of this bill of lading and anyone acting on behalf of such Person.
>
> **"Subcontractor"** includes owners, charterers and operators of vessels (other than the Carrier), stevedores, terminal and groupage operators, road and rail transport operators, warehousemen, and any independent contractors employed by the Carrier performing the Carriage or whose services or equipment have been used for the Carriage and any direct or indirect subcontractors, servants and agents thereof whether in direct contractual privity or not.
>
> **4. Sub Contracting**
>
> 4.1 The Carrier shall be entitled to sub contract on any terms whatsoever the whole or any part of the Carriage.
>
> 4.2 It is hereby expressly agreed that:
> (a) No Subcontractor, agent or servant shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on the Subcontractor, agent or servant's part while acting in the course of or in connection with the Goods or the Carriage of the Goods.
>
> (b)

(i) The Merchant undertakes that no claim or allegation whether arising in contract, bailment, tort or otherwise shall be made against any servant, agent, or Subcontractor of the Carrier which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with the Goods or the Carriage of the Goods whether or not arising out of negligence on the part of such Person. The Subcontractor, agent or servant shall also be entitled to enforce the foregoing covenant against the Merchant; and

(ii) if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof.

(c) Without prejudice to the generality of the foregoing provisions of this clause, every exemption, limitation, condition and liberty contained herein (other than Art III rule 8 of the Hague Rules) and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder including the right to enforce any jurisdiction provision contained herein (clause 26) shall also be available and shall extend to every such Subcontractor, agent or servant, who shall be entitled to enforce the same against the Merchant.

4.3 The provisions of clause 4.2(c) including but not limited to the undertaking of the Merchant contained therein, shall extend to all claims or allegations of whatsoever nature against other Persons chartering space on the carrying vessel.

4.4 The Merchant further undertakes that no claim or allegation in respect of the Goods shall be made against the Carrier by any Person other than in accordance with these Terms and Conditions which imposes or attempts to impose upon the Carrier any liability whatsoever in connection with the Goods or the Carriage of the Goods, whether or not arising out of negligence on the part of the Carrier, and if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof

5. Carrier's Responsibility: Ocean Transport

5.1 Where the Carriage is Ocean Transport, the Carrier undertakes to perform and/or in his own name to procure performance of the Carriage from the Port of Loading to the Port of Discharge. The liability of the Carrier for loss of or damage to the Goods occurring between the time of acceptance by the Carrier of custody of the Goods at the Port of Loading and the time of the Carrier tendering the Goods for delivery at the Port of Discharge shall be determined in accordance with Articles 1-8 of the Hague Rules save as is otherwise provided in these Terms and Conditions. These articles of the Hague Rules shall apply as a matter of contract.

8. General

8.1 The Carrier does not undertake that the Goods or any documents relating thereto shall arrive or be available at any point or place at any stage during the Carriage or at the Port of Discharge or the Place of Delivery at any particular time or to meet any particular requirement of any licence, permission, sale contract, or credit of the

Merchant or any market or use of the Goods and the Carrier shall under no circumstances whatsoever and howsoever arising be liable for any direct, indirect or consequential loss or damage caused by delay. If the Carrier should nevertheless be held legally liable for any such direct or indirect or consequential loss or damage caused by delay, such liability shall in no event exceed the Freight paid.

8.3 Once the Goods have been received by the Carrier for Carriage the Merchant shall not be entitled neither to impede, delay, suspend or stop or otherwise interfere with the Carrier's intended manner of performance of the Carriage or the exercise of the liberties conferred by this bill of lading nor to instruct or require delivery of the Goods at other Port or Place than the Port of Discharge or Place of Delivery named on the reverse hereof or such other Port or Place selected by the Carrier in the exercise of the liberties herein, for any reason whatsoever. The Merchant shall indemnify the Carrier against all claims, liabilities, losses, damages, costs, delays, attorney fees and/or expenses caused to the Carrier, his Subcontractors, servants or agents or to any other cargo or to the owner of such cargo during the Carriage arising or resulting from any impediment, delay, suspension, stoppage or interference whatsoever in the Carriage of the Goods.

9. Notice of Loss, Time Bar

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the Carrier or his agents at the Place of Delivery (or Port of Discharge if no Place of Delivery is named on the reverse hereof) before or at the time of removal of the Goods or if the loss or damage is not apparent within three days thereafter, such removal shall be prima facie evidence of the delivery by the Carrier of the Goods as described in this bill of lading. In any event, the Carrier shall be discharged from all liability whatsoever in respect of the Goods unless suit is brought within one year after their delivery or the date when they should have been delivered.

10. Application of Terms and Conditions

These Terms and Conditions shall apply in any action against the Carrier for any loss or damage whatsoever and howsoever occurring (and, without restricting the generality of the foregoing, including delay, late delivery and/or delivery without surrender of this bill of lading) and whether the action be founded in contract, bailment or in tort and even if the loss, damage or delay arose as a result of unseaworthiness, negligence or fundamental breach of contract.

14. Description of Goods

14.3 The Shipper warrants to the Carrier that the particulars relating to the Goods as set out on the reverse hereof have been checked by the Shipper on receipt of this bill of lading and that such particulars, and any other particulars furnished by or on behalf of the Shipper, are adequate and correct. The Shipper also warrants that the Goods are lawful goods, and contain no contraband, drugs or other illegal substances or stowaways, and that the Goods will not cause loss, damage or expense to the Carrier, or to any other cargo.

15. Merchant's Responsibility

15.1 All of the Persons coming within the definition of Merchant in clause 1, including any principal of such Person, shall be jointly and severally liable to the Carrier for the due fulfilment of all obligations undertaken by the Merchant in this bill of lading.

15.2 The Merchant shall be liable for and shall indemnify the Carrier against all loss, damage, delay, fines, attorney fees and/or expenses arising from any breach of any of the warranties in clause 14.3 or elsewhere in this bill of lading and from any other cause whatsoever in connection with the Goods for which the Carrier is not responsible.

15.3 The Merchant shall comply with all regulations or requirements of customs, port and other authorities, and shall bear and pay all duties, taxes, fines, imposts, expenses or losses (including, without prejudice to the generality of the foregoing Freight for any additional Carriage undertaken) incurred or suffered by reason of any failure to so comply, or by reason of any illegal, incorrect or insufficient declaration, marking, numbering or addressing of the Goods, and shall indemnify the Carrier in respect thereof.

17. Lien

The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier under this contract and for general average contributions to whomsoever due. The Carrier shall also have a lien against the Merchant on the Goods and any document relating thereto for all sums due by the Merchant to the Carrier under any other contract whether or not related to this Carriage. The Carrier may exercise his lien at any time and any place in his sole discretion, whether the contractual Carriage is completed or not. In any event any lien shall extend to cover the cost of recovering any sums due and for that purpose the Carrier shall have the right to sell the Goods by public auction or private treaty, without notice to the Merchant. The Carrier's lien shall survive delivery of the Goods.

19. Methods and Routes of Carriage

19.1 The Carrier may at any time and without notice to the Merchant:

(a) use any means of transport or storage whatsoever;

(b) transfer the Goods from one conveyance to another including transshipping or carrying the same on a Vessel other than the Vessel named on the reverse hereof or by any other means of transport whatsoever and even though transshipment or forwarding of the Goods may not have been contemplated or provided for herein;

(c) unpack and remove the Goods which have been packed into a Container and forward them via Container or otherwise;

(d) sail without pilots, proceed via any route, (whether or not the nearest or most direct or customary or advertised route) at any speed and proceed to, return to and stay at any port or place whatsoever (including the Port of Loading herein provided)

once or more often, and in any order in or out of the route or in a contrary direction to or beyond the port of discharge once or more often;

(e) load and unload the Goods at any place or port (whether or not any such port is named on the reverse hereof as the Port of Loading or Port of Discharge) and store the Goods at any such port or place;

(f) comply with any orders or recommendations given by any government or authority or any Person or body acting purporting to act as or on behalf of such government or authority or having under the terms of the insurance on any conveyance employed by the Carrier the right to give orders or directions.

19.2 The liberties set out in clause 19.1 may be invoked by the Carrier for any purpose whatsoever whether or not connected with the Carriage of the Goods, including but not limited to loading or unloading other goods, bunkering or embarking or disembarking any person(s), undergoing repairs and/or drydocking, towing or being towed, assisting other vessels, making trial trips and adjusting instruments. Anything done or not done in accordance with clause 19.1 or any delay arising therefrom shall be deemed to be within the contractual Carriage and shall not be a deviation.

20. Matters Affecting Performance

If at any time Carriage is or is likely to be affected by any hindrance, risk, danger, delay, difficulty or disadvantage of whatsoever kind and howsoever arising which cannot be avoided by the exercise of reasonable endeavours, (even though the circumstances giving rise to such hindrance, risk, danger, delay, difficulty or disadvantage existed at the time this contract was entered into or the Goods were received for Carriage) the Carrier may at his sole discretion and without notice to the Merchant and whether or not the Carriage is commenced either:

…

(b) Suspend the Carriage of the Goods and store them ashore or afloat under these Terms and Conditions and endeavour to forward them as soon as possible, but the Carrier makes no representations as to the maximum period of suspension. If the Carrier elects to invoke the terms of this clause 20(b) then, notwithstanding the provisions of clause 19 hereof, he shall be entitled to charge such additional Freight and costs as the Carrier may determine; …

26. Law and Jurisdiction

For shipments to or from the U.S. any dispute relating to this bill of lading shall be governed by U.S. law and the United States Federal Court of the Southern District of New York is to have exclusive jurisdiction to hear all disputes in respect thereof. In all other cases, this bill of lading shall be governed by and construed in accordance with English law and all disputes arising hereunder shall be determined by the English High Court of Justice in London to the exclusion of the jurisdiction of the courts of another country. Alternatively and at the Carrier's sole option, the Carrier may

commence proceedings against the Merchant at a competent court of a place of business of the Merchant.

68. The Hague Rules, referred to in clause 5.1, provided in material part as follows:

> "**Article 3 Rule 3**
>
> After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:
>
> a) The leading marks necessary for the identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases of coverings in which such goods are contained, in such a manner as should ordinarily remail legible until the end of the voyage.
>
> b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.
>
> c) The apparent order and condition of the goods.
>
> **Article 3 Rule 6**
>
> …
>
> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

D: Claims by Maersk A/S and Maersk GB in relation to Clauses 4 and 26.

D1: Introduction

69. The Claimants advance claims for damages or an indemnity in relation to alleged breaches by Almar-Hum of Clause 4 (known as the "Himalaya" clause) and Clause 26 (the English jurisdiction clause or "EJC"). The basis of the claims is that both of these terms, which formed part of Maersk's standard terms, were incorporated into the contract of carriage between Almar-Hum and Maersk A/S, and that Maersk GB is also in a position to rely upon both clauses. The principal issues raised by Almar-Hum's defence concern whether: (i) Maersk's standard terms formed part of the relevant contracts of carriage between the parties; (ii) those standard terms, and in particular the two clauses relied upon, were onerous and unusual, and therefore required greater notice of their inclusion than Maersk A/S provided; (iii) Maersk A/S can make a

claim under the clauses, in circumstances where it was not party to the Guinea-Bissau proceedings; and (iv) Maersk GB, which is not the carrier under the bills of lading, is in a position to rely upon their terms.

D2. Were Maersk's standard terms incorporated into the contracts of carriage with Almar-Hum?

70. The parties' arguments were in summary as follows. The Claimants contend that the contracts of carriage were concluded prior to the issue of the bills of lading in February/ March 2019, and that incorporation was achieved during the booking process. In paragraph 6 of its defence, Almar-Hum contends that there was no incorporation. It contends that the contracts of carriage were concluded on 10 December 2018, when Almar-Hum agreed to ship and Maersk GB agreed to carry the cargo, with the bills of lading only being provided subsequently. It also contends that Maersk's terms generally, alternatively the Himalaya clause and EJC, were onerous, in that "they purport significantly to cut down on the Defendant's right".

71. In *Ebury Partners Belgium SA/NV v Technical Touch BV* [2022] EWHC 2027 (Comm) paragraphs [6] – [8], I set out the basic principles concerning incorporation of contractual terms in the context of documents which have not been signed by both parties.

72. Under English law, as explained in *Chitty on Contracts 34th Edition*, para 15-007, where a contract has not been signed, a party can nevertheless be bound by terms contained or referred to in a notice or similar document, including a standard form document. Frequently the document is simply made available to a party before or at the time of making the contract, and the question will then arise whether the printed conditions which it contains, or to which it refers, have become terms of the contract. A party can be bound even if it does not take the trouble to read the terms. Whether or not the terms are binding will depend upon the form of the document which gives notice of the terms, the time at which it is brought to the attention of the receiving party, and whether reasonable steps have been taken to draw the terms to the attention of that party.

73. Paragraph 15-010 of *Chitty* discusses the concept of notice in greater detail.

> "**Meaning of notice** It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that they should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts regarding notice in such circumstances are three in number:
>
> (1) if the person receiving the document did not know that there was writing or printing on it, they are not bound (although the likelihood that a person will not know of the existence of writing or printing on the document is now probably very low);
>
> (2) if they knew that the writing or printing contained or referred to conditions, they are bound;

> (3) if the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them."

74. There is no suggestion in Almar-Hum's defence that any law, other than English law, applies to the question of whether or not Maersk's standard terms are incorporated, or indeed that any other law would be materially different in this regard from English law. The issue of incorporation is indeed governed by English law.

75. Applying the above principles of English law, there is in my view no doubt that Maersk A/S did what was reasonably sufficient to give Almar-Hum notice of its standard terms. Prior to the bookings, Almar-Hum received the 11 October 2018 rate sheet. The front page of that sheet stated that, unless otherwise stated, all bookings and carriage would be "subject to Carrier's Terms for Carriage, including in particular its choice of law and jurisdiction, available at https://terms.maerskline.com/Carriage. Those words appeared alongside the box "Carrier Terms". In addition, the boxes "Quote acceptance" and "Liability" stated respectively as follows.

> "**Quote acceptance**
>
> This quotation shall be considered accepted by the Merchant if the Merchant confirms its acceptance in writing. Provided that if the Merchant does not provide its acceptance in writing, then the Merchant shall also be deemed to have accepted the quotation by the following actions: (1) verbally agreeing to the quotation, or (2) making a booking or tendering a shipment to Carrier covered by this quotation. For trades subject to the US Shipping Act, the parties shall, in the case of (1), subsequently confirm this agreement by agreeing to a writing that will be filed with the FMC as the service contract amendment.
>
> **Liability**
>
> It is a condition of placing a booking under this quotation that you agree that you will be deemed a "Merchant" as defined in the Maersk Line's Terms for Carriage and as such will be responsible for all the obligations and liabilities of the shipper, whether disclosed or not. Any subsequent nomination of a shipper or other party in relation to the booking shall be subject to our discretionary acceptance. In nominating a shipper or other party in relation to the booking you warrant that you have authority to legally bind the nominated shipper or other party relating to the booking, as applicable, and, should that not be the case, you will assume full liability and shall indemnify the carrier for any and all loss suffered or cost incurred as a consequence of the absence of such authority."

76. Almar-Hum then made a series of on-line bookings on 4 December 2018. The evidence of Mr Beavogui was that Almar-Hum was an existing customer, familiar with Maersk's booking procedures. Both he and Ms Li explained that bookings could only be made online, using the Maersk website. There is no reason to doubt Mr Beavogui's evidence that the online process was used by Almar-Hum on 4 December 2018, and no evidence contradicting Mr Beavogui's evidence has been submitted. His evidence is corroborated by the fact that, on the following day, Mr Djalo Djau of Almar-Hum emailed Maersk GB asking for assistance to "link the booking: 967281119 these containers below". This booking number had been generated during the online process, and Mr Beavogui explained that it was common for customers then to request particular container numbers to be linked to an online booking that had already been made.

77. The online booking process made it clear, to a customer such as Almar-Hum, that Maersk's standard terms would govern the contract of carriage. Thus, after the customer had filled in details of the booking, selected a sailing date, and then reviewed the booking, it would have to tick a box against the words: "Accept these terms and conditions". This box appeared in a section headed "Terms and conditions", and immediately below the words: "By clicking submit booking you agree that the *terms and conditions* will govern your booking". The words which I have italicised were hyperlinked to Maersk's standard terms, and thus were readily available to a customer placing a booking.

78. After ticking the "Accept these terms and conditions" box, the customer could then click a "Submit Booking" button. This would not quite complete the booking process. The customer would then be given the option to "Book New Shipment", which it might or might not wish to do. The website would then give a "Price Overview", and the customer would then click a "Place Booking" button. This appeared under the words:

> "You are almost done.
>
> By clicking Place Booking, you agree that the *terms and conditions* will govern your booking".

79. The italicised words were again hyperlinked to Maersk's standard terms.

80. Thus, as with the claimant in *Ebury Partners*, this is a case where Maersk A/S went beyond simply giving notice of its standard conditions. By ticking the relevant box, and clicking the relevant buttons, during the online process, Almar-Hum positively indicated its agreement to those terms and conditions. English courts have held in the past that sufficient notice of terms and conditions has been provided, even without a box being ticked, when a party has been given a document which refers to terms found on the other party's website. As Teare J said in *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd* [2015] EWHC 25 (Comm), paragraph 16:

> "In this day and age when standard terms are frequently to be found on websites I consider that reference to the website is a sufficient incorporation of the warehousing terms to be found on the website."

Teare J expressed a similar sentiment in *Cockett Marine Oil DMCC v ING Bank NV (The M/V Ziemia Cieszynska)* [2019] 2 Lloyd's Rep 541 paragraph 23, where he referred to a party's ability to access terms by clicking a hyperlink.

81. Also, as in *Ebury Partners*, the box that was ticked and the buttons clicked were, objectively construed, an agreement to all of Maersk's relevant terms and conditions. There is nothing to suggest that any of the terms were somehow excluded from the notice that was given to Almar-Hum, or the assent which was being given by Almar-Hum.

82. In the course of his submissions, Mr Henton also relied upon the terms of the "Verify Copy" of bills of lading that were sent to Almar-Hum, prior to shipment. This contained the following text on the front page (which also of course appeared on the actual bills which were in due course issued):

> "SHIPPED, as far as ascertained by reasonable means of checking, in apparent good order and condition unless otherwise stated herein, the total number or quantity of Containers or other packages or units indicated in the box entitled "Carrier's Receipt" for carriage from the Port of Loading (or the Place of Receipt, if mentioned above) to the Port of Discharge (or the Place of Delivery, if mentioned above), such carriage being always subject to the terms, rights, defences, provisions, conditions, exceptions, limitations, and liberties hereof (INCLUDING ALL THOSE TERMS AND CONDITIONS ON THE REVERSE HEREOF NUMBERED 1-26 AND THOSE TERMS AND CONDITIONS CONTAINED IN THE CARRIER'S APPLICABLE TARIFF) and the Merchant's attention is drawn in particular to the Carrier's liberties in respect of on deck stowage (see clause 18) and the carrying vessel (see clause 19). Where the bill of lading is non-negotiable the Carrier may give delivery of the Goods to the named consignee upon reasonable proof of identity and without requiring surrender of an original bill of lading. Where the bill of lading is negotiable, the Merchant is obliged to surrender one original, duly endorsed, in exchange for the Goods. The Carrier accepts a duty of reasonable care to check that any such document which the Merchant surrenders as a bill of lading is genuine and original. If the Carrier complies with this duty, it will be entitled to deliver the Goods against what it reasonably believes to be a genuine and original bill of lading, such delivery discharging the Carrier's delivery obligations. In accepting this bill of lading, any local customs or privileges to the contrary notwithstanding, the Merchant agrees to be bound by all Terms and Conditions stated herein whether written, printed, stamped or incorporated on the face or reverse side hereof, as fully as if they were all signed by the Merchant. IN WITNESS WHEREOF the number of original Bills of Lading stated on this side have been signed and wherever one original Bill of Lading has been surrendered any others shall be void.

Signed for the Carrier Maersk Line A/S"

83. I agree that this provides further, and sufficient, notice to Almar-Hum of Maersk's standard terms, and that these govern the carriage of the goods.

84. Mr Henton suggested that Almar-Hum's argument, that Maersk's terms were not incorporated, was possibly based on authorities which concerned the incorporation into one contract of the terms of another contract. It was far from clear, based on Almar-Hum's pleading, that such an argument was being advanced. However, any such argument would be incorrect, and indeed hopeless. This is a straightforward case of assent to a set of contractual terms. It is not a case where one contract incorporates the terms of another contract. See *Ebury Partners* at [100] – [101], and *Africa Express Line v Socofi SA* [2009] EWHC 3223 (Comm) at paragraphs [28] – [30] (Christopher Clarke J).

85. For the above reasons, and subject to the argument based on the onerous nature of Maersk's contractual terms (or particular contractual terms) discussed in section D3 below, the contracts of carriage were on the Maersk standard terms: i.e. the standard bill of lading terms of Maersk A/S, the Second Claimant in these proceedings. Under those standard terms, the carrier was Maersk A/S (defined in clause 1 as "Carrier"), and the contracts of carriage were therefore (subject to the effect of the Himalaya clause) between Maersk A/S and Almar-Hum.

D3: Onerous terms.

86. As indicated above, Almar-Hum pleads that the Maersk standard terms are onerous, in that they purport significantly to cut down on Almar-Hum's rights. They contend that for them to be incorporated, they "would have needed to be specifically drawn to the Defendant's attention at the time when the contract(s) were made, or at the very least before shipment. They were not, and accordingly are not incorporated into the contracts of carriage". In the alternative, Almar-Hum advances this case by reference to the specific terms pleaded by the Claimants in paragraph 6 of the Particulars of Claim. Those terms include, but are not limited to, the Himalaya clause and the EJC. The other terms which are there pleaded (and thus identified by Almar-Hum in its pleading) are: the definition of "Subcontractor"; clauses 8.1, 8.2 and 8.3; clause 14.3; and clauses 15.2 and 15.3.

87. The authorities concerning the incorporation of onerous terms have recently been considered by Jay J in *John Parker-Grennan v Camelot UK Lotteries Ltd* [2023] EWHC 800 (KB), paragraphs [53] – [57]. As can be seen from those paragraphs, the cases contain various formulations. Lord Denning said that the "more unreasonable a clause is, the greater the notice which must be given of it". Fraser J applied a test of whether a clause was "onerous and unusual". Dillon LJ said the clause must be "particularly onerous or unusual", and Bingham LJ said that the "more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given". Jay J said that there must be "an inherent element of flexibility to reflect the circumstances of the particular case, but (and subject to that) the test should be "onerous *or* unusual"". I propose to apply Jay J's test.

88. Almar-Hum's primary case seeks to attack the entirety of Maersk's standard terms. In my view, this is a bold and unsustainable approach. I know of no authority in which

holds the entirety of the terms of a bill of lading (or indeed of any contract) has been held not to be binding on a party, because of the alleged onerous or unusual nature of the clauses as a whole. Indeed, the terms of bills of lading have, under English law, been enforced by the English courts against shippers and subsequent holders of the bills for well over 100 years. It is probable, in my view, that the shippers in many of those cases received far less notice, of the terms of the contract of carriage, than Almar-Hum received in this case. Almar-Hum had done business with Maersk A/S previously, had received the rate schedule, had ready access to Maersk's terms, had ticked or clicked the appropriate box/ buttons when making the booking, and had received draft bills of lading. I do not consider that Almar-Hum can, without regard to the details of any particular term, simply attack the entirety of Maersk's terms. Furthermore, the authorities to which I have referred focus, as one would expect, on the precise term or terms and the question of whether that term or those terms is onerous or unusual.

89. The two terms which are critical to the Claimants' claim, that I am considering in this section, are the Himalaya clause and the EJC. I do not consider that either clause can be regarded as either onerous or unusual.

90. The Himalaya clause is so-called because one of the cases concerning such clauses, decided 70 years ago, concerned the P&O steamship *Himalaya*: *Adler v Dickson* [1954] 2 Lloyd's Rep 267. Such clauses have been a feature of bills of lading for a very long time. They are far from unusual, and indeed I cannot recall seeing any well-drafted bill of lading which does not include one. From the cargo-owner's perspective, they are not onerous. Their essential purpose is to ensure that the terms on which the carrier has agreed to carry the goods cannot be circumvented; for example, by claims in tort being made by a bill of lading holder against third parties, with the carrier then having to meet the liability of that third party.

91. The EJC is also far from unusual. It is again very common for a well-drafted bill of lading to include a jurisdiction clause, and (for reasons which it is unnecessary to explore, but which include the considerable experience of the English courts in shipping law) England is a very common choice of jurisdiction. I do not consider that such a clause can be considered onerous from the perspective of Almar-Hum. It is true that the clause requires proceedings to be brought in a jurisdiction which is not the home jurisdiction of Almar-Hum. But in the context of a party engaging in international trade (here Almar-Hum was selling a significant quantity of valuable goods to Chinese buyers, and was engaging a very well-known international company to carry them), a requirement to sue in a neutral jurisdiction cannot in my view be considered onerous. In any event, the jurisdiction clause was specifically referenced in the rate sheet which was sent out in October 2018, and therefore was brought clearly to Almar-Hum's attention.

92. As far as concerns the other clauses referred to by Almar-Hum:

    (1) The definition of "Subcontractor" is wide, but this is necessary in order to give full effect to the Himalaya clause. It is not onerous from Almar-Hum's perspective, and the broad definition is far from unusual.

    (2) Clause 8 is not central to the claims which the Claimants are making. However, I do not consider that there is anything unusual or onerous about the

clause. Clauses 8.1 and 8.2 do limit the carrier's liability. It is unsurprising, and indeed is a common feature of many contracts, that a party would be concerned to avoid potentially very wide liabilities that might arise from delays in the shipment of goods. Clause 8.3 precludes the merchant from impeding or delaying performance, and there is in my view nothing onerous or unusual about that.

(3) Clause 14.3, which is again not central to any of the claims which the Claimants are making, contains a warranty that the goods are lawful and will not cause loss, damage or expense to the carrier. I see nothing unusual or onerous in that clause.

(4) Clause 15.2 imposes liabilities upon the merchant in circumstances where, in summary, the merchant has breached the warranties which it has given, or where loss is suffered by the carrier in connection with the goods which have been shipped. In circumstances where the shipper and receiver will know far more about the goods than the carrier, it is difficult to see why this clause is either unusual or onerous. Its principal function and purpose is to allocate responsibility to the merchant for problems arising from the goods themselves.

(5) Clause 15.3 places various, very obvious, obligations on the merchant: essentially requiring the merchant to act lawfully and carefully and to comply with regulations and requirements and to pay duties and taxes in relation to the cargo shipped. I see nothing onerous or unusual in that clause.

93. Accordingly, I reject Almar-Hum's arguments based on the alleged onerous or unusual nature of Maersk's standard clauses.

D4: Enforcement of the Himalaya clause and EJC by Maersk A/S

94. The above analysis leads to the conclusion that (i) the contracts of carriage were made between the Second Claimant, Maersk A/S, and Almar-Hum, and (ii) those contracts included both the Himalaya clause and the EJC. This section considers the consequence of that conclusion in relation to the claims which are made by Maersk A/S.

95. Maersk A/S submits that, in the light of these conclusions, it cannot seriously be disputed that Maersk A/S is entitled to enforce both the EJC and the Himalaya clause. Although the proceedings in Guinea-Bissau were not brought against Maersk A/S, they contend that both clauses have been breached by virtue of the proceedings there against Maersk GB, and that Maersk A/S is entitled to enforce those breaches. They also submit that the question of whether loss has been suffered by Maersk A/S in consequence of such breaches is a matter for a subsequent quantum trial, but that Almar-Hum's liability to Maersk A/S has been established.

96. I agree with these submissions. Although Almar-Hum's pleading denies that the Guinea-Bissau proceedings were commenced in breach of the Himalaya clause, or in breach of the EJC, I consider that any such argument is unsustainable.

97. As far as concerns the EJC, this provides that "all disputes arising hereunder shall be determined by the English High Court of Justice in London to the exclusion of the

jurisdiction of the courts of another country". The authorities show that such a clause contains what has been described as a "negative promise" not to sue elsewhere: see *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, paragraphs [1], [21] & [23]; *Starlight Shipping Co v Allianz Marine & Aviation AG and others (The "Alexandros T")* 2014 EWCA Civ 1010 paragraph [19]; *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2014] EWHC 3632 (Comm) (Cooke J), paragraphs [37] – [40]. Almar-Hum's commencement and prosecution of proceedings in Guinea-Bissau is clearly in breach of the EJC, and Maersk A/S is entitled to such damages as it can in due course prove to have flowed from the breach. The decision of Cooke J in *Hin-Pro* shows that no credit is to be given in respect of any sums which might have been awarded had the claims been brought in the contractual forum. However, I am not presently concerned with quantum of loss, and therefore any argument as to the effect of this aspect of Cooke J's decision does not arise at the present stage. In any event, in the light of my conclusions as to the Claimants' non-liability in Section F below, Almar-Hum is not able to contend that it would have succeeded in the contractual forum.

98. In addition, Maersk A/S has a claim for damages for breach of the Himalaya clause, again arising from the commencement and prosecution of the proceedings in Guinea-Bissau. Clause 4.2 (b) (i) contains an undertaking by the Merchant (which here includes Almar-Hum) that no claim or allegation will be made against any Subcontractor of Maersk A/S. The definition of Subcontractor is wide, and there is nothing in Almar-Hum's pleading which suggests that Maersk GB falls outside that definition. I have no doubt that Maersk GB falls within that wide definition. Maersk GB was the company on the ground in Guinea-Bissau which was dealing with the carriage, including the process of finalising the bills of lading and ultimately issuing them. The company appears to have been the terminal operators, but in any event were "independent contractors … whose services or equipment have been used for the Carriage". The bringing of proceedings against Maersk GB is a breach of the undertaking that no claim or allegation shall be made against a Subcontractor of Maersk A/S. It also gives rise to an obligation on the part of Almar-Hum to indemnify Maersk A/S under Clause 4.2 (b) (ii).

D5: Enforcement of the Himalaya clause and EJC by Maersk GB.

99. Since Maersk A/S, not Maersk GB, was the contracting party in relation to the contracts of carriage, a different legal analysis applies to the question of enforcement by Maersk GB of (i) the Himalaya clause and (ii) the EJC. In relation to both clauses, Almar-Hum's pleading denies Maersk GB's entitlement to enforce. Their argument in relation to the Himalaya clause is based upon (i) the alleged *res judicata* effect of the judgment of the Guinea-Bissau court in action 175/020, and (ii) alleged waiver by Maersk GB in bringing a claim in its own name for freight. In relation to the EJC, Almar-Hum contends that Maersk GB is (i) not entitled, as a matter of English law, to enforce the EJC; and (ii) Maersk GB has accepted the jurisdiction of the Guinea-Bissau courts, even going so far as to appeal their decisions and to bring a claim in that forum. I will address the questions of *res judicata* and submission to the jurisdiction in Section E below, but in this section will consider more general questions concerning Maersk GB's entitlement to enforce.

100. Maersk GB's claim to enforce the Himalaya clause is based upon both (i) the common law concerning the enforcement of such clauses, and (ii) the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act"). Its claim in relation to the EJC is based only upon the former: it accepts that the 1999 Act does not assist. I start by considering the position in relation to the Himalaya clause.

The Himalaya clause

101. The nature and effect of Himalaya clauses is succinctly summarised in the most recent (2024) edition of *Scrutton on Charterparties and Bills of Lading* 25th edition, paragraph 3-048, as follows:

> "Assuming that a cargo owner (A) wishes to circumvent one or more defences in its contract of carriage with carrier (B) by bringing a tort claim against a third party (C) with which B has or will have a contract, a Himalaya clause overcomes the problem of C's lack of privity to the contract of carriage by creating a unilateral contract of exemption between A and C under which A promises to extend the relevant defences to C if C performs the contractual duties it owes to B. Such a clause provides the genesis of a potential contract by (1) evidencing an intention to extend the relevant defences, and (2) expressing an agency of B to contract on behalf of C, in addition to contracting on its own behalf in respect of the main contract. The contract is perfected by (3) the existence of authority, if necessary created retrospectively by ratification by C, and (4) the provision of consideration by C, normally through the performance by C of its contractual obligations owed to B. Of these four requirements, the first two are fulfilled by appropriate contract wording, while the fourth will be satisfied in the ordinary course of events. The third requirement, of authority, will easily be established where there is a course of dealing involving B employing the services of C in the performance of contracts of carriage."

102. Amongst the authorities cited by *Scrutton* is the judgment of the House of Lords in *Homburg Houtimport BV v Agrosin Private Ltd ("The Starsin")* [2003] UKHL 12; [2004] 1 AC 715. Lord Hoffmann explained the analysis as follows:

> "93. A Himalaya clause in a contract of carriage is designed to create contractual relations between the shipper and any third parties whom the carrier may employ to discharge his obligations. It does so without infringing the English doctrines of privity of contract and consideration, which, until the Contracts (Rights of Third Parties) Act 1999, prevented third parties from claiming benefits under contracts. The way it works is this. The shipper makes an agreement through the agency of the carrier with the third party servant or contractor. Such third parties may have authorised the carrier in advance to contract on their behalf or they may afterwards ratify the agreement. The terms of the agreement are that if such a third

> party renders any services for the benefit of the cargo owner in the course of his employment by the carrier, he will be entitled to the exemptions and immunities set out in the clause. At that stage, the agreement is not a contract. The third party makes no promise to the shipper to render any services and, until he has actually rendered them, no contract has come into effect. It is the act of rendering the services which provides the consideration and brings into existence a binding contract under which the third party is entitled to the exemptions and immunities…"

103. As the discussion and citations in *Scrutton* footnote 126 indicate, there is some artificiality in the above reasoning, and I agree with the authors that "it is unlikely that the courts will welcome challenges based on technical purity". In my view, however, there is no difficulty in applying the above analysis so as to reach the conclusion that Maersk GB is entitled to enforce the terms of the Himalaya clause.

104. The first two requirements identified by *Scrutton* depend upon the contract wording. Here the wording is very broad. Clause 4 clearly provides that Subcontractors, such as Maersk GB, are protected by the limitations and exclusions of liability therein. Clause 4.2 (a) provides that no Subcontractor is to have any liability in connection with the Goods or the Carriage of the Goods. Clause 4.2 (b) (i) contains a wide undertaking not to sue any Subcontractor by way of an attempt to impose "any liability whatsoever" in connection with the Goods or the Carriage of the Goods. It also provides, expressly, that the Subcontractor shall "be entitled to enforce the foregoing covenant against the Merchant". Clause 4.2 (c) provides that every "right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier", including the right to enforce Clause 26, shall extend to every Subcontractor. That clause also expressly provides that the Subcontractor can "enforce the same against the Merchant". Accordingly, there is clearly an intention to extend relevant defences and indeed other rights to the Subcontractors. The Claimants submitted that, construing the clause as a whole, Maersk A/S was contracting not only as contractual carrier, but also on behalf of its Subcontractors through whom it would perform some of its obligations in relation to the shipment and carriage. I agree with that submission, and with the Claimants' argument in that regard that clause 4 shows an intention to contract on behalf of Subcontractors and other agents.

105. The third requirement identified by *Scrutton*, namely authority, generally creates no difficulty, and I do not consider that there is any difficulty here. Almar-Hum's pleading takes no point on lack of authority. In circumstances where both Claimants are Maersk entities, and where there had been a regular course of dealing involving Maersk A/S using the services of Maersk GB in the performance of the contract of carriage, there is no realistic point on lack of authority.

106. The fourth requirement identified by *Scrutton*, namely the provision of consideration by (here) Maersk GB, again is easily satisfied. Here, Maersk GB was running the operation on the ground in Guinea-Bissau, and services were rendered to Almar-Hum which provided consideration and brought a binding contract into existence.

107. Accordingly, Maersk GB can enforce the terms of the Himalaya clause. That means, in particular, that it can enforce Almar-Hum's undertaking in Clause 4.2 (b) (i) that no

claim or allegation whatsoever would be brought against it. Although the case-law in relation to Himalaya clauses has tended to concern and focus on the entitlement of an agent or subcontractor to rely upon a particular provision by way of defence, I do not see any reason why a party, which has the protection of and is entitled to enforce a clause such as Clause 4.2 (b) (i), cannot also sue for any loss which flows from the breach of the relevant undertaking. Once it is decided, applying the above contractual analysis, that a third party (here Maersk GB) is entitled to enforce the terms of the Himalaya clause, there is no logical reason why enforcement should be confined to reliance on the clause by way of defence. Indeed, there are good reasons why enforcement should not be so confined, in order that a party can avail itself of the full protection that the clause is designed to confer. It can therefore extend to a claim for damages, although the assessment of damages is a matter to be determined hereafter. I will deal separately below with the question of whether, in accordance with Clause 4.2 (c), Maersk GB can also enforce the jurisdiction provision contained in Clause 26.

108. I have hitherto addressed enforcement of the Himalaya clause at common law. However, Maersk GB also contends that it is entitled to enforce the Himalaya clause (but not Clause 26) pursuant to the Contracts (Rights of Third Parties) Act 1999. Section 1 of the 1999 Act entitles a third party, in certain circumstances, to enforce a contractual term. It provides as follows:

> "(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—
>
> (a) the contract expressly provides that he may, or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party…
>
> (6) Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation…"

109. However, the 1999 Act only applies in a limited way to contracts for the carriage of goods by sea. Section 6 (5) provides as follows:

> "**Exceptions**
>
> (5) Section 1 confers no rights on a third party in the case of –
>
> (a) a contract for the carriage of goods by sea,
>
> …

> except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract."

110. The position is explained in *Scrutton* paragraph 3-051 as follows:

> The 1999 Act does not apply to certain types of contract. Notably, contracts for the carriage of goods by sea governed by the Carriage of Goods by Sea Act 1992 (i.e. contracts of carriage contained in or evidenced by a bill of lading or sea waybill, or in respect of which an undertaking has been given in a ship's delivery order) are excluded from the 1999 Act except for any "exclusion or limitation of liability in such contracts". Thus, Himalaya clauses in bills of lading that extend the benefit of exclusions or limitations of liability, whether arising under the Hague-Visby Rules or bespoke contractual terms, may be rendered enforceable under the 1999 Act without the need to resort to the agency-based reasoning required at common law. However, a Himalaya clause in a bill of lading that sought to extend the benefit of other types of clause, such as exclusive jurisdiction clauses, or the benefit of extra-contractual defences, such as the maritime law doctrine of limitation of liability, would not come within the 1999 Act and could be enforceable only at common law. Charterparties, whether demise, time or voyage or any variant thereon, are fully within the 1999 Act.

111. Applied to the present case, it is clear that Clause 4.2 (b) (i) of the Himalaya clause is enforceable under section 1 (1) (a) of the 1999 Act: the clause expressly provides that Sub-contractors may enforce the covenant not to sue in Clause 4.2 (b) (i). I also agree with the Claimants' submission that section 1 (1) (b) applies to the Himalaya clause: because it "purports to confer a benefit" on Maersk GB, and there is nothing (see section 1 (2)) which indicates that the parties did not intend it to be enforceable.

112. However, the effect of section 6 (5) is, in my view, that Maersk GB's entitlement to enforce the clause is limited to its availing itself of the exclusion or limitation of liability contained in the Himalaya clause. In practical terms, therefore, this means that Maersk GB can rely upon the clause in order to contend that it has no liability to Almar-Hum: an issue which I consider further in section F below. However, and contrary to the position at common law, I do not consider that Maersk GB can rely upon the clause for the purposes of advancing a claim in damages against Almar-Hum.

The exclusive jurisdiction clause

113. Maersk GB contends that it can also enforce the EJC at common law, although it accepts that, as a result of section 6 (5) of the 1999 Act, it cannot do so pursuant to that statute.

114. Maersk GB's enforcement of the EJC is based upon the express terms of Clause 4.2 (c), which extends to the Subcontractor "every right, exemption from liability,

defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder including the right to enforce any jurisdiction provision contained herein (clause 26)" (emphasis supplied).

115. As the Claimants' submissions recognised, there is authority that rights of enforcement under a Himalaya clause do not extend to the enforcement of EJCs: *The Mahkutai* [1996] AC 650. However, they submit that *The Mahkutai* is distinguishable, because the wording in that case was much narrower, and in particular contained no reference to the relevant exclusive jurisdiction clause. Here, by contrast, there is express reference to the EJC and clause 26. They rely upon *Carver on Bills of Lading* 5th edition section 7-079 in support of the proposition that sufficiently clear words would enable a third party to enforce an exclusive jurisdiction agreement. (The critical passage is the third paragraph below, but I have quoted the earlier paragraphs in order to provide context, and also because they explain why the 1999 Act is not relevant in the present context).

> "The third reason why the common law relating to Himalaya clauses may retain some practical importance is that s.1(6) of the 1999 Act applies only where the third party seeks to avail himself of a contract term which "excludes or limits" liability. The subsection thus does not apply to, for example, arbitration, choice of forum or exclusive jurisdiction clauses; and the Law Commission Report on which the 1999 Act was based indicates that such clauses were not intended to fall within the scope of the proposed reform. Although the express provisions to this effect in the Law Commission's Draft Bill (appended to the Report) have no counterpart in the 1999 Act, and although the Act does, contrary to the views expressed in the Law Commission Report, deal with arbitration agreements, the same restriction on the scope of s.1(6) is inherent in its wording since clauses of the kind here in question do not "exclude or limit liability".
>
> In the bill of lading context there is the similar point that what we have called the exception to the s.6(5) exception applies only where the third party seeks to "avail himself of an exclusion or limitation of liability in" the bill, so that a term in the bill other than one excluding or limiting liability cannot be enforced under the 1999 Act by a person who is not a party to the bull. It follows that a choice of forum or exclusive jurisdiction clause in a bill of lading falls within the s.6(5) exception, rather than within the exception to that exception, and this is one reason why such a clause could not be enforced by a person who is not, and is not to be treated "as if he had been a party" to, the bill of lading contract. Such clauses are also outside the scope of the 1999 Act for the further reason that the purpose of the Act is to enable contracting parties to confer *rights* on a third party, while under clauses of the kind here under discussion he would not only acquire rights but also be subjected to duties.

> It was precisely for this reason that the Privy Council held in *The Mahkutai* that a third party could not at common law take the benefit of an exclusive jurisdiction clause in a contract which also contained a Himalaya clause. This decision was, however based on the construction of the Himalaya clause there used, so that the case leaves open the possibility that the parties could by the use of sufficiently clear words make the benefit of an exclusive jurisdiction clause available to a third party; and, since at common law it would so be available by virtue of a separate or collateral contract, there would be no difficulty in principle in also imposing obligations on the third party. The resulting situation would then be one in which the benefit of the exclusive jurisdiction clause in a bill of lading would be available to the third party at common law but not under the 1999 Act; and it would be so available only if the common law requirements developed in the cases on Himalaya clauses were satisfied." (My emphasis).

116. I agree with the Claimants, and the distinguished authors of *Carver* (Professors Francis Rose and Francis Reynolds) that *The Mahkutai* is indeed distinguishable. I also agree that since the Himalaya clause analysis is ultimately a contractual analysis, which concludes that there is a separate or collateral contract with the third party (here Maersk GB), there is no difficulty in principle in holding that the EJC can be enforced. The authors of *Carver* also refer (in footnote 591) to the analysis of Lord Wilberforce in *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd ("The Eurymedon")* [1975] AC 154: Lord Wilberforce had described (at 167 – 168) the contract between the third party (here Maersk GB) and the shipper (here Almar-Hum) as being "initially unilateral but capable of becoming mutual". I also consider that this passage also supports my earlier conclusion that enforcement by Maersk GB of the terms of the Himalaya clause (including, here, the EJC expressly referred to therein) is not confined to Maersk enforcing the clause by way of a defence, but extends to enforcement of a claim for damages based upon breach of the clause.

117. I also consider that there are particular reasons why, in the context of an EJC, a party should not be confined simply to relying upon the clause by way of a defence. That would deprive the party of important potential remedies, for example the ability to apply for an anti-suit injunction to restrain actual or threatened proceedings in breach of the clause. It would also deprive the party of a damages remedy in the event that an anti-suit injunction was ineffective or for some other reason unavailable, or where a party moved very quickly to obtaining a monetary award in the non-contractual jurisdiction.

118. Accordingly, I conclude that Maersk GB is entitled to enforce both the Himalaya clause and the EJC. I also conclude that enforcement of the provisions of the Himalaya clause, including thereby the provisions of the EJC, extends (at common law) to enforcement of a claim for damages for breach of the clause.

119. However, it is now necessary to consider the pleaded arguments advanced by Almar-Hum based upon the alleged *res judicata* effect of the judgment which it has obtained in its favour against Maersk GB in Guinea-Bissau, and arguments (again arising from the proceedings in Guinea-Bissau) based on alleged waiver. I do this in Section E

below, where I conclude that none of these arguments have any substance. Accordingly, Maersk GB's claim to enforce the terms of the Himalaya clause and the EJC, both by way of defence and as the foundation of its damages claim, succeeds.

E: Res judicata and related issues

E1: Introduction and legal principles.

120. In its defence (paragraphs 19, 25.2 and 53), Almar-Hum relies upon the judgment of the CCBDC in case number 175/020 as giving rise to a *res judicata* as against Maersk GB. *Res judicata* is advanced in two contexts. Almar-Hum contends that Maersk GB cannot now contend that it has no liability to Almar-Hum, because its liability has been determined by the judgment of the CCBDC which was given in March 2021 in a "final and unappealable decision". Almar-Hum also contends that Maersk GB can place no reliance on the Himalaya clause, because to do so would be inconsistent with the CCBDC judgment.

121. *Res judicata* is not specifically relied upon in, in the defence, relation to Maersk GB's claim to enforce the EJC. However, since Maersk GB's route to reliance starts with the Himalaya clause (see Section D above), Almar-Hum's argument – that reliance on the Himalaya clause is precluded by *res judicata* – necessarily affects Maersk GB's claim to enforce the EJC.

122. *Res judicata* is not, however, relied upon in relation to Maersk A/S. Indeed, the defence makes it clear that no proceedings were ever brought against Maersk A/S, and indeed that Almar-Hum does not intend to bring such proceedings.

123. The Claimants cited the leading textbook on *res judicata*: *Spencer Bower and Handley: Res Judicata* 6th edition (2024). This identifies the basic principles in paragraphs 1.01 and 1.02.

> "1.01 A *res judicata* is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes once and for all of the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment. A judgment *in personam* binds the parties and their privies, and because this is so basic it will generally be assumed in what follows. A judgment *in rem* is binding on the so-called world, party, privy or otherwise.
>
> **ELEMENTS OF RES JUDICATA ESTOPPEL**
>
> 1.02 A party setting up a *res judicata* as an estoppel against his opponent's claim or defence, or as the foundation of his own, must establish its constituent elements, namely that:
>
> (i) the decision, whether domestic or foreign, was judicial in the relevant sense;
>
> (ii) it was in fact pronounced;

> (iii) the tribunal had jurisdiction over the parties and the subject matter;
>
> (iv) the decision was:
>
> (a) final;
>
> (b) on the merits;
>
> (v) it determined a question raised in the later litigation;
>
> (vi) and the parties are the same or their privies, or the earlier decision was *in rem*."

124. In paragraph 4.20 of *Spencer Bower*, the authors deal with the issue of the "Jurisdiction of Foreign Judicial Tribunals (Common Law)".

> "4.20 The foreign tribunal must have had internationally recognised jurisdiction whether the decision is set up as a bar, as the basis of a *res judicata* estoppel or an action is brought on it. An issue estoppel on jurisdiction can only be raised by the judgment of a foreign court if that court is regarded by English private international law as being a court of competent jurisdiction. Jurisdiction under the law of the foreign forum is not sufficient, and its judgment is conclusive on that question."

125. English law in relation to the recognition and enforcement of judgments of foreign courts is, however, significantly affected by statute, the Civil Jurisdiction and Judgments Act 1982 ("CJJA"), sections 32 – 34. The provisions relevant to the present case are as follows:

> "**32.— Overseas judgments given in proceedings brought in breach of agreement for settlement of disputes.**
>
> (1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if—
>
> (a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and
>
> (b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and
>
> (c) that person did not counter claim in the proceedings or otherwise submit to the jurisdiction of that court

> (2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.
>
> (3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2).
>
> **33.— Certain steps not to amount to submission to jurisdiction of overseas court.**
>
> (1) For the purposes of determining whether a judgments given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely—
>
> (a) to contest the jurisdiction of the court;
>
> (b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;
>
> (c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.
>
> **34. Certain judgments a bar to further proceedings on the same cause of action.**
>
> No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland."

126. In paragraph 4.33, under the heading "Notice to the Defendant Essential", *Spencer Bower* states that:

> "Natural justice requires that the proceedings be brought to the actual notice of the defendant, who must have a fair

> opportunity of presenting his case … A foreign decision *in personam* will not be recognised if aspects of the procedures offend English views of substantial justice. Thus in *Adams* [*v Cape Industries plc* [1990] Ch 433 (CA)] an arbitrary assessment of the damages awarded to 206 plaintiffs by a US Federal District Court, not based on evidence or the individual entitlements of the plaintiffs, was not recognised".

127. This issue is also addressed in *Dicey, Morris & Collins: The Conflict of Laws* 16th edition, Rule 55 at 14R-158:

> "A foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice".

128. In paragraph 14-159, the authors of *Dicey* refer to authority on this issue, and state:

> "In *Jacobson v Frachon* Atkin L.J., after referring to the use of the expression "principles of natural justice," said: "Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court." Questions of natural justice should at least ordinarily be addressed to the specific circumstances under which the foreign judgment was obtained, rather than the features of the foreign legal system as a whole"

129. The authors then go on to discuss *Adams v Cape* and state that the "case is therefore an example of a breach of natural justice outside the categories of notice and opportunity to be heard". A recent example of a case in which there was a breach of natural justice, in the context of foreign proceedings, is *Agbara v Shell Petroleum* [2019] EWHC 3340 (Jason Coppel QC). There, Shell had been prevented from presenting its defence in response to the claim (see paragraph [37]).

130. The Claimants rely on three separate reasons in support of their argument that the CCBDC judgment does not give rise to any *res judicata* which precludes Maersk GB (or indeed Maersk A/S if it were to be regarded as privy of Maersk GB) from advancing the relevant claims in the present proceedings, including the reliance placed on the Himalaya clause and the claim for a declaration of non-liability. If any of these three reasons were to be upheld, that would be sufficient for the Claimants' purposes – albeit they contend that all three reasons should be accepted by the court. The three reasons are: (i) the absence of jurisdiction on the part of the CCBDC, in the light of the exclusive jurisdiction clause agreed between the parties; (ii) the judgment is not final as a matter of Guinea-Bissau law; and (iii) that Maersk GB was denied natural justice in relation to the conduct of the Guinea-Bissau proceedings. In my view, all three of these reasons are well-founded, as discussed below.

E2: The application of CJJA section 32.

131. In order to give *res judicata* effect to the CCBDC judgment, the English court would need, as a starting point, to recognise that judgment. Section 32 of the CJJA 1982 provides for the circumstances in which a judgment should not be recognised or enforced in the United Kingdom. If section 32 (1) applies, and its application is not excluded by section 32 (2), then the English court is bound *not* to recognise or enforce the foreign judgment: see *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309 paragraph [43].

132. There are three conditions that need to be fulfilled if section 32 (1) is to apply.

133. The first is that the bringing of the proceedings in (here) Guinea-Bissau was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in that country. In the light of Clause 26, as well as my conclusions in Section D above as to the enforceability of Clause 26 by Maersk GB (and indeed Maersk A/S), it is clear that the first condition is satisfied.

134. The second condition is that the proceedings were not brought in that court by or with the agreement of the person against whom the judgment was given. I have seen no evidence of any such agreement, and indeed no such agreement is relied upon in Almar-Hum's defence.

135. The third condition is that Maersk GB did not counterclaim in the proceedings or otherwise submit to the jurisdiction of the court.

136. There is no pleaded case that there was any counterclaim by Maersk GB. In the course of the hearing, I asked Mr Rosario and Professor Vicente about one passage in the defence which Maersk GB had submitted in the course of the Guinea-Bissau proceedings. That defence, dated 3 November 2020, took the jurisdictional objection as its first point, in reliance on Clause 26. There is nothing in the document which is headed counterclaim, or which asserts what one would ordinarily regard as a counterclaim; i.e. a claim which seeks to enforce contractual or tortious rights arising out of an alleged breach of contract or tortious conduct by a claimant. However, at the end of the defence, Maersk GB set out the substance of the orders that it was seeking. The first order, based on lack of jurisdiction, was for the defendant to be removed from the proceedings. This order concluded with the words "or, if such is not considered to be the case". The next order, also based on lack of jurisdiction, also concluded with those words, as did all but the penultimate order in paragraph (vii).

137. The final order in paragraph (viii) said:

> "The Applicant must be charged with litigation in bad faith of an amount yet to be determined but never less than USD 600,000, and a fine and the Defendant's lawyers' fees, and also costs, dignified prosecution and other costs with the case".

The allegation of litigation in bad faith was spelled out in an earlier section of the defence, Section X comprising paragraphs 108 – 115.

138. I raised with Mr Rosario and Professor Vicente whether this might be considered to be a counterclaim. Both of them, from the perspective of Portuguese (and therefore Guinea-Bissau) law said that it would not be regarded as a counterclaim. In essence, the court has a power (albeit used very infrequently) to impose sanctions upon parties who conduct litigation in bad faith, essentially as a disciplinary measure and a way of ensuring that its processes are not abused. Section X of the defence, and paragraph (viii) of the orders sought, invited the court to impose such sanctions. Professor Vicente described this as a very specific claim concerning the procedural behaviour of a party, unrelated to the substance of a dispute. The court's power to impose a sanction, which included an indemnity for costs, was an exceptional measure which would only be allowed in extreme situations.

139. As indicated above, Almar-Hum did not contend that there had been any counterclaim by Maersk GB. I do not consider that, in context, Maersk was here advancing a counterclaim. The request for the imposition of sanctions, which was combined with a request for lawyers' fees and other costs, would not be regarded as a counterclaim under the law of the place where the request for this measure was made. Whilst the question of how to construe "counterclaim" in the context of the CJJA 1982 must be a matter of English law, I consider that it must be relevant to take into account how a particular request for an order or relief would be viewed by the courts of the place where the request was made. Even if, however, one only paid regard to English concepts, I would not consider that this was a counterclaim in any real sense. In English litigation, a party can seek relief or remedies from the court without making a counterclaim: for example, a defendant may ask for costs, or indemnity costs, or enhanced remedies consequent upon the claimant having failed to "beat" a Part 36 offer. Although these are requests for remedies, they would not be regarded as being in the nature of a "counterclaim". They are in the nature of procedural rights or remedies which are consequential on the outcome of the litigation, including the way that it has been conducted. I do not consider that the request here by Maersk GB is any different in substance: it was a request for the imposition of a sanction in consequence of the way in which the litigation had been conducted by Almar-Hum.

140. In addition, there is the separate question (arising in relation to the third condition of section 32 (1)) of whether Maersk GB did "otherwise submit to the jurisdiction of that court". Section 33 of the CJJA identifies certain matters which are not to be regarded as a submission. A person thus does not submit if he appears for "all or any one or more of" the purposes set out in section 33 (1) (a) – (c). Accordingly, an appearance for any one of those purposes will preclude a submission.

141. In the present context, both (a) and (c) are relevant and applicable. It was not wholly clear, from Almar-Hum's pleading, whether it was alleged that Maersk GB submitted to the jurisdiction by virtue of submitting their Statement of Defence and then seeking to maintain that defence. In so far as that argument was advanced, it is unsustainable. In its defence, Maersk GB's very first point was to assert the court's lack of jurisdiction, based upon Clause 26. Professor Vicente's evidence (which I accept in all respects) was that it was necessary for Maersk GB also to address, in its defence, the merits of the case. However, this does not take Maersk GB outside the protection of section 33 (1) (a). One of the purposes of Maersk GB's appearance (including the submission of its defence) was to contest the jurisdiction of the court. Where the procedural requirements of the overseas court require a party, who is challenging

jurisdiction, to address the merits, a party can do so without being held to have submitted to the jurisdiction of that court: see *Ecobank* at [67].

142. It is perhaps because of the difficulty of Almar-Hum founding a submission on Maersk GB's defence (submitted in November 2020) that Almar-Hum's defence identifies an earlier stage when they allege that Maersk GB submitted. (This was the point that Mr Henton spotted in his overnight review described in Section A, paragraph 12 above). Thus, paragraph 37 of Almar-Hum's defence alleges that, prior to service of its defence in the substantive proceedings (Case 175/020), Maersk GB "had by that stage already accepted the jurisdiction of the CCBDC by its actions in process no 176/020". The reference to 176/020 appears to a typographical error: the intended reference was to case 146/020 (which is addressed in paragraphs 29 – 35 of Almar-Hum's defence).

143. I reject that argument. Case 146/020 was Almar-Hum's application for provisional measures resulting in the seizing of various assets of Maersk GB. Whilst it is true that Maersk GB opposed this, a party is entitled (see Section 33 (1) (c)) to appear in order to "protect or obtain the release of, property seized or threatened with seizure in the proceedings". In that regard, I have considered Maersk GB's submission to the judge, dated 15 October 2020 to which Mr Henton referred me at the hearing. That submission, which referred back to an earlier submission, was in support of the proposition that a precautionary seizure was unjustified, and that Maersk GB had suffered significant loss as a result of having "its offices closed, accounts blocked, furniture and vehicles seized".

144. Accordingly, the third condition in section 32 (1) is also satisfied: Maersk GB did not counterclaim in the proceedings or otherwise submit to the jurisdiction of the Guinea-Bissau court.

145. It follows that the court is bound not to recognise the Guinea-Bissau judgment relied upon by Almar-Hum. It follows that the judgment cannot be relied upon by Almar-Hum as giving rise to a *res judicata* for any purpose. I reach the same conclusion for each of the following two reasons as well.

E3: The finality of the CCBDC judgment

146. In the analysis of *Spencer Bower*, one of the requirements of *res judicata* estoppel is that decision must be final: see paragraph 1.02 (quoted above) and paragraph 5.01:

> "A judicial decision English or foreign is only a *res judicata* if it is final. The burden of establishing this rests on the party who relies on the decision".

147. *Spencer Bower* goes on to state, in paragraph 5.20, that the "party with the onus must adduce evidence that the decision is final in its country of origin". That proposition is supported by the judgment of Lord Reid in *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, 919:

> "...it seems...to verge on absurdity that we should regard as conclusive something in a German judgment which the German court...would not regard as conclusive. It is quite true that

> estoppel is a matter for the lex fori, but the lex fori ought to be developed in a manner consistent with good sense. The need to prove whether West German law would permit these issues to be re-opened there appears to have escaped the notice of the appellant's advisers."

148. In the present case, Almar-Hum has adduced no evidence at all to discharge its burden of proving the finality of the CCBDC judgment.

149. In contrast, Maersk GB has adduced evidence from a well-qualified and impressive expert witness, Professor Vicente, in support of the proposition that the CCBDC judgment is not final in its country of origin. The underlying basis of that opinion is his evidence that an appeal against the judgment was lodged in time by Maersk GB on 15 March 2019, and that there has been no ruling in relation to that appeal. Article 687 of the Guinea-Bissau Code of Civil Procedure ("the Code") provides as follows:

> "(1) Appeals shall be filed by means of an application, delivered to the registry of the court that handed down the judgement under appeal and indicating the type of appeal lodged.
>
> (2) The filing of the application fixes the date on which the appeal is lodged.
>
> (3) When the application is filed with the proceedings, it will be rejected if it is considered that the decision does not allow for an appeal, or that the appeal was lodged out of time, or that the applicant does not have the necessary conditions to appeal. However, it may not be rejected on the grounds that there has been an error in the type of appeal: if an appeal has been lodged that is different from the one that should have been lodged, the terms of the appeal that is deemed appropriate shall be followed.
>
> (4) The decision admitting the appeal, determining its type or determining its effect is not binding on the higher court, and the parties may only challenge it in their pleadings."

150. Professor Vicente's evidence is that, as a matter of Guinea-Bissau law, Article 687 requires a preliminary order on the admission or rejection of the appeal. Here, there has been no such order. The consequence is that the appeal filed by Maersk against the judgment is still pending. The effect of a pending appeal under Guinea-Bissau law includes the "suspension or paralysation of the *res judicata* effect of the contested decision". In that context, Professor Vicente referred to Article 677 of the Code, which provides:

> "The judgment shall be deemed to have become res judicata or final as soon as it is not subject to an ordinary appeal or complaint under the terms of articles 668 and 669 of the Civil Code".

151. Professor Vicente explained what had in fact happened to the appeal which had been lodged. Instead of making a preliminary order on the admission or rejection of the appeal, the incumbent judge (who has since been suspended from office as described further in Section E4 below) ordered that the appeal and the accompanying documents should be removed from the case file, on the basis that the judge considered that Maersk GB's counsel were not properly enrolled in the Guinean Bar Association. However, as Professor Vicente explained in response to my questions at the trial, this decision of the judge cannot be regarded as being a decision required under Article 687. The judge was required to decide, on a preliminary basis, whether or not the appeal was admissible. Here, the appeal was clearly admissible under Guinea-Bissau law, because it exceeded the relevant applicable monetary value. The judge should therefore have decided that the appeal was admissible, and indeed there is a constitutional right for Maersk GB to appeal. If, however, the judge was going to decide to reject the appeal, albeit that there was no substantive reason for doing so, then he was required to issue an order rejecting the appeal. Here, however, the judge's decision was to remove the appeal from the file. Professor Vicente described this as one of a number of "very uncommon" aspects of the proceedings in Guinea-Bissau. He said that there was a big difference between an order rejecting an appeal, and a decision simply to remove documents from the file. The former would provide a record of the order made, and this could then be the subject of an application for review by an appeal court. But if documents were just removed from the file, as happened here, then it would make it more difficult for any appeal court, or other reviewer, to know what had happened.

152. Professor Vicente's conclusions were in summary that: the judgment of 5 March 2021 was devoid of *res judicata* effect since it did not meet the requirements laid down in Article 677 of the Code; that, accordingly, Maersk GB has so far not been found liable in Guinea-Bissau under a final and unappealable judgment; that, under Article 692 of the Code, enforcement of the judgment is suspended while an appeal is pending; and that the judgment is unenforceable in Guinea-Bissau.

153. I do not consider that there is any reason why I should reject these conclusions, which were not the subject of any contrary evidence. I therefore accept them.

154. Accordingly, Almar-Hum's *res judicata* argument fails for the additional reason that the finality of the CCBDC judgment has not been proved, and that the evidence establishes that it is not final.

E4: Natural justice

155. Maersk GB was represented, in relation to the proceedings giving rise to the judgment (case 175/020) relied upon as *res judicata*, by Miranda, the law firm headquartered in Lisbon. The firm carries out a significant amount of work in Africa, and has alliance offices in 12 African countries including Guinea-Bissau. Mr Rosario, an attorney at Miranda, gave a detailed written statement which outlined the chronology of events relating to those proceedings, and provided an explanation of the meaning and effect of various orders which were issued by the CCBDC as part of those proceedings. He gave oral evidence at trial.

156. Mr Rosario is not himself qualified in Guinea-Bissau law, but he had two colleagues with whom he worked and who had close involvement with him throughout the

course of his work for Maersk GB in connection with case 175/020 and other aspects of the litigation against the company. (Case 175/020 was one of numerous cases (13 in total) commenced by Almar-Hum in relation to the events concerning this shipment). Those colleagues were Ismael Mendes de Medina and Emilio Ano Mendes, both of the law firm GB Legal which is one of Miranda's alliance offices in Guinea-Bissau. Mr Rosario's evidence, supported by documents submitted to Judge Carlos in the course of the proceedings (and contrary to the position taken by the judge) is that both Mr Medina and Mr Mendes were Guinea-Bissau qualified and are registered with the Guinea-Bissau Bar.

157. Miranda was first instructed on 24 April 2020, and it has continued to represent Maersk GB (and, as I understand it, the Maersk group more generally) since that time. Mr Rosario's chronology focused on the development in case 175/020, because that is the case which has given rise to the judgment relied upon as *res judicata*. However, he also addressed, albeit more briefly, other aspects of the overall litigation, including the case (146/020) in which Almar-Hum applied for and obtained precautionary measures against Maersk GB and to which I have referred in Section E2 above.

158. There was considerable detail in Mr Rosario's statement, but I have not included that detail in the body of this judgment. Instead, the Appendix to this judgment, which is mainly based on Mr Rosario's evidence, sets out a chronological account of the way in which the proceedings in case 175/020 developed, and the various orders made by the judge in those proceedings, Judge Alberto Leão Carlos. The course of events can in my view fairly be described as profoundly disturbing and indeed shocking, and I have no doubt on the evidence that the proceedings which resulted in the judgment now relied upon were opposed to natural justice (to use the test in *Dicey* Rule 55) and that aspects of the procedures offend English views of substantial justice (to use the test in *Spencer Bower*).

159. In summary, Maersk GB was prevented by the judge from putting forward its defence to the claim (including its jurisdictional objection) on grounds which had no substance. The case then moved forward to judgment on the basis of an order by the judge that, in the absence of a defence, Maersk GB was deemed to admit all the allegations made by Almar-Hum. The judgment issued by the judge in March 2021 does not therefore deal with the jurisdictional objection at all, and nor does it deal with other aspects of Maersk's response to the case which had been advanced. Furthermore, following judgment, the judge took steps which were designed to prevent Maersk GB from effectively pursuing its constitutional right to an appeal: as discussed in Section E2 above, the judge should have made a preliminary order which accepted the appeal (in the sense of allowing the appeal to move forward), but instead removed the appeal papers from the court record.

160. The judge's original decision to remove Maersk GB's Statement of Defence from the record was made on the basis that court fees had not been paid. As set out in the Appendix, Mr Rosario explained (with the benefit of the input of his Guinea-Bissau colleagues) why this order had no basis in Guinea-Bissau law. However, even if I were to assume that the order was correctly made in accordance with Guinea-Bissau law, I would nevertheless conclude that there had been a denial of natural justice from the perspective of English law. The position was that a very substantial claim had been made against Maersk GB. That company had not invoked the jurisdiction of the Guinea-Bissau courts, and indeed its position was that the CCBDC had no jurisdiction

in relation to the claim. The company was simply seeking to defend itself, and in my view it is contrary to natural justice for a defendant to be refused the opportunity to defend itself unless court fees were paid. This conclusion is reinforced in the present case by the fact that one of the points which Maersk had made in its Statement of Defence was that it should be exempt from the payment of court fees due to the fact that its bank account, offices, movable assets therein and vehicles had been seized in consequence of the precautionary measures application made by Almar-Hum. Even if (which I do not accept) it is generally in accordance with natural justice for a defendant to be required to pay court fees in order to defend itself, the position is different where there were, as here, understandable reasons why the fees have not been paid, and a reasonable request for exemption made.

161. My conclusions above, as to the disturbing course of events in the CCBDC and that natural and substantial justice was denied, is supported by the fact that Judge Carlos has been suspended from office in consequence of the way in which he has dealt with this case. The position here, described, in Mr Rosario's statement, is that Maersk GB and Miranda formed the clear view that it would be impossible for Maersk to receive a fair trial within the Guinea Bissau courts whilst Judge Carlos presided over these cases. Miranda therefore advised Maersk that it would be necessary to seek the removal of the Judge. This is permitted under Guinea-Bissau law in certain circumstances. Under Guinea-Bissau law, judges are bound to obey the law, administer justice and assure the legitimate interests of the citizens, and perform their duty with honesty, impartiality, diligence and dignity. Miranda considered that the threshold for a challenge had been met, given the various irregularities that had already occurred in this case.

162. Accordingly, on 3 June 2020 (at a time when the precautionary measures order had been made in 146/020, but the Statement of Claim in 175/020 had not yet been served), Maersk GB filed a claim with the Superior Council of the Judiciary describing the acts performed by Judge Carlos, and requested the opening of disciplinary proceedings against him and also that he be suspended from his duties, in particular in relation to cases involving Maersk GB. The claim was based on the fact that the judge had failed to comply with his duties as a judge, notably those regarding obedience to the law and to perform his duties with honesty, impartiality, diligence and dignity. Amendments to that claim were subsequently filed as the underlying proceedings developed: on 22 July 2020, 5 November 2020, 17 November 2020 and 7 May 2021. The Superior Council was thus provided an update on the successive actions of the judge.

163. At a meeting on 16 September 2021, a representative of the Superior Council advised that they had prepared a preliminary report, which advised the Superior Council to suspend the judge and initiate disciplinary proceedings against him.

164. In the following week, Mr Medina and Mr Mendes met with the interim President of the Supreme Court and his Chief of Cabinet. They were informed that the judge was to be suspended and substituted by one of the two remaining judges at the CCBDC. The interim President said that he would convene a meeting of the Superior Council of the Judiciary to resolve this as soon as possible.

165. The suspension of the judge took effect on 8 December 2021. In relation to proceedings in 175/020, Judge Carlos was replaced by a new judge. That judge

decided to annul decisions reached by Judge Carlos in two of the underlying cases, and he ordered the return of the seized assets and the release of the bank account of Maersk GB.

166. In his oral evidence, Professor Vicente described the judge's removal from the court, by way of suspension, as uncommon and very serious. He said that it would only have happened if the Superior Council had been convinced that serious and inappropriate acts had been performed by the judge. I accept that evidence.

167. Accordingly, for this third (and separate) reason, namely denial of natural or substantial justice, the judgment relied upon by Almar-Hum does not give rise to a *res judicata*.

E5: Waiver

168. It is convenient here to deal with a separate plea of waiver advanced by Almar-Hum. It pleads that Maersk GB has waived the protection of the Himalaya clause by bringing a claim under the contract(s) of carriage in its own name in Guinea-Bissau. It refers to a claim made in process no. 41/020, in which Maersk GB sought freight in respect of the cargo from the courts of Guinea-Bissau. It contends that this "action was inconsistent with [Maersk GB] being a mere "Subcontractor, agent or servant" of [Maersk A/S]".

169. It is not disputed by the Claimants that Maersk GB did begin proceedings for freight owed under a bill of lading. However, the Claimants have produced documents that show that the relevant bill of lading concerns a separate shipment, and is not one of the 13 bills of lading with which the present case is concerned.

170. In any event, these matters do not in my view provide even the beginnings of a case on waiver of the protection of the Himalaya clause. The nature of the waiver relied upon is unspecified in the pleading. Since this is not a case involving waiver in the sense of "election" (for example between different remedies), the case would need to be advanced as one based on estoppel. For that purpose, Almar-Hum would need to establish a clear representation and reliance. The commencement of the proceedings *by Maersk GB* for the recovery of freight on a different bill of lading does not give rise to any representation at all, let alone a clear representation, by Maersk GB as to what its position would be in the event that proceedings are brought *against Maersk GB*. There is certainly no representation that it will not rely upon the Himalaya clause, or indeed the EJC, in the event that proceedings are commenced against it in breach of the provisions of the bills of lading. Furthermore, there is no evidence of any reliance by Almar-Hum on the representation that they would need to establish. Any case of estoppel is, therefore, hopeless.

171. Furthermore, the EJC in the bills of lading expressly permit the Carrier, at its sole option, "to commence proceedings against the Merchant at a competent court of a place of business of the Merchant." What happened, in the proceedings relied upon by Almar-Hum on its waiver case, is that proceedings were brought not by the Carrier (Maersk A/S), but rather by Maersk GB. This would give rise to a potential argument by Almar-Hum, in the context of those proceedings, that Maersk GB had no title to sue: on the basis that Maersk A/S was the party entitled to the freight, and therefore the party entitled to sue for it (at its option in Guinea-Bissau). It is not clear whether,

in those proceedings, Almar-Hum ever advanced that particular argument. However, all of this is a very long way from a case of waiver.

172. Accordingly, I reject all of Almar-Hum's arguments, arising in connection with proceedings in Guinea-Bissau, based on *res judicata* and waiver.

F: The Claimants' claim for a declaration of non-liability

173. Maersk A/S and Maersk GB each claim a declaration that it has no liability to Almar-Hum under or in relation to the contracts of carriage evidenced by the 13 bills of lading which were issued in February and March 2019. In its defence, Almar-Hum disputed the Claimants' entitlement to such a declaration, relying principally upon the *res judicata* effect of the CCBDC judgment, but also upon some other points.

174. The Claimants reach the conclusion that there was no liability to Almar-Hum via a number of different routes, each of which is sufficient in itself to negate any liability. The Claimants requested the court to address all of their arguments, as advanced at the hearing, as to why they had no liability, in so far as the court felt able to do so. In particular, the Claimants requested a final determination as to the merits that they have no liability for the alleged delays following the seizure of the bills of lading, regardless of whether the court also finds there to be no liability on the basis (for example) that Almar-Hum's claim is time-barred, or on the basis that Maersk GB is not the contractual carrier.

175. My approach in this section is to identify the principal reasons why, in my view, neither of the Claimants has any liability to Almar-Hum. In so doing, I will address the merits of the claims, although I do not consider it necessary or appropriate to address every strand of all of the arguments (which were to some extent overlapping) which the Claimants were able to advance.

F1: Identity of the carrier and the Himalaya clause

176. The first and simple point concerns the position of Maersk GB. I have concluded that the contracts of carriage were made on the terms of Maersk A/S's standard terms, as ultimately set out on the reverse side of the bills of lading. Under those contractual terms, the contractual carrier was Maersk A/S, not Maersk GB. Any alleged liability to Almar-Hum in relation to the alleged delay in delivering the cargo, or otherwise in relation to the carriage that was performed by Maersk A/S would (if such liability were to be established) be a liability of Maersk A/S, not Maersk GB. Since Maersk GB was not the carrier under the contracts of carriage, it can have no liability in respect of any alleged non-performance of mis-performance of those contracts by Maersk A/S.

177. The same conclusion is reached by considering the terms of the Himalaya clause, which (see Section D above) is enforceable by Maersk GB. Clause 4.2 (a) is an exemption clause in very wide terms. It provides that no Subcontractor or agent shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss, damage or delay or any kind [etc]. Maersk GB was a "Subcontractor" (and perhaps also an "agent"), and the claims made by Almar-Hum fall squarely within the exclusion.

F2: Time-bar

178. Article III Rule 6 of the Hague Rules provides a 1-year time limit for the commencement of suit. Under English law (which is the applicable law of the contracts of carriage), this requires suit to be brought in the agreed contractual jurisdiction, here England: see *The Havhelt* [1993] 1 Lloyd's 523 (Saville J); *Hin-Pro* at paragraph [40] (Cooke J). The proceedings wrongly brought by Almar-Hum in Guinea-Bissau therefore do not prevent the 1-year time bar from taking effect.

179. Accordingly, Maersk A/S as the carrier under the bills of lading can rely upon the 1-year time-bar. Maersk GB is entitled, under the Himalaya clause (Clause 4.2 (c)) to rely upon the same defence. Accordingly, neither Claimant has any liability to Almar-Hum for this reason.

F3: Clause 8.1

180. Clause 8.1 negatives any undertaking on the part of Maersk A/S in relation to the availability of the Goods or any documents relating thereto, and it expressly provides that the "Carrier shall under no circumstances whatsoever and howsoever arising be liable for any direct, indirect or consequential loss or damage caused by delay". This, again, is a wide exclusion. In my view, the claims advanced by Almar-Hum are all in respect of alleged delay, whether in relation to issuing bills of lading but also more generally in relation to the arrival and discharge of the goods in China. As such, they are barred by Clause 8.1 – and this is so even if (contrary to my conclusions below) these claims for delay had any factual merit.

181. Again, Maersk A/S as carrier can rely upon Clause 8.1, and Maersk GB can do so via the Himalaya clause.

F4: Clause 15. 3 and the cause of the delays

182. The Claimants referred to a number of contractual clauses (clauses 8.3, 14.3 and 15.3) in the context of their argument that the cause of any delayed delivery of the Cargo was Almar-Hum's own failure to pay its debts to the state of Guinea-Bissau. I considered that the clause which was most directly relevant to this argument was clause 15.3, which it is convenient to set out again here:

> "15.3 The Merchant shall comply with all regulations or requirements of customs, port and other authorities, and shall bear and pay all duties, taxes, fines, imposts, expenses or losses (including, without prejudice to the generality of the foregoing Freight for any additional Carriage undertaken) incurred or suffered by reason of any failure to so comply, or by reason of any illegal, incorrect or insufficient declaration, marking, numbering or addressing of the Goods, and shall indemnify the Carrier in respect thereof."

183. In my view, there was a clear breach by Almar-Hum of its obligation to comply, in the context of the Cargo, with the "regulations or requirements" of "other authorities". The factual position, as set out in detail in Section B above, is that all of the problems which Almar-Hum experienced stemmed from its own unwillingness and failure to

comply with its financial and other obligations to the state of Guinea-Bissau in relation to the export of the Cargo.

184. The initial breach occurred when Almar-Hum made it clear that it would not be paying to the government the sum of XOF 4,500,000 per container which (pursuant to the 2016 agreement for the export of timber) it was required to pay before the goods were loaded onto an exporting vessel. Almar-Hum's unwillingness to do so became clear when it obtained the 12 December 2018 Order from the CCBDC.

185. The next significant breach occurred when Almar-Hum acted in violation of the Termo de Responsabilidade concluded on 28 December 2018. This agreement contained an undertaking by Almar-Hum to pay the amounts due to the government immediately after shipment (i.e. instead of prior to loading as required by the 2016 contract) and no later than 15 days thereafter. No such payments were made. There was also a clear agreement that the bills of lading, and other relevant shipping documents, would be left with the Public Treasury, pending payment of the "corresponding amount". Almar-Hum sought to negate and circumvent this by obtaining the orders from the CCBDC in January and February 2019. However, the contractual position, as between Maersk A/S and Almar-Hum, is that Termo de Responsabilidade contained "requirements" of the "authorities" within the meaning of clause 15.3 and that Almar-Hum was in breach of that clause.

186. Almar-Hum's defence asserts that the Termo de Responsabilidade was concluded under duress. However, Almar-Hum adduced no evidence of any such duress and there was no contemporary document which supported a case of duress. There can therefore be no argument as to the validity of the obligations in the Termo de Responsabilidade. Indeed, even if there were any duress, the obligations to pay the monies due and to leave the shipping documents with the Public Treasury were nevertheless (from the perspective of clause 15.3 of the bills of lading) "requirements" of the "authorities". The same conclusions apply in relation to Almar-Hum's allegation of duress in relation to the Debt Settlement Agreement discussed in the following paragraph.

187. The third significant breach occurred in April 2019. At that time, there had been relatively little delay to the Cargo, which had only arrived at the transshipment ports of Nansha and Hong Kong during the month of March 2019. On 8 April 2019, Almar-Hum and the government entered into the "Debt Settlement Agreement". This required a settlement of Almar-Hum's debt, amounting to XOF 675,000,000, within 8 days of signature. Again, the evidence is that this was not paid. The release of the Cargo was only obtained some time later, after the intervention of Rotterbi.

188. In my view, Maersk A/S has a complete answer to Almar-Hum's claim based on Clause 15.3 of the standard terms (and Maersk GB is also entitled to rely upon that clause via the Himalaya clause). In summary, such delays as occurred were a consequence of Almar-Hum's dispute with the government or state of Guinea-Bissau, and Almar-Hum's unwillingness and failures to meet its obligations in that regard.

189. This conclusion also, in my view, gives rise to an entitlement on the part of the Claimants to rely upon Clause 15.2 as well.

190. In the light of these conclusions, it is not necessary to consider the possible application of clauses 8.3 or 14.3.

F5: No breach by Maersk A/S in any event

191. The Claimants submit that Maersk A/S as contractual carrier delivered the cargoes at the earliest reasonable opportunity following the release of the bills of lading and the CITES certificates from their seizure by the Guinea-Bissau authorities. They contend, in summary, that there was no breach by Maersk A/S at any stage of any relevant obligation.

192. In my view, Almar-Hum cannot establish that there was any breach, on the facts, by Maersk A/S (or indeed Maersk GB). The factual position is, as Mr Henton submitted, that the Claimants were effectively caught in the middle of a dispute between Almar-Hum and the state or government of Guinea-Bissau. Irrespective of my conclusions in sections F3 and F4 above, it is difficult if not impossible to identify any point in time at which it could be said that Maersk breached any obligations owed to Almar-Hum.

193. The factual position, as set out in Section B above, is that there was no delay caused by the Claimants to the shipment of the Cargo in December 2018. The Claimants did nothing to obstruct the export of the Cargo, and the vessel sailed in time to avoid the introduction of new CITES restrictions which were concerning Almar-Hum.

194. The position in the period up to 21 February 2019 is that the bills of lading were still in draft form. That was because, on the evidence of Mr Beavogui, Almar-Hum had not given confirmation of its final shipping instructions – and indeed had not fully paid the origin charges – which would have enabled Maersk to issue its AFR (Approval of Freight Release) and issue original bills of lading. I do not accept an argument, advanced by Almar-Hum in its defence, that (in the period prior to 21 February 2019) Maersk was in breach of an obligation under Article 3 Rule 3 of the Hague Rules to issue bills of lading to Almar-Hum. Article 3 Rule 3 requires a "demand" by the shipper. One would ordinarily expect to see such a "demand" in a communication between the shipper and the carrier, but there is no evidence of such a communication in the documents here. On the contrary, Mr Beavogui's evidence is that it was Maersk that was requesting Almar-Hum's final bill of lading approval, and that this was not forthcoming.

195. I have considered whether it could be said that the CCBDC Order dated 18 January 2019 could be regarded as a "demand" within Article 3 Rule 3 of the Hague Rules. It is certainly not what one would ordinarily expect to see as a "demand" by the shipper. In those circumstances, and also in the light of the fact that Almar-Hum had failed to give final approval to the draft bills of lading, I do not accept that the 18 January Order was, even though obtained at the request of Almar-Hum, a "demand" within Article 3 Rule 3. Furthermore, I accept the point which Professor Vicente made as to the effect of the 18 January Order. He said that Maersk could not have delivered the bills voluntarily upon being notified of that order, because they did not yet physically exist at such time, for reasons beyond their control. There was therefore nothing actually in existence, at that date, upon which the CCBDC's Order could bite.

196. The next important development was Maersk's decision to override its system, and to issue 11 of the bills of lading to the Judiciary Police on 21 February 2019. This was

done in order to avoid the arrest and imprisonment of Maersk GB employees. The Judiciary Police appear to have been acting at the behest of the state or government of Guinea-Bissau which (in the Termo de Responsabilidade) had been given an undertaking by Almar-Hum to leave the bills of lading (and other documents) with the Public Treasury. Mr Henton submitted that Clause 19.1 (f) of the standard terms entitled the Claimants to hand over the bills of lading at that time. This was compliance with "any orders or recommendations given by any government or authority or any Person or body acting purporting to act as or on behalf of such government or authority". I agree with that submission. There was, therefore, no breach by either Claimant in issuing final bills of lading and giving them to the Judiciary Police.

197. Approximately two weeks later, at the beginning of March 2019, Maersk gave the remaining two bills of lading (which could not be drawn up on 21 February) to the CCBDC. I do not see how Almar-Hum could complain about this (and I do not understand them to make such a complaint). It is interesting to note, however, that the delivery of these two bills of lading did not enable Almar-Hum to obtain delivery of the cargo covered by those bills. This is because Almar-Hum did not have other documents required for import, in particular the CITES certificates. I return to this point in Section F6 below.

198. The position as at 21 February and in early March 2019 is that the Cargo had not yet arrived at the transhipment ports of Hong Kong and Nansha. Thereafter, there is no evidence of any relevant delay on the part of Maersk in performing the contracts of carriage. Delivery was eventually taken after Almar-Hum had resolved the problems which (see section F4 above) were of their own making, and were ultimately able to provide their consignees with bills of lading and other relevant documents including CITES certificates.

199. Accordingly, I do not consider that any breach of the contracts of carriage has been established. Rather, the Claimants have established that there was no relevant breach.

F6: Causation

200. A further argument advanced by the Claimants is that none of the delays would have been avoided even if the bills of lading had been provided to Almar-Hum, rather than being given to the Judiciary Police. This point arises from the fact that, as Ms Li's evidence makes clear, documents other than the bills of lading were required in order to obtain delivery in China. In particular, the CITES certificates were critical documents that Almar-Hum needed to obtain. They were, however, unable to obtain them for some considerable time, owing to the dispute with the Guinea-Bissau state or government. This had nothing to do with Maersk.

201. I agree with the Claimants' argument. In my view, any breach by the Claimants (even if proved) in relation to the bills of lading, or any other aspect of the carriage, was not causative of any delay suffered by Almar-Hum. Almar-Hum would have suffered such loss anyway, because of a separate and independent cause (not having the CITES certificates). This is a case where, in my view, the ordinary rule of causation applies: see *FCA v Arch* [2021] UKSC 1 paragraph [181] (" if event Y would still have occurred anyway irrespective of the occurrence of a prior event X, then X cannot be said to have caused Y").

F7: Conclusion in relation to non-liability

202. Accordingly, for all of the above reasons, the Claimants are entitled to declarations of non-liability. I accept the Claimants' argument that there is sufficient, indeed considerable, utility in the court granting such relief, not least for reasons similar to those which led the court to grant declarations of non-liability in *Akai Pty Ltd v People's Insurance Co Ltd [*1998] 1 Lloyd's Rep 90, 106.

CONCLUSION

203. For the above reasons, the Claimants have established that Almar-Hum is liable for damages and/or an indemnity for breach of the Himalaya and exclusive jurisdiction clauses in the relevant contracts of carriage. Damages and/or the amount of the indemnity will be assessed hereafter.

204. The Claimants have also established that they are under no liability to Almar-Hum in relation to the performance of the contracts of carriage.

Appendix

Precautionary Measure - Case no. 146/2020

1. The Precautionary Measure proceedings ("146/2020") were issued by the Almar-Hum against Maersk GB on 17 April 2020, around the same time as the issuance of 175/2020. The presiding judge was the same as in 175/2020: Judge Alberto Leão Carlos. These proceedings are not the source of the USD 10,051,000 (equivalent) Judgment against Maersk GB. Instead they deal with "interim measures" including the seizure of Maersk GB's assets that was permitted by the CCBDC. The contents of the Statement of Claim in 146/2020 were broadly the same as 175/2020.

Summary of Declaratory Proceedings: 175/2020

2. The 175/2020 claim was issued by Almar-Hum as Claimant on 26 May 2020. The Almar-Hum Statement of Claim (the "SoC") formally named five defendants. Defendants 1 -3 were Maersk entities, which included Maersk GB, whilst defendants 4-5 were associated with the consignees in China.

3. On 26 May 2020 Almar-Hum filed the SoC (although Maersk GB were not served with this document at this time). The document replicated the factual background contained in SoC re Case No. 146/020 and claimed various remedies as a result of various alleged losses / damages.

4. On 1 June 2020 the CCBDC rendered Order 1 JUN2020 under which Almar-Hum was granted an exemption from paying the relevant court fees as the reasons under which such benefit was granted under Case No. 146/2020 should have not changed. The reasons for this benefit being granted under 146/2020 was that the precautionary measure proceedings were dependent on the declaratory proceedings. Miranda did not consider it correct for Almar-Hum to have been granted an exemption from paying Court Fees on the basis that a request needs to be made in every case (Article 17 .1 of DL 11/2010) and each time an applicant applies for such benefit, the opposing party (Article 20.1 of DL 11/2010) and the Public Prosecutor (Article 21 of DL 1 1/2010) shall be given the opportunity to respond to such request.

5. On 15 October 2020, Maersk GB was served with Almar-Hum's SoC.

6. On 3 November 2020 Miranda filed a Statement of Defence ("SoD") on behalf of Maersk GB, as they were entitled to do under Guinea-Bissau law, provided that this document is filed within 20 days of receiving the SoC. The Statement of Defence set out various arguments, including a challenge to the jurisdiction of the CCBDC. The relevant Power of Attorney, as required by Guinea Bissau law, was enclosed with the SoD. In relation to court fees, Miranda argued that Maersk should be exempt from the payment of court fees due to the fact that its bank account, offices, movable assets therein and vehicles had been seized.

7. On 10 November 2020 the CCBDC issued an Order, CCBDC Order 10NOV20, ordering the removal of the Maersk SoD from the Court file. Miranda was very surprised to receive this Order on the basis that the Maersk's SoD had been validly filed in accordance with Guinea Bissau law. The CCBDC's stated reason for doing so

was that Maersk had not paid their court fees. Miranda's view was that the CCBDC Order 10NOV20 had no basis in Guinea-Bissau law. They were not aware of any grounds that the CCBDC had for removing the SoD from the record because it was filed on time. In relation to the lack of payment of court fees, the CCDBC should have, first and foremost, notified the opposing party to respond, if it so wished, and further remitted the case to the Public Prosecutor for him/her to render his/her opinion on whether Maersk should be granted the benefit of exemption of payment of court fees and, afterwards, reviewed the request towards the exemption of court fees. Finally, if such benefit was to be dismissed, the CCBDC should have notified Maersk pay the payment of the court fees.

8. On 19 November 2020, and on the basis that Miranda considered the 10 November court order to have no basis in Guinea Bissau law, Maersk filed a motion of notice of appeal disputing CCBDC Order 10NOV20.

9. On 11 December 2020 Maersk was served with CCBDC Order 23NOV20 which accepted the notice of appeal filed on 19 November 2020 disputing CCBDC Order 10NOV20. It further determined that the appeal would be retained by the CCBDC and only be forwarded to the Bissau Court of Appeal (along with the first appeal) after the final judgment. A few days later, on 15 December, the CCBDC rendered Order 15DEC20 which clarified Order 23NOV20 on some wording issues.

10. On 18 December 2020 Maersk filed appeal pleadings disputing CCBDC Order 10NOV20 which had ordered the removal of Maersk GB's SoD from the record as no court fees were paid.

11. On 23 December 2020 Maersk filed a Claim to the President of Bissau Court of Appeal disputing CCBDC Order 23NOV20 and CCBDC Order 15DEC20 on the basis that the appeal should be immediately forwarded to the Bissau Court of Appeal. Miranda's argument for Maersk GB was that the retention of the appeal by the CCBDC would lead to irreparable damages for Maersk GB. Furthermore, that there was the risk of Maersk GB being condemned without being given the opportunity to have its defence and supporting evidence considered by the Court.

12. On 7 January 2021 the CCBDC rendered Order 6JAN21 which accepted Maersk GB's appeal pleadings and granted Almar-Hum an 8-day period to respond. It further dismissed Maersk GB's request on the exemption of court fees. Miranda considered CCBDC Order 6JAN21 to be illegal on the basis that the dismissal of Maersk GB's request on the exemption of court fees was not supported by Guinea-Bissau law (it did not rule on the merits of the request but simply denied it on the basis that it was "manifestly unfounded").

13. On 25 January 2021 the CCBDC rendered Order 23JAN21 which rejected the Claim to the President of the Bissau Court of Appeal as no court fees were paid. Miranda considered CCBDC Order 23JAN21 to be illegal as the dismissal of Maersk GB's request on the exemption of court fees was not substantiated.

14. On 1 February 2021 Maersk GB filed an application with a notice of appeal to dispute CCBDC Order 23JAN21.

15. On 23 February 2021 Maersk GB was served with two CCBDC orders which were as follows:

    (1) CCBDC Order 22FEB21 (1) ruling that the appeal filed disputing CCBDC Order 10NOV20 (which ordered the removal of the SoD from the proceedings) was void as Maersk GB, instead of paying the court fees, filed a claim disputing the court fees payment notices issued. Miranda considered CCBDC Order 22FEB21 (1) to be illegal as the CCBDC had not simply failed to pay the court fees, as was being suggested by the CCBDC, but had instead submitted an application disputing the Court Fees Payment Notices which is in line with the requirements of Guinea Bissau law. The Court had simply ignored this application and ruled on the lack of payment of such fees.

    (2) CCBDC Order 22FEB21 (2) a substantive ruling that found in Almar-Hum's favour. The basis of this Order was that the facts claimed by Almar-Hum are deemed as confessed by Maersk GB due to lack of submission of a Statement of Defence. Miranda considered CCBDC Order 22FEB21 (2) to be illegal because, as set out above, Maersk's SoD had been removed from the file without good reason. On this basis Miranda saw no reason how it could be considered *res judicata* under Guinea Bissau law. This was followed by a Judgment awarding a sum to the Defendant that was issued on 5 March discussed further below.

16. On that same day, 23 February 2021, Maersk filed an application with a Notice of Appeal disputing CCBDC Order 22FEB21 (1) (i.e. this being the first of the two Orders listed above, relating to the payment of court fees).

17. On 2 March 2021 Maersk was served with CCBDC Order 02MAR21 ordering the removal of the Notice of Appeal disputing CCBDC Order 22FEB21 as the Defendant's attorneys were allegedly not registered at the Bissau Bar Association. Miranda considered CCBDC Order 02MAR21 to have no legal basis because there were no legal grounds to order the removal of the application with the notice of appeal from the record. Furthermore, if the CCBDC Judge had any kind of doubts on the registration of Maersk GB's attorneys, he should have enquired of the Bissau Bar Association for such purpose. Both Mr Medina and Mr Mendes are registered at the Guinea-Bissau Bar and so Miranda considered this to be a bizarre Order to make and a further example of procedural irregularity on the part of the CCBDC.

18. On 2 March 2021 Maersk GB filed an application with a notice of appeal to dispute CCBDC Order 22FEB21 (2).

19. On 5 March 2021, Maersk GB was served with the judgment in the case (see further below).

20. On 9 March 2021 Maersk GB filed an application with a notice of appeal to dispute CCBDC Order 02MAR2l. It further enclosed two affidavits issued by the Bissau Bar Association attesting that Mr Medina and Mr Mendes are duly registered there.

21. On 15 March 2021, Maersk GB lodged its appeal against the 5 March 2021 judgment.

22. On 22 March 2021 Maersk was served with CCBDC Order 22MAR21 which rejected the Notice of appeal dated 9 March based on the fact that Mr Medina and Mr Mendes were not registered attorneys as per a list issued by the Bissau Bar Association and were, so it said, trying to "trick" the Court with a Bar Association Affidavit issued after the rendering of the Judgment. It further mentions that the parties should be notified of any court order or decision through their attorney which, if this were the case, would be impossible because, according to the CCBDC, Maersk GB had not appointed a lawful attorney. It further ordered the removal of such application from the record. Miranda's view was that CCBDC Order 22MAR21 was a clear demonstration that Maersk GB was being prevented from exercising its defence rights for the following reasons:

    (1) On one hand, it did not accept Maersk GB's attorneys, even after the production of documentary evidence attesting such capacity.

    (2) On the other hand, even if Maersk GB attorneys were not duly registered attorneys, Maersk GB should have been given the opportunity to appoint a new attorney.

    (3) Also, throughout the whole proceedings, Maersk GB was never served with any decision through its attorneys, rather directly at Maersk GB's premises, thus it is not reasonable to mention that Maersk GB may not be served with any decision.

    (4) Finally, the removal of the application from the record has no grounds in Guinea-Bissau law.

23. On 30 March 2021 Maersk GB filed an application requesting the CCBDC to declare CCBDC Order 22MAR21 null and void due to the failure to review the merits of the procedural grounds for annulment of CCBDC Order 02MAR2l. Maersk GB also declared that, if such request were not accepted, it would file a notice of appeal disputing CCBDC Order 22MAR21. It further enclosed two new affidavits issued by the Bissau Bar Association attesting that Maersk GB's attorneys were duly registered therewith.

Judgment Issued by CCBDC in 175/2020

24. On 5 March 2021 Maersk GB was served with Judgment 5MAR2021 condemning all the Defendants to compensate Almar-Hum for losses and damages in the amount of XOF 6,121,053,000, equivalent to USD 10,151,000. In Miranda's view, Judgment 5MAR2021 should not have been rendered for several reasons, notably: (i) 6 of the Defendants were never served with the SoC and did not have the opportunity to defend themselves; (ii) Maersk GB was prevented from having its defence reviewed; (iii) None of the appeals filed by Maersk GB reached the Bissau Court of Appeal.

25. Moreover, as far as concerns the losses directly connected with the purchase contract executed with Almar-Hum's client, the Judgment specifically mentions that the gains obtained by the Chinese businessmen, who unlawfully took Almar-Hum's merchandise, is totally unjustified. Miranda contends that there are no reasons nor facts that justify that unlawful enrichment (of USD 5,151,000, which was the price agreed by the parties for the purchase of the containers). Additionally, the Judgment

does not review the merits on the claim for USD 5,000,000 "moral damages and commercial and financial damages" as there is no reference or justification on why all claimants should be held jointly and severally liable for the payment of such compensations.

26. On 15 March 2021 Maersk GB filed an application with a notice of appeal to dispute CCBDC Judgment 05MAR21. The fate of this appeal, and Professor Vicente's evidence in relation to it, is set out in Section E3 of the judgment.

27. On 26 March 2021 Maersk GB was served with CCBDC Order 26MAR21 in relation to the appeal. The court considered that Maersk GB was not represented by duly registered attorneys, and that the Bar Association Affidavits offered by Miranda were not credible. Miranda considered there to be no legal basis for the CCBDC to say that Maersk GB was not represented by registered attorneys.

28. On 6 April 2021 Maersk GB filed an application with a notice of appeal to dispute CCBDC Order 26MAR21. There was no response from the CCBDC on this.

29. On 8 February 2021 the CCBDC issued three different Court Fees Payment Notices totalling nearly XOF 200m, as set out below. These Court Fee Payment Notices had been incorrectly addressed:

    a. XOF 133,471,357 in order to forward the Case File to the Bissau Superior Court;

    b. XOF 61,210,530 for the Appeal Pleadings;

    c. XOF 484,000 for the issuance of an Affidavit. This Court Fees Payment Notice is addressed to Aoor, Ki.

(Note: The exchange rate was approximately XOF 600 = USD 1)

30. On 12 February 2021 Maersk GB filed a Claim to the CCBDC Judge disputing the Court Fees Payment Notices and claims for their re-assessment and computation as follows: the Court Fees Payment Notice mentioned in (a) above should be re-assessed and computed to XOF 10,201,755. The Court Fees Payment Notices mentioned in (b) and (c) should be annulled as the fees calculated therein were not supported by law.

31. The court responded through CCBDC Order 22FEB21 (1) by simply rejecting the appeal for lack of payment of court fees and did not review the merits of Miranda's request.

32. On 9 July 2021 Maersk GB were served with two CCBDC notices in respect of Court Fees, (the "Court Fee Notices"). These were issued in the sum of XOF 135,069,357 and XOF 797,533,520 respectively (together "the Court Fees") and were to be paid within 10 days. The total sum across both Notices was XOF 932,602,877 which is equivalent to USD 1,494,131 at the current exchange rate.

33. Miranda considered these Court Fees to be excessive. They were well above what is permitted under Guinea-Bissau law. It was clear that the Court Fees were not correctly assessed, either because (a) there was an overcharge of the amount due as court fees provided in the law or (b) because such fees were not provided for in law.

34. On 19 July 2021, and in response to these Court Fees being issued, Maersk GB lodged an application disputing the Court Fee notices. This application was based upon the fact that the Court Fees were way in excess of what they should be under Guinea-Bissau law. The Court did not provide any response in respect of this.