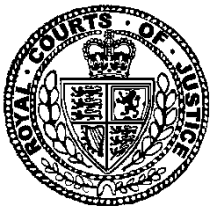

Neutral Citation Number: [2025] EWHC 1148 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION **KB-2023-004487**

BETWEEN

Royal Courts of Justice,
14 March 2025

Before
Master Dagnall
BETWEEN:

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(1) AON UK LIMITED
(2) AON BRASIL CORRETORA DE RESSEGUROS LIMITIDA (a company registered in Brazil)
(3) AON plc (a company registered in Ireland)
Claimants

-v-

(1) HOWDEN GROUP HOLDINGS LIMITED
(2) HOWDEN GROUP SERVICES LIMITED
(3) HOWDEN REINSURANCE BROKERS HOLDINGS LIMITED
(4) HOWDEN REINSURANCE BROKERS LIMITED
(5) TIGERRISK PARTNERS (UK) LIMITED
(6) HOWDEN RE CORRETORA DE RESSEGUROS LIMITIDA (a company registered in Brazil)
(7) HOWDEN BRASIL CONSULTORIA E CORRETORA DE SEGUROS LIMITIDA (a company registered in Brazil)
(8) ELLIOT RICHARDSON
(9) AHMED FAROOQ
(10) MASSIMO ANTONIO REINA
(11) LUKE FOORD-KELCEY
(12) ANTONIO JORGE DA MOTA RODRIGUES
Defendants

Amy Rogers KC, Ed Brown KC, Rupert Paines and Freddie Onslow appeared on behalf of the Claimants instructed by **Lewis Silkin LLP**
David Craig KC and Christopher Lloyd appeared on behalf of the First to Fifth and Eighth to Ninth Defendants instructed by **Mishcon de Reya LLP**
David Davies KC and Alexander Riddiford appeared on behalf of the Sixth and Seventh Defendants instructed by **Mishcon de Reya LLP**

Christopher Lloyd appeared on behalf of the Tenth Defendant instructed by **Mishcon de Reya LLP**
No counsel appeared on behalf of the Eleventh Defendant
Michael Holmes KC and David Barnard appeared on behalf of the Twelfth Defendant instructed by **Stewarts Law LLP**

APPROVED JUDGMENT TRANSCRIPT
(Judgment delivered orally on 14 March 2025)

Digital Transcription by Epiq Europe Ltd,

MASTER DAGNALL:

A Introduction

1. This is my judgment in relation to four sets of applications by various defendants effectively for this court to decline jurisdiction in relation to certain of the claimants' claims against them in favour of various courts in Brazil, namely on the basis mainly that either those courts are the -- or clearly the -- most appropriate forum for those claims, or in the case of some of the defendants that the courts of England and Wales are not.

2. In the alternative, various of the defendants seek for me to strike out parts of the Claim on the basis that (or, possibly, to grant reverse summary judgment against the claimants to the effect that) certain causes of action are governed by the law of Brazil and not by the law of England and Wales.

3. Certain of the defendants also assert that orders which I made granting permission for them to be served out of the jurisdiction were obtained from me without full and frank disclosure having been made by the claimants and should be set aside as a result.

4. The applications of the 1st to 5th, 8th and 9th defendants are made by application notice of 5 February 2024. I will call those defendants “Howden UK2. They have all been properly served with these proceedings in England and Wales and are based in England and Wales. They appear before me by Mr Craig KC, leading Mr Christopher Lloyd of counsel, instructed by Mishcon de Reya LLP.

5. The 12th defendant applies by application notice of 5 February 2024. He has been properly served in England and Wales but is based in Brazil. He appears before me by Mr Michael Holmes KC, leading Mr David Barnard of counsel, instructed by Stewarts Law LLP.

6. The 10th defendant applies by application notice of 9 July 2024. He was served out of the jurisdiction under an order which I made on 7 April 2024, he is residing in Italy. Thus, his application for me to decline jurisdiction also includes an application to set

aside my April order. He appears before me by Mr Christopher Lloyd of counsel, instructed by Mishcon de Reya LLP.

7. The 6th and 7th defendants, whom I will call "Howden Brazil", have applied by application notice of 29 November 2024 to again set aside the order which I made in April 2024 for permission to serve out of the jurisdiction on them, they being located in Brazil, and for me to decline to exercise jurisdiction in relation to the claims against them. They also assert that full and frank disclosure was not made. They appear before me by Mr David Davies KC, leading Mr Alexander Riddiford of counsel.

8. The 11th defendant has not joined in these applications, although he has been served in this jurisdiction. His solicitors are Greenwoods LLP, and I have not heard from him. This may well be because he is only concerned as to claims which the claimants have brought in relation to matters which do not involve Brazil and these jurisdictional arguments which are before me.

9. The claimants have also made an application recently to join a Mr Hamilton-Grant as a party and to amend the particulars of claim. It is common ground that that application should only be dealt with after the resolution of the applications which are before me.

10. I have received and considered very many bundles of documents and authorities as well as written and oral arguments from counsel, oral argument taking place at hearings on 26 and 27 June 2024 and then 8 to 11 October 2024, and, following a hearing on 3 January 2025 when I determined I would not then deliver a reserved oral judgment due to Howden Brazil only then having been served and made their applications, at a further hearing which took place on 28 February 2025.

11. I have considered all those materials in coming to this judgment.

B The parties, relevant companies and individuals, and Aon's substantive claims

B1 Introduction

12. The claimants, Aon, and the corporate Howden defendants, are two well-known groups of insurance and reinsurance brokers, both of whose holding companies and central

operations are located in England, with various subsidiaries and their operations located elsewhere in the world.

13. In this litigation Aon asserts that Howden has suborned, or attempted to suborn, three teams of its employees to join Howden.

14. Firstly, a team dealing with Global Cyber Reinsurance, which I will call “Cyber”. Aon says that Howden suborned the 11th defendant, Aon's then global head of Cyber, who moved with his team to Howden in 2023.

15. Second, possibly, a team dealing with marine reinsurance. Aon says that it may say that Howden suborned a senior Aon employee, namely Mr Hamilton-Grant, who resigned with a number of team members in 2023. Aon say that they fear, but do not yet allege, that Hamilton-Grant was or is proposing to take his team to Howden.

16. Thirdly, teams located within Latin America -- which I will call LatAm -- mainly in Brazil dealing with insurance and reinsurance there, but often, according to Aon, referring work on to London.

17. Aon says that Howden suborned the 12th defendant at a time when he was still working for Aon, and who moved with the Brazil team to Howden Brazil in late 2023. In addition to the Brazil team, there also moved a Mr Marcelino who had worked for Aon in London, but mainly with the Brazil team.

18. Aon say that the 11th defendant, in relation to Cyber, and the 12th defendant in relation to LatAm, and thus including Brazil, acted as "recruiting sergeants" for Howden while they still remained employees of Aon.

19. Aon say that this was in gross breach of their employment contracts and associated fiduciary duties and included the transmitting and misuse of Aon's confidential information and its wrongful provision to Howden.

20. Aon say that what happened would have been worse but for the fact that one employee, a Ms Solano, decided not to defect to Howden, but instead to reveal to Aon what was happening.

21. Aon also say that this is a standard pattern of recent activity on the part of Howden who had previously, Aon says, acted similarly when taking a team from another broker, Guy Carpenter; and where, in litigation brought by Guy Carpenter, Howden had found themselves having to compromise that litigation and having to apologise to Guy Carpenter for what had happened.

22. I note that by proposed amended particulars of claim Aon seek to infer that Mr Hamilton-Grant was part of Howden's LatAm recruitment process and part of Howden's recruitment of the 12th defendant. I note that Aon now propose to seek to have Mr Hamilton-Grant added as a defendant to this claim, although as I have said, that application is for another time.

B2 Aon's Claims

23. Aon have sued various classes of defendants in this litigation; firstly, in relation to Cyber, the first to fifth defendants being various corporate entities of Howden UK who are located in England.

24. Secondly, in relation to all the claims, the 8th and 9th defendants, who are senior executives within Howden whom Aon say were permanently involved and are located here.

25. Thirdly, in relation to all the claims, the 10th defendant, a senior Howden executive, who is an Italian national resident in Italy, but who is often present in this jurisdiction.

26. Fourthly, in relation to the Cyber claims, the 11th defendant, a defecting employee of Aon to Howden.

B3 The Cyber Claim

27. Aon contends that the 11th defendant breached his employment contract acting as a recruiting sergeant whilst still an employee of Aon and misused Aon's confidential information. Aon further contends that there was an actionable conspiracy between those various defendants and also inducements by all but the 11th defendant (and the 12th defendant) of breaches of contract and misuse of confidential information by the

11th defendant. There is no application before me to stay or decline jurisdiction in relation to the Cyber claims.

28. In one sense, the Cyber claim is peripheral to the LatAm claims with which I am primarily concerned; but Aon say that they wish to rely on both the material relating to the Cyber claim, and the Cyber claim itself, in order to assist in proving what they say are similar wrongs on the part of Howden generally in relation to LatAm and Brazil, essentially as similar fact evidence of a common and repeating pattern of wrongful behaviour by Howden.

29. Aon also say that all the relevant disclosure material and many of the relevant witnesses will feature in Cyber as well as the LatAm and its Brazil claims. However, apart from that aspect, Howden Brazil and the 12th defendant are not involved with or affected by the Cyber claims.

B4 The Marine Claim

30. In relation to Marine, Aon intends to sue various defendants, but that claim remains inchoate, although it is very much based on assertions that Howden wrongfully induced Mr Hamilton-Grant, while he remained an employee of Aon, to introduce and entice the Marine team to join Howden.

B5 The LatAm and Brazil Claims

31. In relation to LatAm and Brazil, Aon alleges as follows. Firstly, although this is particularly by the proposed amended particulars of claim (as the present particulars of claim do not really extend this to Mr Hamilton-Grant), that the 12th defendant and Mr Hamilton-Grant worked with Howden in London to identify employees, while the 12th defendant and Mr Hamilton-Grant remained in Aon's employment, to invite to move from Aon to Howden. Aon say this was a conspiracy and combination hatched in and directed from London.

32. Secondly, that Howden then held discussions with those Aon employees and that in doing so Howden communicated electronically with those employees but also held

meetings with them in various London locations, including coffee shops. Further, that Howden induced some of those employees to pretend that they were being approached by an external recruitment consultant when the reality was a direct approach from Howden made through Aon's then employee, the 12th defendant.

33. Thirdly, that the 12th defendant also supplied confidential information, and in particular Aon's actual and intended business plans and financial information to Howden, and how such could and would operate and potentially succeed with the benefit of the suborned employees, so as to enable Howden to better set up and plan its own Brazil operation.

34. Fourthly, the 12th defendant and the suborned employees then joined in pre-planned stages the Howden Brazil companies.

35. Fifthly, that this was all authorised and planned at high level within Howden; the relevant individuals being the 8th, 9th and 10th defendants and the Howden UK companies all being involved by their officers and employees, principally the 8th, 9th and 10th defendants.

36. Sixthly, that Aon's witness evidence, being three witness statements of its solicitor, Michael Anderson, of 2 February 2024, 14 March 2024 and 22 March 2024, provide substantial evidence for all this.

B6 The defendants' position as to the substantive claims

37. As they are entitled to do and to which I will come, the defendants have not sought to state any position with regards to the above, although it is clear from company documentation that the Howden Brazil companies at least existed before these various events occurred. The defendants base their arguments on these applications before me on Brazilian law and jurisdiction points, as well as their assertions of failure on the part of Aon to give full and frank disclosure.

B7 Aon's contentions as to the bases of their substantive claims in law

B7a Aon's claims against the 12th defendant

38. Aon contend that in relation to the 12th defendant that he owed them, in particular whilst still an employee, firstly, duties in contract under his service contract with Aon Brazil; secondly, duties under Brazilian law simply as an employee; thirdly, duties under Brazilian law as a director, officer and manager of Aon Brazil; and fourthly, duties under the Brazilian law of confidentiality.

39. Those duties are said to arise from a number of matters. Firstly, the 12th defendant's service contract with Aon Brazil. That is dated 3 November 2014. The workplace is stated to be Rio de Janeiro or elsewhere in Brazil. It requires the 12th defendant to render the performance of a director. It contains confidentiality obligations in a schedule.

40. It is common ground before me that it is an employment contract governed by Brazilian law. It is also common ground, at least to some extent, that in Brazilian law obligations owed by an employee such as the 12th defendant are owed to the entire Aon Group, so that any company within it can sue on them, thus including not only the second claimant, Aon Brazil, but also the first claimant, Aon UK, which is the holding company of the Aon Group and a company registered in England and Wales, and the third claimant, Aon Ireland, which is an entity registered under the laws of the Republic of Ireland.

41. Aon says that under the Brazilian employment law there are obligations of an employee to serve their employer faithfully.

42. It is also, it seems to me, effectively common ground (and see below) that any claim which is brought in Brazil by any of the claimant entities against the 12th defendant which in any way relates to the 12th defendant working for Aon, would have to be brought in the Brazil Labour Court and not in the Brazil State Court.

43. Secondly, Aon rely upon the appointment of the 12th defendant as a director and manager of Aon Brazil and duties arising from that appointment and status.

44. That appointment was under the 22nd amendment to the articles of Aon Brazil dated 16 September 2020 and the 12th defendant signed that document.

45. Under paragraph 1 of that document the 12th defendant was appointed as director and manager until 7 July 2023; and under paragraph 4 of that document the articles were amended so as to make the 12th defendant a director.

46. Under the articles themselves, chapter 7 clause 12, it was provided that the Brazil State Court of Sao Paulo would have jurisdiction "in relation to all disputes which arise from this contract".

47. Aon contend that the position of the 12th defendant as a director of Aon Brazil is governed by Brazilian corporate law, which places various duties of good faith and proper service upon the director as far as the company is concerned.

48. This is at least somewhat questioned by Howden Brazil's Brazilian law expert.

49. Thirdly, Aon contends that Brazilian law places confidentiality obligations upon the 12th defendant in relation to Aon's confidential information.

50. Aon contends that the 12th defendant has breached all these various duties by acting as Howden's recruiting sergeant while still an employee of Aon Brazil and by supplying Howden with Aon's confidential information.

51. Aon contends that such breaches included suborning Aon's other Brazil employees to join Howden and seeking (perhaps) to suborn others of Aon's LatAm employees, who are located elsewhere in the southern United States, Central and South America.

52. Fourthly, Aon contends that the 12th defendant also has or had rights and obligations under a restricted stock unit agreement (“the RSUA”), relating to various Aon shares. The RSUA contains an exclusive jurisdiction agreement in favour of Cook County, Illinois, but with an exception for claims which are brought by Aon companies which could be brought in any appropriate jurisdiction. The RSUA provides that it is governed by the law of the state of Delaware.

53. It is said by Aon that the RSUA relates to commercial transactions unrelated to the 12th defendant's employment and therefore that the Brazilian courts would not regard such claims as having to be brought in the Brazil Labour Court. I am not sure as to

whether that is correct, but no specific point has been taken by the defendants in relation to that aspect before me. The parties also have before me said that it is accepted and common ground that the RSUA will be complied with; and all of which has had the effect that it has played a limited role in these hearings before me.

B7b Aon's claims regarding Mr Hamilton-Grant

54. In the proposed amended particulars of claim Aon say that Mr Hamilton-Grant, an employee of Aon UK in England, owed Aon contractual obligations, and potentially also fiduciary obligations to serve Aon faithfully and also various obligations regarding protection of confidential information.

55. Aon say that Mr Hamilton-Grant has breached those various obligations by acting with the 12th defendant to share Aon's confidential information with Howden and to suborn Aon's Brazil and other LatAm employees.

B7c Aon's claims regarding Howden defendants

56. Aon say that the Howden corporate entities, both those within Howden UK and Howden Brazil, and the Howden executives, the 8th to 10th defendants -- which executives I will generally in this judgment include within my description, "Howden UK" as a matter of convenience -- are liable for all of what Mr Hamilton-Grant, and importantly the 12th defendant, have done.

57. That is on a number of various bases. Firstly, that the corporate entities are vicariously liable for their various employee's acts.

58. Secondly, that they are all corporate entities and individuals liable, in the law of England and Wales, for, (1) torts of conspiracy to injure Aon by unlawful means, that is to say the wrongs and breaches on the parts of Mr Hamilton-Grant and the 12th defendant; (2) the tort of inducing breaches of contract, those breaches of contract being on the part of the 12th defendant and also Mr Hamilton-Grant; (3) the equitable wrong of dishonest assistance in breaches of Brazilian fiduciary duties owed by the

12th defendant and English fiduciary duties owed by Mr Hamilton-Grant; (4) misuse of what it is said was obviously Aon's confidential information.

59. Thirdly, in the Brazilian law they are all corporate entities and individual liable for:

    a. “unfair competition” under Brazilian law, which is said to be equivalent to the economic torts of conspiracy and/or inducement of breach of contract or other obligation;

    b. tortious inference for what is said to be called "third party accomplice liability" regarding inducing of the 12th defendant’s, and also Mr Hamilton-Grant's, alleged breaches of duty; and

    c. being “accessories” to the 12th defendant's alleged breaches of Brazilian fiduciary duty.

B7d Remedies sought by Aon

60. In the proceedings Aon seeks, firstly, declarations that unlawful conduct has taken place; secondly, declarations relating to shares and the RSUA; thirdly, injunctions.

61. In relation to injunctions, the claim is framed in very general terms, although counsel for Aon has suggested that there might be claimed some sort of springboard relief designed to slow down the operations of what are said to be illegitimately acquired business, but which matter seemed to me to be distinctly unclear.

62. Fourthly, Aon seeks damages in relation to the losses sustained by Aon as a result of loss of Brazilian business, being business either which would have been located in Brazil or which would have been passed on to London, which losses have been sustained as a result of the departure of the Brazilian team members from Aon to Howden Brazil as well as from misuse of confidential information.

63. Fifthly, Aon, possibly - and this seems to be framed in something of a secondary manner, seeks gain-based damages in relation to gains which Howden have made as a result of the impugned contact.

C Brazilian Law and other Evidence adduced

64. In relation to the law of Brazil, there are various substantial disputes between the parties, but also some measures of agreement. I have had advanced to me matters of substantive, procedural and jurisdictional Brazilian law.

65. I have reports relating to Brazilian law adduced by: Howden UK of Professor Yarshell ("Yarshell") of 4 February 2024 and 9 June 2024; the 12th defendant from a Senor Medeiros and Senora Aranha of a firm of lawyers, Lobo de Rizzo ("Lobo") of 5 February 2024, and from Professor Mallet ("Mallet") of 9 June 2024; and by Aon of Professor Nery Junior ("Nery") of 19 April 2024 and 19 June 2024.

66. I have also more recently had adduced from Howden Brazil in relation to their application reports from Professor Francesco Satiro ("Satiro") of 13 December 2024 and 17 February 2025; and in response to Professor Satiro's first report from Aon a report of Professor Marcelo von Adamek ("Adamek") of 31 January 2025.

67. The applicant defendants have also adduced substantial witness evidence not directed to the substantive factual matters, but rather to Brazilian law and jurisdictional matters, as well as to the question as to what is the proper law of the asserted torts, those being: the second witness statement of Daniel Naftalin, solicitor for the Howden UK defendants, of 5 February 2024; and the first, second and third witness statements of Sophie Lalor-Harbord, solicitor for the 12th defendant, of 5 February 2024 and 10 June 2024; and the first, second, third and fourth witness statements of Matthew Wood, solicitor for Howden Brazil, of 9 June 2024, 9 July 2024, 24 September 2024 and 29 November 2024.

68. I have taken account of all the evidence before me, as well as all the submissions in coming to this judgment.

D Summary of Jurisdictional Tests

69. The Howden UK defendants, that is to say the 1st to 5th and 8th and 9th defendants, but not the 10th defendant, accept that they have all been validly served within the jurisdiction.

70. In relation to their jurisdictional applications, they rely on the principle of private international law known as forum non conveniens, that is to say that this court will decline jurisdiction in favour of the courts of another forum where that other forum is clearly more appropriate for the determination of the claim than this jurisdiction and there is not some particular reason why it would be in the interests of justice for this forum to be preferred over that other forum.

71. The position is different in relation to the 10th defendant. He has been served out of the jurisdiction under an order I made on paper without a hearing on 12 April 2024 ("the April order") permitting such service. He applies to set aside that order.

72. The rule here of private international law, and is reflected in CPR 6.37(3), is that the burden is on Aon, the claimant, to show in relation to the 10th defendant that this jurisdiction is clearly the most appropriate forum for the claim against the 10th defendant to be tried.

73. The 10th defendant also asserts that I should set aside the April order and thus the permission to serve out of the jurisdiction on him because he asserts that the claimant did not comply with the duties of full and frank disclosure when applying it.

74. The position is also different in relation to Howden Brazil. They too have been served out of the jurisdiction under the April order, made without a hearing; and therefore again the burden is on Aon, the claimant, to show that England and Wales is clearly the most appropriate forum for the claims against them.

75. Aon says that this is clearly the most appropriate forum, including because they say that Howden Brazil was merely the corporate tool and puppet of a conspiracy and wrongful plan hatched and centred in England.

76. Howden Brazil also assert that I should set aside my April order because they say that the claimants had not complied with their duties of full and frank disclosure when applying for it.

77. As far as the 12th defendant is concerned, although he is resident out of the jurisdiction, he was validly served within the jurisdiction. The position with regards to him therefore is the same as that with regards to the first set of Howden UK defendants, namely the burden is on him to show that another forum -- he says Brazil -- is clearly the most appropriate for the claims against him, and clearly more appropriate than this jurisdiction.

78. The various disputes with regard to which jurisdiction is most appropriate each require a full evaluative principled approach and procedure to be carried out by the court; and the applicable principles are set out in numerous cases.

79. The modern approach stems from the House of Lords decision in The Spiliada [1987] AC 460 and which sets out the two-stage test of, firstly, considering what is the appropriate forum according to the relevant principles; and secondly, whether, whatever the answer is to the first question, that is overridden in favour of England and Wales by the interests of justice.

80. I note that at pages 476B to 476E, Lord Goff held that the burden of showing that another forum than England and Wales was clearly or distinctly more appropriate was on a defendant who had been served within this jurisdiction, and at pages 478F to 482A, it was held that the position was reversed where a claimant had needed to obtain permission to serve a defendant outside the jurisdiction.

81. At pages 482B to 482D Lord Goff dealt with the second stage question of whether there was some overriding interest of justice which would lead to this court favouring this forum over another, even where this forum was not the most appropriate one.

82. I note that at pages 482F to 483C he held that mere differences in disclosure regimes or levels of damages to be awarded was not sufficient for such a conclusion, and that there is a substantial burden on a party to show that the second stage is determinative and

that the interests of justice demand a forum other than that which is dictated by the outcome of the first stage.

83. Apart from certain issues relating to disclosure under stage ,2 and the general question of whether full and frank disclosure had been made and what should happen if it was not, those matters of general approach and law are common ground between the parties, and in my judgment rightly so, in the light of the case law.

84. The parties have relied on numerous different matters before me in relation to the Spiliada tests. However, the 12th defendant has also raised a contention that the terms of Brazilian employment law, and also chapter 7 clause 12 of the articles of Aon Brazil to which I have previously referred, are at least similar to an exclusive jurisdiction contractual clause where the general rule is that the court of England and Wales will enforce such a provision unless doing so is clearly contrary to the interests of justice -- see, for example, Clifford Chance v Société Générale [2024] ILPr 6 at paragraphs 78 to 81. I will revert to that argument in due course.

E Brazilian Law Evidence

85. I have had before me substantial evidence in relation to what is said to be relevant substantive procedural and jurisdictional Brazilian law, and which technically is a matter of fact as far as the courts of this jurisdiction are concerned.

86. There are, as I had set out above, numerous expert reports, although I have not had any joint statements from the relevant experts and so have an obvious difficulty in seeking to evaluate differences between them, although various matters are common ground between them.

E1 Brazilian Legislation

87. I have been taken to particular provisions of Brazil legislation (itself enacted in Portuguese although I have English translations).

88. Firstly, Articles 21 to 23 of the Brazil Civil Code:

"**Art.21** Brazilian courts have jurisdiction to try actions in which:

I- the defendant, regardless of nationality, is domiciled in Brazil;
II- the obligation has to be performed in Brazil:
III- the grounds are facts that occurred or were performed in Brazil.

Sole paragraph. For the purposes of item I, it is deemed that a foreign legal entity that has a branch, subsidiary or affiliate in Brazil is domiciled in the country.

Art. 22 Brazilian courts also have jurisdiction to preside over and try actions:

I- for support orders, when:
   (a) the creditor is domiciled or resident in Brazil;
   (b) the defendant maintains a connection with Brazil, such as the possession or ownership of property, the receipt of income or attainment of economic benefits;
II- arising from consumer transactions, when the consumer is domiciled or resident in Brazil;
III- in which the parties, expressly or tacitly subjecting themselves to Brazilian jurisdiction, refer their dispute to Brazilian jurisdiction.

Art. 23 It is for the Brazilian judicial authorities, to the exclusion of all others, to:

I- hear cases dealing with real property located in Brazil;
II- to in matters of succession, proceed with the probate of a holographic will and the sharing of an estate located in Brazil, even if the deceased has a foreign nationality or domicile outside Brazil;
III- proceed with the sharing of property located in Brazil in cases of divorce, legal separation and dissolution of a civil union, even if the owner has a foreign nationality or domicile outside Brazil

Art. 24 An action filed before a foreign court does not operator as *lis pendens* and does not prevent Brazilian courts from hearing the same action and those related to it, unless

there are provisions to the contrary in international treaties and bilateral agreements in effect in Brazil.

Sole paragraph. The pendency of an action before Brazilian courts does not impede the recognition of a foreign judgement when this is required for its enforcement in Brazil."

89. Secondly, Article 651 of the Brazil Consolidation of Labour Code:

> *"**Art. 651** - The jurisdiction of the Labour Courts is determined by the place where the employee, claimant, or respondent, provides services to the employer, even if they have been hired elsewhere or abroad.*
>
> *Paragraph 1 - In cases involving an agent or commercial traveller, jurisdiction lies with the Labour Court in the area where the company has an agency or branch to which the employee is subordinate. If this is not applicable, jurisdiction may then be determined by the Labour Court in the area where the employee resides or in the nearest locality.*
>
> *Paragraph 2 - The jurisdiction of the Labour Courts established in this article extends to disputes occurring in an agency or branch abroad, provided that the employee is Brazilian and there is no international convention to the contrary.*
>
> *Paragraph 3 - In the case of an employer who carries out activities outside the place of the employment contract, the employee is entitled to lodge a complaint in the place where the contract was executed or where the respective services were provided."*

90. Thirdly. Section V of the Brazil Constitution and articles 111 to 113:

> *"SECTION V Labour Courts and Judges*
>
> ***Article 111.** The following are the bodies of Labour Justice: (CA No. 24, 1999; CA No. 45, 2004) I - the Superior Labour Court; II - the Regional*

Labour Courts; III - Labour Judges. Paragraph 1. (Revoked). Paragraph 2. (Revoked). Paragraph 3. (Revoked).

Article 111-A. *The Superior Labour Court shall be composed of twenty-seven Justices, chosen from among Brazilians over thirty-five and under sixty-five years of age, appointed by the President of the Republic after approval by the absolute majority of the Federal Senate, as follows: (CA No. 45, 2004) I - one-fifth from among lawyers effectively practicing their professional activity for more than ten years and from among members of the Labour Public Prosecution with over ten years of effective exercise, with due regard for the provisions of article 94; II - the others, from among career judges of the Regional Labour Courts, nominated by the Superior Labour Court. Paragraph 1. The law shall make provisions for the powers of the Superior Labour Court. Paragraph 2. The following shall operate in conjunction with the Superior Labour Court: I - the National School for the Education and Further Development of Labour Judges, which shall have the duty, among others, to regulate the official courses for admission into and promotion in the career; II - the Higher Council of Labour Justice, which shall, under the terms of the law, exercise administrative, budgetary, financial, and property supervision over Labour Courts of first and second instances, in the quality of central body of the system, whose decisions shall have a binding effect.*

Article 112. *The law shall establish Labour Courts of first instance, allowing, in districts not covered by their jurisdiction, for the attribution of such jurisdiction to judges, appeals being admissible to the respective Regional Labour Court. (CA No. 45, 2004)*

Article 113. *The law shall regulate the constitution, installation, jurisdiction, powers, guarantees, and conditions of exercise of the bodies of Labour Justice. (CA No. 24, 1999)"*

91. I note that those articles provide for the Labour Courts of Brazil to deal with what is called "labour justice".

92. Fourthly, Article 114 of the Constitution:

*"**Article 114.** Labour Justice has the power to hear and try: (CA No. 20, 1998; CA No. 45, 2004)*

I - judicial actions arising from labour relations, comprising entities of public international law and of the direct and indirect public administration of the Union, the states, the Federal District, and the municipalities;

II - judicial actions involving the exercise of the right to strike;

III - judicial actions regarding union representation, when the opposing parties are trade unions, or trade unions and workers, or trade unions and employers;

IV - writs of mandamus, habeas corpus, and habeas data, when the action being challenged involves matter under the jurisdiction of Labour Justice;

V - conflicts of powers between bodies having jurisdiction over labour issues, except as provided under article 102, I, o;

VI - judicial actions arising from labour relations which seek compensation for moral or property damages;

VII - judicial actions regarding administrative penalties imposed upon employers by the bodies charged with supervising labour relations;

VIII - ex-officio enforcement of the welfare contributions set forth in article 195, I, a, and II, and their legal raises, arising from the judgments it pronounces;

IX - other disagreements arising from labour relations, under the terms of the law.

Paragraph 1. If collective negotiations are unsuccessful, the parties may elect arbitrators.

Paragraph 2. If any of the parties refuses collective negotiation or arbitration, they may file a collective labour suit of an economic nature, by mutual agreement, and Labour Courts may settle the conflict, respecting the minimum legal provisions for the protection of labour, as well as any provisions previously agreed upon.

Paragraph 3. In the event of a strike in an essential activity which may possibly injure the public interest, the Labour Public Prosecution may file a collective labour suit, and it is incumbent upon Labour Courts to settle the conflict."

93. I note from this in general, as is indeed common ground between the experts, that in Brazil it is for the Labour Court to deal with any duties between employer and employee. I note, to which I will revert, that in chapter 7 of the Aon Brazil articles the reference to the court having jurisdiction is to the regional Court of Rio de Janeiro and not to the Labour Court.

94. Fifthly, in relation to the Brazil law of unfair competition, I have been take to the Brazilian Industrial Property Law Code (the "BIPL"), Articles 195 and Articles 207 to 209:

*"**Article 195.** A person commits the crime of unfair competition if they:*

I – publish, by any means, a false statement to the detriment of a competitor, with the intent of obtaining an advantage;

II – provide or disseminate false information about a competitor, with the intent of obtaining an advantage;

III – employ fraudulent means to divert, for their own or another's benefit, the clientele of another;

IV – use the advertising expression or trademark of another, or imitate them in a way that causes confusion between products or establishments;

V – improperly use another's trade name, establishment title, or insignia, or sell, display, offer for sale, or stock products bearing such references;

VI – replace, without consent, the name or corporate name of another on their product with their own name or corporate name;

VII – claim, as a form of advertisement, an award or distinction they have not received;

VIII – sell, display, offer for sale, or use adulterated or counterfeit products in containers or packaging belonging to others, or use such containers or packaging to market similar products, even if not adulterated or counterfeit, provided the act does not constitute a more serious crime;

IX – give or promise money or other benefits to an employee of a competitor to cause the employee, in breach of their employment duties, to provide an advantage;

X – receive money or other benefits, or accept a promise of payment or reward, in breach of employment duties, to provide an advantage to a competitor of the employer;

XI – disclose, exploit, or use, without authorization, knowledge, information, or confidential data usable in industry, commerce, or service provision—excluding those already public or evident to a skilled technician—that they accessed through a contractual or employment relationship, even after the termination of the contract;

XII – disclose, exploit, or use, without authorization, knowledge or information referred to in the preceding subsection, obtained through illicit means or accessed via fraud; or

XIII – sell, display, or offer for sale a product claiming it to be subject to a deposited or granted patent, or a registered industrial design, when it is not, or refer to it in advertisements or commercial documents as patented or registered when it is not;

XIV – disclose, exploit, or use, without authorization, test results or other undisclosed data that required significant effort to produce and were submitted to governmental entities as a condition for product marketing approval.

Penalty – imprisonment for 3 (three) months to 1 (one) year, or a fine.

§1. The employer, partner, or administrator of a company who commits the offenses described in subsections XI and XII is included among those liable under these provisions.

§2. The provisions of subsection XIV do not apply to disclosures made by a government entity authorized to approve product marketing, when necessary to protect the public."

*"**Article 207** - Independently of the criminal action, the injured party may bring any civil action they deem appropriate in accordance with the Code of Civil Procedure."*

*"**Article 208** - Compensation shall be determined by the benefits that the injured party would have received if the violation had not occurred."*

*"**Article 209** - The injured party shall have the right to claim damages in compensation for losses caused by acts of violation of industrial property rights and acts of unfair competition not provided for in this Law, which tend to damage the reputation or business of others, create confusion between commercial, industrial or service-providing establishments, or between products and services offered for sale.*

§ 1. The judge may, in the records of the action itself, in order to avoid irreparable damage or damage that is difficult to repair, order an injunction to stop the violation or the act that gives rise to it, before the defendant has been summoned, by means of, if he deems it necessary, a cash or fiduciary guarantee.

§2 - In cases of reproduction or blatant imitation of a registered trademark, the judge may order the seizure of all goods, products, objects, packaging, labels and other items containing the counterfeit or imitated trademark."

95. Mr Davies KC emphasised to me that those articles, in particular Article 195, lead to there being both criminal and civil liabilities if what is termed "unfair competition" occurs.

96. I have also been taken in this regard to the Brazil Constitution and Article 5. XIII and Article 170.IV:

*"**Article 5**. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (CA No. 45, 2004)…*

XIII - the practice of any work, trade or profession is free, observing the professional qualifications which the law shall establish;"

"The General Principles of Economic Activity ***Article 170***. The economic order founded on the appreciation of the value of human work and on free enterprise is intended to ensure everyone a life with dignity in accordance with the dictates of social justice with due regard for the following principles:

IV- free competition…"

97. Sixthly, in relation to the Brazil law of unlawful assistance in a breach of fiduciary duty, I have been taken to Article 158 of the Brazil Corporate Code:

*"**Article 158** - An officer shall not be personally liable for the commitments he undertakes on behalf of the corporation and by virtue of action taken in the ordinary course of business; he shall, however, be liable for any loss caused when he acts:*

I - within the scope of his authority, with fault or fraud;

II - contrary to the provisions of the law or of the bylaws.

Paragraph 1. An officer shall not be liable for unlawful acts of the other officers, except when acting in connivance with them, when neglecting to investigate such acts or when, despite knowledge of them, he fails to take action to prevent such acts. A dissenting officer shall be exempt from liability when he makes his dissent to be recorded in the minutes of a meeting of the administrative body, or, if this is not possible, when he immediately informs the administrative body, the statutory audit committee, if in operation, or a general meeting about his dissent in writing.

Paragraph 2. The officers shall be jointly and severally liable for the losses caused by failure to comply with the duties imposed by law to ensure the normal operation of the corporation, even when in accordance with the bylaws such duties do not devolve upon all officers.

Paragraph 3. Subject to paragraph 4, below, in a publicly held corporation, liability under paragraph 2, above, shall be restricted to those officers who under the bylaws have the specific responsibilities for the performance of such duties.

Paragraph 4. An officer who knows of any failure to comply with such duties by his predecessor or by an officer responsible under paragraph 3, above, and who fails to bring such fact to the knowledge of a general meeting shall become jointly and servally liable for such non-compliance.

Paragraph 5. Anyone who concurs in the performance of any act contrary to the law or bylaws with the intention of obtaining advantages for himself or for a third party shall be jointly and severally liable with the officer."

E2 Brazilian law experts

98. Turning to the various reports of the Brazil law experts, I note in particular as follows.

E2a Yarshell first report

99. Yarshell in his first report stated, firstly, that Brazil courts would be prepared to hear Aon's various LatAm claims and to apply in the law of England and Wales where that was appropriate.

100. Secondly, that cases of labour justice fall within the exclusive jurisdiction of the Brazil Labour Court and have to be heard there, although Yarshell himself was no expert as to Brazil employment law or as to which claims fall inside or outside labour justice.

101. Thirdly, that the Brazil courts could co-operate to manage overlapping cases within and without the labour justice exclusive jurisdiction of the Labour Court in order to try and avoid conflicting judgments; but they could not hear all of the claims in one court

because the jurisdiction of the Labour Court was both exclusive in relation to the labour justice and limited to labour justice.

102. If one claim was within the exclusive jurisdiction of a state court, for example that of Rio de Janeiro, and another claim within the exclusive jurisdiction of another state court, eg Sao Paulo, problems of inconsistent judgments and multiple litigation could be avoided by a party making a voluntary submission to the alternative state court.

103. However, such a solution would not be available in relation to matters of labour justice and the Labour Court where the rules are strict, and it is not possible for there to be a voluntary contracting out of them.

104. Fourthly, that the courts of Brazil can order disclosure both against parties and non-parties; although, in particular in relation to non-parties, disclosure is not automatic and may be more limited than in the United Kingdom.

105. Fifthly, that the Brazil courts will respect exclusive jurisdiction clauses and provisions, such as Article 144 of the Brazil Constitution and the exclusive jurisdiction of the Labour Courts in relation to matters of labour justice.

106. Yarshell opined that chapter 7 clause 12 of the Aon Brazil articles did amount to an exclusive jurisdiction clause for Brazil purposes.

107. Sixthly, that at least in relation to its own losses, only Aon Brazil could sue for breaches of the 12th defendant's service contract, that being in order to avoid there being claims of reflexive loss by one company effectively seeking to sue for losses which were actually sustained by another.

E2b The Lobo report

108. Lobo, whom the 12th defendant contends are specialist employment lawyers, in their report stated in particular as follows.

109. Firstly, that the jurisdiction of the Labour Court is mandatory and exclusive in relation to all matters which arise out of an employer employee relationship; and thus in

relation to all duties of the 12th defendant; whether as employee or director and whether in relation to employment law, statutory or fiduciary duties, and in relation to all linked torts and wrongs; and whether under the law of England and Wales or that of Brazil; and whether brought by Aon Brazil or by any group company, thus including the other claimants.

110. Secondly, that only the Labour Court can deal with employment relationship claims, and cannot deal with any claim other than where the employee is the sole defendant.

111. Thirdly, that the Labour Court can injunct someone who is suing in relation to a labour justice matter in a court which is not the Labour Court; but only if that someone is subject to the jurisdiction of Brazil, which Aon Brazil is, but which the other claimants, Aon UK and Aon Ireland, are not.

112. Fourthly, that they doubted that the courts of Brazil would recognise a judgment of the England and Wales court made against the 12th defendant arising from an employment relationship, since the Brazil court would consider that such matters were within the exclusive jurisdiction of the Brazil Labour Court.

E2c The Nery reports

113. Nery in his reports for Aon stated in particular as follows.

114. Firstly, he agreed with much of what was said by Yarshell in Yarshell's first report.

115. Secondly, that the courts of Brazil would be prepared to hear all of the LatAm claims being brought by Aon against the various defendants.

116. Thirdly, that the courts of Brazil would recognise foreign judgments unless they fell within specific provisions of Article 23 of the Brazil Civil Code, which is confined to matters of real property succession and divorce.

117. Fourthly, as a consequence of the above, the Brazil courts would enforce a foreign court's judgment, notwithstanding that it related to a labour employment case.

118. He gave an example of a Canadian case, Apotex v Kalinka 2016 ONSC 5527 (which I will call "Apotex"), where a defendant domiciled in Brazil had been working for a Canadian company in Canada, and had acted in breach of fiduciary duty, and for which the defendant had been found liable in damages. The Brazil courts had been prepared to enforce that damages judgment.

119. I note that in the relevant decision of the rapporteur in the Brazil enforcement litigation which is before me, no reference at all was made to Article 114 of the Brazilian Constitution. Further, in the report of the Brazilian court judgment ratifying the decision of the rapporteur, the only dispute which is canvassed by the relevant court was as to whether the Brazil court should not enforce the damages award on the basis that it was said, but was not found to be, punitive.

120. Fifthly, Nery accepted that the Labour Court had exclusive mandatory jurisdiction in relation to all claims arising from the 12th defendant's employment relationship, at least in relation to claims brought in Brazil.

121. Sixthly, Nery said that if two claims were brought in Brazil between the same parties in relation to the same subject matter in different courts, for example, the Labour Court and the state court, the Superior Court of Brazil would stay one claim in order to avoid the potential for inconsistent judgments.

122. However, that would not be so if the parties were different.

123. It would also not be the case in relation to a situation where one claim was brought in a foreign court and another claim in a Brazilian court; although the Brazilian courts would tend not to enforce in Brazil any judgment given by the foreign court until the Brazilian court had decided the case before it.

124. Seventhly, that Brazilian courts can grant injunctions and interim injunctions, or at least orders equivalent to such.

125. Eighthly, that Brazil courts can make orders for specific disclosure against parties.

126. Ninthly, that Brazil courts will admit, where it is appropriate to do so, similar fact evidence.

127. Tenthly, that all and any of the Aon companies could sue the 12th defendant in Brazil for wrongs and breaches of contract relating to the 12th defendant's employment relationship with Aon Brazil. However, the Brazilian courts would ensure that double recovery was not achieved. In this respect, Nery expressly disagreed with Yarshell

128. Eleventhly, that claims against the 12th defendant regarding duties arising from his being a director of Aon Brazil did not arise under Aon Brazil's articles and therefore would not be subject to the exclusive jurisdiction provision contained in those articles.

129. Twelvthly, he did agree that all claims against the 12th defendant which in any way arose from the employment relationship fell within Article 114 and the exclusive jurisdiction of the Labour Court. Insofar as Yarshell said otherwise, Nery disagreed with Yarshell; he, however, did agree with Lobos here.

E2d the Yarshell second report

130. Yarshell in his second report considered the reports of both Nery and Lobo, and stated in particular as follows.

131. Firstly, that the Brazil courts could reach decisions which might conflict with those which had been reached in another jurisdiction.

132. Secondly, that it is a feature of Brazil law that it bars reflexive loss; so a company in a group can only sue for harm directly caused to it rather than harm caused to another group member which has devalued the first company's interest in that group member.

133. I am unsure as to whether Yarshell disagrees with Nery's statement that any Aon company can sue the 12th defendant for loss which is caused to that Aon company, even though the 12th defendant's service contract is with Aon Brazil.

134. Thirdly, he said that the 12th defendant is bound by the exclusive jurisdiction clause in the Aon Brazil articles, but that that clause is itself overridden by the exclusive jurisdiction of the Labour Courts in relation to matters of labour justice.

E2e the Mallet report

135. Mallet in his report stated in particular the following.

136. Firstly, that the Labour Court's exclusive jurisdiction is wide and includes claims that employees have wrongly diverted clients of their employer.

137. Secondly, that the Labour Court will take exclusive jurisdiction even where the employer is a foreign entity if the relevant work was to be carried out in Brazil; and that that and the exclusive jurisdiction of the Labour Courts is all an aspect of "the protectionist principle" that Brazilian employees are only to be dealt with by the local Brazilian Labour Court.

138. Thirdly, that the 12th defendant for these purposes would be considered to be a Brazilian employee working in Brazil and so that all claims against him would be within the exclusive jurisdiction of the Labour Court.

139. Fourthly, Mallet very much doubted that a Brazil employee could contract or agree for a foreign court to have jurisdiction in relation to them even if foreign law in some way or other governed the relevant relationship.

E2f the reports of Satiro and Adamek

140. I now turn to the reports of Satiro and Adamek in relation to Howden Brazil's application.

141. There is some dispute between the parties and in my mind regarding what Professor Satiro actually covers in his reports in the terms of the hypothetical factual situation by reference to which he is expressing his opinions of Brazilian law. I return to that below, but I do note that he was instructed by a letter from Mishcon de Reya of 13 December 2024, which included a copy of the particulars of claim and which made

clear that the claimants were suing Howden for Howden's roles in the 12th defendant's alleged breaches of duty.

E2fi the first Satiro report

142. In his first report Satiro first dealt with the Brazil law of unfair competition and referred to Articles 195, 207 and 209 of the BIPL.

143. He said the Brazil courts were cautious when analysing claims relating to the enticement of employees because they were hesitant to interfere with the contractual freedoms of employees to choose for whom they worked or the competitiveness of the labour market.

144. He referred to Articles 5 and 170 of the Brazil Constitution.

145. He also referred to a decision of the Supreme Court of Brazil, which he said meant that for there to be unfair competition, there required Both, firstly, an enticement of an employee which harms competition as a whole, And, secondly a use of means "contrary to good faith to encourage breach of the contract".

146. He gave a citation from that decision, as follows:

"Thus, making a more advantageous offer to an artist contracted by a competing broadcaster does not automatically constitute an act of enticement. This is due to the absence of any conduct aimed at unfair competition or at breaching the duties inherent of objective good faith, considering the external social function of the contract.

It cannot be said that the appellant's conduct was parasitic or that it improperly exploited the competitor's investment in the professional, simply because the proposal was made during the term of the existing contract. Indeed, it seems inherent to the nature of competition in the entertainment market to seek out artists who are currently in demand – a situation which may inevitably arise from their work with another broadcaster.

Moreover, to require this type of cooperation between economic operators in highly competitive markets is contrary to the whole economic and competitive logic which governs commercial relations.

Additionally, the conduct in question cannot be considered negligent, even in a broad sense, nor can it be deemed to have induced or promoted the breach of another party's contract or exceeded the limits of freedom of initiative and competition. This is because the act of enticing presupposes seduction, attraction, or offering undue advantage to the service provider—something entirely different from presenting a more advantageous legal business proposal to an artist. The artist, exercising their freedom to remain in or leave an ongoing legal relationship, chooses termination with the consequences presumably addressed in the clauses of the contract in effect at the time of the offer."

147. He further cited from a further decision of a state court, which suggests that the Brazil courts would or might not enforce post-termination restrictions of employees' service contracts.

148. He said that a defence existed to claims of unfair competition that no harm had been caused by the relevant acts. He also said that unfair competition required there to have been a deliberate intent to harm a competitor And a fraudulent means aimed at securing a profit.

149. Secondly, he dealt with the Brazilian law of tortious interference in contracts; saying that in civil law, which Brazil law is, there is an academic argument that intentionally inducing a breach of contract is actionable, but that this would be highly controversial in the field of employment contracts in view of the provisions of the Brazilian Constitution and the Civil Code protecting employees' freedom of choice as for whom they should work.

150. In paragraph 52 of his first report he said:

"52. Moreover, as mentioned above [item 1(d)], the Brazilian Superior Court of Justice has ruled out third party liability based on competition considerations, asserting that

"offering a more favorable offer to a performer hired by a competitor does not automatically constitute the practice of soliciting a service provider, in the absence of any conduct aimed at unfair competition or breach of the duties attached to objective good faith". Therefore, the hiring of a competitor`s employee would not give rise to a right to compensation based on third-party complicity or under Article 608 of the Civil Code."

151. In relation to the claim of unlawful assistance in a breach of fiduciary duty on the part of the 12th defendant; he said it was debatable as to whether Aon Brazil was such an entity as would give rise to a relevant duty which could give rise to a claim within Article 158 of the Corporate Code; but that such a claim would also require there to be, in any event, a wrongful intention on the part of Howden, the assisting party.

152. He further opined that only Aon Brazil would be able to sue in relation to such a matter; and if that is wrong, at least only an entity which had suffered primary damage rather than reflexive loss.

153. He stated that all these matters were distinctly complex.

E2fii the Adamek report

154. Adamek responded to Satiro in his report and stated in particular as follows.

155. Firstly, that the poaching of employees carried out by a serving employee of the competitor whose employees are being poached is unfair competition; and that the entity which has induced such poaching would also be liable as a third party accomplice in relation to unfair competition.

156. He cited various decisions of Brazil courts said to be to that effect.

157. Secondly, in relation to unfair competition, he said that there was no additional requirement to the wrongful inducement for there to be some sort of general harm to the market. All that was required were actions within Article 195 of BIPL and which could include wrongful obtaining of confidential information - sub articles (XI) and

(XII), as well as wrongful inducement of a serving employee's breaches of duty - sub articles (IX) and (X).

158. He stressed the matter depended on the unlawful conduct of the poacher, rather than the employee. He said that there were no cumulative requirements and reiterated that there was no general necessity for an unfair competition claim to show damage to the market as a general concept.

159. Thirdly, as far as tortious inference was concerned, he stated that the courts of Brazil do apply the civil law concept of third party accomplice and cited a recent decision of the Brazil Superior Court to that effect – see paragraph 36 of his report:

"36. In this regard, it is worth highlighting a recent decision by the Brazilian Superior Court of Justice, which states that the third party accomplice doctrine (which has roots in French law) is consolidated in Brazilian law (emphasis original):

> *"5. In view of its relevance and dynamic nature, civil liability has broadened its horizons, without restricting itself to a pre-established list of protected rights, seeking to protect the most varied orbits of human dignity. 5.1. In view of the recognition and expansion of new areas of protection for the human person, resulting from the new social reality and the rise of new interests, new hypotheses of rights violations have also arisen, which requires them to be safeguarded by the legal system, including with regard to the behaviour of third parties who interfere with or induce default on obligations. 5.2. Contracts are protected by duties of trust, which extend to third parties due to the objective good faith clause. <u>According to the Third Party Accomplice Doctrine, the offending third party is also subject to the trans-subjective efficacy of obligations, given that their behaviour cannot unduly interfere in the relationship, disrupting the normal performance of the service by the parties, under penalty of being held liable for the damages arising from their conduct</u>.""*

160. Fourthly, in relation to assisting in breach of fiduciary duty, he stated that such a cause of action existed generally in the law of Brazil as well as under the specific provisions of Article 158 of the Corporate Code.

161. Fifthly, he said in relation to all of the above that the law of Brazil protecting employees' freedom of contract, including to choose an employer and to terminate an existing contract, was all simply irrelevant where the claim was that an existing employee had been suborned to act so as to breach their employment contract during a period of time while they were still a subsisting employee.

162. Sixthly, he said that Article 158.5 would apply to Aon Brazil and that it was a relevant type of corporate entity.

163. Seventhly, he said that the law of Brazil would also independently hold that a conspiracy to use unlawful means was actionable in law, although Ms Rogers KC was to say that Aon was not pursuing that contention.

E2fiii the second Satiro report

164. Satiro responded to Adamek in his second report and disagreed with much of it, stating in particular, firstly, that the law of Brazil did regard the treatment of employees to choose their employer as being of great importance.

165. Secondly, that for there to be unfair competition required there to have been harm to the market in general, albeit that at the end of paragraph 28 of the report Satiro said:

" ... I reiterate what I stated in paragraph 33 of my previous report: the only requirement is that the wrongdoer employs "means contrary to good faith... to encourage the breach of the contract."."

166. Thirdly, he agreed that an employee has a duty not to misuse trade secrets; but stated that there was a need to differentiate between what was a trade secret and what was mere employee knowhow.

167. Fourthly, he sought to distinguish the various case law relied on by Adamek where Adamek disagreed with Satiro's first report.

168. Fifthly, he repeated that the existence and ambit of third party accomplice liability was, in his view, controversial in the law of Brazil, and in particular as to whether it could extend to matters of breach of fiduciary duty.

169. Sixthly he repeated that, in his view, Article 158 did not apply to Aon Brazil, or at least that it was dubious that it did.

170. Seventhly, he said that there was no Brazil law equivalent to unlawful means conspiracy in the law of England and Wales.

171. And eighthly, he said that all of these matters were complex in the law of Brazil, uncertain and were in a state of mere development, rather than being clear and settled.

F the parties' submissions

172. Before me the parties have tended to concentrate, rightly in my view, on the question of what is the appropriate forum, that is to say the stage 1 Spiliada; although I have also been referred in some submissions to the question of stage 2 Spiliada i.e. whether the stage 1 answer is displaced by the interests of justice.

Fi Howden UK's submissions in support of their jurisdiction and strike-out (and/or summary judgment) applications

173. Mr Craig (leading Mr Lloyd) for the Howden UK defendants has sought to emphasise the desirability of all matters being heard in a single forum. He says that that would have to be Brazil, with some claims involving the 12th defendant being in the Labour Court and the rest in the state courts, and with the Brazil courts, including the Superior Court, engaging in case management to avoid there being inconsistent judgments.

174. He makes clear, as do Mr Lloyd and Mr Holmes, and I think also Mr Davies, that all of the defendants will accept, at least, that all of the Aon claims can be tried against them in Brazil.

175. As to law, he relied on various authorities. He took me first to Jefferies v Cantor [2020] EWHC 1381 (QB), an alleged suborning of employees' service out of the jurisdiction case. In particular, he took me to paragraph 32:

"32. CPR 6.37 provides that "The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is the proper place in which to bring the claim". The relevant considerations were classically set out by Lord Goff in The Spiliada [1987] AC 460 and more recently in Lungowe v Vendanta Resources Plc [2019] 1 WLR 1051 (SC). The fundamental principle is that the Court is looking for a single forum in which the cases against all the Defendants can be most suitably tried. The burden is on the Claimant to show that England and Wales is the appropriate forum. Where any of the Defendants seek to raise matters supporting an alternative forum, they beare the evidential burden in relation to those matters. Whilst the requirement to avoid a multiplicity of proceedings and the risk of inconsistent judgments is a very important factor, where the claims are likely to proceed against an "anchor defendant" in England and Wales that will often be a decisive factor in favour of England and Wales notwithstanding all other factors appear to favour a foreign jurisdiction, see Lungowe at [69] and [70]."

Mr Craig contended that this emphasised the importance of having a single forum for a trial of all claims, and indeed said that that was a fundamental principle.

176. I note that at paragraphs 37 and 38 of that judgment Master Cook dealt with submissions that the focus of that case were events which had taken place in London and that he regarded it as important that the defendants in that case had asserted that the focus was New York, but had produced no material to support that assertion:

"37. Mr Stafford QC makes the point that the claims made by Jefferies US account for 79% of the value in these proceedings. However, in my judgment this slightly avoids the real issue that the court must decide in relation to the facts of this case. The

evidence before me shows that there is a good arguable case that the tort claims against the Cantor Defendants are based on conduct which was concealed from the Claimants and that key elements took place in London. Mr Oudkerk QC points to the evidence which demonstrates that by location, at the time of the team move 10 of the team were based in London, 12 were based in New York, 3 were based in Hong Kong and 1 was based in Dubai. He makes the valid point that while this may appear finely balanced the three employees who are party to these proceedings were also some of the most senior employees. In the circumstances I accept Mr Oudkerk QC's submission that for the purpose of determining jurisdiction I should not place much weight on the number of contractual claims, most of which are not pursued in this litigation. I accept of course that different considerations may apply in relation to Issues 6 and 8, where a stay is being sought on case management grounds.

38. I also accept Mr Oudkerk QC's submission that while the Cantor Defendants have asserted that the focus of this case is New York they have not made any attempt to support the assertion by producing evidence of where they say the relevant events took place. In the circumstances they have not discharged the evidential burden upon them, see Spiliada at (476)."

177. I also note that in paragraphs 39 to 41 Master Cook referred as part of his evaluative exercise to various matters relating to location of witnesses, location of documents and governing law or laws:

"39. An important factor in this sort of litigation is the location of the witnesses. As has already been noted the three English domiciled defendants were some of the most senior employees involved. Mr Stafford QC did not identify any particular witnesses in the United States who would be called on the basis of the claim as pleaded. It is not unusual in international litigation of this kind for witnesses to be based out of the jurisdiction and there are many ways of managing such evidence to mitigate the cost of attendance.

40. Another important factor is the location of relevant documents. Mr Oudkerk QC makes the obvious point that most if not all of the documents in the case will be held

electronically. In the circumstances the relevance of the location of the documents to forum must be limited.

41. The governing law is another factor that has relevance to the question of forum. The tort claim is currently pleaded under English law. I did not understand Mr Stafford QC to suggest any alternative to English law. However if the applicable law were to reflect the location of each Claimant there would be three governing laws, English, New York and Hong Kong. The English Court will already be considering issues in relation to each of these governing laws in the Claimants' against the Second and Fourth to Sixth Defendants."

178. Master Cook there referred to the decision in Lungowe v Vedanta [2020] AC 1045, which in addition to Spiliada is a seminal authority in this area, albeit affected by the then "Owusu" principle of the law of the European Union, which is irrelevant to this case following Brexit.

179. I have been taken to and note the statements as to the general principles to be applied regarding the court's evaluation of what is the or an appropriate forum, including with regard to the potential for there being irreconcilable judgments and other matters, in various paragraphs of the judgments:

"66. I have found this to be the most difficult issue in this appeal. It does raise an important question of law. CPR r 6.37(3) provides that: "The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is the proper place in which to bring the claim" (my emphasis). The italicised phrase is the latest of a series of attempts by English lawyers to label a long-standing concept. It has previously been labelled forum conveniens and appropriate forum, but the changes in language have more to do with the Civil Procedure Rules' requirement to abjure Latin, and to express procedural rules and concepts in plain English, than with any intention to change the underlying meaning in any way. The best known fleshed-out description of the concept is to be found in Lord Goff of Chieveley's famous speech in the Spiliada case [1987] AC 460, 475—484, summarised much more recently by Lord Collins JSC in The Altimo case [2012] 1 WLR 1804, para 88 as follows: 'The task of the court is to identify the forum in which

the case can be suitably tried for the Interests of all the parties and for the ends of justice . . ' That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred."

"68. There can be no doubt that, when Lord Goff originally formulated the concept quoted above, he would have regarded the phrase "in which the case can be suitably tried for the interests of all the parties" as referring to the case as a whole, and therefore as including the anchor defendant among the parties. Although the persuasive burden was reversed, as between permission to serve out against the foreign defendant and the stay of proceedings against the anchor defendant, the court was addressing a single piece of multi-defendant litigation and seeking to decide where it should, as a whole, be tried. The concept behind the phrases "the forum" and "the proper place" is that the court is looking for a single jurisdiction in which the claims against all the defendants may most suitably be tried. The Altimo case [2012] 1 WLR 1804 also involved multiple defendants. Although it was decided after Owusu v Jackson [2005] QB 801, it concerned the international jurisdiction of the courts of the Isle of Man, so that the particular problems thrown up by this appeal did not arise.

69. An unspoken assumption behind that formulation of the concept of forum conveniens or proper place, may have been (prior to Owusu v Jackson) that a jurisdiction in which the claim simply could not be tried against some of the multiple defendants could not qualify as the proper place, because the consequence of trial there against only some of the defendants would risk multiplicity of proceedings about the same issues, and inconsistent judgments. But the cases in which this risk has been expressly addressed tend to show that it is only one factor, albeit a very important factor indeed, in the evaluative task of identifying the proper place. For example, in Société Commerciale de Rassurance v Eras International Ltd (formerly Eras (UK)) (The Eras Eil Actions) [1992] 1 Lloyds Rep 570, 591 Mustill LJ said: 'in practice the

factors which make the party served a necessary or proper party . . . will also weigh heavily in favour of granting leave to make the foreigner a party, although they will not be conclusive.'"

"83. The recognition that claimants seeking to avail themselves of their article 4 rights to sue an anchor defendant are nonetheless exposed to a choice whether to do so at the risk of irreconcilable judgments, even in cases where article 8 is not available, but another proper, convenient or natural forum is available for the pursuit of the case against all the defendants is, to my mind the answer to the conundrum posed in para 40 above. It does not in any way bring into play forum conveniens considerations as a reason for denying the claimants access to the jurisdiction of England as a member state, against the anchor defendant. It simply exposes the claimants to the same choice whether or not to avoid the risk of irreconcilable judgments, as is presented by the combination of article 4 and article 8 in an intra-EU context.

84. That analysis does not mean, when the court comes to apply its national rules of private international law to the question whether to permit service out of the jurisdiction upon KCM, that the risk of irreconcilable judgments is thereby altogether removed as a relevant factor. But it does in my view mean that it ceases to be a trump card, and that the basis upon which the judge, following Leggatt J in the OJSC VTB Bank case [2013] EWHC 3538 (Comm), regarded it as decisive, involved an error of principle. Since the Court of Appeal appears to have adopted the same approach as the Judge on this issue, I would regard it as incumbent upon this court to carry out that balancing of connecting factors and risk of irreconcilable judgments afresh. Like the judge, it seems to me sensible first to do so without regard to any risk that the claimants would not obtain substantial justice if required to proceed, at least against KCM, in Zambia.

85. It is unnecessary to do more than barely summarise the connecting factors with Zambia which led the judge to the conclusion that, putting aside the risk of irreconcilable judgments, Zambia was overwhelmingly the proper place for the claim to be tried. He described those factors as relevant to a trial as between the claimants and KCM, but the only factor to the contrary which he identified for the purposes of a notional trial as between the claimants and Vedanta was the risk of irreconcilable

judgments. In fact, almost all the connecting factors with Zambia identified by the judge are equally applicable to the case as a whole (i e as against KCM and Vedanta). In summary:

(i) The allegedly wrongful acts or omissions occurred primarily in Zambia. This is plainly true of the claim against KCM, but since the liability of Vedanta depends mainly upon the extent to which it intervened in the operation of the mine, it is likely to be true of Vedanta as well.

(ii) The causative link between the allegedly negligent operation of the mine and the damage which ensued is of course the escape of noxious substances into waterways, which also occurred within Zambia.

(iii) The mine was operated (whether by KCM alone, or by KCM and Vedanta together, as the claimants allege) pursuant to a Zambian mining licence and subject to Zambian legislation. In any event, it is common ground that all the applicable law is Zambian, even if that country may prove to follow the common law of England and Wales in material respects.

(iv) The claimants are all poor persons who would have real difficulty travelling to England to give evidence, for example of their injuries, or of the damage to their land and livelihoods. Although English is an official language in Zambia, many of the claimants only speak a local dialect which would require translation in order to be understood by an English judge or advocate, but not by their Zambian equivalents.

(v) KCM's witnesses of fact are all based in Zambia. They far outnumber the potential witnesses employed by Vedanta, some (but by no means all) of whom may be supposed to be domiciled in England.

(vi) Although relevant disclosable documents will be likely to be found in England and in Zambia (in the possession or control of Vedanta and KCM respectively), many of KCM's documents would, like the evidence of their witnesses, require translation for use in an English court, but not in a Zambian court, which has the considerable advantage in this context of being effectively bilingual.

(vii) All the regulatory and testing records and reports relevant to the alleged emissions from the mine are likely to be based in Zambia, as is the responsible regulator.

(viii) Against all those factors it may, as already noted, be the case that significant relevant documents are located in England. In an age when documents may be scanned (if not already in electronic form) and then transmitted easily and cheaply round the world, this does not seem to me to be a powerful factor. Some of the relevant conduct which the claimants may allege against Vedanta or upon which Vedanta may wish to rely by way of defence, may well have occurred in England, for example at board meetings of Vedanta. But its relatively small number of employees are likely to find it much easier to travel to Zambia than their counterparts in KCM, let alone the claimants themselves, would find it for the purposes of travel to England if only because of the enormous disparity in the number who would be required to travel in each case.

(ix) A judgment of the Zambian court would be recognisable and enforceable in England, against Vedanta. Zambian judgments are enforceable in England under Part II of the Administration of Justice Act 1920. Zambia is specifically listed as a relevant Commonwealth jurisdiction for the purposes of the 1920 Act by the Reciprocal Enforcement of Judgments (Administration Of Justice Act 1920, Part II) (Consolidation) Order 1984 (SI 1984/129).

86. I would not ignore, or downplay, the mitigation of those factors which good case management of an English claim might be able to achieve. For example, as has happened in the past, the English judge may arrange for sittings in Zambia, for Zambian evidence to be taken by video conference and for a Zambian court room or building to be continuously available to the claimants and the Zambian public to listen to and to view on screen those parts of the trial being conducted in England. As already noted, even if the volume of documents located in Zambia greatly exceeds those located in England (as is likely), modern facilities for their transmission should, to a considerable extent, reduce the inconvenience which might otherwise arise from their current location.

87. In conclusion, it is sensible to stand back and look at the matter in the round. This case seeks compensation for a large number of extremely poor Zambian residents for negligence or breach of Zambian statutory duty in connection with the escape within Zambia of noxious substances arising in connection with the operation of a Zambian mine. If substantial justice was available to the parties in Zambia as it is in England, it would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England, if the risk of irreconcilable judgments arose purely from the claimants choice to proceed against one of the defendants in England rather than, as is available to them, against both of them in Zambia. For those reasons I would have concluded that the claimants had failed to demonstrate that England is the proper place for the trial of their claims against these defendants, having regard to the interests of the parties and the ends of justice."

180. I note that it was said there that the risk of irreconcilable judgments is only a factor, although the reason that it was not a trump card in that particular case was because the Owusu principle meant that the claimants there had an indefeasible right to sue defendants domiciled in England, and of course since Brexit that reasoning no longer has application.

181. Mr Craig further took me to the decision in BAT v Windward [2014] 2 All ER (Comm) 757, this being a service out case where again the risk of inconsistent decisions and a party having to litigate twice in different jurisdictions was seen as having great weight, even such as to potentially override an exclusive jurisdiction clause or the fact that another forum had the closest connection to the case.

182. He took me in particular to paragraphs 62 to 73:

"62. This being a service out case, the burden is on BAT to satisfy the court that in all the circumstances, England is clearly and distinctly the appropriate forum for the trial of its claim against API and the court ought to exercise its jurisdiction to permit service of the proceedings out of the jurisdiction: see AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2012] 1 All ER (Comm) 319, [2012] 1 WLR 1804 (at [71], [78]); VTB Capital plc v Nutritek International Corp [2013] UKSC 5, [2013] 1 All ER (Comm) 1009, [2013] 2 AC 337 (at [13] [44], [80], [190]). The task of the

court is to identify the forum in which the case can be most suitably tried for the interests of the parties and for the ends of justice and since this is a service out case, the correct approach is not to Consider first whether there is a natural forum and if there is not, to ask whether England is nonetheless the appropriate forum for other reasons, but instead to answer one overall question: has it been clearly and distinctly shown that England is the appropriate forum: Spiliada Maritime Corp v Cansulex Ltd The Spiliada [1986] 3 All ER 843 at 858, [1987] AC 460 at 480, 481 per Lord Goff of Chieveley; VTB Capital plc v Nutritek International Corp [2012] EWCA Civ 808 [2012] 2 BCLC 437 (at [101], [164]); VTB Capital plc v Nutritek International Corp [2013] 1 All ER (Comm) 1009, [2013] 2 AC 337 (at [44], [190]).

63. The conventional approach involves considering the factors by reference to the issues in the case that connect the proceedings to the competing for a championed by the parties, and I propose to adopt this course because connecting factors are always relevant in answering the question before the court. However, it must be remembered that the forum most suitable for the interests of the parties and the ends of justice is not necessarily the forum with the closest connection to the dispute, as would be the case for example where one of the parties would not obtain a fair hearing in the more closely connected forum: see Dicey, Morris and Collins The Conflict of Laws (15th edn 2012) vol 1, para 12–055. Thus, in the instant case, BAT argues that England is the only forum in which its claims against Windward and API can be determined together and for this reason England is the appropriate forum for the trial of BAT's claim against API since otherwise BAT will be faced with the serious inconvenience and cost of bringing two heavy and very expensive actions covering the same ground in two different jurisdictions with the consequent risk of inconsistent decisions.

64. Mr Swainston QC submitted that in so far as BAT opposes API's case that it should sue API in New York because of the risk of inconsistent outcomes and the multiplication of its own costs, these are matters entirely of BAT's own making. I disagree. In my judgment, it was an entirely proper and reasonable decision for BAT to start proceedings against Windward as well as against API and to bring both sets of proceedings in England. The evidence clearly suggests that there are serious doubts as to the financial strength of API. Thus API's '10Q' consolidated financial statements to the three months ending 30 June 2013 show that as at that date API was balance sheet

insolvent to the tune of ($US377,066,000). On the other hand, Windward had net assets of $US72.3m and cash in hand and at bank totalling $US1m as at 31 October 2012. Further, Windward has claims to recover dividends totalling $US800.7m paid to its former parent company, Sequana SA, and its current directors, which Hamblen J held on 21 November 2013 had a real prospect of success when ordering absent an appropriate undertaking from Windward, the appointment of a receiver over those claims on BAT's application ([2013] EWHC 3612 (Comm), [2013] All ER (D) 265 (Nov)).

65. It is also the case that by reason of the AWA Agreement and the PDC agreement (see para [44], above) Windward is the ultimate paymaster in relation to any liability that API has to BAT and has the contractual right to control the litigation brought not only by NCR but also BAT.

66. Further, it is plain that England is the natural and appropriate forum for a claim by BAT against Windward. Windward is domiciled here and by virtue of art 2 of the Judgments Regulation (Council Regulation 44/2001/EC (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) (OJ 2001 L12 p 1)), the English court unquestionably has jurisdiction to determine such a claim.

67. The court was informed by Mr Attrill that Windward supported API's jurisdiction challenge but would not itself voluntarily submit to the jurisdiction of the New York Court, although if jurisdiction were established it would defend the claim. It is therefore seriously questionable whether a judgment against Windward in New York proceedings would be enforceable in England assuming that the New York Court would assert jurisdiction over the claim: see Dicey, Morris and Collins at [14R-020] (Rule 42) and [14R -054] (Rule 43).

68. There is also a real doubt whether the New York Court would indeed assert jurisdiction over a claim by BAT against Windward for an indemnity. It is common ground between the experts on New York law, Mr Milonas for BAT and Mr Pratt for API, that the New York Court would only have personal jurisdiction over Windward if the requirements of s 302(a)(1) of the Civil Practice Law and Rules were fulfilled, namely, that BAT's cause of action arises out of Windward having transacted business

in New York or having contracted to supply goods or services in New York. The experts also agree that a mere agreement to indemnify does not suffice, but they disagree on the issue whether the quality of Windward's contacts with New York would constitute 'transaction of business' in New York. Relying on Licci v Lebanese Canadian Bank SAL (2013) 20 NY 3d 327, a decision of the New York Court of Appeals not referred to by Mr Milonas in his first statement, Mr Pratt is of the view that:(i) Windward's retention of counsel in the New York proceedings and the subsequent Mediation; (ii) negotiating and concluding the 1998 Settlement Agreement and the AWA Agreement; (iii) conducting the 2005 Arbitration; and (iv) meeting in New York in 2005 as part of Windward's management of the New York proceedings, show Windward's 'purposeful availment' of New York law. In Mr Milonas' view[6]: (i) Licci (which was not an indemnity case) should be limited to its specific facts; and (ii) the matters relied on by Mr Pratt do not establish personal jurisdiction over Windward in New York since they simply 'restate the fact that Windward agreed to indemnify BAT'.

69. BAT does not have to show on the balance of probabilities that the New York Court would find that it did not have jurisdiction over a claim against Windward, merely that there is a real risk of that happening: see Cecil v Bayat [2010] EWHC 641 (Comm), [2010] All ER (D) 25 (Apr), at [28] per Hamblen J citing Cherney v Deripaska (No 2) [2009] EWCA Civ 849, [2010] 2 All ER (Comm) 456 at [29]. In my judgment, Mr Milonas' evidence is sufficiently cogent to support the conclusion that there is a real risk that the New York Court would find that it did not have jurisdiction over a claim brought by BAT against Windward for indemnity, and I so hold.

70. The fact that all possible related claims can be tried in one of the competing fora but not another carries great weight in deciding where the claims can best be tried in the interests of the parties and the interests of Justice. In Donohue v Armco Inc [2001] UKHL 64, [2002] 1 All ER (Comm) 97 (where the issue was whether effect should be given to an exclusive jurisdiction clause) Lord Bingham of Cornhill said (at [34]):

'It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps

made on different evidence, would in my view run directly counter to the interests of justice.'

71.To like effect are these observations of Rix LJ in Konkola Copper Mines plc v Coromin [2006] EWCA Civ 5, [2006] 1 All ER (Comm) 437 (at [27]):

'... the attitude of the English courts is, if possible, to avoid fragmentation of disputes between different jurisdictions where such fragmentation raises the twin dangers of waste of resources and of Inconsistent decisions.'

72. In JSC BTA Bank v Granton Trade Ltd [2010] EWHC 2577 (Comm), [2011] 2 All ER (Comm) 542, the first two defendants were sued as of right in England and (as here) jurisdiction was asserted against the other foreign defendants on the basis that they were necessary and proper parties. The claim against all of the defendants was that they had conspired to defraud the claimant bank by obtaining large payments under letters of credit said to be in connection with bona fide contracts with arms-length third parties, when this was not the case. The chief architects of the fraud were the first two defendants who maintained that there was no rule of law in Kazakhstan and the claims were politically motivated. There were many factors that connected the case to Kazakhstan. The claimant was incorporated and carried on business in Kazakhstan; most of the documentation alleged to have effected the fraudulent scheme was in Russian; the letters of credit were payable in Kazakhstan; and breaches of Kazakhstan law were alleged. Eight of the necessary and proper party defendants applied to have the order giving permission for service out of the jurisdiction set aside. Christopher Clarke J rejected the challenge made to the court's jurisdiction, holding that the fact that it was in the English court rather than a Kazakhstan court that all the issues could be tried against all the defendants outweighed the considerable links the case had with Kazakhstan.

73. The same approach was taken in the recent cases of Erste Group Bank AG V JSC 'VMZ Red October' [2013] EWHC 2926 (Comm), [2013] All ER (D) 128 (Oct) (Flaux J) and OJSC VTB Bank v Parline Ltd [2013] EWHC 3538 (Comm) (Leggatt J)."

183. Mr Craig submitted that Brazil is, and clearly is, the appropriate forum for the claims against the various Howden defendants, and particularly Howden UK, in particular for the following reasons.

184. Firstly, the claims against the 12th defendant have to be brought in the Brazil Labour Court. He reminded me that the evidence is that the courts of Brazil can case manage, so that even if claims against the other Howden defendants and the 12th defendant are in the Brazil state courts, inconsistent judgments and waste of time and cost can be avoided, or at least limited.

185. Mr Craig pointed to the general situation where in this jurisdiction claims may be brought by employees in an employment tribunal, but which interact with their or the employer's claims which are also being brought in High Court litigation, and that there the employment tribunal or the High Court may stay one process in order to allow another to proceed - see, for example, Lycatel v Schneider [2023] ICR 1208; [2023] EAT 81.

186. Mr Craig submits that, if proceedings were allowed to continue against the Howden defendants in England, there will be a much greater risk of inconsistent judgments and also of duplication of costs than if all the proceedings took place in the Labour and State Courts of Brazil.

187. Secondly, he submitted that the centre of gravity of the case was Brazil. He said that the case was essentially about whether Howden could take Aon's Brazil business, including its employees, and do so without paying financial compensation.

188. He submitted that the matter was concentrated on an alleged unlawful suborning of Brazil employees, being directly the 12th defendant and indirectly others; those employees, the business operation and the business clients all being located in Brazil.

189. He said that all the damage had occurred in Brazil and that the essential wrongs were alleged to be breaches of the 12th defendant's duties, which were all governed by the law of Brazil and owed primarily as employee and director of Aon Brazil, itself a

Brazilian company. Even if some consequential loss had occurred elsewhere, he stated that the primary direct loss was in Brazil.

190. Thirdly, he referred to the locations of various aspects of the case.

191. First, he pointed to the location of the parties. He pointed out that the 12th defendant resides in Brazil and pointed to Howden Brazil as being companies existing under the laws of Brazil and operating within Brazil, and that they had had a real existence prior to the Aon Brazil employees joining them, indeed that they had been purchased or the shares in them had been purchased by Howden as a group in 2014.

192. He further pointed out that if either this court required or Aon chose for Aon not to pursue Howden Brazil in this jurisdiction, that could give rise to the possibility that Aon would then sue Howden Brazil in Brazil and which could result in inconsistent judgments if the claims against Howden UK had been permitted to proceed within this jurisdiction.

193. He submitted that I should not limit myself to seeing this case against Howden as involving England and Wales defendants, but should very much consider the position and existence of those other parties, and including the 10th defendant who is a Portuguese national living in Italy.

194. Second, he pointed to the locations of documents and witnesses. Here, he accepted that the Howden defendants, and indeed the other defendants, have not, apart from in relation to questions of governing law and some issues regarding the law of Brazil, set out their case in response to Aon (the claimants)'s various allegations.

195. However, he said that Naftalin had indicated and that, in any event, it was likely, so that the court should assume that it would be the case, there would arise: questions regarding liability, including questions as to who had done what and whether that was in breach of relevant duties; and questions of causation, regarding in particular what would have happened but for the occurrence of wrongful events - for example, whether the Aon Brazil employees, including the 12th defendant, would have left Aon in any event notwithstanding the wrongs of which Aon complains having taken place, and

likewise as to whether Aon's Brazilian clients would have stayed with Aon even if the wrongs of which Aon complains had not taken place. Further, as to matters of quantification of loss and damage Mr Craig submitted that it would be expected that all sorts of issues would arise with regards in relation to a claim of this nature, even if none had been identified by the defendants as yet.

196. As to that stance of the defendants, Mr Craig took me to the decision of VTB v Nutritek [2013] 2 AC 337, and first to paragraph 36:

"36. Numerous judicial statements establish that it is incumbent on a defendant challenging the jurisdiction "so far as possible to identify the issues concerned and to state as clearly as possible how they arise or may arise in the proceedings": see e g Limit (No 3) Ltd v PDV Insurance Co [2005] 2 All ER (Comm) 347, 366, para 72, per Clarke LJ; Dicey, Morris & Collins, The Conflict of Laws, 15th ed (2012), para 11-143."

197. I note that in VTB the defendants there had challenged numerous aspects of that claimant's case, but without actually advancing any positive case of their own and the Supreme Court analysed the matter before them on that basis.

198. In this case, I note that the defendants have chosen to say nothing at all rather than to seek to deny or challenge most of the claimants' case.

199. As regards to all that, I note paragraphs 37, 39, 40, 90, 91, 192 to 194 and 228 of the VTB judgment:

"37. In the present case, the basic issues were in my view established by the evidence and submissions adduced below. The respondents deny that false representations were made, deny that they were party to any that were made, deny that any reliance was placed on any that were made and, for good measure, rely upon the participation agreement as showing that VTB, as opposed to VTB Moscow, did not suffer any loss. The last point was strongly argued in the courts below, as showing that VTB had no good arguable case in respect of which it could properly seek permission to serve out of the jurisdiction, but the Supreme Court refused permission to re-argue the point

before it. The case must therefore be considered on the basis that the claim is properly arguable, but that this defence is among those that the respondents will advance to it. It is however essentially a point of law, in relation to which there is no reason to think that the answer would be any different in Russia to here.

"39. A suggestion that the respondents should have advanced a positive case to support their denial of any involvement in the alleged deceit appears to me to go too far. Even where jurisdiction is established, a defendant is entitled to deny involvement in or liability for an alleged deceit, without advancing a positive explanation as to why he was not party to an alleged lie or conspiracy or as to how assets acquired proved, without any prior knowledge on his part, to be worth so much less than independent accountants had valued them as being. Further, no suggestion or objection appears to have been made below to the case being argued, as it was, on the basis that all the issues were properly raised by the respondents' general denials. On the other hand, there may be particular points, in relation to which, in the absence of any positive case from a defendant's side, it is not possible to conclude that any evidence will be called by the defence. That may in turn preclude bringing into account the convenience or otherwise of adducing in England or Russia any such evidence from the defence side as might be supposed to exist on such points, had any positive case been raised on them.

40. It is also clear, from such material as the court has before it in relation to the issue regarding the worldwide freezing order, that VTB has been given a considerable understanding by Mr Malofeev himself of the nature of his case regarding the discrepancy between the position indicated by the Ernst & Young report of 2007 and the position as it materialised not very long after the completion of the transaction. Mr Michaelson, partner at SJ Berwin acting for Mr Malofeev recorded in his tenth statement of 18 October 2011 (paras 38—42) that Nutrinvestholding (Nutritek's parent) had at Mr Malofeev's instance instructed Ernst & Young to prepare a further report dated 26 February 2010, to determine precisely what accounting practices and transactions were taking place within the Nutritek business and that the report does not implicate Mr Malofeev. Mr Michaelson went on to refer to "the obvious inconsistency between Mr Malofeev commissioning the report and at the same time being responsible for any wrongdoing identified": para 43."

“90. The second point is, in a sense, a sub-set of the first point, and concerns the extent to which a defendant who is challenging the jurisdiction of the English court should identify the nature of his case. In my view, the position is reasonably clear. As a matter of principle, a defendant is entitled to keep his powder dry: he can simply put the claimant to proof of its case. In general at least, that is true at any point of the proceedings. The mere fact that the defendant is challenging jurisdiction does not somehow impose a duty on him to specify his case. The onus is on the claimant to satisfy the court that there is a serious issue to be tried on the merits of the claim, and not on the defendant to satisfy the court that he has a real prospect of successfully defending it.

91. However, if the defendant chooses to say nothing, then it would be quite appropriate for the court to proceed on the basis that there is no more (and no less) to the proceedings than will be involved in the claimant making, or trying to make, out its case. Of course, in many instances, the defendant will be able to say that, although he has not submitted a draft statement of case, or produced a witness statement, setting out the details of his case, its nature is clear from correspondence, common sense, or even submissions. Consistent with my observations on the first point, I would not want to encourage a defendant to go into great detail as to his case in a long document with many exhibits, but if he is wholly reticent about his case, he can have no complaint if the court does not take into account what points he may make, or evidence he may call, at any trial. I agree with Lord Clarke JSC that a defendant could exhibit draft points of defence, but in many cases, it may be disproportionate to expect him to incur the costs of doing so before it has been decided whether the claim is to proceed at all."

"192. There are a number of points that seem to me to be relevant on this part of the case. First, it appears to me that it is important for the court to know what issues are likely to arise at the trial of the action on the merits. Only when the issues are identified will it be possible to compare the two jurisdictions. This principle is now stated in Dicey, Morris & Collins, The Conflict of Laws, 15th ed (2012), para 11-143, in which, having stated the general principles much as above, the editors say that, in practice, the defendant should identify the issues which are appropriate to be tried in the foreign court. In the footnote to that sentence the editors referred to Limit (No 3) Ltd v PDV Insurance Co [2005] 2 All ER (Comm) 347, para 73 and Sawyer v Atari

Interactive Inc [2006] IL Pr 129, para 54. See also Pakistan v Zadari [2006] 2CLC667, para 138 and Novus Aviation Ltd v Onur Air Tasimacilik AS [2009] 1Lloyd–s Rep 576. Lawrence Collins J or Lawrence Collins LJ is the author of the relevant passage in each of those cases except the Limit (No 3) case, in which I admit to being the author.

193. I adhere to the view I expressed in that case, now supported by Dicey. As Eder J put it in Mujur Bakat Sdn Bhd v Uni.Asia General Insurance Bhd [2011] Lloyd's Rep IR465, para 9:

> *"... in considering whether or not England is the most appropriate forum, it is necessary to have in mind the overall shape of any trial and, in particular what are, or what are at least likely to be, the issues between the parties and which will ultimately be required to be determined at any trial. These were originally set out in two letters ..."*

I stress that I do not mean that a defendant must set out his evidence in great detail, whether of foreign law or of fact. The purpose of the exercise is simply to state what the issues of fact are likely to be, so that the court can gauge whether England is clearly or distinctly the appropriate forum for the trial of the issues. This is of some importance in this case because no evidence was put before the court on the merits of the claims by or on behalf of Mr Malofeev. Moreover, Mr Hapgood QC submitted to the court in the course of the argument that Mr Malofeev was perfectly entitled to say and he does say to VTB, "You are accusing me of being a swindler, you get on and prove it." Mr Hapgood added that the matter proceeded in both courts below on the clear understanding that VTB will have to prove its case. As he put it, they will have to prove all five ingredients of a claim for fraudulent misrepresentation and a sixth ingredient in the case of conspiracy. It appears from what Mr Hapgood said that, at any rate at present, he has no positive case. It is of course true that a defendant in the position of Mr Malofeev is not bound to advance a positive case but, in the absence of a positive case, the focus of the court can only be on the ingredients of the claim. It should not speculate about the nature of any positive case that might be advanced in the future.

194. It was suggested in the course of the argument that the defendants could not plead a case or put forward a positive case because of the risk that they would submit to the jurisdiction. There is, in my opinion, no such risk. There is no reason why defendants should not put in a draft defence or evidence on the express basis that they are doing so without prejudice to their case on jurisdiction. I note in passing that it is the duty of the parties under CPR 1.3 to help the court to further the overriding objective, which is to deal with cases justly."

"228. I would only add this in the light of the judgments of Lord Mance JSC and Lord Neuberger of Abbotsbury PSC which I have seen since I prepared my own draft. Subject to the general point that one of the underlying principles of the CPR is that the parties should co-operate with each other and the court in order that cases are resolved justly, which must surely include the necessity for each party to put his cards on the table, I do not disagree with the general points made by Lord Neuberger PSC in the early parts of his judgment. None of the points I have made above is inconsistent with them. Thus, as I see it, even if the burden of proof is on the claimant, the defendant must indicate, at least in general terms what positive case he wishes to advance at a future trial, whether in England or elsewhere. This should be done shortly and concisely. In the instant case no attempt was made to do it at all."

200. Mr Craig submitted that even though the defendants have said nothing either positive or negative with regards to their actual case, it was sufficient for Naftalin to simply say it was likely that such issues, as I have identified above, would arise, and that legal common sense would suggest that in a claim of this nature where a claimant was saying that its Brazilian employees had been wrongfully induced to move to a competitor taking its Brazilian business with them, those are standard issues.

201. Mr Craig submitted, first, that in consequence many of the Brazilian employees, including the 12th defendant, would be likely to give evidence; that they are located in Brazil; that their first language is Portuguese and many might choose to give evidence by interpreter even if some, including the 12th defendant, could speak English well.

202. Further, Mr Marcelino is Portuguese, even if based in London and able to speak English.

203. Further, that the 10th defendant is Italian, even if able to speak English and having a strong connection to London.

204. Further, that the allegations which are made in this case are serious and somewhat equivalent to dishonesty, at least in relation to the 12th defendant, and potentially also Marcelino, and they should be able to give evidence in their first language.

205. Further, that Aon will presumably adduce witness evidence from Solano, whose first language at least is Portuguese, and possibly another Portuguese speaker, a Ms Ferreira.

206. He submitted that those matters and the desirability of witness evidence being given in Portuguese militated towards Brazil.

207. Second, he submits that very many of the documents were likely to be in Portuguese in relation to all manner of issues which were likely to arise. That was, in particular, because the essence of Aon's case on causation and loss and quantification of loss would centre on the Brazilian business and the Brazilian employees, and where the documents would at first sight tend to be in Portuguese.

208. He gave an example of WhatsApp messages passing from Solano to others being in Portuguese and hypothesised that that would be the case in relation to numerous potentially relevant communications involving Brazilian employees and Brazilian clients whose first language and tendency to converse would be in Portuguese.

209. That material would all require translation and which itself might be undesirable as the words used particularly in texts could well be subject to all sorts of nuance, and so as to put a judge in England and Wales at a significant disadvantage in dealing with matters over a judge in Brazil whose own first language would be Portuguese.

210. Fourthly, Mr Craig asserted that the relevant governing law of the claims was Brazilian and that that would be a powerful reason for Brazil to be the appropriate forum. See, for example, VTB at paragraph 46:

"46. The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum. Neither of these considerations here applies."

211. Mr Craig further submitted that if I allowed the claim to proceed in England, I should decide on a summary judgment basis that it is Brazilian law which applies and should strike out Aon's allegations that English law would apply to certain of Aon's claims.

212. As to this, firstly, there is no dispute that the 12th defendant's service contract and associated duties are governed by the law of Brazil. There is also, as between the experts, little dispute as to whether all of the Aon companies could sue on those duties, although there is a dispute as to whether one company can sue for losses which are primarily those of another company, and where that rule against reflexive loss I note exists in England in general, see Johnson v Gore Wood [2002] 2 AC 1 and cases following.

213. Secondly, there is more of a question with regard to the claims which Aon seeks to bring in tort, although Mr Craig submits that it is clear that the governing law there would be that of Brazil.

214. It is common ground that this question of governing law as far as the England and Wales court, which I am sitting in, is concerned is governed by the Rome II Convention of 11 July 2007.

215. I have noted the words of its recitals 16 to 18:

"(16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the

person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

(18) The general rule in this Regulation should be the lex loci damni provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country."

216. There appears then in the Convention Article 4:

"Article 4 General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing

relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

217. It is structured on the basis that the general rule of governing law is that set out in the Article 4.1, namely that of the jurisdiction which is the place where "the damage occurs".

218. That itself is subject to an exception in Article 4.2 as between a claimant who has sustained damage and a defendant who both have their habitual residence in a single jurisdiction.

219. Thirdly, that is overridden by what the cases term "the escape clause", Article 4.3, where the subject matter of the tort is manifestly most closely connected with a particular jurisdiction.

220. Mr Craig has referred me to the commentary in Dicey & Collins: Conflict of Laws: 16th edition at paragraphs 35-026 to 35-033:

"35-026. Where the claim is for the harmful consequences of an event not involving personal injury, death or damage to tangible property greater difficulty will arise. First, in principle, the place of damage should, normally be the place where the direct consequences of the relevant event giving rise to damage occurred. This test, however, is easier to state than to apply in practice, and will require the court to examine more closely the nature of the specific claim or claims brought in a particular case. The need for uniformity in the Regulation's rules, and the desire for consistency with other European Union instruments, demand an autonomous approach to the location of damage, taking due account of decisions of the European and English courts concerning what is now Art.7(2) of the recast Brussels I Regulation. The definition of "damage" in Art.2(1) of the Regulation, as well as the stated need for foreseeability of court decisions and the need to strike a reasonable balance between the interests of the parties, suggest that the court should seek to identify and locate the outward consequences of the defendant's conduct—or of an event for which the defendant is claimed to be legally responsible—and then to treat as the relevant "damage" those consequences which are closely and foreseeably linked to that conduct etc., which are

in some sense irreversible and which do not simply reflect or follow from other consequences occurring in another country. In undertaking that analysis, the court should assess the essential factual and legal characteristics of the "harmful event" underlying the claim or claims presented in order to identify the underlying interest or interests which the putative obligation(s) would seek to protect, and then to find an appropriate method of locating the harmful consequences resulting from interference with those interests. For example, if the defendant's allegedly false misrepresentations have led the claimant or its representative to release goods or documents held as security for a third party's obligations, the damage can be located in the country where the security was held at the time of its release, rather than in the country where the claimant received the representations or took any decision to release. Similarly, if the defendant by a representation specifically addressed to the claimant induces the claimant to enter into an unfavourable transaction (such as a contract) with a third party, it is strongly arguable that the claimant should be taken to have suffered damage at the point, and in the place, where the claimant or his or her representative concludes the transaction, with that place being determined according to factual rather than legal criteria . Cases where the induced transaction consists of a payment from a bank account or other dealing in an intangible asset present greater difficulty, as the European Court's case law concerning the recast Brussels I Regulation supports the view that the location of a bank or securities account from which or into which a transfer is made is not, of itself, a sufficient connecting factor to locate damage for the purposes of what is now Art.7(2) within that Regulation. In such cases, an additional connecting factor is required to locate the damage in the country from which the payment or other dealing originated, although the fact that the claimant or his or her representative is adjudged to have concluded the underlying transaction in that country will probably suffice for this purpose. The European Court's case law concerning the recast Brussels I Regulation also suggests a bifurcated approach to locating damage in cases involving broader informational duties, owed to a class of persons including the claimant. In such cases, it would first appear necessary to locate, albeit rather impressionistically, the market or regulatory sphere within which the defendant's informational duties would apply (for example, a market for consumer goods, the marketing of securities by a prospectus approved or notified in a particular State, or the trading of securities on a stock exchange). That approach is then corroborated or focussed by a factor relating to the specific consequences of the

alleged tort/delict for the claimant within that broader territorial area, for example, where the claimant concluded a transaction to acquire a tangible asset or the location of an investment account into which securities acquired by the claimant were transferred.

35-027. In misappropriation cases, whether involving a single actor or concerted action, it seems appropriate to locate damage at the place where an asset (tangible or intangible) is taken from the control of the claimant or another person with whom the claimant has a relationship. A similar approach can be applied to interferences falling short of misappropriation. For example, if the defendant is alleged to have interfered with the claimant's contractual relations with a third party, resulting in the third party's non-performance of obligations owed to the claimant, the damage should be located in the country where, according to the terms of the contract, performance would have taken place.

35-028. Secondly however, a claimant may suffer direct financial loss in more than one country. In the Explanatory Memorandum, accompanying the Commission's original proposal it is suggested that in such cases "the laws of all countries concerned will have to be applied on a distributive basis, applying what is known as Mosaikbetrachtung in German law". This approach has been endorsed by the Court of Appeal, in relation to Arts 4 and 6 of the Rome II Regulation, in a case involving the alleged misuse of confidential information to manufacture and then sell articles in different markets worldwide. This may be one point where principle may ultimately yield to pragmatism, particularly in cases (such as a claim for non-monetary remedies) where the fragmented application of the laws of several countries may be impossible or exceedingly difficult. In such cases, the temptation may be to avoid this theoretical difficulty by seeking to locate the "direct" damage in a single country or by making use of the "escape clause" in Art.4(3) of the Regulation.

Clause (2) of the Rule. Common habitual residence

35-029. Where the "person claimed to be liable" and "the person sustaining the damage" both have their habitual residence in the same country at the time when the damage occurs, Art.4(2) requires that the law of that country shall apply. It is obvious

that Art.4(2) constitutes a limited exception to Art.4(1) but the following points may be noted. First, the scheme of Art.4 suggests the reference to the "person sustaining the damage" in Art.4(2) must be taken to be the party who suffers the (direct) damage to which Art.4(1) refers. For example, if personal representatives of a deceased victim bring both a claim on behalf of the victim and a bereavement or dependency claim on their own behalf, it may be that only the deceased's country of habitual residence at the time he or she suffered the fatal injury falls to be taken into account as the habitual residence of the person sustaining the damage under Art.4(2). As regards "the person claimed to be liable", it is suggested (although the position is not entirely clear) that it would be preferable to focus on the identity of the person whose legal responsibility for the event giving rise to damage is in issue in the proceedings. For example, if the defendant is alleged to be liable to the claimant for personal injury suffered due to the negligence of the defendant's employee, it is the defendant's common habitual residence (and not that of the employee, if different) which falls to be taken into account, whether the basis of the defendant's claimed liability is his or her own negligence (for example, in choosing the employee for that task) or vicarious liability. By contrast, the bringing of a direct action against the insurer of the person claimed to be liable does not change the identity of the person whose habitual residence falls to be taken into account under Art.4(2).

35-030. Secondly, it must be determined whether and, if so, how Art.4(2) applies in cases where there are multiple claimants, defendants and/or other involved persons. The objective of the Regulation in seeking to designate the same national law irrespective of the country or countries in which an action is brought suggests that Art.4(2) is to be applied in such situations, separately, as between each pairing of claimant and defendant. Any other solution would either open up the possibility of manipulation of the applicable law by the party or parties bringing legal proceedings making tactical decisions as to the joinder of claims and parties in order to secure, or avoid, the application of Art.4(2) and the law to which it refers or would create significant uncertainty as to the meaning of the expressions used in Art.4(2). Thus, for example, if a party (A) wishes to sue both employer (B) and employee (C) in negligence, and if B and C are habitually resident in different countries, it should not matter, in determining the law applicable to the claims against each of them, whether A sues the two defendants in the same set of proceedings, or individually in their home

countries, or concludes that only B is worth suing. Accordingly, in the example, Art.4(2) should be applied separately as between A and B and A and C, and the law applicable to the tort/delict determined accordingly. Similarly, in a traffic accident involving multiple vehicles, it should not be necessary to assess the habitual residence of all those suffering injury, or all those whose involvement might give rise to liability. Each potential claim arising from the accident stands alone for the purposes of applying the rule of displacement in Art.4(2). The habitual residence of other involved parties may, however, be a circumstance to be taken into account in applying the "escape clause" in Art.4(3), discussed below.

35-031. Other points arising in the application of Art.4(2) may be dealt with more briefly. Thirdly, it would seem that the law of the common habitual residence applies irrespective of the degree of connection between that law and the tort/ delict (unless the case can be brought within Art.4(3)). Fourthly, the mere fact of common habitual residence triggers the exception: there is no requirement of any prior relationship between the parties. Fifthly, the exception applies irrespective of the issue or issues which arise for decision in the case. There is thus no room for the operation of depeçage, so that the law of the country of damage applies, say, to the issue of the standard of liability whereas the law of the common habitual residence applies to, say, the issue of heads of damage. Finally, it is the fact of identity of habitual residence, and not the fact that the content of the laws of the parties' habitual residence is identical, that is determinative.

Clause (3) of the Rule. Escape clause

35-032. Article 4(3) is described in Recital (18) as an "escape clause", emphasising that its application is intended to be exceptional. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in Art.4(1) or (2), the law of that country shall apply. Art.4(3) emphasises that a manifestly closer connection might be based, in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question. Before discussing the circumstances to be taken into account, and the way in which the test is to be applied, the following preliminary points arise. First, the provision does not permit assessment of whether a

particular issue is manifestly more closely connected with another law, or require the assessment to be conducted by reference to the matters that are actually in issue in a particular case. It must appear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another law, although the wording (in the French text, "fait dommageable") may well allow a focus which goes beyond the circumstances pertaining to the liability of a particular defendant to a particular claimant. Secondly, as an exception to Art.4(1) or 4(2), it will be for the party relying on Art.4(3) to establish that its terms are satisfied. Article 4(3) sets a "high hurdle" in the path of that party. Thirdly, the requirement that the tort be manifestly more closely connected with the law of another country (which must be "clear from the circumstances of the case") emphasises that the court must be satisfied that the threshold of closer connection has been clearly demonstrated. Nevertheless, the approach of the European Court and the English courts to the similarly (although not identically) worded rules of displacement in Art.4(5) of the Rome Convention and Art.4(3) of the Rome I Regulation suggests that it should not be necessary to demonstrate the absence of any "real" or "genuine" connection with the country whose law is otherwise applicable, and that a clear preponderance of factors pointing to a country other than that whose law applies under Art.4(1) or (2) is what is required. To put the same point another way, the party who invokes Art.4(3) of the Rome II Regulation must demonstrate (clearly) that the "centre of gravity" of the tort/delict lies elsewhere. Finally, purely as a matter of drafting, it is not clear whether it will be possible to invoke Art.4(3) so as to displace Art.4(2) in circumstances where the tort is manifestly more closely connected with the law of the country in which the damage occurs, i.e. the law applicable under Art.4(1). This is because Art.4(3) speaks of a tort which is manifestly more closely connected with a country other than that indicated in Art.4(1) or (2) in which case "the law of that other country should apply". There is, however, no good reason for not allowing Art.4(2) to be displaced in favour of the law applicable under Art.4(1).

35-033. Article 4(3) states that a manifestly closer connection might in particular be based on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question. That, however, is obviously not a complete statement of the circumstances which will suffice to establish (or refute) the manifestly closer connection. Circumstances other than a pre-existing relationship may

be relevant: and a pre-existing relationship other than one arising out of a contract may also be relevant. The court must have regard to "all of the circumstances of the case", apparently without any temporal limitation. This includes the event giving rise to damage and the indirect consequences of that event, although they are left out of account in the application of Art.4(1). Other potentially relevant factors, in addition to the location of the (direct) damage and habitual residences of the parties, include the location of events preparatory to the event giving rise to damage, and the parties' nationalities, as well as other relevant personal connections, and other surrounding circumstances (such as connections to other persons and things involved in the harmful event). Although the location of the direct damage (in a case to which Art.4(1) applies) and the parties' habitual residences (in a case to which Art.4(2) applies) are not factors which connect the tort/delict with "a country other than that indicated in paragraphs 1 or 2", they are obviously factors which connect the tort/delict to the country whose law applies under those paragraphs and which should be given significant, and often decisive, weight in the assessment of relative proximity involved in deciding whether the "escape clause" in Art.4(3) is engaged. Needless to say, what is called for is not a simple counting exercise, but an overall objective appraisal of the significance of each factor in establishing a connection between the relevant harmful event (considered as a whole) and a particular country or countries. Ultimately, the question for the court is whether the "tort/delict" has a manifestly closer connection to a country other than that whose law would otherwise apply, under Art.4(1) or (2), than it has to the latter country. If not, the "escape clause" will not operate."

221. He has also referred me to the decision in Pan Oceanic v UNIPEC [2017] 2 AII ER (Comm) 196 at paragraphs 193 onwards, and where I note, in particular, paragraphs 193 to 196, 199 and 202:

"193. POC's analysis in relation to art 4(1) is as follows:

(a) The search is for the country where the direct damage first occurred.

(b) The country where the unlawful event and/or indirect damage occurred is irrelevant to the issue of where the direct damage first occurred. However, they can and often do occur in the same place as the direct damage (see Dolphin Maritime &

Aviation Services Ltd v Sveriges Angfartygs Assurans Forening [2009] EWHC 716 (Comm), [2010] 1 All ER (Comm) 473).

(c) The direct damage in the present case occurred when the Defendants failed to nominate cargoes to TI (see Union Transport Group plc v Continental Lines SA [1992] 1 All ER 161, [1992] 1 WLR 15, and see further AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbh [2014] EWHC 1085 (Comm), [2015] 1 All ER (Comm) 374, [2015] QB 699). POC suffered indirect damage in the form of lost commissions (see Dumez France SA v Hessische Landesbank (Case C-220/88) EU:C:1990:8, [1990] ECR I-49).

(d) The 'country' where the direct damage to TI occurred was New Jersey because the cargo nominations would have been made at POC's office in New Jersey, but for UHK's breach of the 2010 WAF COA.

194. UHK claims that the failure to nominate cargoes is merely 'the event giving rise to the damage' and that POC's damage is the failure to receive commission, which can only be construed as pure economic loss. The country where the damage was suffered by POC is therefore New York, where POC's bank accounts are located. POC counters that a claimant should not be able to claim the domicile of its bank account as its place of damage: it would give claimants an unfair advantage, being able usually to point to damage in their home country, and therefore be able to apply that law.

195. I do not accept POC's analysis by reference to direct and indirect damage on the facts of this case. Dumez France SA v Hessische Landesbank (Case C-220/88) EU:C:1990:8, [1990] ECR I-49 is distinguishable from the present case, and indeed distinguishable from the paradigm factual scenario that would give rise to an implied in law promise under New Jersey law. Dumez was a case about secondary victims in circumstances where a tort had primary and secondary victims. The parent and subsidiary had suffered loss in different jurisdictions, though the parent company was the claimant. The question was whether the damage occurred where the subsidiary had suffered loss or where the parent had suffered loss. In those circumstances, the court looked to see where the place of primary loss was. Here there is only one form of damage caused by the relevant unlawful act (ie breach of the implied in law promise)

namely loss of commission to the broker. Additionally, it is questionable as to whether or not it is appropriate to transpose the approach in Dumez (under the Brussels Regulation) to issues arising under Rome II (see for example Plender and Wilderspin on The European Private International Law of Obligations (4th edn 2014) para 18–013)).

196. In AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbh [2014] EWHC 1085 (Comm), [2015] 1 All ER (Comm) 374, [2015] QB 699, Popplewell J conducted a comprehensive review of the cases relating to art 5(3) of the Brussels Regulation. This decision has since been examined by the Court of Appeal ([2015] EWCA Civ 143, [2016] 1 All ER (Comm) 486, [2015] QB 699) (and at the time of this judgment is currently under consideration by the Supreme Court). The Court of Appeal overturned Popplewell J's decision, but did not criticise his analysis of the relevant legal principles. Popplewell J's decision provides some useful guidance as to where POC suffered its damage in this case (at page 361):

> *'(4) In cases of economic loss, the search is for the place where the harmful event directly had its effect on the immediate victim and where the original damage is manifested: Dumez [1990] ECR I-49, paras 20–21. The damage occurs where the direct harmful consequences are suffered, not at the place where indirect or more remote damage occurs or consequential financial damage is felt which has arisen out of an event which has already caused initial and actual damage elsewhere: Marinari [1996] All ER (EC) 84, [1996] QB 217, paras 14–15 (and A-G's opinion at Paras 26–27); Kronhofer [2004] 2 All ER (Comm) 759, paras 19, 21; Re´union Europe´enne A-G's opinion at para 48.*
>
> *(5) These formulations give effect to two important aspects of the search. (a) The task is so far as possible to identify a single place for the occurrence of damage. The search is for the place where the damage occurred. This reflects the fundamental objective of certainty. (b) The search will be for the element of damage which is closest in causal proximity to the harmful event. This is because it is this causal connection which justifies attribution of jurisdiction to*

the courts of the place where damage occurs (see Bier [1978] QB 708, [1977] 3 WLR 479, paras 16–17 and Dumez [1990] ECR I-49, para 20).

(6) There is a difference between a case in which the claimant complains that he has lost his money or goods (as in Marinari or Domicrest) and a case in which the claimant complains that he has not received money or goods which he should have received. In the former case the harm may be regarded as occurring in the place where the money or goods were lost although the loss may be said to have been consequentially felt in the claimant's domicile. In the latter case the harm lies in the non-receipt of the money or goods at the place where they ought to have been received and the damage to him is likely to have occurred in the place where he should have received them: Dolphin [2010] 1 All ER (Comm) 473 at [60] and Re´union Europe´enne [2000] QB 690, [2000] 3 WLR 1213, paras 35–36.

(7) It may assist in identifying the place where damage occurred to ask what would have happened if the tort or defect had not been committed: Domicrest Ltd v Swiss Bank Corp [1998] 3 All ER 577 at 595, [1999] QB 548 at 562, 568, Dolphin [2010] 1 All ER (Comm) 473 at [59]. That is not, however always an answer to where the damage has occurred. That question engages the issues of which damage is direct, immediate and initial and which is merely indirect or consequential.'"

"199. In the Court of Appeal in AMT [2016] 1 All ER (Comm) 486, [2015] QB 699, Christopher Clarke LJ formulated a test to ensure that the decision was congruous with the key decisions of the ECJ as follows:

'[54] Such a conclusion is consistent with the authorities of the ECJ. If I ask myself (i) what is "the place where the event giving rise to the damage … directly produced its harmful effects upon" AMTF (Dumez); or (ii) where was the "actual damage" which "elsewhere can be felt" or the "initial damage" suffered (Marinari); or (iii) what was the place where the damage which can be attributed to the harmful event (commencement of proceedings) by "a

direct and causal link" (Réunion) was sustained, the answer is, in my judgment, Germany.'"

"202. This is consistent with ECJ case law, as demonstrated by adopting Christopher Clarke LJ's test set out in AMT, as follows:

(a) What is the place where the event giving rise to the damage directly produced its harmful effects upon the claimant?

(b) Where was the 'actual damage' which 'elsewhere can be felt' or the 'initial damage' suffered?

(c) What was the place where the damage which can be attributed to the harmful event by 'a direct and causal link' was sustained?"

222. I also note that in Article 4.3 there is used, and the case law stresses the use of, the word "manifestly", and states that this is an exceptional matter.

223. I further note that paragraph 209 of the Pan Oceanic judgment reads:

"209. Having considered the various possible connections that this case throws up, in my judgment it cannot be said that there is a manifestly closer connection to England such as to displace the general rule in Article 4(1). The failure to nominate occurred in New Jersey. The loss of commission occurred in New York. UHK is based in Hong Kong. UHK would not have overcome the high threshold required to meet the exceptional test in Article 4(3)."

224. Mr Craig submits, firstly, in relation to Article 4.2 that the damage occurred in Brazil, even on Aon's case. He submitted that I should look to the direct damage being, first, the loss of employees located in Brazil who worked in Brazil; and, second, the loss of Aon Brazil's clients and business: and that I should not look o indirect damage such as consequential loss which might have occurred elsewhere, and in particular in England with regards to remitted Brazilian business.

225. Secondly, in relation to Article 4.2, he submits that the relevant damage referred to there was that identified in Article 4.1. In support of this contentions, he referred to Dicey at 35.029 and 35.030. He submitted that the court needs to ask who suffers that damage, and he contended that it would be Aon Brazil; and that as a result Article 4.2 would be of no assistance to Aon UK, even as an English company in its claims against Howden UK defendants, as Aon UK would not be the person who had sustained the relevant damage for Article 4 purposes.

226. Thirdly, in relation to Article 4.3, he submitted that rather than the torts being manifestly closer connected to England, that they were in fact manifestly closer connected to Brazil. That being in particular as: they related to the 12th defendant's Brazil employment contract; the consequence of any breaches and resultant damage would relate to Brazil employees, Brazil business and Brazil clients; and that, without those consequential events occurring in Brazil, what happened in London would be effectively irrelevant and of no consequence.

227. Mr Craig submitted that the question of governing law should have great weight with regards to the question of appropriate forum. In particular as, first, in general the foreign court would be best placed to resolve a case governed by foreign law, both as to what the foreign law is and how it is to be applied.

228. Second, that would be all the more so where either the foreign law was unclear or in a state of development or foreign public policy was involved, and he referred me to WWRT v Zhevago [2024] EWHC 122 (Comm), and I note, in particular, paragraphs 149 to 151 and 155:

"149. On any view, the centre of gravity of the alleged tort is Ukraine. As discussed in Section C above, WWRT has failed to show any substantial and efficacious act being carried out in England. Even if that conclusion were wrong, however, any such act does not detract from the fact that thus case involves, at its heart, an allegation of a domestic fraud carried out in Ukraine by Ukrainians on a Ukrainian bank, as described in Section C above. As far as connecting factors are concerned, this is a case which is overwhelmingly connected with Ukraine for the reasons set out below.

150. (1) Ukrainian law. The claims are all governed by Ukrainian law, and the natural forum for resolving such disputes is Ukraine. A Ukrainian court is likely to apply its own law more reliably than a non-Ukrainian court, and also to do so without the need for potentially expensive expert evidence. The expert evidence filed hitherto, amounting to approximately 250 pages, indicates that very substantial issues of Ukrainian law will arise in this case. The issue considered in Section B above only scratches the surface of the issues which are in dispute under Ukrainian law. There are, plainly, significant differences between the common law applied in England and the civil law applied in Ukraine. For example, Article 1166 has no English equivalent, and it is apparent that the law of limitation is not the same.

151. In the DGF case, the Chancellor said (at [141]) that it was far more appropriate that the relevant complex issues of Ukrainian law should be determined by the Ukrainian courts. He referred to reasons given by Cockerill J in the Antipinsky Refinery case (see below), where the judge had said that it was an unappealing prospect for a judge of the English Commercial Court to be required to express a view on hotly contentious issues of foreign law (there Russian) which were also in the process of development. That was the more so when any appeal from a decision on the foreign law would, in England, be impeded because it would be a decision on facts and expert evidence, whereas in the foreign court a full appeals process would be followed. I consider that these conclusions are equally applicable in the present case."

"155. It is clear at the present stage that substantial issues will arise on Ukrainian law. The parties' existing Ukrainian legal experts are in Ukraine. It is also clear that there will be a significant issue on limitation. WWRT will need to address the factual issues on limitation in its evidence, and it is likely that Mr Zhevago will also wish to adduce evidence from witnesses on the issue. The potential witnesses here include Ukrainian individuals within the Bank and/or the DGF who conducted the liquidation of the Bank and any investigations into the alleged schemes and claims. Mr Wyatt identified, for example, Ms Cherniavska and her colleagues who carried out investigations into the Bank's affairs, and a number of other individuals previously identified by Mr McGregor. Mr Alyoshin's evidence confirms that if any witnesses refused to co-operate, the Ukrainian courts had power to compel them to give evidence."

229. Thirdly, that that would be the case here, especially as Brazil has no law of tortious conspiracy, but rather has a law of unfair competition, which before me at the time of Mr Craig's submissions had not been developed in the expert evidence; although it has now been in the reports of Satiro and Adamek, and in circumstances where Mr Craig and his clients chose not to appear by oral advocate at the hearing on 28 February 2025.

230. In any event, though, Mr Craig submitted that, relying on statements by Naftalin, although he is not an expert in Brazil law, the Brazil law of unfair competition was limited; and that there would be important questions of Brazil public policy relating to restraint of trade, which in English law is a matter of general complexity and so would likely be also complex as far as the law of Brazil was concerned.

231. Mr Craig submitted that, if the claim was, contrary to his jurisdictional application, to proceed here, Aon would be unable to establish that (as a matter of English law) the law of the relevant torts would be that of any jurisdiction other than Brazil, and in particular of England.

232. In consequence he contended that Aon's claims based on substantive English law failed to disclose reasonable grounds for such to succeed and should be struck out under CPR3.4(2)(a):

"*Power to strike out a statement of case*

...3.4(2) The Court may strike out a statement of case if it appears to the court-

(a) That the statement of case discloses no reasonable grounds for bringing or defending the claim."

233. That provision generally requires the Court to assume that the facts pleaded in the statement of case will be proved at trial when considering whether or not reasonable grounds are disclosed for bringing the reasonable claims.

234. I am unsure are to whether or not Mr Craig was also advancing a case for reverse summary judgment on this issue on the basis that Aon had no real prospect of success

of establishing (in English law) that the law of the relevant torts would be that of any jurisdiction other than Brazil, and in particular of England and that there would also be no other compelling reason why they should be the subject matter of a trial, under CPR24.3. Again, this, if successful, would leave only Aon's Brazil law claims to be advanced.

235. I have borne in mind the wording of Civil Procedure Rule 24.3 itself:

"Grounds for summary judgment

24.3 The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—

(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

236. I have also borne in mind the White Book notes regarding the case law relating to the question as to whether a party has no real prospect of success in White Book 24.3.2:

""no real prospect of succeeding"

24.3.2 The following principles applicable to applications for summary judgment were formulated by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 at [24]:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All E.R. 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

iii) *In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;*

iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];*

v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550;*

vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;*

vii) *On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a*

fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

A more recent summary can be found in Amersi v Leslie [2023] EWHC 1368 (KB) at [142]."

237. I note, in particular, that for there to be a real prospect of success, the claim must be more than merely fanciful, but I have borne in mind the entirety of the provisions and notes.

238. Where, as here, the applicant defendants are not relying on factual evidence, and so the court proceeds on the basis that the factual allegations made in the Particulars of Claim will be proven, there is little difference between an application under CPR3.4(2)(a) and one under CPR24.3 (and see the discussion as to overlap at White Book notes 3.4.2.1); and, and including because I would come to the same conclusion under either provision (see below), and in order to seek to achieve the overriding objective in CPR 1.1 where it would, it seems to me, be artificial to ignore the existence of the two provisions, I have considered both.

239. Mr Craig added, firstly, that he accepted that the Cyber claim and any possible Marine claim would have to be tried in England. He submitted that they were simply separate claims to the LatAm claims involving different persons, and where there would be no risk of inconsistent judgments if the LatAm claims were tried in Brazil, and that there was nothing in the case law preventing such an outcome.

240. He referred me to the decision in VTB v Antipinsky [2021] EWHC 1758, where Mrs Justice Cockerill held at paragraphs 99, 113 to 117, 210 to 228 and 242, and then in 228, that this was a possible and indeed in that case the correct outcome; and that where the overlap between claims was limited the fact of overlap was a factor to be taken very seriously, but that in particular circumstances it might not be a factor of weight.

241. Secondly, that there was little to show that Aon would be disadvantaged by having to proceed in Brazil, and certainly not enough to invoke the stage 2 of Spiliada or for there to be a situation where interests of justice mandated all matters proceeding in England.

242. Mr Craig was not prepared to say that the Howden defendants would comply with orders which the Brazil courts might make. However, he did say that the Howden defendants would submit to the jurisdiction of the Brazil courts and that there was no reason to suppose that Howden defendants would not comply with orders made by those courts. He later clarified that he was only reserving the position with reference to possible questions of English public policy (see paragraph 447 below).

243. He explained that position by saying there might be reasons of England and Wales public policy to conclude that a Brazil court order should not be enforceable within this jurisdiction.

244. Thirdly, in closing, Mr Craig said, to which I will revert, that the place of commission of the torts was Brazil. He said that the torts amounted to the taking of the Brazil employees and the Brazil business, all being matters which were located in Brazil.

245. I note that in VTB v Nutritek the place of commission of a tort was emphasised to be a starting point for what was an appropriate forum, albeit capable of being overborne by other factors, as stated in paragraphs 50 to 52:

"50. For reasons already given, I proceed on the basis that this was London in relation to the claim in deceit, and that the conspiracy, being to commit the same deceit, should be regarded as effectively ancillary. But I also note that, Mr Ryzhkov as managing director of VTB's acquisition department was the first signatory of the Facility Agreement for VTB, and he was based in Moscow. It may well be that his signature was sent or collected electronically from Moscow. Even if that were so, he is in Russia, and on any view an important potential witness.

51. The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view

unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors.

52. Here the common design on which the respondents' tortious responsibility is based was formed in Russia. Further, both the alleged representations emanated from Russia, in the form of the Ernst & Young 2007 report and the information that Mr Alginin was the effective beneficial owner of RAP. The history of the transaction which I have set out indicates that the transaction was introduced, pursued and approved predominantly in Moscow. It is difficult to avoid the conclusion that VTB was effectively following suit on decisions taken there. Further, significant aspects of the facts which are said to have rendered the representations untrue existed in Russia: particularly, the dairy companies' businesses and financial positions, but also, presumably, the factual control which Mr Malofeev is said to have exercised directly or through Marcap Moscow over RAP."

246. Mr Craig submitted in conclusion that therefore it was clear that Brazil was the clearly more appropriate forum than England and Wales, and therefore that jurisdiction should be declined in relation to the LatAm claims against the Howden defendants on the basis of forum non conveniens; and that if I was not prepared to do so, I should in any event resolve the issue that the governing law of tort in this case was that of Brazil.

Fii the 12th defendant's submissions in support of their jurisdiction and strike-out (and/or summary judgment) applications

247. Mr Holmes KC (leading Mr Barnard) appeared for the 12th defendant. He adopted Mr Craig's submissions, but focused on the 12th defendant whom he accepted had been served within this jurisdiction.

248. His primary submission was that the 12th defendant had a right to be sued in the Brazil Labour Court. He accepted that the service contract did not contain any choice of jurisdiction clause, but he said that it was implicit within the employment relationship that the Brazilian rules would apply where the employment relationship was governed by the law of Brazil.

249. He did, however, accept that Brazilian law, being civil law rather than common law, had no concept of implication of terms into contracts. However, he submitted that the Brazilian Constitution effectively imposed the Brazil Labour Courts on disputes arising from the employment relationship.

250. He submitted that, where there was something equivalent to an exclusive jurisdiction provision or right, the England and Wales court would require strong reasons to depart from it.

251. He relied in addition to authorities I have already cited on the decision in Donohue v Armco [2002] 1 AII ER 749, paragraph 24:

"24. If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and

circumstances of the particular case. In the course of his judgment in The Eleftheria [1970] P 94 , 99–100, Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see the SNI Aérospatiale case [1987] 3 All ER 510 at 522, [1987] AC 871 at 896. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case.)."

252. And he also relied on the decision in Zephyrus Capital [2024] 4 WLR 47, at paragraphs 106 to 113:

"(1) The test

106. The court will grant a stay in such circumstances unless the counterparty to the jurisdiction clause can point to strong reasons for the court not to do so. That reflects the strong policy reasons—relating to party autonomy, the enforcement of bargains and commercial certainty—in favour of upholding agreements as to the forum in which disputes are to be resolved. Thus in the leading case Donohue v Armco Inc [2001] UKHL 64; [2002] 1 All ER 749, paras 24–25 , Lord Bingham of Cornhill (with whose speech the other members of the House of Lords agreed in all material respects) said:

> *"24. If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise*

that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it …

"25. Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause …"

107. The same is applied whether the contractual forum is England or a foreign jurisdiction: see, eg, Import Export Metro Ltd v Cia Sud Americana de Vapores SA [2003] EWHC 11 (Comm); [2003] 1 All ER (Comm) 703, para 14 (i).

108. The policy reasons underlying the "strong reasons" test have been underlined in a number of cases, including Konkola Copper Mines plc v Coromin Ltd (No 2) [2006] EWHC 1093 (Comm); [2006] 2 All ER (Comm) 400, para 31 , Riverrock Securities Ltd v International Bank of St Petersburg [2020] EWHC 2483 (Comm); [2021] 2 All ER (Comm) 1121, para 85 , Catlin Syndicate Ltd v Amec Foster Wheeler USA Corpn [2020] EWHC 2530 (Comm) at [26] and the decision of the Singapore Court of Appeal in Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd [2018] SGCA 65 at [72]. Lord Bingham in Donohue referred to it as " an important and substantial, and not a formal and technical, right " (para 29).

109. As to when strong reasons might exist, Lord Bingham in Donohue made the following observations, at para 24:

"… Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in The Eleftheria [1970] P 94, 99–100 , Brandon J helpfully listed some of the matters which might properly be regarded by the court when

exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see [Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] AC 871, 896]. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case).”

110. The factors listed in The Eleftheria [1970] P 94, 99–100 to which Lord Bingham referred in the above passage, appear in the following passage from Brandon J's judgment:

“The principles established by the authorities can, I think, be summarised as follows:

“(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

“(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

“(3) The burden of proving such strong cause is on the plaintiffs.

“(4) In exercising its discretion the court should take into account all the circumstances of the particular case.

“(5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:

“(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.

"(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.

"(c) With what country either party is connected, and how closely.

"(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

"(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

Brandon J went on to say at p 103G that:

"as to the prima facie case for a stay arising from the Greek jurisdiction clause, I think that it is essential that the court should give full weight to the prima facie desirability of holding the plaintiffs to their agreement. In this connection I think that the court must be careful not just to pay lip service to the principle involved, and then fail to give effect to it because of a mere balance of convenience."

Brandon J also regarded it as important that Greek law governed the dispute, which differed from English law in respects that might be material; and that there were advantages of questions of Greek law being decided by the Greek court (including the point that any appeal would be treated as involving a question of law rather than fact).

111. It is well established that to satisfy the "strong reasons" test requires much more than the type of evaluation involved in a forum non conveniens assessment, particularly where the jurisdiction clause is exclusive: see, eg, JP Morgan Securities Asia Private Ltd v Malaysian Newsprint Industries Sdn Bhd [2001] 2 Lloyd's Rep 41, para 51 , Bas Capital Funding Corpn v Medfinco Ltd [2003] EWHC 1798 (Ch);

[2004] 1 Lloyd's Rep 652, para 192 , Antec International Ltd v Biosafety USA Inc [2006] EWHC 47 (Comm) at [7 (iii)]. See also Skype Technologies SA v Joltid Ltd [2009] EWHC 2783 (Ch) at [33] , per Lewison J:

> *"It follows, in my judgment, that what one might call the standard considerations that arise in arguments about forum non conveniens should be given little weight in the face of an exclusive jurisdiction clause where the parties have chosen the courts of a neutral territory in the context of an agreement with world-wide application. Otherwise the exclusive jurisdiction clause would be deprived of its intended effect. Indeed, the more 'neutral' the chosen forum was the less the importance the parties must have placed on the convenience of the forum for any particular dispute. If the standard considerations that arise in arguments about forum non conveniens were to be given full weight, they would almost always trump the parties' deliberate selection of a neutral forum …"*

112. It has been held in forum non conveniens cases that a "real risk" of the denial of substantial justice can exist where requiring a claimant to proceed abroad would result in the claimant's arguable claim, under what the English court would consider the proper law, being likely or bound to fail because the foreign court would apply a different governing law to that claim. For example:

> *(i) In Britannia Steamship Insurance Association Ltd v Ausonia Assicurazioni SpA [1984] 2 Lloyd's Rep 98 , the proper law of the claimants' claims was English law (as the law governing their contracts of reinsurance with the defendants). The defendants challenged the English court's jurisdiction and sought a stay of the claims in favour of Italy. The claimant resisted the stay on the basis that the Italian courts would apply Italian law to certain questions of ostensible authority and ratification that were in dispute, and which, under Italian law, the claimant was likely to lose, thereby causing its entire claim to fail. At first instance, Hobhouse J said:*
>
> *"Therefore the situation is that if I set aside service, the plaintiffs will be deprived of rights which exist under English law and will only be able to avail*

themselves of rights which almost certainly are not the same and are critically different under Italian law. This difference is likely on a balance of probabilities to lead to the failure of the plaintiffs' case.

"Therefore there are strong reasons why the court should allow the English proceedings to go ahead because under English law which is the proper law of the contracts the plaintiffs are entitled to those rights and to accede to the application would deprive the plaintiffs of rights to which they are prima facie entitled. That is the cardinal point." (Quoted at p 100 rhc.)

Hobhouse J accordingly declined to stay the English proceedings. On appeal, his reasoning was endorsed by the Court of Appeal and the appeal dismissed (p 102 lhc).

(ii) In Banco Atlantico SA v British Bank of the Middle East [1990] 2 Lloyd's Rep 504 , the proper law of the claimant's claim was Spanish law. The defendant sought a stay of the English proceedings in favour of the courts of the UAE, which would apply the law of the UAE, under which the claimant's claim was bound to fail. The Court of Appeal declined to grant a stay, Bingham LJ stating:

"... I could not for my part regard it as conducive to justice to require Banco, as a party with an arguable claim under what we would hold to be the proper law ... to litigate, if at all, in a jurisdiction where it would be bound on the evidence to face summary rejection of its claims. Had the discretion been mine, I would not have granted a stay." (p 509 lhc.)

(iii) In Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd (The Golden Future) [2011] EWHC 56 (Comm); [2011] 1 WLR 2575 , the claimants sued under a guarantee the proper law of which, in English eyes, was English law. The defendants sought a stay of the English proceedings in favour of the Indian courts, where there was at least a very real risk that the guarantee would be deemed void and unenforceable (para 142). Christopher Clarke J stated, at para 143:

"the fact that an arguable claim under a contract governed (in English eyes) by English law will fail if it is adjudicated on in the only realistically alternative foreign court, because that court will apply some provision of its own law which invalidates a contract on the grounds of statutory prohibition or public policy, is a powerful indicator that England is the place where the claim can most suitably be tried for the interests of all the parties (which are that their disputes be determined in accordance with the law applicable to the contract between the parties) and the ends of justice (which are that the legitimate expectations of the parties, derived from the contract, are not confounded) …"

(iv) In Lungowe v Vedanta Resources plc [2019] UKSC 20; [2020] AC 1045, para 88 , Lord Briggs JSC observed that: "If there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice." Subject only to the foreseeability point, there is no logical reason why similar considerations should not be relevant in cases where an EJC exists but where the dispute involves the court making decisions about the effect of a separate contract (here, the Leases) that is subject to a different law from the contract under which the claim is brought.

113. There are dicta in Mercury Communications and Antec , which I cite in the following section, suggesting that the claimant must show "overwhelming" or "very strong" reasons. The All Risks defendants, though not the War Risks defendants, relied on them. In my view, those dicta depart from the "strong reasons" test authoritatively stated in Donohue , and followed in most of the later cases, and I consider them to overstate the matter. I would add that a likelihood (if established) of an unfair trial due to state interference or lack of judicial independence/impartiality would fall at or near the top end of the range of factors to which the court may properly have regard when contemplating declining a stay, and could readily be regarded as a "very strong" or "overwhelming" reason to do so."

253. He submitted that such strong reasons could not include matters which were foreseeable at the time of entry into the relevant contract, and which matters he submitted would include the potential suborning of an employee by another and their acting in breach of statute as a consequence.

254. In support of that proposition he cited the decision in Antec v Biosafety [2006] EWHC 47 (Comm), where at paragraph 7 it was said:

"Relevant legal principles

7. In coming to my conclusion, I applied the following legal principles that can be derived from the authorities:

i) The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is appropriate to approach the matter as though the claimant has founded jurisdiction here as of right, even though the clause is non-exclusive; see e.g. per Hobhouse J in S & W Berisford Plc v New Hampshire Insurance Co. [1990] 1 Lloyd's Rep. 454 , at 463; per Waller J in British Aerospace Plc v Dee Howard Co [1993] 1 Lloyd's Rep. 368 ; per Moore-Bick J in Mercury Communications Ltd v Communication Telesystems International [1999] 2 AER 33 at page 41.

ii) Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule; see e.g. British Aerospace Plc supra Mercury Communications supra at page 41; per Aikens J in Marubeni Hong Kong & South China Ltd v Mongolian Government [2002] 2 AER (Comm) 873 at 891(b)–(f); per Lawrence Collins J in Bas Capital Funding Corporation and others v Medfinco Ltd and Others [2004] 1 Lloyd's Rep. 652 , at paragraphs 192–195; per Gross J in Import Export Metro Ltd v Compania Sud Americana de Vapores SA [2003] 1 Lloyd's Rep. 405 .

iii) Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard Spiliada balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain; see cases cited supra . In particular, the fact that the defendant has, or is about, to institute proceedings in another jurisdiction, not contemplated by the non-exclusive jurisdiction clause, is not a strong or compelling reason to relieve a party from his bargain, notwithstanding the undesirability of parallel proceedings. Otherwise a party to a non-exclusive jurisdiction clause could avoid its agreement at will by commencing proceedings in another jurisdiction; see cases cited supra and The El Amria [1981] 2 Lloyd's Rep. 119 ; Breams Trustees Ltd v Upstream Downstream Simulation Services [2004] EWHC 211 (Ch) per Patten J at paragraphs 27 and 28."

255. He further directed me to the decision in Evans v Bertola [1973] 1 WLR 349 and the judgment at page 376, letter H, in support of his contention that whether a type of dispute was foreseeable was a matter of weight in this area.

256. He submits that Article 114 of the Brazilian Constitution, being a matter which could be protected by injunction in civil law, and the Brazil courts requiring employment matters to be brought in the Labour Court were similar to and should be treated as equivalent to an exclusive jurisdiction agreement or right.

257. He also put that argument in the alternative by submitting that when the parties to the 12th defendant's employment contract and appointment as director entered into their relationship, they would have done so on an objectively mutual expectation basis that disputes regarding those relationships would be dealt with in accordance with the law of Brazil, that is to say by the Brazil Labour Court.

258. Mr Holmes submitted that the court of England and Wales should hold them to that expectation, again in a way somewhat equivalent to an express exclusive jurisdiction agreement.

259. Mr Holmes submitted that this approach should apply also to claims against the 12th defendant other than under the service contract. He pointed to the experts having effectively agreed that it was the Labour Court that had jurisdiction in relation to all claims against the 12th defendant.

260. In relation to claims in corporate law, including claims in fiduciary duty arising from the 12th defendant being a director or manager of Aon Brazil, he submitted that those claims were simply for the Labour Court whatever the articles said; and he referred me to the various expert reports which I have already recited in this judgment.

261. With regard to the fact that Nery disagreed as to whether those claims were covered by the articles, Mr Holmes submitted that it did not matter because the articles themselves were overridden in terms of their choice of the state court as having exclusive jurisdiction by Article 114 of the Constitution, and which gave the Labour Court exclusive jurisdiction.

262. However, his secondary fallback submission was that if that was not the case, then the articles themselves, in his submission, gave exclusive jurisdiction to the state court.

263. Thirdly, he submitted that with regards to the question of exclusive jurisdiction clauses, the courts of this jurisdiction approach the question of exclusive jurisdiction not by seeking to determine the matter, but by only asking whether a good arguable case exists as to there being an exclusive jurisdiction agreement or right - see Clifford Chance v Societe Generale [2024] ILPr 6 at paragraph 79:

"79. The party alleging a binding jurisdiction agreement needs to show a good arguable case. In practice this means that:

i) The party relying on the existence of the agreement must supply an evidential basis showing that it has the better argument (and not much the better argument).

ii) If there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so.

iii) The nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the existence of the agreement if there is a plausible (albeit contested) evidential basis for it.

(Dicey § 12-083, summarising the restatement in Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV [2019] EWCA Civ 10 of the tests as formulated in Brownlie v Four Seasons Holdings Inc [2017] UKSC 80 , and Goldman Sachs International v Novo Banco SA [2018] UKSC 34).”

264. In consequence, Mr Holmes submitted, first, that I should simply apply the Brazilian rule that claims against the 12th defendant should be determined by the Brazil Labour Court; and second, if I was not simply applying that rule, then in any event it would have great weight as to what is the most appropriate forum, at least in relation to claims against the 12th defendant.

265. He repeated those submissions regarding forum in relation to his submissions relating to Article 4.3 of the Rome II Convention as to the governing law of torts being the law of Brazil.

266. Fourthly, Mr Holmes accepted that the desirability of avoiding the multiplicity of proceedings could be a strong reason for a single forum to be the appropriate one, and indeed to depart from the provisions of an exclusive jurisdiction clause. That was in fact said in Donohue at its paragraph 27.

267. In this regard, he also referred me to Evans Marshall and the section at 377C, where he submitted that the Court of Appeal seemed to regard the avoidance of having a conspiracy claim tried in two different jurisdictions, especially where one might not even recognise the existence of such a tort in its own law, as being a strong reason of weight favouring the matter being tried in a single jurisdiction which did recognise such a tort:

"I would, moreover, refer to one further factor which in my judgment has considerable weight. The conspiracy allegations, which we were told are definitely being pursued and are supported by evidence prima facie fit to be left to a jury, sound in tort and fall within head (h) of Ord, 11, r. 1. It would seem odd indeed, even if such a tort exists, or alternatively is recognised in Spain (as to which no evidence has been put before us), were we in all the circumstances, to adopt a course which necessitated separate trials of this cause of action in Spain and in England."

268. Fifthly, Mr Holmes submitted that, if all the proceedings took place in Brazil, there would be little risk of inconsistent judgments as the courts of Brazil would manage some staged approach of the various litigation.

269. Sixthly, Mr Holmes submitted that the 12th defendant should really be seen as only something of a "bit" player; that Aon's real target was Howden, and that only Howden and not the 12th defendant could afford to pay substantial damages, or for that matter, costs.

270. He submitted that there was in fact no real need, commercially or legally, for Aon to sue the 12th defendant, who would still be able to give evidence without being a party, and in which case Aon would be no worse placed either jurisdictionally -- indeed it would improve Aon's chances of being able to sue in England and Wales -- or commercially.

271. He said that suing the 12th defendant was Aon's own choice; and in doing so they had brought jurisdictional problems, including the possibility of inconsistent judgments on themselves; and that was not a reason to allow Aon simply to proceed in relation to all matters, including the claims against the 12th defendant, in England.

272. He referred me to paragraph 484 of the Zephyrus decision:

"484. A risk of irreconcilable judgments may have less, or possibly no, weight if it was self-induced by the party asking the court not to give effect to the EJC. Lungowe v Vedanta Resources plc [2019] UKSC 20; [2020] AC 1045 was a forum non conveniens case concerning claims brought against a defendant domiciled in England who could

be sued in England as of right (the "anchor defendant", Vedanta) and its Zambian subsidiary (KCM). The defendants having challenged jurisdiction, the Supreme Court had to consider the proper approach to ascertaining the appropriate forum where Vedanta had, after proceedings were issued, offered to submit to the jurisdiction of the Zambian courts so that the whole case against both defendants could be tried there (paras 40 and 75). The Supreme Court held that the judge had erred in principle in regarding the risk of inconsistent judgments as decisive (para 84) and that if (as it found to be the case) substantial justice was available to the parties in Zambia, it would offend common sense to think that the proper place for the litigation to be conducted was England, if the risk of irreconcilable judgments arose purely from the claimants' choice to proceed against one of the defendants in England rather than against both in Zambia (para 87). Lord Briggs JSC said, at para 75:

> *"… the reason why the parallel pursuit of a claim in England against Vedanta and in Zambia against KCM would give rise to a risk of irreconcilable judgments is because the claimants have chosen to exercise that right to continue against Vedanta in England, rather than because Zambia is not an available forum for the purpose of the claim against both defendants. In this case it is the claimants rather than the defendants who claim that the risk of irreconcilable judgments would be prejudicial to them. Why (it may be asked) should that risk be a decisive factor in the identification of the proper place, when it is a factor which the claimants, having a choice, have brought upon themselves?"*

and, a little later, at para 84:

> *"That analysis does not mean, when the court comes to apply its national rules of private international law to the question whether to permit service out of the jurisdiction upon KCM, that the risk of irreconcilable judgments is thereby altogether removed as a relevant factor. But it does in my view mean that it ceases to be a trump card …"*

Those statements were, as the War Risks defendants point out, made in the context of a forum non conveniens analysis."

273. Seventhly, Mr Holmes submitted that English law should for reasons of comity respect the jurisdictional law of Brazil. In this regard he referred me to Petter v EMC [2016] ILPr 3, this being an exclusive jurisdiction clause case, where Lord Justice Sales also referred to forum non conveniens, and where the relevant paragraphs are 48 and 52:

"48. The basis for a court of equity to intervene to grant an anti-suit injunction is the right of a person to be protected from undue harassment in the form of inappropriate litigation in more than one place. The jurisdiction is to be exercised when the ends of justice require it: Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] 1 A.C. 871 , 892. This jurisdiction founds both the forum non conveniens principle (which applies even where there is no contractual right to litigation in any particular jurisdiction) and the grant of injunctions where there is an exclusive jurisdiction agreement. The principles which govern the grant of injunctive relief (to prevent litigation abroad) or a stay (to prevent litigation in England) are heavily informed by public policy concerns relating to the comity of nations, the rational and proper distribution of litigation to resolve disputes in a fair and a cost-effective way and other matters."

"52. Whether the public policy of the foreign forum is to be given weight requires an evaluative assessment by the English court, including by inquiry whether the foreign restriction on the party's choice of law or venue corresponds to restrictions in English or EU law (see Akai Pty Ltd , [56]) or to public policy recognised or reflected in that law (see OT Africa Line Ltd v Magic Sportsware at [78]–[79] per Rix LJ). The more it does so, the easier it will be for the English court to consider it should recognise such public policy concerns on grounds of comity and expected reciprocity. Similarly, the English court's assessment may include issues such as the nature of the rule of foreign law (e.g. whether it is permissive, as for the Canadian legislation in issue in OT Africa Line , or preclusive, as in the case of art.22 of the Regulation, since this is likely to reflect the force of the public policy which underlies the rule in question) and whether the foreign public policy calls in question the weight to be given to party autonomy on grounds which would be recognised as having force by an English court (e.g. is the foreign rule designed to protect a party which may be expected to have less bargaining power when making the agreement in the first place: see OT Africa Line at [47], [74] and [77] per Rix LJ, emphasising the strength of the bargaining power of the parties in

that case, who "had nothing of the consumer about them"; cf the discussion below in relation to the converse situation of protection of employees under English/EU law, who are recognised to be in a weaker social and economic bargaining position than employers). In Akai Pty Ltd and in OT Africa Line the English court found that the foreign public policy in question in each case should not override the pacta sunt servanda principle in relation to an English exclusive jurisdiction clause."

274. Eighthly, Mr Holmes submitted that I should give weight to a general public policy that employees should be sued in their home courts. He referred me to this being a principle of European law in article 21 of the Recast Judgments Regulation and post-Brexit to a principle in relation to employees resident or working in the UK, as laid down by Section 15C of the Civil Jurisdiction and Judgments Act 1982:

"15C.— Jurisdiction in relation to individual contracts of employment

(1) This section applies in relation to proceedings whose subject-matter is a matter relating to an individual contract of employment.

(2) The employer may be sued by the employee—

(a) where the employer is domiciled in the United Kingdom, in the courts for the part of the United Kingdom in which the employer is domiciled,

(b) in the courts for the place in the United Kingdom where or from where the employee habitually carries out the employee's work or last did so (regardless of the domicile of the employer), or

(c) if the employee does not or did not habitually carry out the employee's work in any one part of the United Kingdom [or any one overseas country] , in the courts for the place in the United Kingdom where the business which engaged the employee is [or was] situated (regardless of the domicile of the employer).

(3) If the employee is domiciled in the United Kingdom, the employer may only sue the employee in the part of the United Kingdom in which the employee is domiciled (regardless of the domicile of the employer).

(4) Subsections (2) and (3) are subject to rule 11 of Schedule 4 (and rule 14 of Schedule 4 has effect accordingly).

(5) Subsections (2) and (3) do not affect—

(a) the right (under rule 5(c) of Schedule 4 or otherwise) to bring a counterclaim in the court in which, in accordance with subsection (2) or (3), the original claim is pending,

(b) the operation of rule 3(e) of Schedule 4,

(c) the operation of rule 5(a) of Schedule 4 so far as it permits an employer to be sued by an employee, or

(d) the operation of any other rule of law which permits a person not domiciled in the United Kingdom to be sued in the courts of a part of the United Kingdom.

(6) Subsections (2) and (3) may be departed from only by an agreement which—

(a) is entered into after the dispute has arisen, or

(b) allows the employee to bring proceedings in courts other than those indicated in this section.

(7) For the purposes of this section, where an employee enters into an individual contract of employment with an employer who is not domiciled in the United Kingdom, the employer is deemed to be domiciled in the relevant part of the United Kingdom if the employer has a branch, agency or other establishment in that part of the United Kingdom and the dispute arose from the operation of that branch, agency or establishment."

275. Mr Holmes accepted that he could only rely on this provision by analogy where the 12th defendant is resident in Brazil and was, he said, working primarily in Brazil.

276. Ninthly, he submitted that there is good reason as to why employees should be sued in their home court and which underlies the relevant legislation of both Brazil and

England. Employees tend to lack bargaining powers against their employees; it tends to be a greater burden on them to have to travel from one jurisdiction to another than for the employer; and it may be that the employee's home court and court of their place of work will best appreciate and understand an employee's case and submissions.

277. Mr Holmes submitted that there was support for those contentions, both in the Mallet report and also in the Petter decision at paragraphs 55 to 59:

"55. In my view, s.5 of the Regulation reflects and seeks to give expression to a clear public policy to protect employees in relation to litigation relating to their employment, because they are taken to be in a weaker negotiating position by reason of their economic and social status as against employers. The decision in Samengo- Turner gives effect to this public policy, as reflected in the Regulation. In my opinion, it was legitimate for the court in Samengo-Turner to do this.

56. I think it is also relevant in assessing how to weigh up domestic public policy concerns reflected in English law against the usual principle of party autonomy to consider whether the relevant English public policy and law are themselves intended to reflect a judgment regarding the force to be accorded to party autonomy and whether there are party autonomy factors which provide reasons to favour England as the place to litigate despite a foreign exclusive jurisdiction clause.

57. As to the first of these, where a case falls within s.5 of the Regulation, the object of the section is to deprive foreign exclusive jurisdiction clauses of effect when the English court is asked to apply them and to require a person who is an "employer" for the purposes of the Regulation to litigate against the employee in the courts of the employee's place of domicile. The policy and the precise legal rules in the Regulation which reflect the policy are clearly directed to protecting employees as a category of persons who are assessed to be in a weaker social or economic position than employers as a category, so that weight should not be given to contractual choices an employee has made as to jurisdiction. The public policy and law are specifically designed to derogate from party autonomy and the pacta sunt servanda principle, so that the employee is not to be treated as stuck with what he has contracted for. I would add that the Regulation treats employers and employees as general categories for the

purposes of this public policy: it has not been thought appropriate to provide in the legislation for individualised assessments of relative bargaining power of employer and employee to be made case by case. That would be an invidious, very difficult and costly exercise to try to undertake.

58. As regards the second factor, there are additional reasons why overriding weight should not be given to party autonomy as reflected in the relevant contract. MMC in the Samengo-Turner case and EMC in ours are US corporations operating on an international basis, with subsidiaries in other countries. As Tuckey LJ said in Samengo-Turner at [43], "A multinational business must expect to be subject to the employment laws applicable to those they employ in other jurisdictions." Both MMC and EMC and their groups chose to employ staff in countries outside the US, with the attendant possibility that local employment laws might include provisions like those in the Regulation to protect employees. This tends to undermine the extent to which weight should be given to the expression of choice of jurisdiction in the relevant contract: see also Stitchting Shell Pensioenfonds at [43] ("[Shell] invested in a company incorporated in the BVI and must, as a reasonable investor, have expected that if that company became insolvent it would be wound up under the law of that jurisdiction").

59. Both these sets of factors are ones which it is reasonable to think that a common law court in New York or Massachusetts would understand and regard as being capable of respect on grounds of comity. Recognition that employees may often be in a weaker position than employers is something which is not unknown in common law jurisdictions, as well as in civilian jurisdictions such as those in the European Union. The idea that an international company may enter into dealings with someone based in a foreign jurisdiction, whose ties are strongest with that jurisdiction, and hence may be taken to have chosen to have accepted the risk of having the jurisdictional rules of that jurisdiction applied to it, is again something which I think can readily be understood by courts in common law jurisdictions as a potentially relevant consideration. Further, in Samengo-Turner no relevant public policy of the State of New York and in the present case no relevant public policy of the State of Massachusetts (apart from the general desire to give effect to party autonomy) was identified to be weighed in the balance against the public policy factors which are relevant in the jurisdiction of

England. There is thus a reasonable prospect that another common law court in New York or Massachusetts may come to accept, upon reading the reasoned decisions of this court, that on grounds of comity it should accept that an employee such as the claimants in Samengo-Turner or Mr Petter should be allowed to litigate in England, the country of their domicile and the country with which their employment was most closely connected."

278. Tenthly, Mr Holmes submitted in relation to the Apotex Brazil decision relied on by Nery that that was all about an underlying Canadian judgment, which related to a Canadian employment relationship in relation to work being done in Canada, and that the courts of Brazil, when considering whether that judgment should be enforced, paid little attention to the fact that the employee was Brazilian and the Brazilian Constitution, all of which was extensionally coincidental and not relied on.

279. Eleventhly, he repeated, in relation to the corporate law claims arising from the second defendant being a director of Aon Brazil, that the experts effectively did agree that the Labour Courts still had exclusive jurisdiction, albeit that otherwise there was an exclusive jurisdiction clause in the articles in favour of the Brazil State Court.

280. Mr Holmes submitted in conclusion that it was clear that the most appropriate forum was Brazil, indeed the Labour Court in Brazil being the mandatory forum for the claims against the 12th defendant.

Fiii the 10th defendant's submissions in support of their jurisdiction and strike-out (and/or summary judgment) applications

281. Mr Lloyd made submissions on behalf of the 10th defendant. Firstly, he pointed out that as the 10th defendant was resident in Italy and had been served out of the jurisdiction there, that the burden was on the claimant to show that England and Wales was clearly the most appropriate forum.

282. He otherwise adopted Mr Craig's submissions as to appropriate forum and as to governing law being that of Brazil. He did, however, fairly, accept that if the litigation was to continue in England and Wales against Howden UK, the court would be likely

to conclude that it should also do so against the 10th defendant in order to avoid multiplicity of jurisdictions.

283. He did confirm that the 10th defendant would submit to the jurisdiction of the Brazil courts and would accept that he would be bound by any Brazil court order, subject to whether the courts of England and Wales were prepared to enforce it.

284. He did, however, submit that I should set aside my April 2024 order, and with it the permission to serve the 10th defendant out of the jurisdiction, on the basis of material non-disclosure.

285. He cited various authorities, including Sloutsker v Romanova [2015] EWHC 545(QB), Tugushev v Orlov (No 2) [2019] EWHC 2031 (Comm) and Derma v Ally [2024] EWCA Civ 175. The principles set out with those in other cases were collated recently in Marsalis v Karipidis [2025] EWHC 13 (a decision handed down after the parties' submissions but which I consider to be a useful summary reflecting what the parties had cited to me) at paragraphs 48 to 54:

"48. Finally, the law concerning the duty to make full and frank disclosure which rests on an applicant on a without notice application was summarised as follows by Warby J in Sloutsker v Romanova [2015] EWHC 545 (QB); [2015] 2 Costs LR 321, at [51] :

> *"i) An applicant for permission to serve proceedings outside the jurisdiction is under the duty of full and frank disclosure which applies on all applications without notice.*
>
> *ii) The duty requires the applicant to make a full and fair disclosure of those facts which it is material for the court to know: Brinks Mat v Elcombe [1988] 1 WLR 1350, 1356 (1) and (2) (Ralph Gibson LJ). Put another way, disclosure should be made of "any matter, which, if the other party were represented, that party would wish the court to be aware of": ABCI v Banque Franco-Tunisienne [1996] 1 Lloyd's Rep 485, 489 (Waller J) .*

iii) Non-disclosure of material facts on an application made without notice may lead to the setting aside of the order obtained, without examination of the merits. It is important to uphold the requirement of full and frank disclosure.

iv) But the court has a discretion to set aside or to continue the order. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues that were to be decided. The answer to the question whether the non-disclosure was innocent is an important, though not decisive, consideration. See Brinks Mat at pp1357 (6) and (7) and 1358 (Balcombe LJ).

v) In the context of permission for service outside the jurisdiction the court has a discretion to set aside the order for service and require a fresh application, or to treat the claim form as validly served and deal with the non-disclosure by a costs order: NML Capital Ltd v Republic of Argentina [2011] UKSC 31, [2011] 2 AC 495, [136] (Lord Collins) ."

49. The relevant principles were also summarised by Carr J in Tugushev v Orlov (No. 2) [2019] EWHC 2031 (Comm), at [7] :

"i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;

ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to

evidence and arguments which it can reasonably anticipate the absent party would wish to make;

iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;

iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;

xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;

xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and

to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;

xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure."

50. That summary was approved by the Court of Appeal in Derma Med Ltd v Ally [2024] EWCA Civ 175 (see Males LJ, with whom Bean LJ and Lewis LJ agreed, at [29]). At [30], Males LJ said "Although this was said in the context of an application for a freezing order, the principles are of general application."

51. On behalf of the First and Second Defendants, Mr Hodson also made reference to Masri v Consolidated Contractors International Co SAL [2011] EWHC 1780 (Comm) - in which Burton J expressed the view at [58] that the duty of full and frank disclosure may apply "particularly where [the without notice application] is made on paper where the judge is left to consider on his own in his or her room what may often be a pile of undigested exhibits" - and to Ophthalmic Innovations International (UK) Ltd v Ophthalmic Innovations International Inc [2004] EWHC 2948 (Ch) .

52. The particular point that emerges from those cases relates to the relevance of foreign proceedings. In the latter case, in which Lawrence Collins J set aside the order granting permission to serve proceedings out of the jurisdiction, he stated at [45] that "the existence of overlapping proceedings in a foreign jurisdiction between the same or related parties (whether pending or prospective) is likely to be a particularly relevant matter which in normal circumstances must be disclosed, and the non-disclosure of which may well of itself lead to the order for permission being set aside".

53. I should add that the duty of fair presentation was described in Fundo Soberano de Angola v Jose Filomeno dos Santos [2018] EWHC 2199 (Comm) by Popplewell J at [52] as follows:

> *"The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision."*

54. I should also add that further guidance as to the correct approach to be adopted by the parties and the Court towards allegations of material non-disclosure was provided in Mex Group Worldwide Ltd v Stewart Owen Ford and others [2024] EWCA Civ 959 :

(1) By Males LJ at [112]:

"... I sought in National Bank Trust v Yurov [2016] EWHC 1913 (Comm) at [14] and [15] to encourage a degree of restraint and a sense of proportion on the part of those seeking to set aside without notice orders on this ground, but it appears that the message has not got through. In this case we have been prepared to separate the wheat from the chaff, but I would suggest a different approach for the future. In future, if the court is presented with a long shopping list of alleged failures of disclosure, with no attempt made to identify the relatively few points which really matter, it should simply decline to consider the issue at all."

(2) By Coulson LJ at [127]-[128]:

"It is almost always the position that, no matter how big the case or how complex the underlying issues, a defendant's case that the claimant failed to make full and frank disclosure at the ex parte hearing will stand or fall on no more than a handful of alleged failures. That is because, if the 'big ticket' allegations of failure are not established, or are established but found to be immaterial, then the less significant failures will not bridge the gap. It is the law of diminishing returns…

Accordingly, those preparing this sort of attack in the future should ensure that they concentrate their efforts on alleged failures of disclosure which are clear-cut and obviously important. Quality not quantity should be the watchword. The failure to follow that course … means that there is a real risk that the best points become buried in an avalanche of trivia …"".

286. He also cited Formal v Franklin [2021] EWHC 1415 (Comm) at paragraphs 71 to 74:

"71. In The Libyan Investment Authority v. J.P. Morgan Markets Ltd. [2019] EWHC 1452 (Comm), at [92]-[94] , Bryan J helpfully referred to three authorities often cited in this context:

"The principles to be applied to breaches of full and frank disclosure were summarised in OJSC ANK Yugraneft v. Sibir Energy plc [2008] EWHC 2614 (Ch) , in which Christopher Clarke J. approved the following guidance at [102]:

"Mr Boyle drew my attention, with appropriate diffidence, to a decision of his own, sitting as a Deputy Judge of the Chancery Division, as to the approach to be taken by the Court in the event that there is culpable non-disclosure. In The Arena Corporation Limited v. Schroeder [2003] All ER (D) 199 (May) at paragraph 213, he summarised the main principles which should guide the Court in the exercise of its discretion as follows:

(1) If the Court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.

(2) Notwithstanding the general rule, the court has jurisdiction to continue or re-grant the order.

(3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.

(4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.

(5) The Court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the Judge might have made the order anyway is of little if any importance.

(6) The Court can weigh the merits of the plaintiff's claim but should not conduct a simple balancing exercise of which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.

(7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.

(8) The jurisdiction is penal in nature and the courts should have regard to the proportionality between the punishment and the offence.

(9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."

In Knauf UK GmbH v. British Gypsum Ltd. [2001] EWCA Civ 1570 the Court at [65] explained the "golden rule" which must be followed with respect to full and frank disclosure:

"65. The leading cases remain Brink's Mat Ltd v. Elcombe [1988] 1 WLR 1350 and Behbehani v. Salem [1989] 1 WLR 723 . Those authorities in this court bring their reminder of the essential principles: that there is a "golden rule" that an applicant for relief without notice must disclose to the court all matters relevant to the exercise of the court's discretion; that failure to observe this rule entitles the court to discharge the order obtained even if the circumstances would otherwise justify the grant of such relief; that a due sense of proportion must be maintained between the desiderata of marking the court's displeasure at the non-disclosure and doing justice between the litigants; that for these purposes the degree of any culpability on the part of the applicant or of any prejudice on the part of the respondent are relevant to the reviewing court's discretion; and that a balance must be maintained between undermining "the heavy duty of candour and care" which falls on applicants and promoting a "tabula in naufragio" to save respondents who lack substantial merits.""

(see also, to similar effect, Dar Al Arkan Real Estate Development Co. v. Al Refai [2012] EWHC 3539 (Comm) at [148]-[149] , Fundo Soberano at [82], and The Public Institution for Social Security v. Amouzegar [2020] EWHC 1220 (Comm) [139]-[143] (and, in particular, [141])).

72. I must make four preliminary points before explaining why I have concluded that the September order must be discharged.

73. First, although in some cases where there has been material non-disclosure a proportionate response is not to discharge the order in question but to impose a costs sanction (see, for example, Al Refai at [149]), that would not be a proportionate, or otherwise appropriate, response in this case for the following reasons:

i) I made no order as to costs on the Extension Application and the Defendants incurred no costs in relation to it, so the Extension Application itself cannot be a vehicle for a costs sanction;

ii) It would be to pre-judge where the costs of the present application should fall, in circumstances where I have heard no submissions on costs and where there may be many factors other than the material non-disclosure which may affect costs questions on the present application, if the costs of the present application were used as vehicle for a sanction for the material non-disclosure;

iii) if the September order is discharged, it has not been suggested that thereby the Claimants will lose the opportunity to litigate in the English courts, so increasing the risk that discharging the September order may be disproportionate.

74. Secondly, it may be suggested that discharging the September order serves no practical purpose. The Claimants issued the second claim in December 2020, whilst the UK was party to the Lugano Convention. The second claim form has been served. It has not been suggested on the present application that the response of the English or BVI courts to the second claim will be any different to what it might have been had the UK remained party to the Lugano Convention from 1 January 2021. Additionally, the present claim has hardly advanced beyond service of the claim form. Whilst the Defendants have acknowledged service that has been done only to challenge jurisdiction so far. In the result, the present claim is not much more advanced than, or any different to, the second claim."

287. He also cited Parish v Wikimedia Foundation [2024] EWHC 2301 (KB), where at paragraphs 63 to 64 was again set out the Sloutsker v Romanova and Tugushev v Orlov analysis.

288. He submitted that the following propositions flowed from those authorities.

289. Firstly, the court will in principle set aside an order which has been obtained without notice if there has not been full and frank disclosure.

290. Secondly, that those principles apply to orders which have been obtained without notice for permission to serve out of the jurisdiction.

291. Thirdly, that there would be a failure to provide full and frank disclosure if the applicant party had failed to tell the court of the other side's likely or possible cases or arguments, or misled the court in any material respect.

292. Fourthly, the court, even in a circumstance where there had been a failure to provide full and frank disclosure, has the discretionary jurisdiction not to set aside the grant of permission to serve out, but the burden would be on the applicant who had failed to provide full and frank disclosure to justify that course; and which course is not to be taken lightly, albeit that the court needs to act in a proportionate manner.

293. He referred me to Anderson's first witness statement of 2 February 2024 upon which the application for permission to serve out was in part based. He took me to various aspects.

294. First, to its setting out of Aon's case in detail, but where he said there was a failure to set out the 10th defendant's possible defences especially as to jurisdiction.

295. Second, to its paragraph 101, where it referred to possible witnesses as including a number of persons not based in Brazil, but did not refer to Brazil-based employees except by implication from a reference to "non Brazil-based employees".

296. Third, to its paragraph 102, where he said it was said that it was understood from Aon Brazil-based lawyers that Brazil's courts would not order disclosure against non Brazil-based defendants except in very limited circumstances; which statement as to Brazilian law is now accepted by Aon to be incorrect as a matter of law, although Mr Lloyd accepted that Aon had been given the stated wrong advice by its Brazilian lawyers.

297. Fourth, to its paragraph 119, being part of sections 117 to 119 where Anderson purported to make full and frank disclosure, where it was said that Anderson was not aware of problems with Aon's claims in Brazilian law; whereas in fact on Howden's case there were considerable problems with regards to that, at least as now supported by Professor Satiro.

298. Fifth, that in its paragraph 123(1) Anderson relied on what he said was similar wrongful Howden poaching conduct in relation to Cyber; but without saying that the 10th defendant might wish to contend that such evidence was inadmissible against the 10th defendant.

299. Sixth, that in its paragraph 123(2) Anderson had stated that the gravity of the torts was in London; but gave reasons which were limited to contrary arguments which might be adduced by the 10th defendant that employees were based in Brazil, without adding such matters as the potential for documents to be located in Brazil.

300. Seventh, that in its paragraph 123(3) Anderson had stated that witnesses were based in London and others could come to London; but without saying that the majority of Brazilian employees were likely to be at least located in Brazil and may well never have come to London.

301. Eighth, that in its paragraph 123(4) Anderson had referred to documents being held in London and to documents in Brazil being available electronically; but without saying that many would be in Portuguese, including not just commercial documents and letters, but also WhatsApp messages.

302. Ninth, that in its paragraph 123(5) Anderson referred to the fact that the 10th defendant might say that the LatAm team move was planned in Brazil and that notwithstanding that Aon's case was that it was planned in London; but without adding that the 10th defendant might add that the move had been mainly carried out in Brazil, being the place where the 12th defendant would have spoken to the Brazil employees.

303. Mr Lloyd accepted that, by the time that I considered the application for permission and made the April order, I had before me Naftalin's second witness statement setting out Howden's UK's case as to why England and Wales was not the most appropriate jurisdiction, and the Lobo material for the 12th defendant.

304. He, however, then pointed to the Anderson second witness statement of 14 March 2024 in response to that material and which was also before me at the time that I considered the without notice application and made the April 2024 order.

305. Mr Lloyd submitted that while Anderson in his paragraph 19 of his second witness statement said that he had provided the other witness statements and said that they summarised the Howden UK and the 12th defendant cases on jurisdiction, Anderson had then sought to refute those cases without saying where they might be correct -- or be argued to be correct.

306. Further, in Anderson's second report, paragraph 24, Anderson had said that Howden was seeking an outcome of a multiplicity of proceedings, without stating: firstly, that Aon could resolve that problem by giving up against the 12th defendant; or secondly, the Brazil courts could case-manage to avoid inconsistent judgments; or thirdly, the England and Wales court might not allow Aon to rely on what happened with regards to Cyber to support Aon's evidential case with regards to what had happened regarding LatAm.

307. Next, that in its paragraph 26.2 Anderson had said that Aon's case was that the conspiracy had been planned and directed in and from London; but without saying it was executed in Brazil, and that the 10th defendant could say that that was important.

308. Next, that in its paragraph 28 Anderson had set out in detail Aon's case on factors which Aon contended pointed towards England and Wales being the appropriate jurisdiction; but without seeking to challenge that by reference to Howden's case and without setting out what Howden's and the 12th defendant's case actually were in the witness statement, although Mr Lloyd accepted that Mr Anderson had referred to some documents being in Portuguese.

309. Mr Lloyd then complained of the section in Anderson's second witness statement in paragraphs 30 to 41 which purported to give full and frank disclosure and referred to points raised by Howden UK and the 12th defendant.

310. Firstly, he directed me to paragraph 33, referring to the fact that Howard had points about witnesses' location and language; but which did not set out in detail what such points were.

311. Secondly, that in paragraph 40 Anderson referred to and refuted Howden's case as to damage being suffered in Brazil; but without setting out Howden's arguments as to that.

312. Thirdly, that in paragraph 41 Anderson repeated Aon's case that there was a Brazilian law cause of action in tortious interference; but without expressly referring to Naftalin's statement that such was only a developing concept.

313. Fourthly, that in paragraph 41.3 Anderson had repeated the wrong point that a Brazil court would only order disclosure against overseas defendants in very limited circumstances; this being at a point in time where Aon now had Yarshell's first report to the contrary, and where Aon and Anderson had clearly failed to go back to their own Brazilian lawyers to check this particular aspect.

314. Mr Lloyd submitted that, in essence, Anderson had decided to set out Aon's case without setting out expressly a detailed version of the Howden and 12th defendant's case and of what was likely to be the 10th defendant's case, and so had presented a skewed picture rather than a neutral, objective balanced one.

315. In particular, (a) Anderson's witness statements contained the error regarding Brazilian disclosure law; (b) they did not set out how the loss was sustained in and centred on Brazil; (c) they did not set out why Howden said that the gravity of the case was in Brazil; (d) they did not set that Brazil law was complex and in a state of development; (e) they did not say enough about how many documents were likely to be in Portuguese.

316. He said that there was clear absence of full and frank disclosure.

317. He accepted that I could, if I wished, set aside the April 2024 order, but regrant permission to serve out if I felt at the end of this hearing that England and Wales was clearly the most appropriate forum; but submitted that any course that I took should have cost consequences adverse to Aon.

Fiv Howden BZ's submissions in support of their jurisdiction and strike-out (and/or summary judgment) applications

318. As I have said, at the hearing on 3 January 2025 I decided it would be most consistent with the overriding objective to hear the Howden Brazil defendant's application before delivering judgment with regards to the Howden UK defendants, the 10th defendant and the 12th defendant.

319. That resulted in the hearing on 28 February 2025 where I heard from Mr Davies (leading Mr Riddiford) for Howden Brazil, who supplemented his written skeleton with oral submissions.

320. Mr Davies adopted what was said by Mr Craig and Mr Lloyd, and at least to a considerable extent what was said by Mr Holmes.

321. He further, firstly, stressed the matter of law that in relation to the claims against Howden Brazil, as they were served outside of the jurisdiction, the burden was on the claimants to show that for them England and Wales was clearly the most appropriate forum.

322. Secondly, he submitted that I should look at the claims as a whole, citing Lungowe at paragraph 60:

"60. In my view the defendants' primary submission under this heading, that the judge and the Court of Appeal failed to apply sufficient rigour to their analysis of the claimants' pleadings and evidence on this question, fails in limine. This was not a case of the assertion, for the first time, of a novel and controversial new category of case for the recognition of a common law duty of care, and it therefore required no added level of rigorous analysis beyond that appropriate to any summary judgment application in a relatively complex case. Nor does the judge's judgment disclose any lack of appropriate rigour. The question as to triable issue as against Vedanta was one of a significantly larger number of contentious issues than those which have survived in this court. The reason which the judge gave for the relative brevity of his analysis of the underlying materials in para 119 of his judgment said nothing about the depth and

rigour of his own review of those materials. He was merely seeking to explain why, in what was necessarily a long and detailed judgment, having formed a clear view that the case against Vedanta was arguable, it was unnecessary to burden his judgment with a lengthy and detailed description of his own analysis. For the reasons I have already given, his legal analysis may have departed slightly from the ideal, but only in respects in which either he followed the parties' joint invitation, or by imposing a straitjacket derived from the Chandler case [2012] 1 WLR 3111 which, if anything, increased rather than reduced the claimants' burden in demonstrating a triable issue. But in that respect those imperfections were largely cleared up by the Court of Appeal which, rightly in my view, recognised that they did not undermine the judge's conclusion."

323. He accepted that the differing burdens, being on Howden UK and the 12th defendant to show that Brazil was clearly the most appropriate forum, while in relation to Howden Brazil and the 10th defendant the burden is on the claimants to show that England and Wales is clearly the most appropriate forum, gave rise to an incongruity and a possibility for the court to come to different answers with regards to different defendants, notwithstanding the desirability of having all claims before one forum to avoid waste of cost, time, resource and the risk of inconsistent results.

324. Thirdly, he submitted that the Howden Brazil companies were in no way bit players in this litigation. The claimants had chosen to pursue them for potentially injunctions, but in any event for damages, and which might be said to run into millions of pounds.

325. Fourthly, he submitted the Howden Brazil companies were corporate entities in their own right, existing under the law of Brazil, where they and their business are located, and should not simply be seen as aspects of Howden UK.

326. Fifthly, as far as the governing law of torts was concerned, he accepted that the Howden Brazil defendants had made no application for strike-out (or for reverse summary judgment). However, he sought to adopt Mr Craig's submissions and position as advanced for Howden UK.

327. He submitted that the Howden Brazil entities were all resident in Brazil, and also he submitted that the primary Aon claimant is Aon Brazil, and so that Article 4.2 would apply, and at first sight, subject to Article 4.3, render Brazilian law as being the governing law in tort.

328. He submitted that if that was not right, then in any event the damage was sustained in Brazil and so Article 4.1 should apply with the same outcome. Otherwise, he submitted that, in any event, there was a manifestly closest connection with Brazil, and Article 4.3 would override any other article which tended to the contrary.

329. He submitted that Article 4.3 should not assist the claimants; in particular that it should not be thought that the mere location of a head office in one country or even location of a conspiracy, where a plan is made in one country to have a wrongful act take place in another country, should mean that there is a manifestly closer connection with the first country rather than where the wrongful act is to or does take place.

330. Sixthly, he submitted that to try these matters in England and Wales would involve a great deal of Brazilian evidence of fact; including many documents from Brazil which might very well be in Portuguese, witnesses from Brazil, including the employees who were at Aon and now are employed by Howden Brazil, and potentially material of Howden Brazil itself relating to its own business, which material would be located in Brazil and quite possibly be in the Portuguese language.

331. Seventhly, he submitted to have these matters tried in England and Wales would involve the court in this jurisdiction hearing expert evidence as to Brazilian law, which would be highly expensive, very substantial in nature and potentially very complex. There would need to be expert reports, even though much may already have been done in that direction; but also joint meetings between experts, joint statements and possibly oral evidence, all of this would place a substantial burden on the trial judge as well as substantial expense.

332. He further submitted that it was undesirable for the court of this jurisdiction to deal with these matters of complex Brazilian law especially as, first, according to Professor Satiro at least, there is no obvious applicable Brazil law directly in point.

333. Second, that the Brazil law in these areas is developing and therefore it is most appropriate for the Appellate Courts in Brazil to develop it, rather than a court of England and Wales.

334. Third, to remind me that as far as unfair competition is concerned, that is a matter which is criminal in Brazil law as well as giving rise to civil consequences, and he submitted that it was undesirable for a court of this jurisdiction to pronounce on matters which might amount to criminal offences in Brazil.

335. Fourth, he submitted that the remedies which were sought, particularly injunctions, would potentially affect the actions of the Howden Brazil companies in Brazil itself; and he submitted that such matters ought best be for the courts of Brazil to decide and not those of England and Wales.

336. He accepted that there was no evidence before me as to how the courts of Brazil would approach questions such as what in Brazil law is the proper law of tort in this case, and whether a Brazil court would or would not apply the same procedure as the courts of this jurisdiction with regards to how such matters of foreign law would be resolved, and whether their procedure would or would not produce a similar or similarly expensive exercise as that in this jurisdiction when these courts come to consider foreign law, such as Brazil law. He submitted that if the claimants wished to rely on that sort of argument to say that there would be concomitant procedures and expense in both jurisdictions, they should have adduced evidence expressly directed towards that matter.

337. As far as Brazil law itself was concerned, he submitted it was at least unclear as to the following matters.

338. First, whether, for there to be a claim of unfair competition, there needed to be conduct which affected the relevant market as a whole. He submitted that I should not simply prefer Adamek to Satiro; and that Satiro must have had in mind that the claimants' case is that the 12th defendant was suborned by Howden to carry out an enticing of other employees' process during the period while the 12th defendant was still an employee of Howden.

339. Second, that it was agreed by Satiro and Adamek that the concept of the tortious interference or a third party accomplice liability does not expressly appear in any specific article of Brazil Civil Code; and he submitted that Satiro was therefore likely to be right when opining that that was a controversial area of Brazil law.

340. Third, that it was at least highly debatable whether Article 158 sub-article 5 of the Corporate Code did apply in these circumstances so as to create a liability for assisting in breach of fiduciary duty; and reminded me that that was Professor Satiro's opinion that it was not at all clear.

341. Fourth, that there was very much a debate as to whether or not any concept of unlawful means conspiracy actionability existed in Brazil law;

342. He submitted that this case raised distinctly complex issues of the law of Brazil and it ought to be for courts of Brazil to determine such matters.

343. He further referred to other matters in his written skeleton. In particular, first, that in relation to an application to set aside an order for permission to serve out of the jurisdiction, which is the case here in relation to Howden Brazil, that I should be looking at the matter as at the date of the April order rather than now.

344. Second, he confirmed, as Mr Wood had set out in his witness statement, that Howden Brazil had offered to submit to the jurisdiction of the Brazilian state court. In his written skeleton he referred me to there being a question on the authorities as to whether that is relevant when no such undertaking existed as at the date of the April order, but Ms Rogers for Aon has not taken any point on that.

345. Third, he reminded me of his submission that the actions of Howden Brazil which Aon is seeking to impugn in this litigation would all, or at least almost all, have occurred in Brazil; that is to say the 12th defendant's dealing with the employees suborned by Howden and the taking of Aon's Brazil confidential information for other purposes by the 12th defendant, and similarly with regards to the damage in terms of the claimants' loss of their Brazil employees and Brazil clients.

346. Fourth, that the majority of the documents from witnesses, according to him, would be likely to be Brazilian and often written in or speaking Portuguese.

347. Fifth, that he too was asserting that there had been a failure to provide full and frank disclosure on the parts of the claimants when obtaining the April order.

348. As to this he relied on Mr Lloyd's submissions. He submitted that there were a number of possible outcomes if I was to find that there had been a failure to provide full and frank disclosure; including setting aside the April order and requiring some reapplication to be made, or at least requiring the claimants to pay various costs.

349. He relied in particular on asserted failures: first, that the claimants had failed to properly develop and describe the forum non conveniens arguments which might be put forward by Howden Brazil; second, that the claimants had failed to identify the various complexities of Brazil law and failed to obtain and adduce sufficient evidence to that; third, that the claimants had failed to engage with the question as to what would be the governing law of tort sufficiently; and fourth, the claimants' error with regards to the Brazil law of disclosure.

350. He accepted that he had not sought to strike-out (or reverse summary judgment) in relation to the question of governing law, but sought to adopt Howden UK and the 12th defendant's submissions.

Fv Aon's submissions in answer to those of Howden UK, the 12th defendant, the 10th defendant and Howden BZ

351. Ms Rogers KC for Aon responded to these various sets of submissions; she submitted that not only is Brazil not the most appropriate forum, but that England and Wales clearly is.

352. Firstly, she said that the key to the case was a conspiracy planned in London, directed from London and part executed in London. She said the core of the conspiracy, or at least the combination, was the Common Design. The conspirators were the English individuals, including Mr Hamilton-Grant and the 10th defendant, who all worked in

London, together with the 12th defendant, who may have lived and worked in Brazil, but came to London for such purposes.

353. She said that all the individuals were either working for or at the instance of Howden UK and that Howden Brazil itself operates at the behest and under the effective control of Howden UK.

354. She referred to Howden's own business plan, which referred to "initial conversations in London", as evidence that, (a) Howden operatives have spoken to and met with the 12th defendant in London; (b) that some Brazil employees had met with Howden operatives while they were in London; and (c) that Howden had gone to the length of seeking to create a false paper trail, sending messages to Brazil employees from London to suggest that Brazil employees were being headhunted by independent recruitment consultants.

355. She submitted that in the circumstances London was the main place of the commission of the tort and also its gravity.

356. Secondly, whilst she accepted that the conspiracy on her case had damaging effects in Brazil, she submitted that it had also caused substantial damage in London as various Latin American business had always been referred to London from Brazil -- from Aon Brazil. Further, that in any event insurance and reinsurance are effectively global, and that reinsurance matters for Brazil clients had often in the past ended up being dealt with in London.

357. Thirdly, she submitted that all the Aon entities were owed obligations by the 12th defendant of which each could enforce and sue for relevant damage, and further that confidential information might well have belonged to Aon UK rather than Aon Brazil.

358. Fourthly, that numerous witnesses were based in London or mainly worked there. That would be true of the Howden UK individuals, and also the 10th defendant, who had a property and worked in England even if he was resident in Italy. Further, Mr Hamilton-Grant was also based in London. Even the 12th defendant would often travel to London.

359. She submitted that the conduct and intents of those various individuals was crucial as they were the relevant conspirators or a combination. She submitted that the employees in Brazil were less important.

360. She went on to submit that all those identified as witnesses had their first language as English; and apart from the 12th defendant and perhaps the 10th defendant, would not speak Portuguese at all. Further that the 10th and 12th defendants each would speak and actually deal in English; and that many of the Brazil employees had some ability to speak English, but in any event could be provided with interpreters, they only being witnesses and not defendants.

361. She adverted to some other potential witnesses who might be based in the United States, and who, again, would all speak English.

362. As far as documents were concerned, she submitted they were all located here or in Brazil. She accepted they would be in English and Portuguese but would have to be translated whichever court heard the matter.

363. She pointed out that while Brazil does have a full disclosure regime, it appears to be somewhat more limited than that of England and Wales.

364. She placed reliance on the decision in Lakatamia v Su [2024] 1 WLR 746. There the question was whether England and Wales was the most appropriate forum, where defendants said it was Monaco. This was in the context of an alleged conspiracy between a judgment debtor and a Monaco lawyer to defeat enforcement of a judgment granted by the courts of England and Wales.

365. At paragraphs 178 to 180 it was said:

"178. In this regard:

(1) A fundamentally important factor is that the Blair Freezing Order and Cooke Judgments lie at the very heart of the causes of action that Lakatamia assert, and the authority of this court which the conduct challenged by Lakatamia is said to have undermined. Sir Michael Burton rightly regarded this fact as highly significant in

holding that England was the proper forum for the 2019 Proceedings to be determined, see Lakatamia Shipping Co Ltd v Su [2019] EWHC 1145 (Ch) . At para 20(i), he emphasised that "The setting for the torts is the [2011 Proceedings] and the English judgment and the breach of the English orders", whilst at para 20(iii), he stressed that "The aim of the conspiracy was to breach and evade the English court orders". Males LJ refused Madam Su permission to appeal (identifying that "the weight to be given to the various factors" in play was a matter for the judge, not the Court of Appeal). In this regard Butcher J (in granting permission to serve out against Ms Tseng) also considered that England was the forum conveniens (at para 17).

(2) Lakatamia's claims against Mr Su and Mr Chang will be determined at trial in this jurisdiction. Both Mr Su and Mr Chang are subject to this court's jurisdiction and Lakatamia has good reasons for not entering default judgment against them as I have already identified (see, again, Gardner, at paras 42—43). The fact that the proceedings will continue against Mr Su and Mr Chang in relation to a conspiracy claim in this jurisdiction is, and has long been recognised as, another very powerful factor. As Lord Briggs JSC said in Vedanta Resources , para 70:

"70. In cases where the court has found that, in practice, the claimants will in any event continue against the anchor defendant in England, the avoidance of irreconcilable judgments has frequently been found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction …"

(3) It makes obvious sense, when the central claim is of a conspiracy, for all the co-conspirators to be tried in the same jurisdiction, and in the jurisdiction that is at the heart of the claims which is England in the context of the Blair Freezing Order and Cooke Judgments, and which is where the claims against Mr Su and Mr Chang will inevitably proceed. It would make little sense for two co-conspirators (jurisdictionally anchored here) to be tried in England and another co-conspirator (Maître Zabaldano) to be tried separately in Monaco. Quite apart from the obvious risk of irreconcilable judgments, it would be wasteful in terms of costs, and potentially prejudicial, for Lakatamia to be expected to pursue parallel litigation in two separate forums, in

relation to one of which (Monaco) there are little or no connecting factors at all (as further addressed below).

(4) It would be unattractive, and inappropriate, to pursue parallel proceedings in Monaco against Mr Su, Mr Chang and Maître Zabaldano to the proceedings that will continue in any event in England. Whilst it is said on Maître Zabaldano's behalf that such a claim could be brought in Monaco (from a jurisdiction perspective) this ignores the inherent uncertainties of whether or not, in fact, jurisdiction could be achieved and maintained against Mr Su and Mr Chang (and whether any judgment there obtained would be enforceable). Not only would requiring Lakatamia to bring its claims against Maître Zabaldano in Monaco give rise to the risk of irreconcilable judgments, it would also be wasteful in costs and potentially prejudicial to expect it to pursue parallel litigation in two jurisdictions when proceedings are already extant in this jurisdiction.

(5) There is, and has long been, closely related litigation unfolding in England. Several applications were very recently heard in both the 2011 Proceedings and 2019 Proceedings (see Gardner 2, paras 44.1—44.2). There are also associated proceedings in this court against Mr Su's eldest sister and Ms Tseng (who I held that Madam Su uses to conceal her assets—see at para 715) which are concerned, in part at least, with the Cresta Overseas Monies (see Gardner 1, para 83 and Gardner 2, para 44.3). The existence of related litigation in this jurisdiction points in favour of England being the most appropriate forum (see, in this regard, Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada) [1987] AC 460, 485—486). In the 2019 Proceedings, Sir Michael Burton rightly held that the existence of the 2011 Proceedings supported the court's exercising jurisdiction over Madam Su (see Lakatamia Shipping Co Ltd v Su [2019] EWHC 1145 (Ch) at [20 (ii)]). Since that time there are considerably more related proceedings in this jurisdiction further increasing the significance of this factor.

(6) Lakatamia's damage has been suffered in and only in England (for the reasons that I have already addressed).

(7) By reason of the fact that Lakatamia's damage has been suffered in England, English law is the applicable law pursuant to article 4(1) of Rome II (Parliament and Council Regulation (EC) 864/2007 on the law applicable to non-contractual

obligations). I reached this conclusion in relation to Lakatamia's claims in the 2019 Proceedings. It is accepted in Maître Zabaldano's skeleton argument that those claims were "very similar" to those now advanced against him. I also held that even if the damage had been suffered in Monaco (as Madam Su had unsuccessfully argued), English law was nevertheless the applicable law under article 4(3) of Rome II because the proceedings were "manifestly more closely connected with England" (at paras 844—855). The significance of English law being the proper law of the torts is reinforced by the fact that English law would also apply under Monaco's rules of private international law per the evidence of Lakatamia's experts on Monégasque law (see Charrière-Bournazel/Revet Report 1, paras 9—10), albeit it would appear that Maître Zabaldano's experts disagree (see LeMoyne de Forges/Coulet Report 1, paras 7(iii)—10). Such dispute, if dispute there be, cannot be resolved other than at trial. Lakatamia's case will be that the applicable law is English law, and in that context the English courts are best placed to adjudicate on complex torts under English law with which a foreign court may be unfamiliar (and at the same time the Commercial Court has considerable experience of trying cases that do, or may, involve expert evidence on foreign law, in the event that Maître Zabaldano pleads Monégasque law in his defence).

(8) If Lakatamia's claims are heard in England, the court will be presented, following disclosure, with a complete picture of what happened enabling the proceedings to be fairly determined. Although Maître Zabaldano relies (albeit somewhat selectively) on the fact that he owes professional secrecy obligations as a matter of Monégasque law (see, e g, Zabaldano 1, paras 7—13), the existence of a foreign privilege does not suspend English disclosure obligations—see, for example, Secretary of State for Health v Servier Laboratories Ltd [2014] 1 WLR 4383, para 99 . If Lakatamia's claims were tried in Monaco the likelihood is that the Monaco court would be presented with an incomplete picture of the relevant events, by reason of the fact that Maître Zabaldano is entitled to refuse to disclose documents on the basis of professional secrecy while at the same time is "free to choose" whether or not to disclose information which he considers to be "indispensable" to his defence (see Charrière-Bournazel/Revet Report 1, para 43) a point on which there is agreement on the part of Maître Zabaldano's experts (see LeMoyne de Forges/Coulet Report 2, para 43). The choice in this regard is therefore between a trial of Lakatamia's claims against Maître Zabaldano in England

where both Lakatamia and Maître Zabaldano will be required to put all of their cards face up on the table, or in Monaco where, on the expert evidence to date, it appears that Maître Zabaldano can pick and choose which documents he deploys, whilst being under no obligation to disclose those that do not assist his case, or support that of Lakatamia.

(9) There is a vast amount of documentation relevant to Lakatamia's claims in the custody and control of its solicitors in England. The overwhelming majority of these documents are in English. Many of the very limited foreign language documents have already been translated into English (see Gardner 1, para 76). The likelihood is that many if not most of the relevant documents held by Maître Zabaldano will also be English, as he and Ms Zoccola communicated with Mr Su, Mr Chang and Mr Garrett in English (Gardner 2, para 4). Accordingly, minimal translation work would be required if Lakatamia's claims were tried in England. Conversely, were Lakatamia's claims determined in Monaco, the relevant documents would need to be translated into French (past failures to do so have led to Lakatamia's claims in Monaco to be rejected). The cost of this would be very considerable. Whilst at one point it was suggested that translation costs per page might be modest (if using auto-translating) it is clear that this would not be appropriate, and the weight of the evidence before me is that the costs would be considerable, and based on the amount of documentation in existence, would run into many tens of thousands of pounds of (extra) costs. Equally, whilst Maître Zabaldano has suggested that there is an arbitrary cap on the number of documents that can be placed before the Monaco court (see Zabaldano 2, paras 16—17), he does not identify either the source, or the level, of the suggested cap and Lakatamia's evidence is that there is none (see Gardner 3, para 7). If, however, there were a cap, and that would result in potentially relevant documents being incapable of being relied, that would itself militate against Monaco being an appropriate forum.

(10) Importantly, the principal independent witness, Mr Garrett, is resident in England and does not speak French (see Gardner 1, para 77.3). This is a further factor that militates against Monaco being the appropriate forum since translating witnesses' evidence "is bound to affect, adversely, the ability of a court to gauge their credibility" (see Briggs, Civil Jurisdiction and Judgments , 7th ed (2021), para 22.14).

(11) All Maître Zabaldano's witnesses speak and understand English (and have given all their statements in English), and Mr Ho confirmed at the hearing that they will give evidence in English if the claims proceed in England. Given that intention, it is difficult to see any disadvantage to them in proceedings taking place in England. In the wider scheme of things, travel times by air or TGV are modest, as would be the associated costs.

179. There are then some factors connected to other jurisdictions around the world. Mr Su may be in Taiwan (or as per his modus operandi some 5 star hotel elsewhere in the world). Mr Chang may be situated in Thailand or Taiwan. No one is suggesting any of these locations as an, or the, appropriate forum.

180. As for the alleged connecting factors to Monaco, I am satisfied that they are thin gruel indeed, and bear little weight in the balance:

(1) It is submitted that the torts were committed in Monaco (Maître Zabaldano's skeleton argument, para 59(2)) presumably on the basis that the Cresta Overseas Monies were transferred from a Monaco bank account by Maître Zabaldano who lives in Monaco. However this is a factor of little weight in circumstances where the tort is "delocalised" and its elements "scattered" (see Briggs, Civil Jurisdiction and Judgments , 7th ed (2021), para 22.14). Here, the ingredients that constitute the various torts are dispersed because the damage was suffered in England, because Mr Chang's relevant acts took place in Taiwan (or possibly in Thailand) (see Gardner 1, para 9) and because Mr Su's acts likely took place in Taiwan and/or Japan where he had homes and business interests (see Gardner, paras 3.3 and 14.2).

(2) Maître Zabaldano is a Monaco lawyer with professional obligations in Monaco (see, for example, Maître Zabaldano's skeleton, para 59(2)). However, Lakatamia's claim is not premised on any breach of those obligations, but rather on a conspiracy whereby Maître Zabaldano allegedly combined with Mr Su and Mr Chang to breach an order of the English court and to violate rights established by English court judgments knowing that damage to Lakatamia would inevitably result and thus intending it, such damage being suffered in England the situs of the judgment debt.

(3) Maître Zabaldano relies on Monégasque law, and it is presumably submitted that a Monégasque court would be best placed to receive and adjudicate upon such evidence and it would be most convenient to hear that evidence in Monaco. The weight to be attached to this factor is, I consider, limited. First, and for the reasons already identified, it is doubtful whether Monégasque law is even relevant (given the lack of an available justification defence), but even if pleaded, and of relevance, the Commercial Court is very experienced in hearing evidence as to foreign law, and even if the experts had to travel to England (assuming any areas of disagreement remained) and did not give evidence by live-link, the costs would be modest.

(4) Maître Zabaldano's expert evidence is that Lakatamia could bring its claims against Mr Su, Mr Chang and Maître Zabaldano in Monaco. Even assuming that this is true as a matter of jurisdiction, it cannot be known whether, in fact, that would be possible. Jurisdiction against Mr Su and Mr Chang has already been established in England.

(5) Maître Zabaldano and his witnesses might have to travel to England, whereas they live in Monaco (as coincidentally, and irrelevantly, does the owner of Lakatamia). Again I consider this is a factor of only modest weight—the travel time and cost of travel by plane or TGV would not be substantial in the context of the litigation as a whole."

366. Ms Rogers relied on paragraph 178(3) and the desirability, where a central claim was of a conspiracy, for the matter to be tried where the conspirators were located.

367. She further relied on paragraphs 178(3) and (4), the undesirability of having parallel proceedings in different jurisdictions.

368. She further relied on: paragraph 178(5) and the consideration of there being other relevant litigation in England and Wales, she pointing to the Cyber claim in this case; on paragraph 178(6) and the question of location of the damage; and on paragraph 178(7) in relation to the importance of the governing law, and where reference in that paragraph was made in that case to the questions of Rome II Article 4.3 only to be being resolved at trial.

369. She further relied on: paragraph 178(9), as to the importance of the location of documents; paragraph 178(10) as to the importance of the location of independent witnesses, although none appeared to exist in this case; and on paragraph 178(11) as to the importance of witnesses' languages, Ms Rogers repeating her case that the primary witnesses here all have either English as their first language or very good facility in English.

370. She pointed me to paragraph 180(1) and the concept of a delocalised tort; and said that, even if she was wrong in relation to the locality of damage, the gravity of these torts was in England.

371. She pointed me to paragraph 180(3) and the statement that the Commercial Court is very experienced in dealing with questions of foreign law; and to paragraph 180(5) and the fact that there the consideration that some witnesses would have to travel to England to give their evidence was regarded as being of limited weight.

372. In relation to the conspiracy claim, she also relied on Donohue at paragraphs 33 to 34, and which she submitted showed that it was desirable for there to be one single court dealing with a conspiracy claim:

"33. Thus Mr Donohue's strong prima facie right to be sued here on claims made by the other parties to the exclusive jurisdiction clause so far as the claims made fall within that clause is matched by the clear prima facie right of the Armco companies to pursue in New York the claims mentioned in the last three paragraphs. The crucial question is whether, on the fact of this case, the Armco companies can show strong reasons why the court should displace Mr Donohue's clear prima facie entitlement. If strong reasons are to be found (and the need for strong reasons is underlined in this case by the potential injustice to Mr Donohue, already noted, if effect is not given to the exclusive jurisdiction clauses) they must lie in the prospect, if an injunction is granted, of litigation between the Armco companies on one side and Mr Donohue and the PCCs on the other continuing partly in England and partly in New York. What weight should be given to that consideration in the circumstances of this case?

34. I am driven to conclude that great weight should be given to it. The Armco companies contend that they were the victims of a fraudulent conspiracy perpetrated by Messrs Donohue, Atkins, Rossi and Stinson. Determination of the truth or falsity of that allegation lies at the heart of the dispute concerning the transfer agreements and the sale and purchase agreement. It will of course be necessary for any court making that determination to consider any contemporary documentation and any undisputed evidence of what was said, done or known. But also, and crucially, it will be necessary for any such court to form a judgment on the honesty and motives of the four alleged conspirators. It would not seem conceivable, on the Armco case, that some of the four were guilty of the nefarious conduct alleged against them and others not. It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice."

373. She also directed me to Al-Aggad v Al-Aggad [2024] 4 WLR 35 at paragraphs 142 to 143:

"142. In my judgment the risk of multiplicity of proceedings and irreconcilable judgments is properly to be regarded in this case as an important factor. Some further weight is added by the point rightly made by Mr Shane Sibbel in his very clear submissions that there is authority to the effect that the court is to be particularly vigilant on this score where the claim alleged is one in conspiracy—and the more so where (as here) the case seems likely to stand or fall against all or none. Mr Sibbel directed my attention to Donahue v Armco Inc [2001] UKHL 64; [2002] 1 All ER 749, para 34 , where Lord Bingham gave "great weight" to the consideration that:

> *"it will be necessary for any such court to form a judgment on the honesty and motives of the four alleged conspirators … It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal …"*

143. It is notable that in that case that single factor was so important that it was sufficient to override an exclusive jurisdiction clause. The same point was made by Sir Nigel Teare in PJSC National Bank Trust v Mints [2021] EWHC 692 (Comm) ."

374. Again, she said that this emphasised the desirability of a single court to deal with a conspiracy claim.

375. She submitted that the case law was clear about the advantages of having a single trial in one place and that that was important here, and where the effect of Brazilian law is that it would be impossible to have a single trial in Brazil as a result of the need for claims made against the 12th defendant in Brazil to be dealt with by the Labour Court.

376. She reminded me that the Cyber claim would have to be dealt with in this jurisdiction in any event.

377. In all these contexts, she referred me to the fact that those considerations are regarded as important in The Spiliada decision itself where the House of Lords referred with approval to the first instance judge, Mr Justice Staughton, as he was then, concluding to that effect at sections 470D to 471E and 485E to 486C of the report.

378. I do note that it was there held that to require a claimant to sue in two different jurisdictions with two different sets of proceedings would potentially cause it a substantial burden and result in waste and inefficiency which would not be desirable.

379. As to those aspects she also referred me to the general desirability of not having multiple claims, as set out in BAT v Windward [2014] 2 AER (Comm) 757; and I note its paragraphs 62 to 73 and 82 to 83:

"62. This being a service out case, the burden is on BAT to satisfy the court that in all the circumstances, England is clearly and distinctly the appropriate forum for the trial of its claim against API and the court ought to exercise its jurisdiction to permit service of the proceedings out of the jurisdiction: see AK Investment CJSC v KyrgyzMobil Tel Ltd [2011] UKPC 7, [2012] 1 All ER (Comm) 319, [2012] 1WLR 1804 (at [71], [78]); VTB Capital plc v Nutritek International Corp [2013] UKSC 5,

[2013] 1 All ER (Comm) 1009, [2013] 2 AC 337 (at [13], [44], [80], [190]) The task of the court is to identify the forum in which the case can be most suitably tried for the interests of the parties and for the ends of justice and since this is a service out case, the correct approach is not to consider first whether there is a natural forum and if there is not, to ask whether England is nonetheless the appropriate forum for other reasons, but instead to answer one overall question: has it been clearly and distinctly shown that England is the appropriate forum: Spiliada Maritime Corp v Cansulex Ltd, The Spiliada [1986] 3All ER843 at 858, [1987] AC460 at 480, 481 per Lord Goff of Chieveley; VTB Capital plc v Nutritek International Corp [2012] EWCACiv808, [2012] 2 BCLC 437 (at [101], [164]); VTB Capital plc v Nutritek International Corp [2013] 1 All ER (Comm) 1009, [2013] 2 AC 337 (at [44], [190]).

63. The conventional approach involves considering the factors by reference to the issues in the case that connect the proceedings to the competing fora championed by the parties, and I propose to adopt this course because connecting factors are always relevant in answering the question before the court. However, it must be remembered that the forum most suitable for the interests of the parties and the ends of justice is not necessarily the forum with the closest connection to the dispute, as would be the case for example where one of the parties would not obtain a fair hearing in the more closely connected forum: see Dicey, Morris and Collins The Conflict of Laws (15th edn, 2012) vol 1, para 12–055. Thus, in the instant case, BAT argues that England is the only forum in which its claims against Windward and API can be determined together and for this reason England is the appropriate forum for the trial of BAT's claim against API since otherwise BAT will be faced with the serious inconvenience and cost of bringing two heavy and very expensive actions covering the same ground in two different jurisdictions with the consequent risk of inconsistent decisions.

64. Mr Swainston submitted that in so far as BAT opposes API's case that it should sue API in New York because of the risk of inconsistent outcomes and the multiplication of its own costs, these are matters entirely of BAT's own making. I disagree. In my judgement, it was an entirely proper and reasonable decision for BAT to start proceedings against Windward as well as against API and to bring both sets of proceedings in England. The evidence clearly suggests that there are serious doubts as to the financial strength of API. Thus API's '10Q' consolidated financial statements to

the 3 months ending 30 June 2013 show that as at that date API was balance sheet insolvent to the tune of (US$377,066,000). On the other hand, Windward had net assets of US$72.3 million and cash in hand and at bank totalling US$1 million as at 31 October 2012. Further, Windward has claims to recover dividends totalling US$800.7 million paid to its former parent company, Sequana SA, and its current directors, which Hamblen J held on 21 November 2013 had a real prospect of success when ordering absent an appropriate undertaking from Windward, the appointment of a receiver over those claims on BAT's application ([2013] EWHC 3612 (Comm), [2013] All ER (D) 265 (Nov)).

65. It is also the case that by reason of the AWA Agreement and the PDC Agreement (see paragraph [44] above) Windward is the ultimate paymaster in relation to any liability that API has to BAT and has the contractual right to control the litigation brought not only by NCR but also BAT.

66. Further, it is plain that England is the natural and appropriate forum for a claim by BAT against Windward. Windward is domiciled here and by virtue of Article 2 of the Judgments Regulation, (Council Regulation 44/2001/EC (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) (OJ 2001 L12 p 1)), the English court unquestionably has jurisdiction to determine such a claim.

67. The court was informed by Mr Attrill that Windward supported API's jurisdiction challenge but would not itself voluntarily submit to the jurisdiction of the New York Court, although if jurisdiction were established it would defend the claim. It is therefore seriously questionable whether a judgement against Windward in New York proceedings would be enforceable in England, assuming that the New York Court would assert jurisdiction over the claim; see Dicey, Morris & Collins at [14R-020] (Rule 42) and [14R -054] (Rule 43).

68. There is also a real doubt whether the New York Court would indeed assert jurisdiction over a claim by BAT against Windward for an indemnity. It is common ground between the experts on New York law, Mr Milonas for BAT and Mr Pratt for API, that the New York Court would only have personal jurisdiction over Windward if the requirements of s. 302 (a) (1) of the Civil Practice Law and Rules were fulfilled,

namely, that BAT's cause of action arises out of Windward having transacted business in New York or having contracted to supply goods or services in New York. The experts also agree that a mere agreement to indemnify does not suffice, but they disagree on the issue whether the quality of Windward's contacts with New York would constitute "transaction of business" in New York. Relying on Licci v Lebanese Canadian Bank SAL, 20 N.Y. 3d 327 , a decision of the New York Court of Appeals not referred to by Mr Milonas in his first statement, Mr Pratt is of the view that: (i) Windward's retention of counsel in the New York proceedings and the subsequent Mediation; (ii) negotiating and concluding the 1998 Settlement Agreement and the AWA Agreement ; (iii) conducting the 2005 Arbitration; and (iv) meeting in New York in 2005 as part of Windward's management of the New York proceedings, show Windward's "purposeful availment" of New York law. In Mr Milonas's view 6 : (i) Licci (which was not an indemnity case) should be limited to its specific facts; and (ii) the matters relied on by Mr Pratt do not establish personal jurisdiction over Windward in New York since they simply "restate the fact that Windward agreed to indemnify BAT".

69. BAT does not have to show on the balance of probabilities that the NewYork Court would find that it did not have jurisdiction over a claim against Windward, merely that there is a real risk of that happening: see Cecil v Bayat [2010] EWHC 641 (Comm), [2010] All ER (D) 25 (Apr), at [28] per Hamblen J Citing Cherney v Deripaska (No 2) [2009] EWCA Civ 849, [2010] 2All ER (Comm) 456 at [29]. In my judgment, Mr Milonas' evidence is sufficiently cogent to support the conclusion that there is a real risk that the New York Court would find that it did not have jurisdiction over a claim brought by BAT against Windward for indemnity, and I so hold.

70. The fact that all possible related claims can be tried in one of the competing fora but not another carries great weight in deciding where the claims can best be tried in the interests of the parties and the interests of justice. In Donohue v Armco Inc [2001] UKHL 64, [2002] 1 All ER (Comm) 97 (where the issue was whether effect should be given to an exclusive jurisdiction clause) Lord Bingham of Cornhill said (at [34]):

> *'It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in*

issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.'

71. To like effect are these observations of Rix LJ in Konkola Copper Mines plc v Coromin [2006] EWCA Civ 5, [2006] 1 All ER (Comm) 437 (at [27]):

> *'...the attitude of the English courts is, if possible, to avoid fragmentation of disputes between different jurisdictions where such fragmentation raises the twin dangers of waste of resources and of inconsistent decisions'.*

72. In JSC BTA Bank v Granton Trade Ltd [2010] EWHC2577 (Comm), [2011] 2 All ER (Comm) 542, the first two defendants were sued as of right in England and (as here) jurisdiction was asserted against the other foreign defendants on the basis that they were necessary and proper parties. The claim against all of the defendants was that they had conspired to defraud the claimant bank by obtaining large payments under letters of credit said to be in connection with bona fide contracts with arms-length third parties, when this was not the case. The chief architects of the fraud were the first two defendants who maintained that there was no rule of law in Kazakhstan and the claims were politically motivated. There were many factors that connected the case to Kazakhstan. The claimant was incorporated and carried on business in Kazakhstan; most of the documentation alleged to have effected the fraudulent scheme was in Russian; the letters of credit were payable in Kazakhstan; and breaches of Kazakhstan law were alleged. Eight of the necessary and proper party defendants applied to have the order giving permission for service out of the jurisdiction set aside. Christopher Clarke J rejected the challenge made to the court's jurisdiction, holding that the fact that it was in the English court rather than a Kazakhstan court that all the issues could be tried against all the defendants outweighed the considerable links the case had with Kazakhstan.

73. The same approach was taken in the recent cases of Erste Group Bank AG v JSC 'VMZ Red October' [2013] EWHC 2926 (Comm), [2013] All ER (D) 128 (Oct) (Flaux J) and OJSC VTB Bank v Parline Ltd [2013] EWHC 3538 (Comm) (Leggatt J)."

"82. Does the prospect of BAT having to bring substantially identical actions in two jurisdictions, in London against Windward and in New York against API, with the risk of inconsistent decisions, decisively tip the scales in favour of London being the appropriate forum for the claim against API? In my judgement it does. The claims brought by BAT involve very heavy and very expensive litigation and the risk of inconsistent decisions is pregnant with disaster. As I have already found, BAT acted entirely properly and reasonably in starting proceedings against Windward as well as against API and in bringing both sets of proceedings in England. As the party with considerably greater assets to meet a judgement and as the ultimate paymaster with the right to control the litigation, Windward is the main protagonist and ought to be sued in England which is manifestly the appropriate forum and where effective execution measures are available. It is also not clear on the evidence that if a claim were made against Windward in New York, the court would assert jurisdiction over the claim. No doubt it would be more convenient for API to be sued in New York, but in my view the hardship for API in being sued in London is clearly and decisively out-weighed by the hardship to BAT in not being able to sue both defendants in London.

83. I am accordingly satisfied that BAT has established that England is clearly and distinctly the appropriate forum for the trial of its claim against API."

380. She also took me to the decision in Municipio de Mariana v BHP [2022] 1 WLR 4691, and where I note in particular its paragraphs 343 to 345, 363 to 366 and 371:

"343. It is important to start by identifying with precision the alternative foreign forum relied on and the nature of the proceedings which render it available. It is not permissible merely to refer to the Brazilian courts in general, when there are different forms of proceedings in different courts, each of which raise their own questions of appropriateness and suitability. The Judge did not identify the form of proceedings he was considering in applying Spiliada .

344. The defendants' primary case was that the alternative forum was a federal court in which all the claims of all the defendants could heard in a single action through the commencement of a new CPA, followed by multiple liquidation proceedings brought by individual claimants following a generic sentence. Mr Gibson maintained a fallback

position that the alternatives were (a) federal courts hearing multiple CPAs brought by and/or on behalf of different claimants; or (b) federal or state courts in multiple ordinary or special civil claims brought by individual claimants.

345. We do not think that reliance on either of these two alternatives is realistic; and, to be fair to the defendants, they were not developed to any extent in the written or oral argument. Nor were they really supported by the defendants' experts, who both implicitly recognised the disadvantages and limitations in seeking to advance the claims through individual lawsuits in a case of this kind where liability is in issue. They would all involve a multiplicity of liability proceedings resulting in proliferation of time effort and expense, an acute risk of inconsistent judgments, with few, if any of the advantages of case management and synergy of cost sharing and expertise available in a group action here. The small claims courts would not have expert evidence and would be overwhelmed. The deficiencies in such multiplicity of proceedings are inherent in the optional initiatives set up pursuant to TTAC/GTAC and are well articulated in the Baixo Guandu Judgment. In our view the defendants do not establish that these are clearly and distinctly more appropriate forums in which the case can more suitably be tried than in a single action in England, even taking into account the four Brazilian connecting factors identified by the Judge. This may be the reason why until shortly before the appeal the undertaking by the defendants to submit to Brazilian jurisdiction was confined to a new CPA."

"363. The only additional points which fall to be considered in this context arise at stage one and depend upon the proper application of Vedanta [2020] AC 1045 . The stage two issues have already been addressed and are unaffected by the existence of the continuing action here against BHP England.

364. We have already cited the important passages from the judgment of Lord Briggs in Vedanta . It is authority for the proposition that where a defendant is amenable to suit in a foreign forum which is the appropriate forum for the claim against it, it is not a trump card, although it remains a relevant consideration, that the claimant asserts a risk of irreconcilable judgments arising from his pursuit of another defendant here as of right. In Vedanta itself, such risk was held not to be sufficient, on the facts, to prevent the foreign forum being the appropriate forum.

365. The Judge cited the relevant passages from Vedanta , recognised that the risk of irreconcilable judgments was a relevant factor but not a trump card, and concluded at para 241 that the factors in favour of Brazil as the appropriate forum outweighed the risk of irreconcilable judgments where the claimants had a choice to sue BHP England in Brazil. On the assumption that Brazil was an available forum for such a claim, that was a conclusion he was entitled to reach in the exercise of his discretion and we should not interfere with it unless persuaded by the claimants that there was some error of principle in his interpretation or application of Vedanta .

366. None of the points advanced by the claimants reveal any such error of principle."

"371. Moreover we consider that the risk of irreconcilable judgments was an entirely irrelevant consideration, for the reasons given by the Judge at para 242, namely that if the forum non conveniens application of BHP Australia were to fail, and the action would be proceeding against BHP England alone in England, the strong likelihood is that the claimants would not sue BHP Australia in Brazil. It does not appear from his Judgment that he regarded this as an independent reason why a risk of irreconcilable judgments was irrelevant at stage one, but in our view it is conclusive. The factual premise, that the claimants would not sue BHP Australia in Brazil, is not in this context dependent on any difficulties or obstacles in so proceeding, but rather is simply the logical result of the two claims being materially identical: there would be no advantage in the claimants additionally seeking relief against BHP Australia, in Brazil, if identical relief were to the same extent available in proceedings against BHP England which are to be pursued in any event. In those circumstances there would be no risk of irreconcilable judgments in the absence of a stay, because there would be no foreign proceedings, as the direct result of pursuit of the claim against an adequate alternative defendant in England."

381. She further relied on that latter decision as suggesting that the mere fact that Howden are prepared to submit to Brazilian jurisdiction was not necessarily a factor of particular weight.

382. Ms Rogers submitted that Aon would wish to enforce any judgment primarily against Howden in the United Kingdom; and it would therefore not be convenient to open up

the possibility of there being a further contest, following determination of matters in Brazil, as to whether or not the courts of this jurisdiction would enforce a particular order made by the Brazilian court.

383. It was, however, somewhat unclear to me as to what orders would be sought by Aon at a trial other than damages; although Ms Rogers did suggest that there might be some form of springboard injunction or injunction to prevent further use of confidential information; although she also accepted that it would be likely that she would have to amend the present prayer for relief if such injunctions were to be sought.

384. Ms Rogers submitted that, with regards to all these various matter,s it was for the defendants to identify what they said would be the actual issues in the case and that they have so far simply failed to do that. Thus, the court is left with a case which is really about, she would submit, the claimants proving the existence of a conspiracy, or at least a combination, to induce a serving Aon employee to act in breach of their existing obligations whilst they remained an employee of Aon, and which conspiracy combination and inducement was created, implemented in part and fully directed from London.

385. Turning to the question of governing law, she submitted that it was not of any particular great importance unless the law of Brazil was materially different from that of England and Wales.

386. She referred me in detail to the decision in VTB v Nutritek [2013] 2 AC 337 where the claimant's case was that they had been induced by misrepresentations emanating from Moscow to enter into a facility agreement in London, and where they sued the defendants for conspiracy to commit deceit. Questions of proper forum arose, as did the question of what was the governing law. The Court of Appeal had concluded that the governing law was Russian, and questions arose in the Supreme Court as to whether it mattered if the governing law was English.

387. Lord Mance dealt with the importance of where was the gravity of a conspiracy claim in paragraphs 7 to 10:

"7. Both the alleged misrepresentations on which VTB relies originated in Russia, but they reached VTB in London (very probably via VTB Moscow), and were relied upon by VTB there when it gave formal agreement to the facility agreement and interest rate swap there. Further, VTB sustained its loss by disbursing money in and from London, although, as will appear, it was in fact covered by VTB Moscow against any loss which it might otherwise make on the loan. In these circumstances, I address the question of the appropriate forum on the basis that, contrary to the conclusion of the judge and Court of Appeal, the law governing the alleged tort of deceit is English rather than Russian law. In summary, this is because England is the place where the events constituting the tort occurred, within the meaning of section 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995 and the respondents have not shown under section 12 that the significance of the factors connecting the tort with Russia is such that it is substantially more appropriate for Russian rather than English law to apply to determine the issues arising in this case. Whether the same applies to the alleged tort of conspiracy was not the focus of detailed submissions on this appeal and appears to me more doubtful. The conspiracy was to commit the deceit, but since both are based on a common design allegedly formed in Russia, that is a point that cuts both ways. I am however content to proceed on the basis that the conspiracy was, like the deceit, governed by English law, since ultimately in my view it makes no difference to the result.

8. It is relevant in the light of the above to examine the pleaded basis for the allegations of deceit and conspiracy. Each of these alleged torts depends upon an allegation that the first respondent, Nutritek, made false representations as part of a common design and conspiracy with the other respondents to defraud VTB: amended particulars of claim, para 27(f)(g). They "acted in concert pursuant to a common design": amended particulars of claim, para 67(a). The nominal owner of Nutritek was the second respondent, Marcap BVI. Marcap BVI through another company owned and controlled Marshall Capital LLC ("Marcap Moscow"), and it is pleaded that "Marcap through Marcap BVI had de facto control of and beneficially owned in part Nutritek" (amended particulars of claim, para 68(a); see also para 55) and that "The whole transaction under which VTB was defrauded was co-ordinated by Marcap": para 68(d). "Marcap" is defined as "the Marshall Capital group of companies": para 3. These pleaded formulations no doubt point to the reality that the affairs of Nutritek

were controlled in Moscow, by Marcap Moscow through Marcap BVI, and, consistently with this, Marcap Moscow's offices and personnel feature prominently in the history of the transaction: see eg amended particulars of claim, paras 30 and 69 and para 19 below.

9. It follows that, even though the tort of deceit was itself committed in England, the alleged tortious responsibility of all the respondents depends upon its being established that they were party to a common design. On the facts of this case, it is also clear that any common design is alleged to have been and must have been formed in Russia. That is where Mr Malofeev and Marcap Moscow are based and it is "Marcap" who co-ordinated the transaction under which the fraud allegedly occurred and through Mr Malofeev as Marcap BVI's agent that the Court of Appeal held that there was a good arguable case against Marcap BVI: see judgment, para 127. As to Nutritek that was, like Marcap BVI, a British Virgin Islands company, but it was principally owned by two Russian companies (see amended particulars of claim, para 2(a)), it was managed in Russia, no doubt through Marcap Moscow, and the approach relating to the proposed sale and facility agreement was made on its behalf to VTB Moscow by Mr Malofeev. The principal witnesses from all three respondents who have been served in relation to the alleged torts will come from Russia.

10. The conclusion that the alleged tort of deceit is governed by English law is very relevant to the question of the appropriate forum, and I am prepared to assume that the alleged tort of conspiracy is also governed by English law. However, assuming English law to govern both alleged torts, no one suggests that this is decisive of the appropriate forum. For reasons I have already indicated, the common design on which VTB's tortious claims depend is thoroughly Russian."

388. Ms Rogers submits that the gravity of the claim before me is in London. I note that in paragraph 10, Lord Mance said that the governing law was not decisive either way.

389. In paragraphs 44 onwards Lord Mance dealt with the relevance of which system was the governing law, and of the place of commission of the tort and of the place of formulation etc of a common design.

390. I note, in particular, paragraphs 44 to 56 of the judgment:

"44. The Court of Appeal re-exercised the discretion, because it believed that Arnold J had erred in his interpretation of Lord Goff's speech in The Spiliada . It said that he had adopted a two-stage approach instead of recognising that, in a service out case, there was a single burden on a claimant to show that England was clearly or distinctly the appropriate forum: paras 128–131, 164; and see The Spiliada [1987] AC 460 , 481D–D. But the two-part approach was the one which Lord Goff identified as appropriate in cases where service is effected within the jurisdiction, so that the claimant starts with the advantage of having achieved a legitimate basis for jurisdiction without leave, and it is for the defendant to show that some other country is the appropriate forum: see The Spiliada , p 476F. Any error therefore favoured VTB as claimant. Any error, if error there was, does not in any event impact on the force and weight of the judge's analysis in the paragraphs quoted above. Further, the way the judge answered his two-part test shows that he could not conceivably have come to any conclusion other than that the claimant had failed to show (clearly or at all) that England was the appropriate forum. He expressed his conclusion, at stage 1 of the two-part test which he (wrongly) adopted, as being that Russia was the natural forum (para 195) before going on at stage 2 to reject any suggestion that substantial justice could not be obtained in Russia: para 196 to the conclusion at para 222. Once one concludes that Russia is the natural forum, where there is no risk that substantial justice cannot be obtained, it is really impossible to conclude that England is clearly the appropriate forum. The Court of Appeal itself held that the judge was correct to conclude that VTB had failed to establish that England was clearly or distinctly the appropriate forum: para 165. However, it itself fell into error in my view in its treatment of the governing law.

(a) Governing law

45. The Court of Appeal was wrong to regard Russian law as governing the alleged torts, but it acknowledged that possibility and it dealt with the alternative, that English law governed them. However, in relation to this alternative, it was in my opinion also wrong to approach the matter on the basis that it made no difference which law

governed, because each side would have in any event to prepare evidence on both legal systems in whichever country the case was tried.

46. The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum. Neither of these considerations here applies.

47. VTB's claims are for deceit and for conspiracy. The conspiracy alleged is to obtain finance by the deceit. Accepting that the governing law of both alleged torts is, to English legal eyes, English, there is nothing to show that Russian law would reach any different conclusion. Parties are able to plead and rely on English law in Russian courts. But, even if there were reason to think that a Russian court would regard Russian law as governing the alleged torts, there is nothing to suggest that Russian law does not recognise and impose tortious liability for deceit, and for conspiracy to commit a deceit, on bases for material purposes equivalent to those which would be recognised under English law. It is unlikely that it does not, and no evidence has been adduced that it does not. It would have been for VTB to adduce evidence on all these points, if it could, in support of its case that England was the appropriate forum.

48. Although Arnold J wrongly concluded Russian law governed the alleged torts, he also considered the exercise of his discretion on an opposite basis, namely that English law applied, and, as I understand him, accepted the submission that this would not be a strong factor in favour of England, as well as saying that it was clear that the Russian courts could if necessary hear evidence of English law: see judgment, para 194, quoted above. His judgment therefore addresses the position on a correct hypothesis.

49. Even if, contrary to my view, the judge's conclusion as to the appropriate forum was limited by an assumption that Russian law governed the alleged torts, I cannot conceive, in the light of what he said in para 194, that it would have made any

difference to his conclusion if he had concluded that English law governed. The key issues in this litigation will on the face of it be factual not legal.

(b) Place of commission of tort

50. For reasons already given, I proceed on the basis that this was London in relation to the claim in deceit, and that the conspiracy, being to commit the same deceit, should be regarded as effectively ancillary. But I also note that, Mr Ryzhkov as managing director of VTB's acquisition department was the first signatory of the facility agreement for VTB, and he was based in Moscow. It may well be that his signature was sent or collected electronically from Moscow. Even if that were so, he is in Russia, and on any view an important potential witness.

51. The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors.

52. Here the common design on which the respondents' tortious responsibility is based was formed in Russia. Further, both the alleged representations emanated from Russia, in the form of the Ernst & Young 2007 report and the information that Mr Alginin was the effective beneficial owner of RAP. The history of the transaction which I have set out indicates that the transaction was introduced, pursued and approved predominantly in Moscow. It is difficult to avoid the conclusion that VTB was effectively following suit on decisions taken there. Further, significant aspects of the facts which are said to have rendered the representations untrue existed in Russia: particularly, the dairy companies' businesses and financial positions, but also, presumably, the factual control which Mr Malofeev is said to have exercised directly or through Marcap Moscow over RAP.

53. VTB, as a London based bank, must have had to go through some formal decision-making processes, or it would not have been party to the facility agreement at all. However, it did not need to put the loan proposal through its own credit committee, once it had been through VTB Moscow's credit committee: para 34 above. Further, the main documents emanating from VTB, the two credit applications of 13 and 15 November, date from well after the matter was approved by VTB Moscow's credit committee on 31 October and are contemporaneous with the approval of 13 November by VTB Moscow's management board. Finally, no formal record of any decision-making or approval by VTB itself exists, save in the form of Mr Ryzhkov's and Ms Bragina's signatures on the facility agreement. All this is however unsurprising when the transaction was effectively negotiated and decided upon in Moscow, and the funding and credit risk in respect of the loan was being fully assumed by VTB Moscow.

54. Arnold J was not referred to The Albaforth [1984] 2 Lloyd's Rep 91 , but in my view his approach in paras 186–195, cited above, was consistent with the proper application of the overriding principles of The Spiliada [1987] AC 460 by which he correctly directed himself. It is true that at an earlier point in his judgment, when determining the governing law of the alleged torts to be Russian, he wrongly identified Russia as their place of commission: paras 134–135. But, as I have already said, in para 187 he also considered the exercise of the discretion to serve out on the opposite hypothesis, namely that English law governed the torts. Had he had cited to him The Albaforth , I do not see how it could or should, in the light of the other factors that he correctly identified, have led him to any different result than that to which he in fact came. It is clear that in his view the other factors pointed very powerfully towards Russia as the natural forum for resolution of the issues.

55. Further, the Court of Appeal, before which The Albaforth was relied upon, did not regard it decisive in the circumstances of this case: para 166 et seq. It erred in treating Russian law as governing the alleged torts, but went on largely to eliminate the significance of this error by treating it as irrelevant which law governed. It should have treated English law as governing the torts and have recognised this as one factor generally tending to favour English jurisdiction. But, for reasons explained in paras 46–49 above, it was in this case a factor of very little if any real potency. Had the Court of Appeal approached the potential relevance of the governing law on a correct

basis, it is in my view clear that it would in this case also have made no difference to its ultimate conclusion.

56. The Supreme Court is, in these circumstances, being asked to re-exercise the discretion exercised at two stages below in the light of points made about their reasoning of no real significance, which it is clear would not have altered the decision in either court."

391. Ms Rogers says that paragraph 47 makes clear that it is for the defendants to adduce evidence that Brazilian law is different from that of England and Wales.

392. Lord Mance then went on to analyse relevant factors and held in paragraph 61 that the thinking of those in Moscow was particularly important in that case. He came to the conclusion that the appropriate forum was Russia; and I note in particular paragraph 70 of the judgment:

"70. However, if it were incumbent on us to re-exercise the discretion regarding service out, I would myself arrive at the same conclusion as the judge and the Court of Appeal. Once again in summary, the major part of the factual subject matter involves Russia, and it is clear that the great bulk of evidence on both sides will have to come from Russian witnesses. The location in law of the alleged torts is of much diminished relevance, on examination of their circumstances and place in which they are said to have originated, the process by which they are said to have reached and impacted on VTB and the evidence which would be involved in undertaking such examination. The fact that any deceit was intended to induce an English law contract which provided for English jurisdiction is relevant, but cannot determine the appropriate forum in which to decide whether there was in fact any such deceit or conspiracy."

393. Ms Rogers says that Lord Mance recognised that conspiracy may be ancillary to a tort ,and that the place of commission of a tort is a starting place, and that the governing law is important; but submitted that it followed from that judgment: firstly, that in an international context it is the conspiracy that is the key – she said that in the case before me that is London; and, secondly, that the governing law is not likely to be of particular weight, especially if it is likely to be similar to that of England and Wales.

394. As to what is the governing law in this case; Ms Rogers accepted that that of the service contract and employment of the 12th defendant is Brazil law and pointed out that, as far as the RSUA is concerned, it is governed by Delaware law.

395. As far as tort is concerned, she submitted as follows.

396. Firstly, that when Article 4.1 of Rome II refers to the place where damage occurs, that is not limited to direct matters of damage, such as moves of employees, but extends to indirect financial damage, such as loss of insurance business in London.

397. She relied as to this on the decision of Kwok v UBS [2023] 1 WLR 1984 where the Court of Appeal applied Article 5.3 of the Lugano convention, the relevant wording being "Where the harmful event occurs", to say that that meant where damage occurred; and then held in paragraphs 45 to 52 as follows:

"45. It seems clear to me that the judge was right to hold, as she did, that the place where the damage occurred for the purposes of article 5(3) has indeed been held by the CJEU to be "where the alleged damage actually manifests itself" (see Löber at para 27 and VEB at para 31). The remaining guidance to be obtained from the CJEU cases is somewhat dependent on the facts of those cases. I am not certain that there is any rule that is universally applicable to financial loss cases as UBS London seeks to establish. The answer will depend on the facts of those cases as the contrast between the outcomes in Kronhofer and VEB on the one hand and Kolassa and Löber on the other hand, demonstrates.

46. It is, in my judgment, dangerous to seek to define the test for where damage occurs in a wide range of financial loss cases, because they are likely to be so fact dependent. There will of course, need to be factors connecting the dispute to the jurisdiction in question (see Marinari at para 11, and UMI at para 26). But relevant factors will, of course, vary. It is also clear that loss must manifest itself in the jurisdiction in question.

47. The judge seems to me to have founded her decision on the indication that she found in UMI to the effect that damage manifested itself where it crystallised. In UMI , that was where the arbitration award identified what loss UMI had actually sustained,

even though UMI had obviously sustained loss when it entered into the option agreement pursuant to the negligent drafting of the Czech lawyers.

48. I am not sure, however, that jurisdiction founded on damage under article 5(3) will always be where the loss actually crystallises and is made certain. In VEB , for example, the CJEU seems to have laid down a rule that applies to cases brought in respect of listed companies breaching reporting requirements. This is not such a case. Nor is this a case like Kolassa and Löber , where there were significant connecting factors with the claimant's domicile in that the investments were made in Austria and the losses manifested themselves there.

49. I regard it as of the first importance to give the words of article 5(3) and the damage limb established by para 19 of Bier an autonomous construction. The same outcome ought to prevail on the same facts whatever law governs the tort or delict relied upon. I am conscious too of what the Supreme Court said in Ablyazov at para 32 to the effect that:

"However, the requirement of an autonomous interpretation does not mean that the component elements of the cause of action in domestic law are irrelevant. On the contrary they have a vital role in defining the legally relevant conduct and thus identifying the acts which fall to be located for the purposes of article 5(3). In particular, whether an event is harmful is determined by national law. To take an example raised during the hearing of the appeal, if a firearm is manufactured in State A and fired in State B the place of the event giving rise to the damage within article 5(3) is likely to differ depending on whether the basis of the complaint in national law is negligent manufacture of the firearm, or its negligent handling by the gunman."

50. In this case, UBS London places central reliance, in effect, on the fact that Mr Kwok and Ace Decade sustained some loss when Ace Decade entered into the Co-Investment Agreement in Hong Kong. Accordingly, the tort of negligent misstatement was complete at that stage and some loss had manifested itself immediately. UBS London points to the pleading of loss at that point.

51. In my judgment, that approach is over technical and not appropriate in this case. It puts form above substance, and places too much reliance on the shape of the pleadings. An autonomous approach to article 5(3) requires an answer to the pragmatic questions of where the damage claimed by Mr Kwok and Ace Decade actually manifested itself, and whether there are, in substance, factors connecting the dispute to England and Wales such as to allow the specific jurisdiction in article 5(3) to be invoked and to outweigh the general rule that, under Lugano II, parties are to be sued in the place of their domicile.

52. In my judgment, the judge was right to answer these questions in favour of the jurisdiction of England and Wales. First, the substantive damage claimed (US$495m) did indeed only manifest itself when the H-shares were sold in London. Up to that point, there was never realistically going to have been a claim; the H-shares might have gone back up in value. Secondly, the fact that Mr Kwok and Ace Decade only had an indirect interest in Dawn State is of no consequence, because Ace Decade's loss really did manifest itself in London, howsoever the transaction was structured. Once the shares were sold, Ace Decade had lost whatever interest it had in the value of the H-shares. Moreover, it is not correct to contend, as UBS London did, that the Co-Investment Agreement was unrelated to the funding arrangements entered into by Dawn State. Under the Letter Agreement, Ace Decade had agreed that it would be solely responsible for any costs incurred in connection with the financing of the investment. Thirdly, from the start of the transaction it was entirely foreseeable to all the parties and to UBS London in particular that proceedings were likely to be brought in London if things went wrong. The H-shares were always to be held in London. The Facility and Security Agreements were founded in London, and any real loss to the H-shares was always likely to be suffered in London. Fourthly, the domicile of UBS has no connection whatever with the transaction, so this is the kind of case where it could always have been seen that article 5(3) might apply so as to displace the general rule under Lugano II. The possibility of jurisdiction in Hong Kong or China is irrelevant to this point."

398. Ms Rogers contends that that holds that where damage ultimately manifests in a financially accessible way is the important consideration, rather than the process by which that came about. So, in that case damage resulted from advice to invest in shares

in a Hong Kong stock exchange limited company by way of a loan agreement governed by English law with the shares being held in London; with the result that ,when the shares were ultimately sold at a loss, the relevant damage occurred in London.

399. Ms Rogers seeks to submit that the same applies here, where eventually business is lost in London at least to some extent.

400. She contended that Anderson was right to point to that aspect, and also to potential loss in terms of management time incurred in London with dealing with what had happened.

401. Secondly, in relation to Article 4.2, she submitted that both Aon UK and Howden UK are domiciled in England and Wales, and so the proper law of tort for all those entities as between themselves is England and Wales.

402. Thirdly, she submitted in any event that Article 4.3 applied and that the tort was manifestly more closely connected to England and Wales.

403. She took me further to the decision in Fortress v Blue Skye [2013] EWHC 14 (Comm). There UK investors investing under a UK loan agreement sued in relation to what they contended was a dishonest scheme to restructure a Luxembourg entity so as to prejudice them. The defendants sought to have determined summarily that Luxembourg law applied, relying on Articles 4.1 and 4.2.

404. In paragraph 46 Mr Justice Flaux set out his approach to Article 4.1:

"46. The effect of the various decisions of the European Court of Justice on the place where the damage occurred was helpfully summarised by Simon J in London Helicopters Ltd v Heliportugal LDA-INAC [2006] EWHC 108 (QB)at [20](iii), [2006] 1 All ER (Comm) 595 at [20](iii) in these terms:

> *'The place where the damage occurred (within the meaning of the first part of the jurisdictional rule in [Handelswekerij GJ Bier BVvMines de Potasse 'SA Case 21/76 [1978] QB 708, [1976] ECR 1735]) is not the place where a claimant simply suffers financial loss. It is necessary to see where the event*

giving rise to the damage produced its 'initial', 'direct', 'immediate' or 'physical' harmful effect. For example, in the Bier case, the direct loss was the application of saline waste to the nursery. In the Dumez France case (see [Dumez France v Hessische Landesbank (Helaba) CaseC-220/88 [1990] ECR I-49 at 79 (para 13)]) the initial or direct damage was the withdrawal of support to the subsidiary. The harm to the plaintiffs in the Dumez France case was 'merely the indirect consequence of the financial losses initially suffered by their subsidiaries'. In the Marinari case it was the initial or direct act of interference with the notes.'"

405. In paragraph 47 the judge set out that Article 4.3 is an escape clause, which applies only on an exceptional basis:

"47. As recital (18) to the Rome II Regulation also makes clear, Articles 4(2) and 4(3) are exceptions to that general rule in Article 4(1) . Article 4(2) in effect provides that where both parties to a claim have their habitual residence in the same country, there is a special connection with the law of that country. Article 4(3) as the recital describes it: "should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country." The provision is only to be used on an exceptional basis. The defendants rely upon para 35–032of Dicey, Morris and Collins The Conflict of Laws which states that Article 4(3) should only be applied where there is a "clear preponderance of factors" pointing to another country than that indicated by Articles 4(1) and (2). The Explanatory Memorandum refers to the "centre of gravity" of the tort."

406. The judge, however, refused to decide the matter on a summary basis saying: firstly, that that was pointless as a tort liability would exist in law whatever was the relevant system; but secondly, that the court should be cautious in determining these matters on a summary basis -- see paragraphs 56 to 62:

"56. I agree with Mr McQuater that it is neither necessary nor appropriate to decide the issue of applicable law now on a summary basis. It is not necessary because there is no discernible benefit in terms of case management given that, if the claimants

establish their case on the facts, the defendants will face a liability in tort irrespective of which system of law applies to the tortious acts and conduct. By abandoning those aspects of their strike out application (paras 10 and35of the grounds) which alleged that the claims were unarguable as a matter of Luxembourg law, the defendants necessarily accept that there are arguable claims in tort against them under Luxembourg law. In the circumstances, it matters not whether in the event that the claimants establish their case on the facts, the defendants are liable for a whole series of categories of tort in English law or for an all-encompassing tort in Luxembourg law. I suspect that at trial, the real battleground will be whether the scheme was, as the claimants allege, a dishonest one designed to prejudice them or, as the defendants contend, entirely honest and above board and that, if the claimants make out their case on the facts and that they have suffered the losses alleged, the court is not likely to be unduly troubled with the question under which tort law regime those losses are recoverable.

57. The fact that, irrespective of the applicable law, if the facts are established, the defendants will be facing liability in tort, whichever system of law applies to the claim in tort, also seems to me to be the answer to the point Mr Wardell made by reference to para 12 of the explanatory memorandum that determination of the applicable law will facilitate the settlement of disputes. That may well be the case if there is a liability in tort under one system of law but not the other, but it is difficult to see how in the present case determination that one system of law rather than another was applicable would promote settlement.

58. If it were simply a question of determining where any direct damage occurred for the purposes of art 4(1) then it might be the case that it would be appropriate to decide the issue of the applicable law on a summary basis, but once art 4(3) is arguably applicable, it does not seem to me to be appropriate to do so. Obviously if the defendants could demonstrate that the claimants had no real prospect of establishing a manifestly closer connection with England the position might be different but, for the reasons set out below, I consider that the claimants do have a real prospect of establishing at trial that the tortious acts and conduct are manifestly more closely connected with England.

59. In support of his submission that it was not appropriate to decide the issue of applicable law in a complex case such as the present until the court was in possession of the full factual picture at trial, Mr McQuater relied upon the decision of Burton J in Alliance Bank JSC v Aquanta Corporation [2011] EWHC 3281 (Comm), [2012] 1 Lloyd's Rep 181. In that case, the defendants alleged that it could be determined, for the purposes of an issue as to jurisdiction, that there was no serious issue to be tried in relation to the applicable law of a conspiracy claim, contending that the issue was governed by Kazakh law as the law of the place where the matters alleged to give rise to the conspiracy took place. The claimants alleged that the issue was governed by English law, as the proper law of the relevant fraudulent transactions.

60. Burton J declined to decide the issue at an interlocutory stage, concluding that there was a serious issue to be tried as to whether English law was the applicable law of the tort in these terms (at [41]):

> *"It seems clear to me that I cannot decide this question without a full understanding of the facts. At the moment, I would regard it as likely that Cyprus law is the same as English law, and, in any event, am safe in adopting the presumption (which I could not adopt in relation to Kazakh law because I am told, as was Teare J, that there is no law of conspiracy in Kazakh law) that Cyprus law is the same as English law so far as the common law of conspiracy is concerned (see Dicey, Morris & Collins The Conflict of Laws (14th Ed) 9–025 and supplement), but even without the alternative candidacy of Cyprus law, I would regard it as a serious issue to be tried as to whether English law is the proper law of the tortious acts alleged."*

61. That cautious approach was endorsed by Tomlinson LJ in the Court of Appeal in that case ([2012] EWCA Civ 1588 at [90], [2013] 1All ER (Comm) 819 at [90]):

> *"For my part I consider that the judge was wise to conclude that he could not reach even a provisional view as to the likely proper law of the tort without a full understanding of the facts. In concluding that there is a serious issue to be tried whether English law, or perhaps some other system of common law derived therefrom such as that of Cyprus, is the governing law, he did not I*

think err in his assessment. An assessment at this stage which ruled out the serious prospect of English law or some other common law derivation therefrom ultimately being shown to be the proper law of the obligations would, I think, have been over-confident."

62. Similar caution seems to me to be appropriate here. Furthermore, that cautious approach seems to me to be consistent with the approach to summary judgment applications in complex cases advocated by Mummery LJ in the Bolton Pharmaceutical Co 100 case [2007] FSR 63 which I cited earlier in this judgment at para [40]. In the circumstances, I do not consider it appropriate to decide the issue of applicable law summarily at this stage. I propose simply to set out my reasons for concluding that the claimants have a real prospect of successfully establishing at trial that the applicable law of the tortious acts and conduct of the defendants is English law."

407. Ms Rogers says that both aspects apply here; including because she submits that it is clear that a tort would exist in Brazil law in any event.

408. In relation to Article 4.1, Ms Rogers pointed to parts of the judgment where Mr Justice Flaux held that that claimant had a real prospect of success on the basis of the relevant fund being run from London, and that damage can take the form of loss of an intangible business asset - see paragraphs 67 to 68:

"67. The existence of that conflict of evidence and the fact that it cannot be resolved without full disclosure by the defendants and, in due course, cross-examination of the individual defendants at trial, demonstrates why it is inappropriate to determine the issue of applicable law summarily now. It seems to me that if the claimants establish at trial that the Fund was indeed run from London and carried on business in England, then they will have a real prospect of establishing that, for the purposes of art 4(1) , the direct damage occurred in England, because it is arguable that the direct damage consisted of the loss of or diminution in value of Stepstone's interest in the Fund and that interest in the Fund, a limited partnership, was situated in England because the partnership was carrying on business in England: see Dicey, Morris & Collins (15th edn, 2012) para 22–049.

68. Furthermore, in their commentary on art 4(1) at para 35–026, the editors of Dicey, Morris & Collins express the view that: "[i]n misappropriation cases, it seems appropriate to locate damage at the place where an asset (tangible or intangible) is taken from the claimant's control." That approach would in the present case arguably locate the damage in England, because the critical aspect of transfer of control was the transfer of assets away from the English registered limited partnership the Blue Skye Fund, which, for the reasons I have given, was arguably carrying on business in England to the Luxembourg registered limited partnership Blue Skye SCS."

409. In relation to Article 4.3, Ms Rogers pointed to Mr Justice Flaux's holding that the claimant had a real prospect of success as to whether the matter was manifestly most closely connected to this jurisdiction. I note, in particular, paragraphs 70 to 75:

"70. Even if the claimants did not have a sufficiently arguable case to go to trial that the direct damage occurred in England, so that, under art 4(1), the applicable law of any tort is English law, in my judgment, for a number of reasons, the claimants have a real prospect of succeeding under art 4(3) in demonstrating that the tortious acts and conduct complained of have a manifestly closer connection with England than with Luxembourg.

71. First, given that, for the reasons I have given, the claimants have a seriously arguable case that the Fund was run from London and carried on business in England, even if the defendants are correct that the damage suffered by the Fund is not the direct damage which occurred for the purposes of art 4(1), nevertheless the Fund was at the heart of the original investment structure and the fact that the Scheme, if established, had the effect of removing the assets from and dissolving the Fund of itself provides a close connection with England.

72. Second, each of the English torts alleged, conspiracy, unlawful interference, procuring breach of contract and dishonest assistance, directly or indirectly involved either the breach of contracts governed by English law (the partnership deed, loan agreement and security assignment) or damage to the interest and rights of the claimants under such contracts (in the case of the loan agreement and security assignment). The adverse effect on those English law contracts arguably provides

another close connection with England and, in any event, art 4(3) itself expressly recognises that a pre-existing contractual relationship may give rise to a manifestly closer connection.

73. The defendants seek to challenge that conclusion by pointing out that the agreements and instruments most closely connected with the alleged scheme are governed by Luxembourg law. Whilst it is not necessary to determine the issue now, it seems to me the difficulty with that argument is the one identified by Mr McQuater, that these agreements were the mechanisms by which the allegedly dishonest scheme was implemented, not pre-existing agreements, whereas art 4(3) is focusing on agreements in place before the allegedly tortious acts took place.

74. Third, for the reasons I have already given, it is arguable that the whole scheme was planned, orchestrated and implemented by the second and third defendants in London. If established, this serious mismanagement of the Fund by the key managers took place in England and demonstrates that the centre of gravity of the relevant torts is England. Mr Wardell in particular sought to challenge that conclusion by pointing out that the various steps in the Scheme and overt acts in any conspiracy largely took place in Luxembourg. Once again, it is not necessary to determine this issue now, but it seems to me that, if the claimants' case is established at trial, it will involve the conclusion that the various other defendants, whether natural persons or entities, were in effect "puppets" of the second and third defendants, who, on this hypothesis, were the "puppet masters" pulling the strings from London. The fact that the carrying out of the second and third defendants' instructions involved overt acts in another jurisdiction does not seem to me to detract from the torts in question being at least arguably more manifestly connected with England.

75. Accordingly, for all the above reasons, I have concluded that the claimants have a real prospect of establishing at trial that the applicable law of the tortious acts and conduct alleged is English law and the defendants' application to have this issue determined in their favour summarily should be dismissed."

410. Ms Rogers says that there are similarities here with: a conspiracy or plan being formed and directed in and from London; a material suborning of the 12th defendant and some

of the Aon Brazil employees occurring in London; and a situation of Howden UK and its directors pulling the strings of what Ms Rogers would say were the Howden Brazil puppets.

411. Ms Rogers also reminded me of the reference in paragraph 178(7) of the Lakatamia judgment of the need for there to be a trial there in order to determine Article 4.3 questions.

412. Ms Rogers also pointed out that the 11th defendant is resident and works in England; and so he is in the same position as the other Howden UK parties, apart from the 10th defendant.

413. Ms Rogers further submits that it is possible for some tort claims even if they have similar and related subject matters to be governed by England and Wales law, with others being governed by the law of Brazil.

414. She said that it is clear that whichever court hears these matters will have to grapple with the law of England and Wales as well as that of Brazil.

415. In summary, she submitted that the tort case is governed by the law of England and Wales, or at least reasonable grounds have been advanced for that or there is a real prospect of that being held to be the case; but that for the purposes of these applications I should proceed on the basis that any court will have to deal with the law of both jurisdictions, and where, whatever may be the state of Brazil law, the law of England and Wales in relation to these economic torts is itself in a state of development and of complexity.

416. In any event, she submitted that Aon had a real prospect of success in relation to governing law and the court should reject the application for a summary judgment.

417. As to the position of the 12th defendant, Ms Rogers submitted in summary as follows.

418. Firstly, that he would have to show that the Brazil court is clearly the most appropriate forum for claims against him since he has been served here.

419. Secondly, she pointed out that there is no exclusive jurisdiction clause in his employment contract; and she submitted that civil law would not permit the implication of any provision into it to the effect that any dispute should be dealt with by the Brazil courts, notwithstanding that the contract is governed by Brazil law.

420. Thirdly, she referred to a discussion in a book, the author being Paul Nicholls KC, called "Employment and Commercial Disputes -- The International Aspects". She identified a scenario created by the author in section 17.43, and the author's discussion of it in paragraph 17.45 to 17.47:

"17.43 After the UK has left the EU and in circumstances where neither the Brussels Recast Regulation nor the Lugano Convention apply in the UK, a German-domiciled employee employed by an English company to work in England is sued in England for breach of a post-termination restraint in a contract of employment governed by English law and containing an English choice of jurisdiction clause. Relying on rights under the Brussels Recast Regulation as a domiciliary of Germany, the employee applies for a stay of the proceedings commenced by the English employer in England, claiming to be entitled only to be sued in Germany. Will such a stay be granted?"

"17.45 This is not a straightforward case. There appear to be two possible analyses. One is that the English court would respect the law applicable to the employee – law which the individual would say should be capable of being relied on and as containing rights of which the employee should not be deprived. On this footing, it would be argued that the law as contained in the Brussels Recast Regulation was an exceptional situation justifying the court not giving effect to the choice of jurisdiction clause.

17.46 But on the other hand, the English court might say that its function is to apply domestic rules of jurisdiction, which no longer includes the Brussels Recast Regulation. By the domestic rules, the choice of jurisdiction clause means that the employee has agreed to submit to the court. In this context, the attempt by the German defendant to rely on the Brussels Regulation would seek to apply foreign law – and certainly law inapplicable in England – to determine the English court's jurisdiction. It would be said that it was not open to the German defendant to invoke law applicable to that individual (by reason of domicile), a matter personal to the individual, to defeat

what would otherwise be the applicable rule of jurisdiction. Section 15C of the Civil Jurisdiction and Judgments Act 1982 does not help the German employee because it provides only that UK-domiciled employees must be sued in the place where they are domiciled. The provisions dealing with jurisdiction clauses likewise only apply to UK-domiciled employees.

17.47 It is thought that the latter argument is likely to prevail. In such a case, an individual would be seeking to say that because certain law, inapplicable in England, applies to that individual, therefore the English court should not give effect to its own rules of jurisdiction. That seems to be a high hurdle to clear. On that basis, it seems likely that the English court would not stay the claim."

421. She said that that demonstrates that the question as to which court will deal with employee claims, even where foreign law provides for an exclusive foreign jurisdiction, is unclear; and that the author at least favours the English court applying its own rules with regard to jurisdiction, and without taking into account the foreign law, or at least without giving it great weight.

422. Fourthly, she submitted that questions of comity and respecting the law of Brazil were irrelevant in this area. She reminded me of paragraph 24 of the Donohue decision. I note that that case related to an exclusive jurisdiction clause, and whether or not the English court should depart from a negotiated contractual bargain.

423. She further submitted that if litigation does occur in England and Wales, that will not involve any interference with the process of any foreign court, which can itself decide whether or not it is appropriate for a resultant judgment to be enforced in that jurisdiction.

424. Fifthly, she submitted that Mallet's views with regards to the Brazilian Civil Code and Constitution requiring claims against Brazilian employees to be brought in the Brazil Labour Court all only related to claims brought in Brazil; and that there is nothing therein, like, for example, the provisions regarding real property, succession and divorce in Brazil law, to give the Brazil court some sort of worldwide exclusive jurisdiction.

425. She contended that the Brazil courts would respect an English judgment in an employment case, as they did in Apotex, and that that respect would potentially include the granting of consequential injunctions. In any event, she submitted that none of the experts said that this was an impossible outcome.

426. Sixthly, as far as Aon Brazil's articles of association are concerned, she pointed to the exclusive jurisdiction clause in relation to the Sao Paulo court as only relating to disputes arising from "this contract".

427. She submitted that that was irrelevant in relation to breaches by the 12th defendant of fiduciary duties owed as a director, because those did not come within the context of "this contract".

428. She further submitted that Nery was right to say that the articles only really cover the claims of a shareholder against a company, rather than claims of a company against its director; and that Yarshell was wrong to say otherwise.

429. She further submitted that even if I was to regard the situation as being equivalent to that of an exclusive jurisdiction clause, Donohue at paragraph 24 allows for strong reasons to exist to depart from such. She further relied on paragraph 27 of Donohue to contend that the risk of parallel proceedings and inconsistent judgments, and the existence of a London conspiracy, were all sufficient to amount to such strong reasons.

430. She also submitted that, even if she was to lose at stage 1 of Spiliada, there are special circumstances, including in particular the disclosure regimes, but also the existence of the Cyber claims, and possibly also of the Marine claim, which would operate to make it clearly in the interests of justice that the claim should be determined in this jurisdiction; and so that at stage 2 of Spiliada I should depart from a stage 1 conclusion which was adverse to Aon.

431. As far as Mr Lloyd's and Mr Davies' reliance on absence of full and frank disclosure was concerned, Ms Rogers submitted, firstly, that evidence in support is not to be tested in terms of full and frank disclosure as if the court was conducting some exam,

but rather the court should be approaching the matter by reference to an evaluative question as to whether or not it had been misled.

432. Secondly, she submitted the duty of full and frank disclosure is to identify points and to engage with them, not to present some sort of full argument as would take place at a hearing such as this.

433. She relied in relation to these matters on the decision in Boettcher v Xio [2023] EWHC 801 (Comm), citing paragraphs 161 to 163:

"161. There is a duty upon the applicant for permission to serve proceedings outside the jurisdiction where the application is made without notice to make full, fair and accurate disclosure of material information (significant factual, legal and procedural matters) which might reasonably be thought to weigh against the making of the order sought (Commercial Court Guide, Appendix 9, para. 6(c); Memory Corporation v Sidhu (No 2) [2000] 1 WLR 1443, 1460; Tugushev v Orlov [2019] EWHC 2031 (Comm), para. 7; Valbonne Estates Ltd v Cityvalue Estates Ltd [2021] EWCA Civ 973). 162. The breach of the duty must concern the withholding of a substantial matter. As Sir Michael Burton said in PJSC 'Pharmaceutical Firm Darnitsa' v Metabay Import/Export Ltd [2021] EWHC 1441 (Comm) at para. 17:

"There will be cases where the consequence of a non-disclosure can be shown to be that the order would not, or at least might not, have been made, had the truth been told. There may also be cases in which, even if the order would still have been made, the seriousness of a non-disclosure must be marked either by a discharge of the order or at any rate by a suitably penal order for costs. But in the ordinary case a judge on the return day or on a discharge application must really have his timbers shivered by something serious that has gone wrong, rather than a litany of matters that could have been put differently or could have been expanded. My timbers have not been shivered in this case …"

163. It is generally inappropriate to seek to set aside an order for non-disclosure where it depends on proof of facts which are themselves in issue in the action, unless

the facts are truly so plain that they can be readily and summarily established (Tugushev v Orlov [2019] EWHC 2031 (Comm), para. 7(viii)).”

434. She further submitted that, even if I found that there had been a failure to provide full and frank disclosure, that should not lead to a simple setting aside of the permission drawing my attention to what was said about that in paragraphs 164 to 165 of Boettcher:

“164. If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains the order sought without full disclosure is deprived of any advantage that party may thereby have derived. This is so even if the Court would have made the order had there been full and frank disclosure of the information not disclosed. Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive (Brink’s-Mat Ltd v Elcombe [1988] 1 WLR 1350, 1356-1357). Where the non-disclosure is deliberate, it will only be in exceptional circumstances that an order would not be discharged (Tugushev v Orlov [2019] EWHC 2031 (Comm), para. 7(ix)-(xi)).

165. If a material non-disclosure is established, the Court has a discretion to (a) set aside the order without renewal, (b) set aside the order and require a fresh application (to be considered in the light of new facts which have arisen since the original application for service-out was first made), or (c) treat the claim form as validly served, and deal with the non-disclosure by a costs order (NML Capital Ltd v Republic of Argentina [2011] UKSC 31; [2011] 2 AC 495, para. 136 and Punjab National Bank (International) Ltd v Srinivasan [2019] EWHC 3495 (Ch), para. 68(1)-(3)). The Court inclines towards the first of these options (Evison Holdings Limited v International Company Finvision Holdings LLC [2020] EWHC 239 (Comm), para. 60-61).”

435. She submitted, firstly, that Aon had taken care with regards to full and frank disclosure and raised a great deal of material; secondly, it would be obvious to the court considering the without notice application as to what would be the types of argument which the 10th defendant and Howden Brazil would present; thirdly, that Anderson had adduced the Naftalin and other defendant material and carefully referenced it to specific paragraphs; fourthly, that Anderson had made clear that Brazil law might be

complex, and she submitted there was no need to identify particularly great detail of that; and fifthly, the only real error was with regards to the question as to what disclosure regime the Brazil court had, in particular with regards to foreign defendants, and that it was relatively minor in context.

Fv submissions in reply of Howden UK, the 12th defendant, the 10th defendant and Howden Brazil

436. As to all this, the defendant's counsel replied as follows, albeit also simply repeating their previous submissions.

Fva submissions in reply of Howden UK

437. Firstly, as far as Mr Craig's submissions were concerned for Howden UK; he, firstly, reiterated the risk of fragmentation of proceedings if matters were to proceed in this jurisdiction, in particular if the 12th defendant had to be sued in the Labour Court in Brazil.

438. He repeated, firstly, that that was a consequence of the claimants deciding to sue the 12th defendant; and secondly, that it was in fact pointless for the claimants to sue the 12th defendant as he could not satisfy any judgment and there was no real prospect of an injunction being granted where the 12th defendant had left Aon a substantial time ago.

439. He also relied on Mariana v BHP [2022] 1 WLR 4691 to submit that if it was clear, as here, that a claimant(s) -- here Aon -- was going to sue a particular defendant(s) -- here Howden UK and Howden Brazil; that the court should give little weight to the claimants' decision also to sue someone else – here the 12th defendant -- who did not really matter commercially, see paragraph 371 of that decision:

"371. Moreover we consider that the risk of irreconcilable judgments was an entirely irrelevant consideration, for the reasons given by the Judge at para 242, namely that if the forum non conveniens application of BHP Australia were to fail, and the action would be proceeding against BHP England alone in England, the strong likelihood is

that the claimants would not sue BHP Australia in Brazil. It does not appear from his Judgment that he regarded this as an independent reason why a risk of irreconcilable judgments was irrelevant at stage one, but in our view it is conclusive. The factual premise, that the claimants would not sue BHP Australia in Brazil, is not in this context dependent on any difficulties or obstacles in so proceeding, but rather is simply the logical result of the two claims being materially identical: there would be no advantage in the claimants additionally seeking relief against BHP Australia, in Brazil, if identical relief were to the same extent available in proceedings against BHP England which are to be pursued in any event. In those circumstances there would be no risk of irreconcilable judgments in the absence of a stay, because there would be no foreign proceedings, as the direct result of pursuit of the claim against an adequate alternative defendant in England."

440. He submitted therefore, in those circumstances, that the fact that the claimants were choosing to sue the 12th defendant and that the 12th defendant could not be sued in the same court as the other defendants in Brazil, was no reason why this court should be the appropriate forum for all claims.

441. Secondly, he referred to the fact that the claimants had decided to sue only some of the alleged wrongdoers and conspirators and had decided not to sue the Brazil employees; he submitted that that demonstrated that the claimants were taking some sort of selective tactical approach.

442. Thirdly, he said that the question of fragmentation and related actions is really all relevant only to stage 1 of Spiliada and not stage 2, as suggested by Ms Rogers.

443. Fourthly, he submitted that the claimants should not be able to advance an argument as follows; that the public policy of Brazil required claims against the 12th defendant to be in the Labour Court in Brazil, and therefore to avoid fragmentation all claims should be in England. He submitted it would be perverse and would undermine Brazilian public policy for that argument to be used to enable the 12th defendant to be sued in England rather than in a Brazil Labour Court.

444. Fifthly, he accepted that there could be some advantage in English procedural law to claimants in seeking disclosure against non-parties as compared to the law of Brazil but pointed out that that procedure was still available in Brazil, according to the experts.

445. Sixthly, he said that if the 12th defendant was sued in the Labour Court in Brazil, the Brazil courts would be willing and better able than the English court to manage the process in relation to the other defendants, who would be sued in the Brazil State Court, to avoid the risk of irreconcilable judgments than if the proceedings against the other defendants took place in this jurisdiction.

446. Seventhly, he said that the difficulties possibly attendant on an English court's injunction being exported to be enforced in Brazil and of a Brazil injunction granted in Brazil being exported to enforcement in England rather cancelled each other out.

447. He again made clear that Howden UK was saying that it would comply with any order the English court made, and was only reserving its position as to whether it could challenge the export of a Brazil injunction to England on grounds of English public policy.

448. Eighthly, with regards to Cyber he submitted, first, that Howden UK would accept any findings made by the English court dealing with Cyber so as to bind Howden UK in Brazil.

449. Second, it would be unreal, if an English court was only dealing with the Cyber claim, that in some way other as part of that claim the English court would try out the factual side of the LatAm recruitment claim allegations as part of a similar fact exercise. He said that that would be a vast and disproportionate exercise, and would be contrary to case management in accordance with the Civil Procedure Rules overriding objective, and that the English court would find some other way to deal with that possibility.

450. Ninthly, he accepted that in The Spiliada decision it was held that the use by a claimant of only one legal team in one jurisdiction could be desirable; but pointed out that that was in the context of a claim which involved highly technical scientific matters; and he

submitted that the only technical side of this claim was as to Brazil law and that that should be pre-eminently for the Brazil courts and lawyers to determine.

451. Tenthly, in relation to governing law and Ms Rogers' arguments as to the effect on governing law of there being an allegation of conspiracy; he referred me to ENTC v JSC [2015] 1 CLC 706.

452. There, there was an alleged Russian conspiracy to manipulate Russian insolvencies, so that a guarantee was not repaid in New York; and the Court of Appeal regarded tests of jurisdiction under the judgments regulation and of governing law under Rome II, even if similar phrases were used in the different regulations, as being different schemes - see paragraph 91 onwards.

453. Mr Craig drew attention to why the court there said that Russia was manifestly most closely connected to the tort in paragraphs 98 to 99:

"98. In our view, it is clear that all the participants in the alleged conspiracy were based in Russia, that the alleged conspiracy itself would have been hatched in Russia, and that all the acts done pursuant to it would have occurred in Russia. It was a conspiracy allegedly designed to take improper advantage of Russian insolvency procedures, by bringing about the insolvent liquidation of D1 and D2, and the benefit to the conspirators consisted of the extraction of supposedly valuable assets (consisting of, or connected with, the Red October steel works) from D1 and D2, and their being vested in persons in Russia owing no obligations to the lending syndicate of which the Bank formed part. Any impartial observer of the alleged facts, posed with the question: 'by reference to which system of law should it be adjudged whether the conduct complained of was unlawful?' would answer 'Russian law of course'. No aspect of the question whether that conduct was or was not unlawful could possibly turn upon any issue of interpretation of the Loan Agreement or Guarantee, to which the main perpetrators of the conspiracy (i.e. the puppet masters rather than the puppets) were not parties in any event.

99. Finally, although (as the judge said) in many cases it may be premature to reach a final decision on applicable law at the very early stage of an application for permission

to serve proceedings out of the jurisdiction, we find it difficult to envisage what further developments during the litigation of a case based upon the existing particulars of claim could significantly detract from its manifestly close connection with Russia. It is, in short, as Russian a conspiracy as it is possible to imagine."

454. He also took me to the Court of Appeal's obiter analysis of what was the most appropriate forum in that case in paragraph 127 onwards; and to their reasons for rejecting the first instance judge's analysis that England and Wales was the most appropriate forum, and in particular as to why the gravity of that conspiracy case was in Russia as well as references to locations of witnesses and document factors, all in paragraphs 147 to 150 of that judgment:

"147. The fourth and fifth factors put forward by the Bank and relied upon by the judge were (i) that the Russian court would apply the wrong applicable law, Russian law, to the conspiracy claim and (ii) that the applicable law of the torts alleged was English law. As we have set out above, in the context of our consideration of the gateway contained in paragraph 3.1(9) of PD6B, the applicable law of the conspiracy and other tort claims was Russian law. In the light of that conclusion the judge's reliance on these factors as pointing to England as the appropriate forum cannot stand.

148. Quite apart from the five factors which the judge did take into account in reaching his conclusion, in our view (apart from his passing reference to Mr Morgan's submissions in paragraph 161 of the judgment) he ignored, or attached far too little weight to, the fact that the fundamental factual and legal focus of this litigation concerned events which had occurred in Russia. Thus the judge failed, or failed adequately, to take into account the following critical factors in his evaluation of the issue of appropriate forum:

(i) First, and most importantly, he failed to consider what was the actual scope of the factual inquiry that the conspiracy claims would involve. It was apparent from the particulars of claim and the Bank's supporting evidence that the conspiracy claim would involve a root and branch attack on the insolvency procedures governing D1 and D2, the conduct of meetings between creditors of D1 and D2, the propriety of applications made by creditors to the Russian court, and the propriety of the decisions

made by the Russian courts in relation to Russian law transactions. Mr Salzedo's proposed undertaking (as referred to above) that the Bank would limit its case at trial in relation to unlawful means so that it did not include any assertion that any final decision of the Russian court in relation to the insolvencies of D1 and D2 was wrong as a matter of Russian law, went no way to meeting this point. The undertaking was uncertain in ambit and, even if accepted, would necessitate a wholesale re-pleading of the particulars of claim which in their current form clearly challenged not only the entitlement, or propriety, of the defendants in acting as they did to procure the relevant transactions, and seeking decisions of the Russian courts to uphold them, but also challenged the very decisions of the Russian courts themselves. The undertaking was neither before the judge, nor before Cooke J on the application to serve out. Moreover, even with the benefit of the undertaking, an English court hearing the conspiracy claims would still need a detailed understanding of Russian insolvency law and court procedure and it would be necessary to go through the entire course of the Russian insolvency process in relation to D1 and D2, and indeed the transactions which preceded it, to determine whether or not the conduct by D3 and D5 and the other defendants was unlawful as a matter of Russian law.

(ii) We take by way of example, the Bank's challenge to the Amicable Agreement, and the Russian court's approval of it, and the Bank's challenge to the subsequent transfer of assets by D1 to two newly created subsidiaries in September 2011, which was likewise upheld by the Russian court. In fact, as Mr Mumford's schedule shows, all the transactions about which the Bank now makes complaint, were the subject of decisions by the Russian courts. In our judgment it is wholly inappropriate that the English court should be faced with the task of ascertaining whether, in the light of such judgments apparently approving the relevant transactions, the conduct of the defendants was in any particular respect egregious. Any such assessment would necessarily require a detailed understanding of Russian insolvency law and court procedure.

(iii) Second, the judge failed to pay due regard to the fact that all relevant documentation is located in Russia and written in the Russian language; that all the relevant witnesses would be Russian speaking and many of them are resident in Russia; and that it would be necessary to review decisions taken by Russian insolvency practitioners, and the strategies which they advised, against the background of their

relevant Russian professional obligations, in order to decide whether the conduct of the defendants was unlawful.

(iv) Third, whatever the judge's view as to what was the applicable law of the conspiracy claims, the relationships between the various defendants and other parties are all governed by Russian law. Indeed, we were informed that it was common ground that, even if the Bank's tort claims are governed by English law, the lawfulness or not of the conduct on which those claims were based would be judged by reference to Russian law.

149. For all the above reasons we consider that the judge was clearly wrong in his evaluation that England was the appropriate forum for the determination of the Bank's claims against D3 and D5. In our view he approached the issue relating to forum by examining the technical factors urged on him by the Bank, rather than by standing back and asking the practical question where the fundamental focus of the litigation was to be found. As Lord Mance said in VTB Capital v Nutritek at paragraphs 14–16 and 51, the appropriate starting point for deciding on appropriate forum is the place of commission of the tort. In the present case that was manifestly Russia. There was no reason to depart from that starting point. We have no doubt that the clearly appropriate forum for the determination of this dispute was Russia and that, on any basis, the Bank failed to discharge the burden on it to establish that England was the appropriate forum.

150. Further, in the exercise of his general discretion the judge did not give any consideration to the fact that in reality the only commercial driver behind the Bank's issue of proceedings in England against D1 and D2 was to enable a claim to be brought against D3 and D5 and to attempt to execute against their assets, whether in Russia or elsewhere. Whilst taken on its own this particular factor did not predicate that permission to serve out should be refused, it was, in the circumstances of this case, clearly an important factor that should have been taken into account."

455. Mr Craig contended that the points relied on there, as to the location of the gravity of that conspiracy being affected by where it was implemented, favoured Brazil when applied by analogy to this case. He said that the claim was that the 12th defendant had

recruited employees in Brazil; and he contended that this was not a puppets-on-a-string case, but related to the actions of the 12th defendant, a person with a mind of their own and whose actions to recruit Aon's employees predominantly took place in Brazil.

456. Mr Craig again repeated his submission that if people in one country conspire to commit a wrong in another country, for example, to steal assets located in another country, then the location of the gravity of the tort should be where the implementation of the wrong takes place.

457. Mr Craig repeated his points that the 12th defendant and the Brazil employees are key witnesses, who in principle should be able to give their evidence in their primary language, Portuguese, especially where serious allegations were made against them.

458. He referred me to VTB Commodities Trading v JSC Antipinsky Refinery [2021] EWHC 1758 (Comm). In paragraphs 223 to 238, it was said that :

"223. Among the available fora, England therefore became "the only rational choice", even though the Russian courts were available. Reliance was also placed on this judgment for its emphasis on the importance of a single forum in claims relating to conspiracy, and its recognition that an increased risk of irreconcilable judgments could be a factor even if the risk could not be altogether eliminated.

224. As for the legal question on Vedanta implicitly posed by the parties' differing approaches, I would venture to suggest that what Vedanta does is some way short of a step-change; and can most properly be seen as a reminder or point of emphasis. It emphasises the overall test and the fact specific nature of that test. If it makes a difference, that difference is to remind the Court when considering these issues that multiplicity of proceedings is only ever a factor, though it may be a factor of predominant importance in some cases – depending on the facts.

225. The position here is both similar to and different from Vedanta . There is no real link to England; this is in essence a Russian case. It is before this court "purely" because VTB has chosen to bring an arbitration claim here. However there are two "non-choice" factors: (i) that claim was brought in support of the claim which VTB had

to bring in London-based arbitration and (ii) Petraco cannot bring a claim on the cross-undertaking in damages in Russia. Thus part of the claim will continue here regardless; there is no question of the whole case being capable of transplantation.

226. The position here is also distinct from the position in ED&F Man - where substantive proceedings had to be brought here and the other proceedings were mere pre-action proceedings; here there is no requirement to bring proceedings here, and while the arbitrations must be brought here, VTB was under no obligation to seek interlocutory assistance from the supervising court. Further in addition to the other tie to Russia there has been at least some engagement of the Russian jurisdiction by VTB itself. The case is also different from Mints where there was evidence as to enforcement difficulties if the case was heard in Russia and an implicit acceptance that Russia would in the circumstances have been an irrational option.

227. I do not accept (as was tacitly suggested by Mr Gaisman) that Sir Nigel Teare in National Bank Trust should be taken as laying down a test of general application at [67] where he referred to a rational choice. Any such test would not really sit with the approaches in previous cases of high authority. Nor, if he did, would I accept the submission that the only rational choice for VTB was to make its Article 1064 claims against Petraco in England. I see this case as more akin to Vedanta – or to ED&F Man , but in reverse. The proceedings here should be seen as akin to the pre-action disclosure proceedings in Singapore in ED&F Man . The decision there was in essence that the tail of voluntary interlocutory proceedings should not wag the dog of the contractually agreed centre of gravity of the substantive litigation.

228. I would consider here likewise that the tail of the proceedings accessory to now defunct arbitrations should not wag the dog of a substantive dispute which is truly a Russian case. The risk of irreconcilable decisions is – as it must be – a factor. But it is not a trump card. And, given my conclusions earlier as to the limited nature of the overlap, while it must be a factor which is taken very seriously it does not become a factor of huge weight.

Weighing the uncontested factors in favour of Russia

229. Having reached a conclusion on the main contentious issues, it is then necessary to assess just how strong are the uncontested factors in favour of Russia.

230. Any balanced reflection on those factors produces the result that the scales are extremely heavily weighted against this jurisdiction. Of course not all of the factors I have outlined above are of huge weight – and some of them are perhaps of less weight than they used to be. The location of events of course points toward Russia; but at the same time this court spends much of its time dealing with disputes whose centre of gravity is elsewhere. It therefore carries less weight than the huge preponderance of location factors in its favour might suggest.

231. Similarly the location of the parties and their documents, though a factor, is possibly less of a factor in these days, when law firms have representatives in most jurisdictions who can assist in the preparation of the case, and the disclosure exercise – and indeed when the balance of disclosure has moved so much towards electronic documents, which are less location specific.

232. But there remain very weighty aspects. In this case there will be very serious focus on Sberbank's and MachinoImport's state of mind, motives and actions. This has an impact on how one views the documentary aspect; with the best will in the world, translations are not the ideal vehicle for this. This is the more so where (as is often the case when this type of allegation is made) the court is likely to want to examine internal messages and discussions between colleagues, which may be drafted informally.

233. Here I agree entirely with the submission made by Lord Goldsmith QC that it is far better to be working in the native language than from translations. This is a point which has also been referenced in Mousavi-Khalkali v Abrishamchi [2019] EWHC 2364 (Ch) by HHJ Eyre QC at [88]:

> *"The difficulties of translation and of interpreting the effect of what was said are compounded when the court is dealing with text messages, manuscript notes, and similar documents. Those are written in abbreviated form with context being of great importance in determining what an abbreviation meant*

or was intended to mean and with ample scope for argument about the true effect of a particular abbreviated note. It is already clear that there will be such dispute here. In such cases the outcome can depend on a judge having to make a determination between different nuances of meaning. That can involve a difficult exercise of judicial assessment even when the judge is a speaker of the language used. A judge working from a translation of notes (and in this case an English judge is unlikely to be familiar even with the script in which the notes are written) is in a markedly worse position to decide on a party's contention as to what was meant by a particular abbreviation than a judge who is a speaker of the language in question and who can make an assessment for him or herself of the credibility of a particular account of what was meant by a note."

234. Of course many of the documents which have emerged thus far are actually in English – including the contracts and some of the pleaded emails. But it remains overwhelmingly likely that many of the key "informal" documents will be in Russian – as will the key source material for the Russian Law exercise. That is an area where working in translation is particularly inefficient, as there is a tendency for even skilled translators to differ and for there to be real scope for disagreement on the exactly correct translation of a key word in a decision or article.

235. Here there is also the factor of the Antipinsky bankruptcy; if there is a need to get documents from the bankruptcy administrator that will inevitably be much easier in Russia.

236. A similar point applies to witness evidence. Of course the court can take evidence through interpreters, and indeed remotely through interpreters. It is well used to doing so. But there is no doubt that (leaving aside the efficiency aspect – interpreted evidence inevitably taking longer and therefore being less efficient) interpreted evidence is less easy to assess than evidence in a person's first language. To the limited extent that demeanour can properly come into the equation it becomes much more difficult to judge when the words accompanying it come later and in another person's voice. This is a point of some significance when serious allegations of dishonesty are in play.

237. There are also greater problems in testing a witness's evidence as robustly when they are giving evidence through an interpreter. The flow of evidence is disrupted; it becomes less easy to know when a lengthy answer can be interrupted; and there is ample scope for voluntary and involuntary confusion on the witness's part as to understanding the question.

238. Witness evidence and questions as to use of language here is likely to be of considerable importance. VTB's allegations bring a significant number of individuals into the firing line as to their honesty. In one instance, referenced at paragraph 58 of the Particulars of Additional Claim, VTB attributes detailed nuance to particular words alleged to have been said in a telephone conference attended by numerous individuals in Russia."

459. And he submitted that the same applied with regards to experts, see paragraph 239:

"239. There is then the question of applicable law. The principal claim, i.e. for conspiracy to defraud, is governed by Russian law. Whilst the contractual claim under the "Letter of Assurance" is governed by English law, it seems unlikely that that claim will give rise to difficult issues of law: the issues will largely be factual ones, i.e. whether the statements were false and, if so, what loss has been suffered. But as regards Russian Law as I have concluded above there will have to be very considerable and complex Russian Law evidence, which is likely to have to be given through translated documents (a factor dealt with already) and orally though translators if the matter proceeds here. Such oral evidence will take much longer than would be the case in Russia and will be less efficient because of the need to explain basics and building blocks."

although he did accept that the reverse applied with regards to English witnesses:

460. I note that in that case that judge decided to split the litigation between jurisdictions; see paragraphs 242 to 243:

"242. Mr Gaisman urged me not to emulate King Solomon and divide VTB's litigation into two. Of course, it follows from what I have already decided above, that that is my

decision. However even had I reached different conclusions on jurisdiction and on discretion, I would have concluded that this was a case where the burden of establishing that England was "clearly and distinctly" the most appropriate forum was not discharged, and that the court should refuse to exercise its discretion to permit service out.

243. Ultimately this decision comes down to a balancing exercise and so heavy are the factors in favour of Russia that unless the question of the proceedings here were a trump card (or in this context possibly a trump weight) – as I have decided it is not – the answer could only be that Russia is the forum conveniens"

461. Mr Craig submitted that the majority of issues of causation and loss would be focused on Brazil.

462. Mr Craig sought to distinguish Lakatamia v Su and said in particular it was based on a limited Monaco disclosure requirement, and where Spiliada had laid down the differences in disclosure regimes between jurisdictions should have limited impact and would rarely cause a stage 2 reversal of a stage 1 conclusion. He said that that case related to and depended up the anchor defendant and the governing law and the subject matter judgment all being English or located in England.

463. Elventhly, as far as governing law was concerned: in relation to Article 4.1, firstly, he repeated that the damage occurred in Brazil; secondly, he referred to the Fortress v Blue Skye decision and its referring to a transfer of business being damage, and to Dicey 35.027 dealing with the importance of looking at what was a taken asset. He submitted that here relevant taken assets were the Brazilian employees and the Brazil clients.

464. In relation to Article 4.2, he repeated the need to look at a single set of damage; and that the concept of the "damage" should be the same in Article 4.2 as in Article 4.1, that is to say the only relevant person to sustain "damage" was Aon Brazil, which of course is located in Brazil.

465. He submitted that that single approach was supported by Dicey at 35.027 and in paragraph 848 of the further decision in Lakatamia v Su [2021] EWHC 1907 (Comm):

"848. I consider that the principles identified in Pan Oceanic and Dolphin Maritime, and the passages I have highlighted above, are apposite in the present case and support Lakatamia's submission that the damage occurred in England where the Judgment Debt should have been (but was not) paid. It is well established that an English judgment is payable in England: see In re A Debtor (No.1838 of 1911) [1912] 1 K.B. 53 (per Cozens-Hardy M.R. at 56: "The creditors must come within the realm, and if they are within the realm, then no doubt the debtor must search them out.")."

466. In relation to Article 4.3, he referred to paragraphs 856 to 859 of the earlier Lakatamia v Su judgment:

"856. However if, as Madam Su submits, by reference to Ablyazov (No.14), the damage occurred in a foreign jurisdiction (and assuming that was in Monaco, which does not necessarily follow) then Monaco law would apply by reference to Article 4(1).

857. In the event, it really does not matter whether English law or Monaco law would apply by reference to Article 4(1), as it is common ground that Article 4(1) is subject to Article 4(3), and it is clear from all the circumstances of the case, as addressed below, that the torts are manifestly more connected with England, and accordingly English law applies by virtue of Article 4(3).

858. It will be recalled that Article 4(3) provides:

> *"3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question"*

859. In relation to the applicable principles concerning Article 4(3) Lakatamia made the following points, which I did not understand Madam Su to take issue with:-

> *(1) The fact that Article 4(3) is an exception to the general rule in Article 4(1) does not mean that it should be given an overly restrictive construction. As Cranston J stated in Pickard v. Motor Insurers' Bureau [2017] EWCA Civ 17; [2017] R.T.R. 20 at [16], "art.4(3) is an escape clause but in my view that does not mean that its ambit should be unduly narrowed". He also added (also at [16], that Article 4(3) exists to "enabl[e] the court to adapt the rigid rule [in Article 4(1)] to an individual case so as to apply the law that reflect[s] the centre of gravity of the situation".*
>
> *(2) Before Article 4(3) applies, it is not required that the tort not be connected at all with the jurisdiction identified by Article 4(1). As stated by the authors of Dicey & Morris state at paragraph 30-032: "it should not be necessary to demonstrate the absence of any "real" or "genuine" connection with the country whose law is otherwise applicable, and that a clear preponderance of factors point to a country other than that whose law applies under Art.4(1) … is all that is required".*
>
> *(3) The words "all the circumstances of the case" in Article 4(3) encompass the country in which any proceedings have been commenced. In Stylianou v. Toyoshima [2013] EWHC 2188 (QB) the claimant had prosecuted proceedings in Western Australia for around two-and-a-half years prior to commencing a claim in England. A dispute arose as to the law that was applicable to the English claim. Sir Robert Nelson, finding that that the applicable law was that of Western Australia in the course of deciding an application for permission to serve the English claim form out of the jurisdiction, said, ¶79: "One of the matters to take into account … under Article 4(3) … is the issue and pursuit of proceedings in Western Australia by the claimant".*

(4) The location of the damage is an irrelevant consideration under Article 4(3). As Burton J stated in Alliance Bank JSC v. Aquanta Corporation [2011] EWHC 3281 (Comm), at [38]:

"The fall back provision under Article 4(3) "where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs1 or 2" , is that the law of that other country is to apply, and there is no mention there of the relevance of the place of the occurrence of the damage – indeed, it would appear to be excluded from consideration by the very nature of the issue.""

and he reiterated that Article 4.3 is an exception and must be seen and used only as such

467. He submitted that Kwok was about a different regulation and based on location of loss, which he said in this case was Brazil.

468. Mr Craig therefore submitted that this is a Brazil case and that the England and Wales court should decline jurisdiction, and pursued his alternative application to strike-out (or, possibly, for reverse summary judgment).

Fvb submissions in response of the 12th defendant

469. Mr Holmes for the 12th defendant responded, firstly, to emphasise Article 114 of the Brazil Constitution and to contend that it was equivalent to an exclusive jurisdiction provision and right. He said that all the experts agreed that claims against Brazil employees had to be brought in the Brazil Labour Court, and submitted that the fact that terms cannot be implied into a contract in civil law should not, in the circumstances of this case, prejudice the 12th defendant.

470. As far as the Nicholls book was concerned, he submitted that the author was themselves equivocal and had, in any event, not cited any authority for their approach.

471. With regards to the articles of association of Aon Brazil, he pointed out that they were signed by both sides. He submitted that when read, they contained a clear exclusive

jurisdiction clause, albeit that he accepted that the reference to the Brazil State Court is, effectively, overridden by Article 114 of the Constitution in favour of the Labour Court.

472. He again drew my attention to the Clifford Chance case and stated that whether an exclusive jurisdiction clause existed only requires the relevant party to have the better of an argument to that effect, and that, if such does exist, then strong reasons are required to override it.

473. He pointed to Lungowe to submit that, although there may be a risk of irreconcilable judgments, that is only an important, and not necessarily a determinative, factor; and reiterated that, in his submission, the Brazil courts could arrange matters so as to avoid, or at least to limit, such a risk.

474. He repeated that there was a strong public policy of this jurisdiction, as well as that of Brazil, that claims against employees should be dealt with by a specialist labour/employment court, and referred again to the Petter case.

475. Finally, he repeated that it would be unfair and perverse for the 12th defendant to be proceeded against in England and Wales simply because employee claims in Brazil have to be brought in a Labour Court without possibility of joinder of other claims, notwithstanding that those other claims are being dealt with by other courts in Brazil.

Fvc submissions in response of the 10th defendant

476. Mr Lloyd for the 10th defendant, dealing with the full and frank disclosure aspect added to his previous submissions to submit, firstly, that it is not enough in his submission for an applicant simply to refer to points which are or might be advanced by defendants and simply seek to knock them down. The applicant should go into the merits of those points and advance them by way of stating what is the full argument that might be raised.

477. Secondly, he submitted that the claimant should have asked me to read the second Naftalin witness statement rather than simply purporting to summarise it.

478. Thirdly, he submitted that it was wrong for Anderson to say the question of whether Brazilian law was the governing law would not affect forum questions.

479. Fourthly, he submitted again that Anderson had failed to identify what would be substantial Portuguese written documents and Portuguese-speaking witnesses, or at least had failed to do so sufficiently.

480. Fifthly, he confirmed that the 10th defendant was only saying that the error with regards to Brazil disclosure law was an innocent one, albeit that he asserted that it was a serious, albeit innocent, mistake.

Fvd submissions in response of Howden Brazil

481. Mr Davies for Howden Brazil, while repeating his previous submissions, submitted, firstly, again that the Brazil law in each of the relevant areas was, according to him, complex and controversial, and that the court should be slow to reach any conclusion that Satiro had not fully considered Aon's scenario of an employer who induces another's employee to act in breach of their contract of employment whilst they remain that other's employee.

482. Secondly, that there's no evidence that the Brazil courts would in any way seek to apply or even investigate England and Wales law, or that they would do so in a process which would be as expensive and heavy as the process of this court investigating and dealing with Brazil law.

G Discussion and conclusions

G1 introduction

483. I am conscious, as Ms Rogers has pointed out on occasion, that jurisdictional challenges of this nature involve an evaluative test which should be approached on a proportionate basis -see Lungowe at paragraph 6 onwards. While that was said more in the context of jurisdiction appeals, I have before me, as I have set out above, a mass of material and authorities. However, I have considered all the material and submissions

put before me, and, if I have omitted anything above, it is for considerations of space; and I have taken everything into account.

484. I am of course not deciding any issues of fact, or except where specifically appears below, of law, in relation to the substantive claims.

G2 location of gravity of the tort

485. In relation to both jurisdiction and governing law, an important question is where the gravity of the tort is located.

486. Here, I start, firstly, with the claim as pleaded by the claimants, and where the defendants have chosen, as is their right, but with the consequence that the court is left with the claimants' version of the matter, but to have remained silent (and not to have advanced any positive case) - see VTB and Lungowe. It seems to me that it is for the defendants, if they wish to contend that particular issues will arise in the litigation, to raise those matters by adducing supporting, or at least indicative, evidence, and not just by speculative submissions made by reference to what might or might not generally happen in relation to claims of this type.

487. As to liability, it seems to me that the gravity is located more in England than in Brazil. My reasons are as follows.

488. Firstly, while the 12th defendant is a key actor and Howden Brazil and the 12th defendant are said to be fully liable; the main claims, both commercially and legally, appear to be made against Howden UK which is located in England.

489. It is said that it was Howden UK who formulated the plan to entice the 12th defendant, and in so far as is relevant, Mr Hamilton-Grant, to breach their duties to Aon (by their enticing the LatAm team whilst they were both still working for Aon; and to have them supply Aon's allegedly confidential information to Howden whilst they were still both working for Aon).

490. It is also said that Howden UK then directed what the 12th defendant, and so far as relevant, Mr Hamilton-Grant, then did.

491. It is also said that Howden UK effectively had the 12th defendant entice the employees to Howden Brazil.

492. It is not said by the claimants, or as yet by the defendants, that Howden Brazil was in some way acting independently of Howden UK. Rather it seems to me to be a case where the allegation and claim is on the basis that Howden Brazil was simply having its strings pulled by its holding company and that entity's board, being Howden UK, and receiving the end product in the form of feasible employees and clients etc.

493. Secondly, the primary events of the alleged economic torts are claimed, with evidential support to have taken place in England; those being: the decision of Howden UK to engage in the relevant conduct; Howden UK's meetings with and enticement of the 12th defendant, and also insofar as relevant, Mr Hamilton-Grant; and the directions from Howden UK to the 12th defendant and Howden Brazil as to what they should do.

494. Thirdly, some secondary events are claimed, again with evidential support, to have taken place in England. That includes some recruitment by the 12th defendant, and also so far as relevant, Mr Hamilton-Grant, of Aon Brazil employees, and those employees physically going to engage with Howden in London.

495. Fourthly, and obviously, many secondary events, including the recruitment of various LatAm employees and their formal engagements with Howden Brazil, took place outside England with much of that occurring in Brazil and I have borne that fully in mind.

496. Fifthly, I see the claim supported by what seems to be some real evidential and other material as being one with its liability gravity being centred in England. As to this, first, while it is framed in English law terms as a conspiracy, and which concept does not exist in Brazil law, it is in any event founded upon there having been an alleged unlawful combination to use unlawful means.

497. Second, that alleged combination would have been centred in England. Its principal actors, principally Howden UK, are here; and those principal actors would have been effectively in a puppet-master role directing both Howden Brazil and the 12th defendant, and, in so far as relevant, Mr Hamilton Grant.

498. Third, the alleged confidential information was given in one way or another to Howden UK, which is located in England, even if it was used by Howden UK in conjunction with Howden Brazil.

499. However, as to damage, I see the gravity as being much located much more in Brazil, although also other parts of Latin America. The Brazil employees are located there; the Brazil clients are located there; the relevant primary operations are located there. Therefore, even though it is somewhat artificial on the evidence to split up what is a global operation of Aon which involves at least reinsurance being dealt with out of London and some damage in London, it seems to me that the focus of the damage is more Brazil.

500. As far as causation is concerned, that is more nuanced; at least in terms of the actual suborning by the 12th defendant and, if involved, Mr Hamilton-Grant, of the other Brazil employees; and their recruitment and the taking of confidential information, all at a time when the 12th defendant and, if relevant, Mr Hamilton-Grant, were still working for Aon.

501. The claim as pleaded, together with the evidence adduced by the claimants in support, is that at least some of that happened in England; including the various Brazil employees meeting with Howden in London, and confidential information being given to, considered and processed by Howden UK in England in order to formulate a grand business plan, even though that was also at least technically done with Howden Brazil.

502. I accept that all of this involves to some extent looking into whatever was the actual relationship between Howden UK and Howden Brazil; but the way in which the claim is formulated and so far evidenced is that this was all directed by Howden UK; and with Howden Brazil doing what its holding company and central control operation in London directed; and with particular acts taking place in London. Howden UK and

Howden Brazil are yet to contest that formally, if at all; and it seems to me that I have to look at the claim in that way.

503. In those circumstances, I see the overall gravity as being much more England than Brazil; and particularly so in relation to the economic torts aspects. I see that approach as being supported by various of the decisions of the higher courts; in particular Lakatamia, ENTC, Fortress, and to an extent VTB v Nutritek.

504. The situation is more nuanced in relation to the breaches of contract and fiduciary duty claims against the 12th defendant. There, the breaches themselves are key to the liability aspects, and thus their location of the breach as to where the gravity is. As stated above, it seems to me a very real part of that took place in England, but other real parts took place in Brazil and elsewhere. It further seems to me that it is relevant here that the 12th defendant's employment contract and fiduciary duties are all governed by Brazil law. Therefore, in relation to those aspects it seems to me that the situation is more of a nuanced one.

G3 Governing law

505. I turn next to the governing law of the LatAm tort claims, which in the light of the applications to strike-out (or possibly for reverse summary judgment) being made by Howden UK, the 12th defendant and the 10th defendant, I need to consider in their own right, but where I also need to consider this as an element of the evaluative judgments which I need to reach in relation to jurisdiction and Spiliada stages.

G3a Governing law of the non-tort claims

506. As to this, firstly, it is common ground and it seems to me obviously correct that the 12th defendant's employment contract is governed by Brazil law.

507. Secondly, Mr Hamilton-Grant's employment contract is presumably governed by English law. On the other hand, there is no substantial, or at least particularised, allegation with regards to Mr Hamilton-Grant in the LatAm claims context. It seems to

me I should give little weight to him, apart from recognising that he and his actions may become a prominent element of the economic tort aspect.

508. Thirdly, the claims in relation to fiduciary duties owed by the 12th defendant are governed by the law of Brazil.

509. Fourthly, although I have not heard much about governing law in relation to the confidential information, it seems to me that whatever (if anything) was the confidential information would belong primarily to Aon Brazil and therefore its governing law would be likely to be Brazil law.

510. Fifthly, the RSUA's governing law is that of Delaware. There is a presumption, but no more than that, that Delaware law is similar to England and Wales law in any material respect. However, it seems to me that that aspect plays a limited role at this point in this litigation; especially as there appears to be no dispute with regards to the stock as such and the relevant restrictive covenant obligations, even if enforceable, would seem to have expired some considerable time ago.

G3b Governing law of the claims in tort

511. The real issue before me has been what is the governing law of the economic torts, the alleged unlawful combination and inducements of the 12th defendant to act in breach of his contractual and fiduciary duties.

512. Here, I have concluded that Howden have somewhat better of the argument that the governing law is the law of Brazil, but that, nevertheless, Aon have advanced reasonable grounds for their case that the governing law is that of England and Wales, and have a real prospect of success on the issue as to whether it is the law of England and Wales.

513. My reasons are as follows. Firstly, I look at Article 4.1. It seems to me that the gravamen of the damage is that it occurred in Brazil. As to this, I do see the authorities extending the concept of damage to include damage by reason of loss of contracts, employees' work, client relationships and other business operations, and similar

intangible matters, all of which are either choses in action, or good will or other matters of recognisable individual value.

514. I also see the essential question as centring on the loss of or interference with such assets rather than the financial consequences arising from such loss. See, for example, the citations from Dicey and the Fortress decision above.

515. Here what was taken was essentially intangible assets located in Brazil, even if that had some financial consequences in England as well as Brazil.

516. I do not see Kwok in any way as being inconsistent with this analysis. There, the essential asset was the one which was acquired as a result of the alleged misrepresentation, and that asset was held and thus effectively located in London.

517. It seems to me that Article 4.1 is likely to render Brazil as being the governing law in principle. That is notwithstanding Mr Justice Flaux's decision in Fortress that such a conclusion was not clear on the facts of that case. Further, it does seem to me likely that what the court has to do is simply look at the gravamen of the damage and not to seek a split between different jurisdictions and different points of damage.

518. At the end of the day, I do not need to decide any of this and therefore do not reach any final decision, but it does seem to me that this part of the analysis would favour Howden's contentions, and I proceed onto the further stages on the assumption that that would be the outcome.

519. The second stage of the analysis is Article 4.2. Here, Aon UK says that it and various Howden UK defendants (but not the 10th defendant) are domiciled here and therefore the governing law as between those parties in relation to the torts is that of England and Wales.

520. Again, I think that that is probably wrong; but again, I do not see any need to and do not decide the question.

521. As to it, firstly, I tend to agree with Mr Craig that Article 4.2 should be read in the context of Article 4.1, and so that the reference to "damage" in Article 4.2 is that damage referred to in Article 4.1.

522. I have applied ordinary construction principles of looking at the words and the apparent underlying purpose as a whole; and considering the various competing constructions, and asking myself which I think is the most likely one which a reasonable reader would adopt.

523. That interpretation does have the considerable merits of both consistency and reducing the potential for different governing laws applying in relation to the same subject matter as between different sets of parties.

524. It therefore seems to me in principle that the relevant damage would not be seen to be Aon UK's damage for Article 4.2 purposes.

525. I should add, though, that I tend to disagree with Mr Craig that one cannot as a matter of principle have a different governing law for torts arising from the same acts as between different parties. There is no authority to that effect; and it seems to me that, if the "damage" (within the meaning that that concept has in Article 4) is different as far as different parties are concerned, Article 4 contemplates precisely the situation that the same essential liability subject matter may give rise to torts governed by different governing laws as between different parties. However, that depends on there having occurred (at least) more than one type of different Article 4 "damage", and which would justify the possible distinction of more than one governing law being applicable. However, in principle it does not seem to me that that situation can arise in this particular case, albeit I do not decide it any way.

526. I will therefore proceed on the basis that Howden would succeed on both Article 4.1 and Article 4.2 when coming, as I now do, to consider Article 4.3.

527. Here, in relation to Article 4.3, it does seem to me that the claimants have advanced reasonable grounds for contending, and do have real prospects of success in succeeding

in showing, that, in relation to the alleged economic torts, their subject matter is manifestly more closely connected with England.

528. As to this; firstly, while I bear in mind that Article 4.3 and its application has been said to be exceptional in various cases, such as Pan Oceanic and indeed Fortress, Mr Justice Flaux made clear in Fortress that the court needs to be cautious in applying it either way at the summary stage, where only a trial can really determine facts which may be very relevant to the degree of connection of the subject matter with a particular jurisdiction. That judicial attitude seems to me also to be reflected in paragraph 178(7) of Lakatamia v Su.

529. Secondly, I have held on the present material that the gravity of the torts at least, and indeed the claim as a whole, is somewhat more London than Brazil.

530. Thirdly, this is complicated by the fact that the subject matter extends to other Latin American countries than Brazil; which weakens the concept of focus on Brazil whereas the London elements are common to all aspects of the alleged torts.

531. Fourthly, the Fortress decision points to the location of the conspirators or combiners and the location of their taking decisions and the locations of "puppet masters" as being potentially key - see paragraph 74 of that judgment – and Aon's case, and which has some real evidential support, is that that was London. It seems to me that that is relevant, and would be so even if in Brazil law there is no law of conspiracy. The puppet-master aspect remains, as does the fact that is it the puppet master who induces the wrongful acts to take place. It is the claimants' case, not presently contradicted by any statement, let alone any evidence, that both the puppet master, being Howden UK, and the inducing of the 12th defendant to act wrongfully were (and are) located and centred in England.

532. I therefore consider that the claimants have advanced reasonable grounds for contending, and do have a real prospect of success in showing, that the governing law of the torts is England and Wales, even though I consider that the defendants have a distinctly substantial argument (and quite probably the better of the argument) that it is Brazil. In consequence, I would (if I were to decide against them in relation to

jurisdiction – as to which see below) reject the Howden and 12th defendant applications to strike-out (and/or possibly for reverse summary judgment in relation to) the economic tort claims as framed in the law of England and Wales.

G4 Spiliada Stage 1

G4a Principles to be applied

533. I now come onto the jurisdictional questions. As I have already said, it is common ground, and rightly so in my view, that on stage 1 of Spiliada, as set out in Spiliada itself and VTB v Lungowe; firstly, in relation to the Howden UK and the 12th defendant, I need to consider whether they have shown that Brazil and not England and Wales is clearly the most appropriate forum. Secondly, in relation to Howden Brazil and the 10th defendant, I need to consider whether the claimants have shown that England and Wales is clearly the most appropriate forum.

534. I note that the test in each case is "clearly" something which I held was a word of importance in Klifa v Slater [2022] ILRP 5 @ see paragraphs 41 and 42 .

535. It seems to me clear on the authorities in relation to "most appropriate forum":

a. firstly, that the place of commission of the wrongs, in particular the liability aspects, although also causation and damage, is something of a real starting point - see VTB - although this, like any other factor, can be outweighed

b. secondly, that the court needs to evaluate all factors, including (a) governing law and its potential consequences; (b) location of witnesses and documents; (c) language of witnesses and documents; and (d) the potential for irreconcilable judgments

c. thirdly, that the potential for irreconcilable judgements is, like the other factors, no more than a potentially important factor - see Lungowe. As to that, while I note that in paragraph 32 of Jefferies it was said to be a fundamental principle to look for a single forum for all claims to be tried, and that was an alleged suborning of employees' case, Master Cook went on in that

paragraph to make clear in line with Lungowe, which is a decision of the Supreme Court, that it is only a very important factor, albeit potentially a decisive one.

536. I have carried out a full evaluation and done so holistically, although with regard to each defendant and each claim. I go on to consider the particular aspects.

G4b Place of Commission

537. As far as place of commission is concerned, it seems to me that there is very much a split here between Brazil and London. That is for reasons which I have already focused on. Different highly material events took place in different places, but I see the gravamen of the tort claims as being more London events, even if manifested in conduct which took place in both London and Brazil; albeit it seems to me that the gravamen of the breach of contract and breach of fiduciary duty claims against the 12th defendant have more, but only more and not exclusively, of a location of Brazil.

538. I do stress that I have borne very much in mind that it seems to me that the damage occurred in Brazil, and that a court may very much have to investigate questions of causation and quantum of damage by reference to Brazil matters rather than English matters, including, for example, the factual actual and counter factual hypothetical behaviour of both Brazil employees and Brazil clients and resultant profits and losses if particular alleged wrongful conduct had and had not occurred.

G4c Governing Law

539. As far as governing law is concerned, it seems to me, firstly, that I have held in relation to the contract and fiduciary duty elements that it is the law of Brazil, or possibly of Delaware, and both point away from England. However, the Brazil law evidence does not seem to me to suggest that the relevant law of Brazil (I have no evidence as to the law of Delaware or its being different from that of England & Wales) is particularly complex; and I have borne in mind here, and elsewhere, that, as was said in Lakatamia and is clear from very many cases, judges of the English courts are very experienced and potentially perfectly able to deal with questions of foreign law.

540. Secondly, in relation to the tort elements, I have held that there is a distinctly substantial argument that the governing law is Brazil, but a real prospect nevertheless of it being English law, in whole or at least in part.

541. As to the consequences of this; first, it seems to me that it may well result in the Brazil courts, if the matter was to be litigated in Brazil, having to consider what is to my mind a somewhat complex and still developing area of English law, although I do note that the English law is becoming more settled in the light of many recent cases.

542. I also note that no one has produced any evidence as to how the Brazil courts would answer the question of what is the governing law; and where Rome II does not bind them. I, however, do not see it as appropriate to determine upon whom, if anyone, the burden of proof is with regards to what the courts of Brazil would regard as being the governing law. It seems to me the reality is that there is a real question as to that; and that is matter of some, but only limited, weight against Brazil and in favour of England, or. at least. not in favour of Brazil as against England.

543. However, I will simply proceed on the basis that Brazil courts would only apply Brazil law; and where I have noted the importance of it being a local court which applies local law, as is set out in both the VTB and WWRT decisions.

544. Second, while I consider Brazil law is in a developing state in this area and somewhat complex, I do not see in the circumstances of this case that that is a matter of particularly great, as opposed to at least some, weight against England and in favour of Brazil. That is for the following reasons.

545. Firstly, as I have already said, I am not clear that the governing law would be Brazil law, although I am prepared to proceed on the basis that it would be.

546. Secondly, the English courts are experienced in dealing with foreign law questions as a matter of fact.

547. Thirdly, the Brazil law experts appear to each have a high facility in English, even though I accept that it is best to have witnesses, including expert witnesses, give evidence in their own language.

548. Fourthly, there does not seem to me to be a problem with the translation of Brazilian law into English, even though I accept it is best to see, read and interpret the statutory law and case law in their primary original language.

549. Fifthly, the Brazilian court approach to their Codes seem to me to be producing fully reasoned decisions equivalent to English case law, and thus where it is an ordinary process of interpretation, with which English judges are full familiar and experienced, to ascertain and understand Brazil judges' analysis.

550. Sixthly, I see the injunction aspects of this as being of limited importance. After the passage of time which has occurred, it seems to me that the grant of injunctions are unlikely. Further, even if there was a question of injunctions being granted, each jurisdiction would have to consider what was proper to grant by way of injunction against defendants located in its own jurisdiction, even if the other jurisdiction had already decided the case in some particular manner both as to liability and remedy. Each jurisdiction would have to apply its own public policy. There is, in fact, a slight advantage favouring English jurisdiction because any injunctions granted in this jurisdiction could include injunctions to compel the holding company (Howden UK) to at least influence the conduct of its subsidiaries (Howden Brazil), and the reverse is not possible in ordinary company law.

551. Seventhly, I see the primary case of the claimants in tort in Brazil law as being unfair competition under Article 195 of the BIPL. At first sight, sub-articles IX-XII are clearly worded, and at first sight plainly support Aon’s contentions that a clear civil liability arose upon the various Howden defendants if they, as Aon asserts they did, suborned the 12th defendant to act in breach of the 12th defendant's subsisting employment contract and duties whilst he remained an employee of Aon).

552. I see Professor Satiro's possible answer to this, as there being an additional requirement that the wrongful conduct has had some general effect on the Brazilian market, as

being distinctly dubious. As to that, first, I'm not at all clear that Professor Satiro is actually saying that in the first place - see the final sentence of paragraph 28 of his second report.

553. Second, if Professor Satiro is saying that, I am altogether unclear as to how he gets there from the wording of the BIPL (which does not mention any such requirement), or how such a conclusion is consistent with the Brazilian case law cited by Adamek (which does not seem to require such a general effect either).

554. Third, I am not at all clear that Professor Satiro has really focused on the factual scenario asserted by Aon in this case, and notwithstanding his instruction letter. He seems more to be concerned with making clear that is it in principle lawful to entice someone else's employees away; rather than with focusing on the question as to whether it is lawful to entice an existing employee to carry out such enticement of other employees while that existing employee remains an employee of the competitor, and which is Aon's case (supported by evidence and not responded to by the defendants) that that is what has occurred.

555. I am not in any way in this judgment finding any facts as to foreign law, but on the material before me it does not seem to me that the unfair competition aspect is likely to be that complex.

556. However, in view of the disagreements between Satiro and Adamek, I do see the tort of inducement/third party accomplice and Article 158 aspects as being complex. On the other hand, it does not seem to me that that is a matter of particular weight if the claimants succeed as a matter of law as to what is Brazil unfair competition law; and which it seems to me is likely, and which may very well be determinative either way.

557. I do add; firstly, that I do accept that there are some issues of Brazil public policy and freedom of employees to work which may arise here; but this case., it seems to me, is not really about that, but rather about the freedom, or absence of freedom, of an existing employee to entice co-employees away from the employer, and the freedom, or absence of freedom, of others to procure that that such existing employee so acts during the time while they remain an employee.

558. Secondly, I accept that the various Brazil freedoms of individuals to choose for whom they work may well be relevant with regards to assessment of damages, although no one has really gone into that aspect.

559. Thirdly, I do not see the general desirability of a local court to determine the local law as being of that much substantial weight here essentially for the reasons I have already given i.e. that the most material law of Brazil appears clear and that the judges of the English Courts are well able to deal with these questions of foreign law.

560. Fourthly, I have no evidence before me as to what would be the relevant Brazil procedures or cost. Of course, it must follow that the requirement for expert evidence will impose some real cost, albeit a cost which is incurred in order to achieve justice.

561. Fifthly, I accept that if English law would not be in issue in Brazil, there will be some very real extra cost to have English lawyers arguing the case in England and adducing the expert evidence of Brazil lawyers, albeit that evidence will only be about the law of Brazil and not the underlying facts. I therefore consider that there is a very real potential for some extra expense if the matter is litigated in England, and I have weighed that in my evaluative balance.

562. Taking account of all the above, it seems to me that in the circumstances, particularly in the light of my views as to the unfair competition aspect on the existing evidence, that, while this governing law aspect favours Brazil over England to some extent, the weight of this factor is somewhat limited.

G4c Documents

563. As far as documents are concerned, it seems to me that it is clear that there will be a large number of documents, including emails and texts and the like, which have been written in both English and Portuguese and which will be located in both England and Brazil. The documents will be held and can be transmitted electronically.

564. It seems to me that this documents element is neutral. While there may be more communications in Portuguese which might involve nuanced words, that is pure

speculation and is to be balanced against the fact that there are many more witnesses, or at least substantial witnesses, who are likely to have written and to speak in English.

G4d Witnesses

565. As far as witnesses are concerned, it seems to me that this factor points towards England as being the more appropriate jurisdiction.

566. As to this; firstly, the defendants say that they will need to adduce evidence from Brazil witnesses who speak Portuguese at least as their first language and with potentially serious allegations being made against them, and which may amount to assertions of criminal conduct, for example engaging in unfair competition in breach of Article 195 of the BIPL.

567. There is some force in that, but it seems to me to be outweighed by other factors.

568. Firstly, the majority of identified witnesses on the claimants' case, and where I have no detail of the defendant's case as to what particular witnesses they might be calling and for what purposes, are based in England. Those identified witnesses include the majority of the Aon London-based witnesses, the Howden UK defendant witnesses and Mr Hamilton-Grant.

569. Secondly, the vast majority of identified witnesses, but also the defendants' possible Brazil employee witnesses, have, seemingly, a good facility in English, written and oral. That includes those who came to London and met Howden in coffee shops etc.

570. Thirdly, the 12th defendant, against whom the most serious allegations are levelled, has as his first language Portuguese, but all the indications are that he speaks and reads English well.

571. Fourthly, there will be many witnesses whose primary language is English who have no facility in Portuguese, for example the various London-based witnesses.

572. Fifthly, there may also be some LatAm witnesses whose first language is Spanish and others, such as the 10th defendant, whose first language is Italian, who might well have more facility in English than Portuguese.

573. Sixthly, the allegations against the Brazil employees are not, at first sight, serious as such. They are not being sued. The claim is based primarily on their being wrongfully enticed, not their acting wrongfully in leaving.

574. Seventhly, as far as the criminal side is concerned, here I have no evidence beyond Article 195 itself with regards to such matters as criminal procedure in Brazil. It seems to me that it may well be less oppressive to have a foreign court determine a question against a person with regards to something which may be a crime under a Brazil court, than for a Brazil court to consider it and where they might actually come to some finding immediately of criminal liability.

575. If there was a foreign determination, it would be for the Brazil prosecuting authorities to consider whether or not to take any resultant steps. It seems to me that relevant defendants would be unlikely to be bound in Brazil in the criminal context by an English court finding of fact or of Brazilian law in a civil case (and that would not be the case in English law and I have no evidence to suggest that the law of Brazil would be different).

576. In fact, it seems to me that the criminal aspect could be more of a problem if the civil case were to be litigated in Brazil; and where this court has considerable experience of finding it right to stay civil claims in view of possible criminal proceedings. It seems to me therefore that that aspect has limited weight in favour of Brazil, if any.

577. Eighthly, the courts of this jurisdiction are well used to witnesses giving evidence through interpreters.

578. Taking all that together, it seems to me that the witnesses aspect is something of a weighty pointer towards England and Wales being the most appropriate forum.

G4e The Cyber Claim

579. There is then the Cyber team and Cyber claim aspect. It is common ground, rightly in my view, that this aspect involves many of the same entities and persons, documents and witnesses as, and might be relevant similar fact evidence for, these LatAm claims; and that it cannot be resolved in Brazil.

580. Howden say that that does not matter as they are content to be bound in Brazil by any English court findings. I still, however, see it as a weighty matter favouring England and Wales.

581. Firstly, the claimants say with force that Howden has effectively engaged in a team-poaching course of conduct, involving targeting a recruitment sergeant who recruits while still an employee of the competitor -- here Aon -- although also in the past, Guy Carpenter. It seems to me that an alleged similar contemporaneous operation in relation to Cyber is potentially a material matter as far as the LatAm claims are concerned.

582. Secondly, the claimants again say with force that the need to determine the resultant questions as to what is or was Howden corporate policy and tactics, and including with regards to the specific Howden individuals, but also possibly Mr Hamilton-Grant, is likely to result in a very considerable overlap between witnesses and documents between the Cyber case and the LatAm case; and which would make it very desirable in order to save time, cost and resource etc. for there to be only one set of proceedings however case-managed. It seems to me it would promote sensible holistic case management if one had one court which dealt with both sets of claims.

583. Thirdly, I do not think that just having the defendants accept that they will be bound by the English court findings in relation to Cyber in relation to any claim in Brazil is a real answer to Aon's points as; first, that depends as to which case is heard first. Unless Cyber is heard first in England, the Brazil court would have no findings to consider.

584. Second, the Cyber claim may be compromised. If that occurred, then documents and witnesses would have to be exported to Brazil, which would all be complex.

585. Third, it seems to me that a court conducting a trial should, in principle, hear evidence and see documents rather than just rely on a foreign judgment finding various facts, which judgment will itself depend very much on how that trial has been conducted and the issues in it advanced, and which trial would not in any way be focused by reference to the LatAm claim. It seems to me in principle it is much more sensible and desirable in order to achieve justice that a court hears actual matters rather than merely relies on a judgment of another court which is really directed towards something else.

586. It therefore seems to me that the Cyber aspect is a weighty factor towards England as a separate forum.

G4f The 12th Defendant

587. Before I come to the question of irreconcilable judgments, it seems to me that I ought to specifically consider the 12th defendant. He is in something of a special position as he is being sued predominantly, although technically the torts are also framed against him, for breaches of contract and fiduciary obligation and wrongful disclosure of confidential information, and where all the experts accept that in Brazil he must be sued in the Brazil Labour Court.

588. As to him, I consider the following. Firstly, the Aon Brazil articles do contain an exclusive jurisdiction agreement in favour of the Brazil State Court in relation to breaches of duties as director, or for that matter, manager. That is what the articles actually say. The document makes clear that it is a contract, an agreement. It appoints the 12th defendant as director and manager. It says all disputes which arise under it are for a state court. It is signed by both sides.

589. I do see it as something of an exclusive jurisdiction agreement; but I also accept, as is common ground between the experts, that Brazil law requires these matters not to go to the State Court, but to the Labour Court.

590. I have borne in mind that it is said by at least one expert that the articles do not govern these claims in any way; although that is contradicted by the other experts and it seems

to me that the weight of the opinions, especially whether one looks at the articles, somewhat favours them as applying to the breach of fiduciary duty claims at least.

591. Secondly, I do not see any contractual exclusive jurisdiction agreement arising from the employment contract. That is because it's common ground between parties and the experts that there is no ability to imply a term into a contract governed by civil law; therefore it seems to me that the case law regarding exclusive jurisdiction agreements can only apply at most indirectly by analogy.

592. Thirdly, I do see powerful policy considerations which favour the 12th defendant being sued in Brazil for the following reasons.

593. First, this is a Brazil resident employee working predominantly in Brazil under a contract with Aon Brazil, a Brazil entity with an employment contract governed by Brazil law.

594. Second, Brazil law always provided at the time of all the relevant events, including the service contract and the articles and the alleged wrongs and now, that claims against employees have to be dealt with by the Labour Court.

595. Third, the employer, that is to say Aon, the claimants in this litigation, can very well be seen as having taken on that Brazil law rule when engaging the 12th defendant. It seems to me it is something which Aon must be taken reasonably to have known and to be a price of someone in the position of Aon employing an employee such as the 12th defendant in Brazil.

596. Fourth, it seems to me there is a general global principle recognised in Brazil law and also in English law that employees should be sued in the courts of the country where they are resident or work. That is within the Brazil Constitution. In England it is apparent from the existence of specialist employment tribunals, although I accept the claims for breach of contract can be brought in the courts; and also, and all the more so, from Section 15C of the 1982 Act, albeit that section only actually applies to English resident or working employees, but that is because that statute only relates to questions of whether they are to be sued in England and Wales or other UK jurisdiction.

597. I do not see what is said by Mr Nicholls in his book as being particularly relevant here. Those paragraphs relate to a different situation and scenario, namely that of a foreign employee employed to work in England by an English company, not, as here, an employee who is employed to work in Brazil by a Brazil company. In any event, what Mr Nicholls says is merely an academic discussion which itself is not framed in ways which are at all conclusive.

598. It does seem to me that there is good reason for such general principle in view of, (a) the weakness of an employee's bargaining power against an employee; (b) if an employee is working in a foreign country, what they do, and even more the consequences to them of any breach of an employment contract, will generally raise issues of the public policy of that country, including, for example, in this country, questions of restraint of trade and proper damages.

599. Fifth, the majority, although not all. of the 12th defendants alleged wrongs, it seems to me, took place in Brazil in relation to his suborning the Brazil team.

600. Sixth, it does seem to me likely that a Brazil court would not recognise an England and Wales judgment against the 12th defendant for the purposes of enforcement. That is the view of Mallet and Lobo. I see Nery's reliance on Apotex as dubious. Apotex was not concerned with a Brazilian employee working in Brazil or a Brazil employer, and did not refer to Article 114 of the Constitution at all. It seems to me that that was likely to have been because the Brazil court did not regard the Apotex case as being concerned with such a scenario at all.

601. If that is correct, then for this claim to be pursued against the 12th defendant in this jurisdiction would seem somewhat pointless.

602. I therefore see strong weighty factors for the 12th defendant to be sued in the Brazil Labour Court.

603. I do not see the fact that the State Court was identified in the Aon Brazil articles as being contrary to that conclusion. Firstly, it seems to me that provision was itself

somewhat of an error of law. It should, at least as far as the 12th defendant was concerned, have referred to the Labour Court.

604. Secondly, though, it does represent some agreement that Brazil is the appropriate forum for claims arising out of the relationship.

G4g Risk of Irreconcilable Judgments

605. I turn now to the matter relied on strongly by all sides, but for different purposes, the risk of irreconcilable judgments. That is said in various cases to be important and often a very important factor. See, for example, Lungowe, Donohue, Evans, and Al-Aggad in relation to conspiracy claims, and VTB, Jefferies and ENTC.

606. But it is also made clear that it is only a factor; for example, in Mariana it was overcome by a consideration of reality.

607. It is correct, as Aon submits, that England and Wales is the only place where all the claims can be dealt with together in a single court. That is because in Brazil the 12th defendant must be pursued in the Labour Court, and all claims against others, Howden UK, Howden Brazil and the 10th defendant, would have to be in the State Court.

608. However, there is an important question here as to whether the 12th defendant should be separated out from the rest of the defendants in any event as; firstly, there are weighty factors in favour of the claimants having to sue the 12th defendant in the Brazil Labour Court, whatever else is being litigated elsewhere – see above.

609. Secondly, the claimants have no actual need to sue the 12th defendant in order to sue the other defendants. Those other defendants can still be sued for their own acts of procuring the 12th defendant's allegedly wrongful conduct. Orders can be made by Brazil or the English court for non-party disclosure, witness summonses etc.

610. It seems to me that there is no actual legal need, or indeed likely commercial need, for the 12th defendant to be sued.

611. Thirdly, the 12th defendant is an individual. Even if it is the case that Howden might stand behind him in relation to any judgment against him, he is still something of a "bit player". I see this as being somewhat similar to the situation in Mariana, where the court permitted an outcome there being different actions in different countries. In many ways his status can be seen as being something more of a witness, at least in terms of the primary claims which are, it seems to me, being made by Aon against the Howden defendants.

612. Fourthly, the conspiracy combination inducer claims are really focused on Howden, not the 12th defendant, and I see that as ameliorating the general desirability of all combiners and inducers to be sued together as set out in such cases as Evans and Al-Aggad. This is more a case about a combination to induce another to breach their contract, rather than (as in those authorities) of simply some conspiracy between a number of persons.

613. Howden say that the single forum approach favours Brazil; in particular as, firstly, the Brazil courts are said to be able to manage parallel claims in the Labour Court and the State Court; and secondly, they say Howden Brazil is entitled to be sued in Brazil unless England is clearly the most appropriate forum.

614. As to the first of those points, I accept that the experts say that the Brazil courts can manage parallel claims in the Labour Court and the State Court. However, it seems to me that the inherent problem of two different courts reaching decisions with different parties and no single binding judgment would, in any event, remain.

615. I only see limited difference here between the Brazil Superior Court managing two cases in different courts and the English court managing its case, while the claimants sue the 12th defendant, if they choose to do so, in the Brazil Labour Court.

616. The same type of problems will arise, and the same type of steps can be taken to seek to ameliorate the obvious risks, of inconsistent judgments; and while the parties can simply just rely on similar arguments in each individual court.

617. It does seem to me that, unless all matters were litigated in England, this possibility of irreconcilable judgments is simply unavoidable; and the Brazilian solution which is advanced is unlikely to achieve the desired objective.

G4h Different principles to be applied to Howden UK and Howden Brazil

618. In relation to the second point I accept that there is a logical circularity conundrum as to whether the answer to where Howden UK should be sued will tend to answer the question with regards to Howden Brazil; or, vice versa, whether the answer as to where Howden Brazil should be sued should tend to answer the question with regards to Howden UK; and where there are differing burdens of proof and tests which are potentially logically inconsistent with each other.

619. It seems to me Mr Davies was right to say that the authorities do not consider this point or at least provide a clear answer to it.

620. It seems to me that I need to consider the matter holistically; but where the reality is that, even though Howden Brazil are separate entities in law from Howden UK and have an independent existence in Brazil under Brazilian law, nonetheless I should see, for the reasons that I have already given in particular as to the location of control and relevant decision-makers, the claim more on the basis that Howden Brazil are Howden UK's creatures and puppets for all the reasons I have already given.

G5 Decisions as to Jurisdiction matters

G5a Spiliada Stage 1

621. I have considered all this holistically and my decisions are as follows applying first Spiliada Stage 1.

622. The claim against the 12th defendant should be stayed in favour of the Brazil Labour Court. The claims against the other defendants should proceed in this jurisdiction.

623. The 12th defendant has shown that Brazil (and, in particular, the Brazil Labour Court) is clearly the most appropriate forum for the claims against him. Howden UK has not

shown that Brazil is the, or clearly the, most appropriate forum for claims against them; but Aon have shown that England is clearly the most appropriate forum for claims against Howden Brazil and the 10th defendant.

624. That is a result of my weighing all the factors as so above.

625. I so conclude in the light of the above, but in particular for the following reasons. First, the place of the commission of the wrongs is a starting point, but here is somewhat neutral and outweighed by other factors.

626. Second, I see the gravamen of the claims, and all the more so with regards to the economic torts (but less in terms of the 12th Defendant's alleged breaches and wrongs), as being more London than Brazil.

627. Third, the position as to governing law is unclear except that it is clear that it would be Brazil law in relation to contract and fiduciary claims against the 12th defendant (and the law of Delaware in relation to RUSA – but that is a minor consideration); but, firstly, the claim against the 12th defendant can, and in my judgment should be, split off, and that can be done sensibly without undue prejudice to the rest of the litigation; and, secondly, even if in English law the law of the alleged torts is Brazil law, I do not see that that will cause that much of a problem or that it is very desirable to have the Brazil courts rather than the English court resolve the relevant issues.

628. Fourth, the documents position is neutral.

629. Fifth, the witnesses aspect, in my judgment, strongly favours England (at least in relation to the economic torts claims and which are the main claims against Howden and the 10th defendant as opposed to the 12th defendant).

630. Sixth, the existence of the Cyber claim, in my judgment, strongly favours England, although it does not concern the 12th defendant so much as the rest of the defendants.

631. Seventh, it seems to me there are very strong considerations favouring the 12th defendant being sued in the Brazil Labour Courts. In the light of my reasoning set out above (in particular in paragraphs 587-604 but also generally in this Section G of this

judgment), I do not feel that those considerations are outweighed by the desirability of a single forum for all claims or the other factors (in particular, witnesses and Cyber) favouring England and Wales. It seems to me that the Brazil Labour Court is clearly the most appropriate forum for the 12th defendant to be sued in, and clearly a more appropriate forum than the courts of this jurisdiction. The facts that the 12th defendant may have been induced wrongfully by others to commit the alleged wrongs, and that those others are being and are to be sued in England, and the other matters which I have regarded as having weight, are not sufficient to lead me to conclude otherwise.

632. Eighth, in circumstances where the 12th defendant having to be sued in the Brazil Labour Court will cause a problem of different courts dealing with claims against other defendants, and also in the other circumstances of this case, I do not see it as clearly more appropriate for Howden UK to be sued in Brazil (i.e. in the Brazil State Courts). Rather, I see it as clearly more appropriate for the Howden Group as a whole, and thus including Howden Brazil and the 10th defendant as well as Howden UK, to be sued in England. That has the result of a single forum for Howden which I see as being clearly more appropriate, having weighed all the factors together.

633. Even if that was wrong, in any event on the claim before me I see Howden UK as being the primary, indeed anchor (in terms of primary rather than CPR practice direction 6B meaning), defendant, and which weighs in favour of England, as in Lungowe v Vedanta and VTB v Nutritek.

634. If the logical conundrum between the different tests applying to Howden UK and Howden Brazil/the 10th defendant has to be engaged with, and the two sets of entities have to be considered and dealt with separately rather than holistically (as I have been doing above); I consider that the correct approach is to look at the primary defendants first, and they are Howden UK; and Howden UK has not, in my judgment, discharged its burden and therefore is to be sued here.

635. On that approach, I would then come on to the secondary defendants, Howden Brazil and the 10th defendant; and, having already come to a conclusion with regards to the primary defendants, it seems to me that that conclusion itself would be a weighty factor in favour of Howden Brazil and the 10th defendant being sued in relation to these

claims and this litigation in this country; and so that, after having taken all the other considerations set out above in account, this jurisdiction I would conclude that this jurisdiction is clearly the most appropriate forum for the resolution of all of those claims.

636. It seems to me that the same analysis applies for the 10th defendant as for Howden Brazil. The 10th defendant is, like Howden Brazil, very much part the Howden Group which is directed from Howden UK, and exactly the same analysis applies to him.

G5b Spiliada Stage 2

637. I have considered the question of stage 2 Spiliada, but only the claimants rely on it. I see nothing in it.

638. As far as the question of importance of single forum is concerned, it seems to me that is a matter for stage 1 Spiliada.

639. As far as the question of disclosure regime is concerned, Spiliada itself makes clear that there is nothing in the disclosure regime point. The Brazilian disclosure regime seems to me to be a perfectly acceptable disclosure regime in global terms; and the fact that one country's disclosure regime is somewhat more limited than that of England and Wales was held in Spiliada itself not to be sufficient to invoke the stage 2 test and a conclusion different from that afforded by stage 1.

G5c General Conclusion on Forum Non Conveniens

640. Therefore in principle I decline to exercise jurisdiction against the 12th defendant but decide against the other defendants' applications.

G5d The arguments regarding asserted failures to provide full and frank disclosure

641. There, however, remains the questions of alleged failures by Aon to provide full and frank disclosure upon obtaining the April order to serve out against Howden Brazil and the 10th defendant.

642. As to this, I have carefully considered all the submissions and material.

643. There is in fact, an air of unreality here. All those defendants have the same solicitors as Howden UK, that is to say Mishcon de Reya, although different counsel, and are effectively all part of the Howden Group. By the time I considered making the April order, I had before me the Naftalin 2 witness statement, which set out the Howden Group objections to the litigation in England; and Anderson's second witness statement annexed Naftalin's second witness statement and other material adduced by Howden, including expert reports, and referred extensively to it. In fact, before making the April Order, I read all the witness statements knowing of the then expert evidence and directions; and this was after my having held a previous directions hearing relating to Howden UK's and the 12th defendant's applications, and where I had been given a distinct flavour of the case by counsel who there appeared.

644. All that took place before my deciding to make my April order. Thus, when I made it, I knew perfectly well what was the then general Howden case. That, it seems to me, was a very different situation from the usual application for permission to serve out situation; where the court has no material from defendants, but simply a paper application, and the claimants' full and frank disclosure has to fill what may be potentially a massive gap.

645. I have, however, considered carefully whether there have been any real failures to provide full and frank disclosure. As to this, firstly, I feel, as a matter of reality, that Anderson did refer to and identify the Howden's ventilated and prospective points. In any event, Anderson provided the material from Howden which appeared to be full and read it.

646. Secondly, many of the points taken by Mr Lloyd, and thus also Mr Davies, were controversial, for example as to who would be witnesses at a trial. This was in a situation where the Naftalin second witness statement had supposedly set out the Howden position as to such matters; and, in the circumstances of this case, I do not see there to have been a particular burden on Aon to have to provide much further to what Howden UK (the controller of the Howden group), through Naftalin, had already chosen to say.

647. Thirdly, the questions as to whether as a matter of full and frank disclosure an applicant should merely identify an opposing argument or put it as forcefully as possible, but still seek to knock it down, and of what has been done with regards to those aspects in a particular case, are very fact sensitive.

648. What is required from the applicant is a fair presentation of what appeared to be the arguable points. It seems to me that, in the particular circumstances where Naftalin had purported to identify the various Howden points, albeit only from the perspective of Howden UK, the Anderson witness statement was sufficiently extensive for Aon to have done enough.

649. I note that there were particular submissions from Mr Lloyd that Anderson did not do enough with regards to various points relating to Brazil. However, Aon's case is and was that Brazil law is clearly in their favour and their own Brazil law experts say and said that. I cannot see in the circumstances that there was some particular burden on the claimants to seek to attack their own Brazil law experts.

650. As far as the question of documents being in Portuguese and witnesses speaking in Portuguese are concerned; it seems to me that where the claimants' case was presented in a full way with regards to what they said had happened, not only in England and Wales, but also in Brazil; and that it would be obvious to me, and in fact was obvious to me, that there would potentially be substantial Portuguese elements.

651. Fourthly, the error with regards to disclosure procedure and disclosure law of Brazil is potentially more serious. However, it is only one point of many, and I did have Howden's general statements as to their position and arguments in the Naftalin second witness statement.

652. It seems to me that, overall, there is really little to criticise here, applying the type of analysis required by the case law; but that I should bear the error with regards to Brazil disclosure law in mind in any event, as it is something of a real breach and matter.

653. However, even if that was sufficient to suggest that I might have a discretion to set aside the April order, and even if I was wrong on the other points I have canvassed

about full and frank disclosure, I would not set aside the April order. I would hold that Aon has fully discharged its burden to show that it would be inappropriate and disproportionate, and indeed wholly disproportionate, for me to do so.

654. That is, firstly, because I had really taken all the various matters into account when I made the April 2024 order, and I am sure I would have come to the same outcome if the disclosure error point had not been made.

655. Secondly, the claim against Howden UK is to proceed in England anyway – see above.

656. Thirdly, the breach or breaches are relatively minor, and in any event innocent.

657. Fourthly, it seems to me to be set aside the claim against Howden Brazil and the 10th defendant would be altogether disproportionate in the light of the nature of these various possible breaches and their effect.

658. Fifthly, in the circumstances that, even were I was to set aside the April order, it seems to me in the light of the rest of my judgment that I would just regrant permission, in my judgment it would be altogether contrary to the overriding objective to have to go through such a process involving waste of time, costs and resource.

659. It does, however, seem to me that I should impose some sanction in relation to the disclosure point error. While innocent, it should not have happened. What I feel is proportionate is to provide that Aon's costs of obtaining the service out order insofar as they are extra to the costs of the jurisdictional disputes should be subject to a no order as to costs.

660. Those costs will be limited because it would only be the costs which are extra to what have been incurred anyway; but it seems to me that that properly reflects what is an accepted failure on their part, where they not only put the matter forward incorrectly to start with, but failed to go back to their own Brazil lawyers even after the error had been pointed out to them.

G5e Overall Summary of Conclusions

661. Thus, the overall position is this.

662. I decline jurisdiction with regards to the 12th defendant, but otherwise I dismiss the various defendants' different jurisdiction applications, including to set aside the April 2024 order (subject to the costs point set out in paragraph 661 above).

663. In relation to the question of governing law of the tort, I dismiss the defendants' applications to strike-out (and, if made, for reverse summary judgment).

664. I add that before this judgment I read the decision in Vauxhall and Denso [2025] EWHC 213 (Ch) which refers to a question as to what are the relevant dates by reference to which a judge should consider the facts for the different types of jurisdiction application which have been made before me. I do not consider that anything in that would affect this judgment and so I have not sought further submissions in relation to it.

H Further Matters

665. As advertised by me at a previous hearing, I am now going to adjourn this hearing, and to adjourn all questions of permission to appeal and time for filing appeal and appellants' notices; and I will grant general intermediate extensions of time with regards to those matters pending them all being considered at a further hearing, whether that takes place on paper or in court. The parties should liaise as to what should next happen with regards to consequential orders and any consequentials hearing.

666. There will need to be considered matters of availability and time, and particularly if I am going to be asked to deal with the question of the addition of Mr Hamilton-Grant and amendment of the proceedings. As far as my own diary is concerned, I have more room in June, July and following than I have before then.

667. I am prepared, if anyone wants me to do so, to have drawn up and sealed a formal order which records those particular matters and which requires the parties to produce some sort of, preferably agreed, way forward by a particular point in time. However, that is

not something which I am particularly minded to go into this afternoon as the parties may need to give it thought in the light of this judgment. If anybody wants such a formal order, the parties should liaise and formulate something with which they can approach me on a joint basis. I will consider anything provided it is sent to me by email, copied to my clerk and copied to everyone else.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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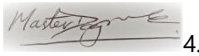
Approved  4.6.2025