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Case No: Claim Nos. CL-2019-000410
and CL 2019 000583

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

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

Date: 05/08/2020

Before :

CHRISTOPHER HANCOCK QC
(Sitting as a Judge of the High Court):

- -

Claim No. CL-2019-000410

Between :

WECO PROJECTS APS	**Claimant**
- and –	
(1) MR. PIER LUIGI LORO PIANA **(2) CREDEM LEASING SPA**	**Defendants / Part 20 Defendants**
(3) PETERS AND MAY LIMITED	**Defendant / Part 20 Claimant**

- and –

Case No: CL 2019 000583

Between :

PETERS & MAY S.R.L	**Claimant**
- and -	
1) MR. PIER LUIGI LORO PIANA **2) CREDIM LEASING SPA**	**Defendants**

- -
- -

Nigel Jacobs QC and Ben Gardner (instructed by **Reed Smith**) for the **First and Second Defendants in CL-2019-410 and CL-2019-00583**
John Russell QC and Andrew Leung (instructed by **Campbell Johnston Clark**) for the **Claimant in CL-2019-410**
Michael McParland QC and Tim Marland (instructed by **Kennedys Law LLP**) for the **(Third Defendant in CL-2019-410) and (Claimant in CL-2019-00583)**

Hearing dates: 1 and 2 July 2020

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Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10am Wednesday 5th August 2020.

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Christopher Hancock QC (sitting as a Judge of the High Court): :

1. This is an application to set aside service of the proceedings brought by the two sets of Claimants in England, on the grounds that the English Courts do not have jurisdiction under the Brussels Recast Regulation to hear the claims.

The facts.

2. The relevant facts are set out in the paragraphs which follow. They are largely common ground.

The contracts and the casualty.

3. The First Defendant ("Mr Loro Piana") is an Italian businessman and amateur yachtsman, who is domiciled in Italy. He is a minority shareholder in an eponymous high-end clothing company, Loro Piana SpA, founded by his family. I refer to the company herein as Loro Piana SpA. His business is said now to be the management of his wealth related to that shareholding, although he ran Loro Piana SpA with his brother until 2013 and I understand that he retains an ambassadorial role for the company. Mr Loro Piana was a keen sailor, and raced the sailing yacht, MY SONG ("the Yacht"), in regattas in the Caribbean and the Mediterranean. This was one of a series of yachts which Mr Loro Piana had raced.

4. The Yacht was owned by the Second Defendant ("Credem") and leased back to Mr Loro Piana. I refer to Mr Loro Piana and Credem, where necessary, together as "the Yacht Interests".

5. Mr Loro Piana wished to organise transport of the Yacht from Antigua to Genoa. To this end, Mr Georgio Benussi, who handled Mr Loro Piana's logistics arrangements, approached P & M S.r.l ("PMS") in August 2018, with a view to arranging carriage in April 2019. Mr Grotti, of PMS, sent a draft booking note and a key facts document to Mr Benussi on 8 November 2018. On 13 November 2018, Mr Loro Piana signed the booking note. The counterparty to that booking note was P & M Ltd ("PML"), who were the principals of PMS. On that booking note, PML were named as the Service Provider; and Mr Loro Piana was named as the Merchant. The carriage was to be from Antigua to Genoa, on a vessel which was to be confirmed, within a delivery window of 1 to 20 April 2019. The Yacht was named as the cargo, and the freight rate was said to be USD147,228.00.

6. I attach a copy of the booking note to this judgment as Schedule 1. I should however make reference to a number of clauses, as follows.

   (1) The booking note itself contained a jurisdiction agreement ("the EJC"), which provided as follows:

   > *"3. Law and Jurisdiction.*
   >
   > *This Booking Note shall be governed by and construed in accordance with the laws of England and all disputes and claims arising out of or in connection with this Booking Note shall be referred to and determined exclusively by the English High Court"*

> *"17. Exemptions and immunities of all servants and agents of the Company.*
>
> *It is hereby expressly agreed that no servant or agent of the Company (including every independent contractor from time to time employed by the Company) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss, damage or delay arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption from liability, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Company or to which the Company is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Company acting as aforesaid and for the purpose of all the foregoing provisions of this clause the Company is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the agreement evidenced by this Booking Note."*

7. The booking note also contained a series of clauses indicating the scope of the voyage, the period of responsibility, liberties to substitute, tranship and forward, provisions in relation to deck cargo, freight and liens, and the like.

8. In addition, the booking note incorporated by reference the Heavy Lift Rider Conditions, which, in case of inconsistency, were said to override the terms of the booking note; and the standard terms of the British Institute of Forwarding Agents ("BIFA"). Those terms are also to be found in Schedule 1. The BIFA terms included (in clauses 4 to 6) a liberty to perform services as principal or agent, and a liberty to subcontract if services are performed as principal. They also included an exclusive jurisdiction clause, which provided:

> *"JURISDICTION AND LAW.*
>
> *28. These conditions and any act or contract to which they apply shall be governed by English law and any dispute arising out of any act or contract to which these Conditions apply shall be subject to the exclusive jurisdiction of the English Court."*

9. By an Addendum to the booking note dated 18 March 2019, PML agreed to use reasonable endeavours to fix the BRATTINGSBORG ("the Vessel") to carry the Yacht. PML already had a contract of affreightment with Zeamarine Carrier GmbH ("Zeamarine"), and they entered into an amendment to this contract on 20 March 2019 so that the Yacht could be carried on board the Vessel.

10. PML in their turn procured the issue of a Non-Negotiable Liner Bill Seaway Bill ("the Waybill") by Zeamarine dated 10 May 2019 for the carriage of the Yacht on board the Vessel. A copy of that Sea Waybill is also annexed to this judgment as Schedule 2. The Waybill named Mr Loro Piana as the shipper and consignee and was stamped *"Express Release"*. The waybill also included a jurisdiction agreement, which stated as follows:

> *"3 Law and Jurisdiction.*
>
> *Disputes arising under this Sea Waybill shall be determined by the courts and in accordance with the law at the place where the carrier has his principal place of business"*

11. Zeamarine had its principal place of business in Germany. However, there was a dispute between the parties, to which I return below, as to whether this Sea Waybill was a contract of carriage at all, or whether it was intended to be a mere delivery note, to enable Mr Loro Piana to obtain delivery at the place of destination. I return to this below, in the context of the disputes between the Claimant in Action 410 ("Weco") and the Yacht Interests.

12. Weco is the bareboat charterer of the Vessel. Weco time-chartered the Vessel to RZ Carrier GmbH & Co KG ("RZ Carrier") pursuant to a Time Charter dated 21 June 2016 (with various Addenda). RZ Carrier in turn chartered the Vessel to Zeamarine. Zeamarine in turn concluded the contract of affreightment with PML to which I have already made reference.

13. The Yacht was lost overboard during the carriage on about 26 May 2019.

The various sets of proceedings.

14. Mr Loro Piana commenced proceedings in Italy against PML and PMS on 14 June 2019 in the Courts of Milan.

15. The current proceedings were commenced on 27 June 2019 by Weco. Weco claim negative declaratory relief against Mr Loro Piana, Credem, and PML in these proceedings.

16. On 18 August 2019 PML commenced Part 20 proceedings against Mr Loro Piana and Credem in England, also seeking negative declaratory relief.

17. On 18 September 2019 PMS commenced proceedings in England against Mr Loro Piana and Credem. In those proceedings PMS once again seek negative declaratory relief.

18. Mr Loro Piana then commenced proceedings against Zeamarine and Weco on 13 May 2020 in the Courts of Genoa.

19. I consider in this judgment the position as between each of the relevant parties, in the interests of clarity. Accordingly, the remainder of this judgment is structured as follows:

(1) Preliminary matters (paragraphs 20 to 25)

(2) The position as between PML and Mr Loro Piana (paragraphs 26 to 111)

(3) The position as between Weco and Mr Loro Piana (paragraphs 112 to 172)

(4) The position as between PMS and Mr Loro Piana (paragraphs 173 to 192)

(5) The position of Credem (paragraphs 193 to 198)

(6) Summary of conclusions (paragraph 199 to 200)

Preliminary matters.

20. First, it is necessary for me to say a word or two about the interrelationship between the two jurisdiction clause in the booking note. I consider the interrelationship between the jurisdiction clauses in the booking note and the further jurisdiction agreement in the Sea Waybill later in my judgment. Next I need to say a little about the interrelationship between the proceedings in Milan and the proceedings in this Court. Finally I address the nature of the test to be applied in determining the issues before me.

21. I start with the interrelationship between the two exclusive jurisdiction clauses in the booking note. In one sense, it may be said that it is unnecessary to reach any conclusion as to which clause is the governing clause, since there is no inconsistency between them. In my judgment, however, particularly because there may be issues as to whether disputes fall within the clause as a matter of construction, it is better for me to seek to decide which clause is the governing one. I conclude that it is clear that it is clause 3 in the booking note itself which is the relevant clause, since the express terms of the contract are entitled to greater weight than incorporated terms.

22. Moving on to the interrelationship between the actions, the Recast Regulation contains the following provisions in relation to cases of *lis alibi pendens* where a jurisdiction agreement is in issue. Those provisions are Articles 25, 29 and 31.

> ***Prorogation of jurisdiction***
>
> *Article 25*
>
> *1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:*
>
> *(a) in writing or evidenced in writing;*
>
> *(b) in a form which accords with practices which the parties have established between themselves; or*
>
> *(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties*

to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

Article 29

1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court….

Article 31

1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

4 Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.

23. Here, the position is as follows:

(1) The Milan Court is first seised of the dispute between Mr Loro Piana and PML and PMS.

(2) However, both PML and PMS contend that they are parties to a jurisdiction agreement (the EJC) which is valid under the Regulation and which is not invalidated under Sections 3, 4 or 5, nor invalid under the national law applicable to that jurisdiction agreement – here English law.

(3) Until this Court determines whether that exclusive jurisdiction clause is valid, then the Milan Court is obliged to stay its proceedings.

(4) If this Court determines that the exclusive jurisdiction clause is valid, then the Milan Court must decline jurisdiction.

(5) Conversely, if this Court determines that the exclusive jurisdiction clause is invalid, and that, therefore, this Court does not have jurisdiction under the contract, then the Milan proceedings may continue.

24. The last preliminary matter I should deal with is the nature of the test to be applied by the Court. In this regard, the parties agreed that the relevant guidance was to be found in the decision of Kaifer Aislamentos SA de CV v AMS Drilling Mexico de CV [2019] 1 WLR 3514, at paragraph 70, endorsing the approach advocated by Lord Sumption in the earlier case of Goldman Sachs International v Novo Banco SA [2018] UKSC 34. Thus, the approach is as follows (adopting the words of Lord Sumption in paragraph 9 of the Novo Banco case):

> *"This is, accordingly, a case in which the fact on which jurisdiction depends is also likely to be decisive of the action itself if it proceeds. For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had 'the better of the argument' on the facts going to jurisdiction. In Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192 , para 7, this court reformulated the effect of that test as follows: '(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that 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; but (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 application of the gateway if there is a plausible (albeit contested) evidential basis for it.' It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."*

25. I turn therefore to consider the disputes between the various parties, taking each dispute in turn, and adopting the approach set out above.

The position as between PML and Mr Loro Piana.

26. This is, in many ways, the clearest of the disputes. There is no question but that there was a contract between Mr Loro Piana and PML; and there is also no question but that that contract incorporated the EJC.

27. My starting point is the terms of Article 25 of the Recast Regulation, which has been set out above. It is now common ground between the parties that the formal requirements of Article 25 are met. As between these parties, there are two disputes, as follows:

(1) The first is whether the EJC is invalidated by reason of the consumer contract provisions of the Recast Regulation.

(2) The second is whether the EJC is invalidated by reason of the provisions of the Consumer Rights Act 2015.

<u>The consumer protection provisions of the Recast Regulation.</u>

28. I begin therefore by considering the consumer provisions of the Recast Regulation. In this regard, the Recast Regulation provides as follows:

SECTION 4

Jurisdiction over consumer contracts

Article 17

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

(a) it is a contract for the sale of goods on instalment credit terms;

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 18

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 19

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen;

(2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

(3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

29. This issue, as PML point out, involves two sub-issues, as follows:

(1) Whether the booking note is a "contract of transport" within Article 17(3);

(2) Whether the First Defendant was a consumer.

30. I turn therefore to the first of these issues, namely whether the booking note is a contract of transport, as between the First Defendant and PML.

Submissions on behalf of Mr Loro Piana.

31. Mr Loro Piana submitted as follows:

(1) The Schlosser Report explains at [160] the reasoning behind the original introduction of this exception to the Brussels Convention: *"such contracts are subject under international agreements to special sets of rules with very considerable ramifications"* and their inclusion would *"merely complicate the legal position"*. Therefore Article 17(3) was motivated not by a lack of concern for consumers entering into contracts of transport, but by a concern to avoid disrupting existing international agreements, such as the CMR Convention and the Hague-Visby Rules.

(2) The French Supreme Court has provided useful guidance in C Stein di Arnaldo Righetti v X [2016] I.L.Pr. 17, a case concerning a contract to remove furniture. At [7], the Court upheld the (French) Court of Appeal's judgment that the contract was not a contract of transport under what is now Article 17(3) on the following ground:

> *"… if a contract for the removal of furniture, includes, indeed, a transport of goods, its object is however not limited to the transport, since it also includes the handling, and possibly the installing of the furniture, so that it could in that respect be qualified as a contract for services."*

This authoritative decision under French law should be adopted in English law to ensure consistent interpretation of European law and because its implicit logic is unimpeachable: contracts for a parcel of services including transport do not raise the same concerns about disrupting international transport conventions and so the consumer should not be deprived of the protection for weaker parties underlying Section 4 (explained in Recital 18).

(3) The booking note is not a *"contract of transport"*, having due regard to the natural meaning of the words, the purpose of Article 17(3) and the guidance in the Schlosser Report and in the Stein case:

(a) The booking note itself is a contract to arrange a contract of transport, *viz.* a freight forwarding agreement. In this regard, PML positively asserts in its Particulars of Part 20 Claim that the booking note required it *"to arrange the carriage"* of the Yacht, rather than to perform the carriage as carrier.

(b) PML is right to characterise the booking note as a contract to arrange carriage. PML is (and held itself out to be) a leading freight forwarding company that arranges the forwarding of yachts. The contract was a *"Booking Note"*, which ordinarily precedes a contract of carriage such as a bill of lading or waybill (as happened in this case). It provided for PML to *"arrange"* the carriage of the Yacht (clauses 6 and 8) and the carriage itself was said to be at Mr Loro Piana's *"sole risk"* save for PML's *"personal gross negligence"* (clause 8(a)). By way of the "General Clause Paramount" (clause 2), it incorporated the British International Freight Association, the membership body for freight forwarders. It was envisaged that PML would procure a contract of carriage between Mr Loro Piana and a contracting carrier, as PML did by procuring the Waybill with Zeamarine in accordance with the terms of the contract of affreightment. By the Addendum to the booking note, PML agreed to use reasonable endeavours to secure the Vessel to carry the Yacht, reflective of its freight forwarding obligations. Thus the booking note is not properly characterised as a "contract of transport", but rather a contract to arrange carriage or a "contract for carriage".

(c) A forwarding agreement such as this is materially different from a contract of carriage. As recently held in Globalink Transportation and Logistics Worldwide LLP v DHL Project and Chartering Ltd [2019] 1 Lloyd's Rep. 630 (Nicholas Vineall QC) at [57]: *"the essential nature of the obligation [under a forwarding agreement] is not to carry, but an obligation to procure that carriage is achieved by others"*. Even if the forwarding agreement permits the forwarder to carry the goods, *"that would not … convert the contract to arrange into a contract of carriage"* [58]. The factors that rendered the contract a forwarding agreement in Globalink, discussed at [57], are similar to those identified above in this case. See further Aikens' *Bills of Lading*, 2nd Ed. (2015) at §§2.35 & 10.92: the present case could fall within examples (i) or (ii),

Scrutton on Charterparties and Bills of Lading, 24th Ed. (2019) at §4-057 and Article 47 (a booking note will typically be issued by a freight forwarder).

(d) Article 17(3) excludes *"contracts of transport"*, not 'contracts relating to transport'. The natural meaning of this phrase is that the contract involves a carrier agreeing to carry goods or persons, not merely to arrange that transport as an intermediary. This reflects the purpose of the provision, which is to avoid conflict with international conventions that govern contracts for the transport of people and goods (e.g. the CMR, the Hague-Visby Rules, the Athens Convention). These conventions do not apply to contracts to arrange carriage and, specifically, the Hague-Visby Rules do not apply to the booking note because it was not a contract of carriage, it was not a bill of lading and did not contemplate that PML would issue a bill of lading (see Articles I and II). The contract did not even incorporate the Hague-Visby Rules.

(e) Therefore this is a clearer case than Stein because there is no transport obligation at all. However, even if the booking note could be read as including a transport element, PML had additional obligations to arrange a contract between Mr Loro Piana and the contracting carrier, including a reasonable endeavours obligation to fix the BRATTINGSBORG. There were also additional obligations on PML, including the appointment of a loadmaster, responsibility for loading and discharging the Yacht and the cradle and provision of lashing and dunnage.

32. This contention, it was said, is supported by the decision of the ECJ in Haeger & Schmidt GmbH v Mutuelles du Mans Assurances IARD [2015] QB 319. That case concerned the interpretation of contract of carriage under the Convention on the law applicable to contractual obligations (Rome 1). The case concerned a series of contracts. The first was between the shipper and a French "freight commission agent"; the second was a contract between the French agent and a German freight commission agent; and the third was a contract for the carriage of the goods between the German agent and a carrier for the carriage of the goods by barge. The question for the ECJ was whether the contract between the consignor and the French agent was a contract of carriage within Article 4(4) of the Convention. The judgment of the Court includes the following passage:

> *"22. In the first two sentences, article 4(4) of the Rome Convention reflects the specific nature of the contract for the carriage of goods which, at least in a cross-border context, does not lend itself easily to being connected with the country of residence of the contractual party who effects the characteristic performance since the principal purpose of such a contract is the transport of goods and the carrier's habitual residence has no objective connection with that contract. Thus, the second sentence of article 4(4) of the Convention sets out an exhaustive enumeration of the connecting criteria concerning the law applicable to contracts for the carriage of goods.*
>
> *23. Article 4(5) of the Convention contains an exception clause which makes it possible to disregard those presumptions when the circumstances as a whole establish that the contract is more closely connected with another country: the ICF case, para 27.*

24. On the basis of those considerations and for the purposes of answering the first question from the referring court, it was appropriate to ****326*** *examine the third sentence of article 4(4) of the Rome Convention, which states that "single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods".*

25. It must be remembered with regard to the expression "shall be treated as contracts for the carriage of goods" and the conditions under which another contract may be considered a contract for the carriage of goods that consistent and independent criteria are necessary in order to guarantee the full effectiveness of the Rome Convention in view of the objectives which it pursues: Koelzsch v Grand Duchy of Luxembourg (Case C-29/10) [2012] QB 210; [2011] ECR I-1595 , para 32 and the case law cited.

26. It should also be borne in mind that, in the ICF case [2010] QB 411 , paras 32–34, the court interpreted the last sentence of article 4(4) as meaning that it allows other contracts to be equated with contracts for the carriage of goods, since one of the purposes of that provision is to extend the application of the second sentence of article 4(4) to contracts which, despite being categorised as charter-parties under national law, have as their principal purpose the carriage of goods. In order to ascertain that purpose, it is necessary to take into consideration the objective of the contractual relationship and, consequently, all the obligations of the party who effects the performance which is characteristic of the contract.

27. The same holds true for a commission contract for the carriage of goods which is a separate contract the characteristic performance of which consists in organising the carriage of goods. As the carriage of goods per se is not its principal purpose, a commission contract for the carriage of goods cannot be considered to be a contract for the carriage of goods.

28. However, taking account of the purpose of the contractual relationship, the actual performance effected and all of the obligations of the party who must effect the characteristic performance, and not the parties' categorisation of the contract, a commission contract for the carriage of goods may turn out to relate to the specific nature of a contract for the carriage of goods as referred to in para 22 above, if its principal purpose is the transport as such of the goods.

29. In the main proceedings, it is apparent from the order for reference that the first two contracts concluded, on the one hand, by Va Tech and Safram and, on the other, by Safram and Haeger & Schmidt, were categorised by the referring court as commission contracts for the carriage of goods. In order to have effected carriage of the transformer by inland waterway, Haeger & Schmidt concluded a contract for the carriage of goods with Mr Lorio, owner of the barge "El-Diablo", which capsized during the loading of the goods.

30. It is also apparent from the order for reference that the principal purpose of the contract concluded by Safram and Haeger & Schmidt was "the overall organisation of carriage and not simply legal representation of the contractor", with Haeger & Schmidt acting as intermediary under its own responsibility and in its own name, but on behalf of the contractor, in order to complete the tasks necessary for the carriage of the transformer in question.

31. It is for the referring court, in examining the overall circumstances of the dispute in the main proceedings, namely the contractual stipulations ****327*** *reflecting the economic and commercial reality of the relations existing between the parties and the purpose of article 4(4) of the Rome Convention, to ascertain whether and to what extent the commission contract for the carriage of goods in question has as its principal purpose the actual carriage of the goods concerned.*

32. In the light of the foregoing considerations, the answer to the first question is that the last sentence of article 4(4) of the Rome Convention must be interpreted as applying to a commission contract for the carriage of goods solely when the main purpose of the contract consists in the actual transport of the goods concerned, which is for the referring court to verify."

33. Mr Loro Piana relied, in particular, on paragraph 27 of the above judgment, to support the proposition that a forwarding contract is not a contract of carriage and therefore not a contract of transport.

34. For all these reasons, it was submitted that Articles 17(1) and (3) are satisfied and Mr Loro Piana is not bound by the EJC.

Submissions on behalf of PML.

35. For its part PML made a number of submissions, as follows.

(1) First, PML argued that this Court has to consider the legislative purpose of Art. 17 (3). This was explained in Pammer (C-585/08) by Advocate General Trstenjak at para. [43] of her Opinion, as follows:

> *"The purpose of art. 15(3) [now art. 17(3)] is to exclude determination of jurisdiction in accordance with the provisions on consumer contracts* ***in the case of contracts the main purpose of which is transportation****".*

This was confirmed by the ECJ in ZX v Ryanair DAC (C-464/18) [2019] 1 WLR 4202, at paragraph 28, where the Court held as a result of the unambiguous wording of art. 17(3), that even though an airline passenger may be considered to be a "consumer", a passenger who "… simply purchased a ticket for a flight, rather than a travel package, cannot rely on the rules of special jurisdiction over consumer contracts contained in [Brussels (Recast)] Regulation No 1215/ 2012". This exclusion obviously applies equally to any form of transport. Therefore, the first question to ask is whether the contract in question is a "contract of transport" that is excluded under art. 17(3), because if it is, as the Ryanair case shows, it does not matter if Mr Loro Piana is otherwise a "consumer".

(2) Next, PML submitted that an independent autonomous definition is required. The Brussels Recast Regulation did not expressly define the concept of "a *contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation*" within the meaning of Art. 17(3), nor did it refer to any national law in order to define it. In such circumstances, it was argued that the need for the uniform application of EU law and the principle of equality requires the terms of a provision of EU law which makes no express

reference to the law of the Member States to determine its meaning and scope, to "be interpreted independently by reference principally to the system and objectives of the Regulation, in order to ensure that it is fully effective": Pammer (C-585/08), at paragraph 55. This is especially so where the definition of a particular concept contributes to defining the scope of a Regulation. In order, therefore, to guarantee the uniform application in all Member State of the conflict-of-laws rules for which it provides, the concept must be given an autonomous meaning, by reference to the wording of the provision, its legislative history, as well the scheme and objectives of the Regulation: see Verein fur Konsumenteninformation (C-272/18) [2019] I.L.Pr. 44, 1118, 1134, paragraph 42 of the Attorney-General's opinion. Conversely, any interpretive arguments based on a national law interpretation of a particular concept cannot have any role in determining its meaning under the Brussels (Recast) Regulation: "That concept cannot therefore be taken to refer to classification under the relevant national law of the legal relationship in question before the national court": Česká spořitelna as v Feichter (C-419/11) [2013] I.L.Pr.22, at paragraph 45; Pammer *(*C-585/08), paragraph 55.

(3) PML submitted that the required autonomous concept of a "*contract of transport*" within the meaning of art. 17(3) is a contract "… ***the main purpose of which is transportation***", as was stated by Advocate General Trstenjak's Opinion in Pammer (C-585/08) set out above. The Court did not disagree with or qualify the Advocate-General's view.

(4) PML submitted that the end result of these legislative developments is that *any* contracts of transport (which ***do not*** for a fixed price, combine travel and accommodation) are now the *only* type of contract which are specifically excluded from the consumer contract jurisdiction provisions of both the Brussels (Recast) Regulation (see Petruchová v FIBO Group Holdings Limited (C-208/18), [2019] I.L.Pr. 42, at paragraph 48) and the Lugano II Convention (see Pillar Securitisation Sarl v Arnadottir (C-694/17) [2019] 1 WLR 5285, at paragraph 42). That legislative exclusion should be respected.

(5) Furthermore, PML pointed out that the use of the "main purpose" test is consistent with the test used to determine whether a particular contract is "*a contract for the carriage of goods*" for the purposes of art. 4(4) of the Rome Convention (now art. 5(1) of the Rome Regulation (593/2008) OJ [2008] L177/6), where those contracts whose "*main purpose*" is the carriage of goods are treated as contracts for the carriage of goods irrespective of national classifications: see e.g. Haeger & Schmidt, ref supra, at paragraphs 17 to 32.

36. Applying that test, PML submits that the main purpose of the booking note is clearly transport. In this regard, PML made the following submissions:

(1) The booking note was the only contract that Mr Loro Piana entered into for the transport of the Yacht. Whether PML were arranging that transport or carrying it out themselves does not matter: it was still a contract whose main purpose was the transportation of the Yacht.

(2) It was the purpose of the contract that matters and not what PML's precise role in it was. It does not matter whether PML was a carrier or a freight-forwarder. There is

nothing in art. 17 that requires the other party to have any particular role. Throughout art. 17 it is the purpose of the contract that is relevant and that is equally applicable to art. 17(3). If the EU legislature had not intended that to be the case they would have said so.

(3) There was no suggestion in Pammer (C-585/08) that the concept of a "contract of transport" only applies to contracts where a "carrier" agrees to carry goods or persons, or to contracts that were either subject to international conventions or raise concerns about disrupting them. If this had been the case, the ECJ would never have equated the exception with the Package Travel contracts. Mr Loro Piana is simply improperly trying to impose national law interpretations on a concept which is required to be decided independently.

(4) There were, in any event, indications in the booking note that PML was the carrier of the goods. Thus various clauses in the contract, it was argued, only make sense in the context of a contract of carriage. In this regard, PML made reference (in particular) to terms of the booking note which provided that payment was to be by way of freight; that PML were to be at liberty to carry the goods; that there were exemptions in relation to the loading and discharge of the goods; that there were rights to discharge in certain circumstances; and that the booking note contemplated that the contract that it evidenced might be subject to US COGSA.

(5) The poorly reasoned decision of the French Court De Cassation (First Civil Chamber) in C. Stein Di Arnaldo Righetti v X [2016] I.L.Pr. 17 does not assist Mr Loro Piana.

My conclusions.

37. I can summarise my conclusions on this point as follows:

(1) I accept PML's submission that the exclusion of contracts of transport has remained unchanged throughout the historical development of the various Conventions and Regulations, save for the introduction of the package holiday limitation on that exclusion. However, I do not think that this assists me in determining what the meaning of the phrase "contract of transport" is.

(2) I also accept that the phrase is one which must be given an autonomous meaning. In that regard, in my judgment, the definition given in Pammer is the most helpful, although the case itself is of little assistance. That was a case in which a party booked accommodation on a freighter in order to experience life on board a cargo vessel. It was, in essence, a holiday contract, although the holiday was on board a ship. In the words of the headnote to the ECJ decision:

> *"since the voyage by freighter at issue in the proceedings involved, for an inclusive price, accommodation and lasted for more than 24 hours, it fulfilled the necessary conditions for a "package" within the meaning of article 2(1) of Council Directive 90/314/EEC ; and that, accordingly, it fell within the definition of a contract of transport at an inclusive price for the purposes of article 15(3) of Regulation (EC) No 44/2001"*

(3) The decision in Haeger v Schmidt is, in my judgment, the closest on the facts. Although that case involved the Rome Convention on the applicable law, the case did draw a clear distinction between a freight commission contract (ie a contract to arrange carriage) and a contract of carriage (ie a contract to perform carriage). In my judgment, this is clear from paragraph 27, cited above.

(4) Both PML and Mr Loro Piana submitted that the purpose of the contract had to be determined as at the time of contracting, and without reference to what in fact happened. Weco submitted, by reference to paragraph 27 of Haeger, that it was legitimate to look at how the contract was in fact performed. In my judgment, that is to read too much into the sentence in Haeger. I accept the submission that what is important is the purpose of the contract, which must be judged as at the time that it is made.

(5) I have not found either the decision in the Pammer case itself or that in the Stein case of any real assistance. Those cases involved the question of whether a contract which included both transport and other services was to be regarded as a contract of transport. Here the contract does not involve any other services ancillary to the main obligation. The question is a more stark one; is the main obligation a transport obligation at all?

(6) Nor do I think that the decision in the Globalink case is of any real assistance to me. In that case, the issue was whether the "no set-off" rule established in *The Aries* [1977] 1 WLR 185 could be relied on by a freight forwarder. Mr Vineall QC concluded it could not, whether the freight forwarder in fact carried the goods or not. His observations in the latter context were *obiter*, but of course entitled to great respect. However, the issue that he had to deal with was very different from the issue before me.

(7) I have come to the conclusion that in this case the contract is clearly a contract of transport within the exclusion to the consumer section. I reach this conclusion for the following reasons:

(a) On its face, the contract was clearly not *limited* to the arrangement of carriage. There was an express liberty to perform the carriage; and to subcontract the carriage. However, this liberty was contained in the BIFA terms, which were only incorporated by reference.

(b) The remuneration for the services rendered was freight, and not commission.

(c) PML chartered in a vessel to perform their obligations and paid a separate rate of freight to the shipowners.

(d) The booking note clearly contemplated that this might happen and that at least one of the statutes relating to international carriage would apply – ie the US COGSA.

(e) A large number of the provisions within the booking note contemplated that the service provider might well be providing the vessel: see, for example, clauses 4 (period of responsibility), 5 (scope of voyage), 6 (substitution of

vessel, transhipment and forwarding), 8 (loading, discharging and delivery), 9 (deck cargo), 12 (lien), 13 (delay) and 15 (both to blame collision clause).

(f) Overall, therefore, in my judgment, the purpose of this booking note was indeed the transport of the Yacht.

(8) This makes it unnecessary for me to reach any concluded view as to whether a freight forwarding contract, to arrange carriage, would be a contract of transport. I would accept that Haeger suggests that such a contract would not be a contract of carriage. However, it does not seem to me to follow that the contract would not be a contract of transport. The purpose of the contract is to arrange transport of the yacht, and thus the primary purpose of the contract is transport. Unlike cases like Pammer, no other services over and above transport are being provided. In my judgment, it is probable that a freight forwarding contract is a contract of transport.

38. It follows from what I have said above that I conclude that the jurisdiction clause is not invalidated by the consumer section of the Regulation.

Was Mr Loro Piana a consumer?

39. This conclusion makes it unnecessary for me to decide this second issue. However, because the point was fully argued, I will set out my conclusions briefly.

40. Starting with the question of how to define a consumer in the Recast Regulation, paragraph 1 refers to a contract entered into by a consumer for a purpose which can be regarded as being outside his trade or profession.

41. However, it may be the case that a party enters into a contract for a dual purpose. To some extent, the contract may be regarded as entered into for a purpose outside the trade or profession of that party, but to some extent for a purpose which was within the trade or profession of the party.

42. In order to determine whether Mr Loro Piana was entitled to claim the benefit of the consumer protection provisions of the Regulation thus depended on whether this was a dual purpose contract and, in that regard, what the test to determine whether a contract is a dual purpose contract is; and then to determine whether, on the facts of this case, that test was satisfied.

43. Dealing first with the nature of the test, I was referred by both parties to the cases of Gruber v Bay Wa [2006] QB 204, Schrems v Facebook Ireland Ltd [2018] 1 WLR 4343, Milivojevic v Raiffeisenbank [2019] CMLR 25 and Ang v Reliantco Investments Limited [2019] EWHC 879.

44. In Gruber, the ECJ said:

> *"37. It follows that the special rules of jurisdiction in articles 13–15 of the Brussels Convention apply, in principle, only where the contract is concluded between the parties for the purpose of a use other than a trade or professional one of the relevant goods or services.*
>
> *38. It is in the light of those principles that it is appropriate to examine whether and to what extent a contract such as that at issue in the main proceedings, which*

relates to activities of a partly professional and partly private nature, may be covered by the special rules of jurisdiction laid down in articles 13–15.

39. In that regard, it is already clearly apparent from the purpose of articles 13–15, namely, properly to protect the person who is presumed to be in a weaker position than the other party to the contract, that the benefit of those provisions cannot, as a matter of principle, be relied on by a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it. It would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety.

40. As the Advocate General stated in paras 40 and 41 of his opinion, in as much as a contract is entered into for the person's trade or professional purposes, he must be deemed to be on an equal footing with the other party to the contract, so that the special protection reserved by the Brussels Convention for consumers is not justified in such a case.

41. That is in no way altered by the fact that the contract at issue also has a private purpose, and it remains relevant whatever the relationship between the private and professional use of the goods or service concerned, and even though the private use is predominant, as long as the proportion of the professional usage is not negligible.

42. Accordingly, where a contract has a dual purpose, it is not necessary that the purpose of the goods or services for professional purposes be predominant for articles 13–15 of the Convention not to be applicable.

43. That interpretation is supported by the fact that the definition of the notion of consumer in the first paragraph of article 13 is worded in clearly restrictive terms, using a negative turn of phrase ("contract concluded ... for a purpose ... outside [the] trade or profession"). Moreover, the definition of a contract concluded by a consumer must be strictly interpreted as it constitutes a derogation from the basic rule of jurisdiction laid down in the first paragraph of article 2, and confers exceptional jurisdiction on the courts of the claimant's domicile: see paras 32 and 33 of the present judgment.

44. That interpretation is also dictated by the fact that classification of the contract can only be based on an overall assessment of it, since the court has held on many occasions that avoidance of multiplication of bases of jurisdiction as regards the same legal relationship is one of the main objectives of the Brussels Convention : see to that effect, in particular, Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (Wabag) (Case C-256/00) [2003] 1 WLR 1113 , 1131, para 27; Proceedings brought by Gabriel (Case C-96/00) [2002] ECR I-6367 , 6404, para 57, and Danmarks Rederiforening (acting for DFDS Torline A/S) v LO Landsorganisationen i Sverige (acting for SEKO Sjöfolk Facket för Service och Kommunikation) (Case C-18/02) [2004] ECR I-1417 , 1452, para 26.

45. An interpretation which denies the capacity of consumer, within the meaning of the first paragraph of article 13 of the Brussels Convention , if the link between

the purpose for which the goods or services are used and the trade or profession of the person concerned is not negligible, is also that which is most consistent with the requirements of legal certainty and the requirement that a potential defendant should be able to know in advance the court before which he may be sued, which constitute the foundation of that Convention: see in particular Besix , paras 24-26.

46. Having regard to the normal rules on the burden of proof, it is for the person wishing to rely on articles 13–15 to show that in a contract with a dual purpose the business use is only negligible, the opponent being entitled to adduce evidence to the contrary.

47. In the light of the evidence which has thus been submitted to it, it is therefore for the court seised to decide whether the contract was intended, to a non-negligible extent, to meet the needs of the trade or profession of the person concerned or whether, on the contrary, the business use was merely negligible. For that purpose, the national court should take into consideration not only the content, nature and purpose of the contract, but also the objective circumstances in which it was concluded.

48. Finally, as regards the national court's question as to whether it is necessary for the party to the contract other than the supposed consumer to have been aware of the purpose for which the contract was concluded and the circumstances in which it was concluded, it must be noted that, in order to facilitate as much as possible both the taking and the evaluation of the evidence, it is necessary for the court seised to base its decision mainly on the evidence which appears, de facto, in the file .

49. If that evidence is sufficient to enable the court to conclude that the contract served to a non-negligible extent the business needs of the person concerned, articles 13–15 of the Convention cannot be applied in any event because of the status of those provisions as exceptions within the scheme introduced by the Convention. There is therefore no need to determine whether the other party to the contract could have been aware of the business purpose.

50. If, on the other hand, the objective evidence in the file is not sufficient to demonstrate that the supply in respect to which a contract with a dual purpose was concluded had a non-negligible business purpose, that contract should, in principle, be regarded as having been concluded by a consumer within the meaning of articles 13–15, in order not to deprive those provisions of their effectiveness."

45. In the case of Schrems, the Court had this to say:

"27. Within the scheme of Regulation No 44/2001, the jurisdiction of the courts of the member state in which the defendant is domiciled constitutes the general principle enshrined in article 2(1) of that Regulation. It is only by way of derogation from that principle that that provision provides for an exhaustive list of cases in which the defendant may or must be sued before the courts of another member state. As a consequence, the rules of jurisdiction which derogate from that general principle are to be strictly interpreted, in the sense that they cannot give rise to an interpretation going beyond the cases expressly envisaged by that

Regulation: Gruber v Bay Wa AG (Case C-464/01) [2006] QB 204; [2005] ECR I-439 , para 32.

28. Although the concepts used by Regulation No 44/2001, in particular those which appear in article 15(1) of that Regulation, must be interpreted independently, by reference principally to the general scheme and objectives of that Regulation, in order to ensure that it is applied uniformly in all member states (Kolassa's case, para 22 and the case law cited), account must, in order to ensure compliance with the objectives pursued by the legislature of the European Union in the sphere of consumer contracts, and the consistency of European Union ("EU") law, also be taken of the definition of "consumer" in other rules of EU law: Vapenik v Thurner (Case C-508/12) [2014] 1 WLR 2486 , para 25.

29. In that respect, the court has stated that the notion of a "consumer" for the purposes of articles 15 and 16 of Regulation No 44/2001 must be strictly construed, reference being made to the position of the person concerned in a particular contract, having regard to the nature and objective of that contract and not to the subjective situation of the person concerned, since the same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others: Benincasa v Dentalkit Srl (Case C-269/95) [1997] ECR I-3767; [1998] All ER (EC) 135 , para 16 and Gruber's case, para 36.

30. From this the court has inferred that only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules laid down by the Regulation to protect the consumer as the party deemed to be the weaker party. Such protection is, however, unwarranted in the case of contracts for the purpose of a trade or professional activity: Gruber's case, para 36.

31. It follows that the special rules of jurisdiction in articles 15 to 17 of Regulation No 44/2001 apply, in principle, only where the contract has been concluded between the parties for the purpose of a use of the relevant goods or services that is other than a trade or professional use: Gruber's case, para 37.

32. As regards, more particularly, a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it, the court has held that he could rely on those provisions only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety: Gruber's case [2006] QB 204 , para 39.

33. It is in the light of those principles that it is appropriate to examine whether circumstances such as those at issue do not entail the loss of a Facebook account user's status as a "consumer" within the meaning of article 15 of Regulation No 44/2001 .

34. In that regard, it is clear from, inter alia, the order for reference that, between 2008 and 2010 Mr Schrems initially used a Facebook account which he had opened exclusively for private purposes whereas, from 2011, he has also used a Facebook page.

35. According to the applicant, there are two separate contracts, that is to say, one for the Facebook page and the other for the Facebook account. By contrast, according to Facebook Ireland, the Facebook account and the Facebook page form part of the same single contractual relationship.

36. Although it is for the referring court to establish whether Mr Schrems and Facebook Ireland are, in fact, bound by one or several contracts and to draw the appropriate inferences regarding the status of "consumer", it should be noted that even a potential contractual link between the Facebook account and the Facebook page would not call into question an assessment of such status on the basis of the principles set out in paras 29–32 above.

37. Within the framework of that assessment, in accordance with the requirement, referred to in para 29 above, to construe strictly the notion of "consumer" within the meaning of article 15 of Regulation No 44/2001 , it is necessary, in particular, to take into account, as far as concerns services of a digital social network which are intended to be used over a long period of time, subsequent changes in the use which is made of those services.

38. This interpretation implies, in particular, that a user of such services may, in bringing an action, rely on his status as a consumer only if the predominately non-professional use of those services, for which the applicant initially concluded a contract, has not subsequently become predominately professional.

39. On the other hand, given that the notion of a "consumer" is defined by contrast to that of an "economic operator" (Benincasa's case, para 16 and Gruber's case, para 36) and that it is distinct from the knowledge and information that the person concerned actually possesses (Costea v SC Volksbank Romania SA (Case C-110/14) [2016] 1 WLR 814 , para 21), neither the expertise which that person may acquire in the field covered by those services nor his assurances given for the purposes of representing the rights and interests of the users of those services can deprive him of the status of a "consumer" within the meaning of article 15 of Regulation No 44/2001 .

40. Indeed, an interpretation of the notion of "consumer" which excluded such activities would have the effect of preventing an effective defence of the rights that consumers enjoy in relation to their contractual partners who are traders or professionals, including those rights which relate to the protection of their personal data. Such an interpretation would disregard the objective set out in article 169(1)FEU of promoting the right of consumers to organise themselves in order to safeguard their interests.

41. In the light of all of the foregoing considerations, the answer to the first question is that article 15 of Regulation No 44/2001 must be interpreted as meaning that the activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of a private Facebook account user's status as a "consumer" within the meaning of that article."

46. Turning to the case of Milivojevic, in that case the Court said, at paragraph 91 of its judgment:

> *"As regards, more particularly, a person who concludes a contract for a dual purpose, partly for use in his professional activity and partly for private matters, the Court has held that he could rely on those provisions only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the transaction in respect of which the contract was concluded, considered in its entirety (see, to that effect, judgment of 25 January 2018, Schrems, C-498/16, EU:C:2018:37, paragraph 32 and the case-law cited)."*

47. Finally, I turn to the decision of Andrew Baker J in Ang. There a wealthy individual invested in foreign exchange transactions. The question was whether she did so as a consumer or not. In that case, the learned judge said:

> *29. In Case C-269/95, Benincasa [1997] ETMR 447 , again decided under the Brussels Convention, the ECJ decided that the consumer rule did not apply in the case of a contract entered into by an individual for the purpose of a trade to be taken up in the future. The contract was a franchising agreement for the purpose of setting up a business selling dental hygiene products under the Dentalkit trade mark. Again, the court reasoned from the starting point that the consumer rule was a derogation favouring the domicile of the plaintiff and, therefore, to be kept within its proper bounds (at [13]-[14]). The court cited Shearson Lehman Hutton as 'settled case-law' for the proposition that the consumer rule " affects only a private final consumer, not engaged in trade or professional activities " (at [15]). It held (at [18]) that the consumer rule applies " only to contracts concluded outside and independently of any trade or professional activity or purpose, whether present or future ".*
>
> *30. At [17], the court said that " only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption " were protected by the consumer rule, which protection " is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character ". I do not read the reference to an individual's " own needs in terms of private consumption " as refining the notion of 'consumer' to something narrower than " private final consumer, not engaged in trade or professional activities ". The sole criterion is that of being a private individual contracting as the end user (of goods or services) and not as part of a business (trade or profession).*
>
> *31. In Case C-464/01, Gruber v Bay Wa AG [2006] QB 204 , the ECJ considered the problem of a contract with a dual purpose. The contract in question was for the supply of roof tiles to a farmer to renovate a roof covering both the parts of a main farm building used as the farmhouse, i.e. Mr Gruber's home, and parts of that same building used for the commercial purposes of the farm. The court held that where to a non-negligible extent the purpose of a contract was a business purpose, the consumer rule did not apply. It adopted the reasoning in Shearson Lehman Hutton Inc and Benincasa . It said nothing to gainsay my reading of the reference in Benincasa to an individual's 'private consumption' needs.*

32. The court was also asked whether for the consumer rule to apply it is necessary for the counterparty to have been aware of the purpose for which the putative consumer entered into the contract. Its answer fashioned a rule under which an individual may fall outside the scope of the consumer rule because she has given the impression of acting for a trade or professional purpose even though she was not in fact doing so. The scope of this 'non-consumer impression' rule was contentious before me, especially as to whether the counterparty must in fact have formed a view that the putative consumer was acting for a business purpose. What the ECJ said, in full, was this:

> *"50. If ... the objective evidence in the file is not sufficient to demonstrate that the supply in respect to which a contract with a dual purpose was concluded had a non-negligible business purpose, that contract should, in principle, be regarded as having been concluded by a consumer within the meaning of Articles 13 to 15 , in order not to deprive those provisions of their effectiveness.*
>
> *51. However, having regard to the fact that the protective scheme put in place by Articles 13 to 15 of the Brussels Convention represents a derogation, the court seised must in that case also determine whether the other party to the contract could reasonably have been unaware of the private purpose of the supply because the supposed consumer had in fact, by his own conduct with respect to the other party, given the latter the impression that he was acting for business purposes.*
>
> *52. That would be the case, for example, where an individual orders, without giving further information, items which could in fact be used for his business, or uses business stationery to do so, or has goods delivered to his business address, or mentions the possibility of recovering value added tax.*
>
> *53. In such a case, the special rules of jurisdiction for matters relating to consumer contracts enshrined in Articles 13 to 15 of the Brussels Convention are not applicable even if the contract does not as such serve a non-negligible business purpose, and the individual must be regarded, in view of the impression he has given to the other party acting in good faith, as having renounced the protection afforded by those provisions."*

33. Most recently, in Case C-498/16, Schrems v Facebook Ireland [2018] 1 WLR 4343 , the ECJ considered the meaning of 'consumer' under what was then Article 15 of the Brussels Regulation . In particular, it considered whether an individual is a consumer where, having used a Facebook account for private purposes, he opened a Facebook page to report to internet users on: legal proceedings; lectures; panel debates/media appearances; donation campaigns; and book promotions. The court held that those activities did not entail the loss of a private Facebook account user's status as a 'consumer':

"37. ... in accordance with the requirement ... to construe strictly the notion of 'consumer' within the meaning of Article 15 of Regulation No 44/2001 , it is necessary, in particular, to take into account, as far as concerns services of a digital social network which are intended to be used over a long period of time, subsequent changes in the use which is made of those services.

> *38. This interpretation implies, in particular, that a user of such services may, in bringing an action, rely on his status as a consumer only if the predominately non-professional use of those services, for which the applicant initially concluded a contract, has not subsequently become predominately professional.*
>
> *39. On the other hand, given that the notion of a 'consumer' is defined by contrast to that of an 'economic operator' (see, to that effect … Benincasa … para 16, and … Gruber's case … para 36) and that it is distinct from the knowledge and information that the person concerned actually possesses (Costea v SC Volksbank Romania SA (Case C-110/14) EU:C:2015:538 , para 21), neither the expertise which that person may acquire in the field covered by those services nor his assurances given for the purposes of representing the rights and interests of the users of those services can deprive him of the status of a 'consumer' within the meaning of article 15 of Regulation No 44/2001 ."*

48. In my judgment it is clear that the relevant test is that laid down in Gruber**,** as repeated in Milivojevic. Hence the question for me is whether the business use of the Yacht was negligible. I accept also, on the basis of Gruber, that the burden of establishing this lies on the party claiming to be a consumer – here Mr Loro Piana: see paragraph 46 of the judgment.

Contentions of Mr Loro Piana on the facts.

49. Turning to the facts of the case, the starting point is the contract itself. The booking note was not a contract *of* carriage but a contract to procure or arrange the carriage of a luxury sailing yacht agreed between a wealthy individual held out as the owner, Mr Loro Piana, and PML, a freight forwarder specialising in the forwarding of yachts. PML knew that Mr Loro Piana wanted the Yacht moved from the Caribbean to the Mediterranean so that he could compete in a regatta in the Caribbean on 24 March 2019 and arrive in Genoa in time for his participation in another regatta in Sardinia on 3 June 2019.

50. Therefore the nature of the service offered, the stated purpose of the freight forwarding arrangement and the identity of the parties point firmly towards the booking note being a consumer contract. PML must regularly deal with similar requests from wealthy individuals to move their yachts as part of its business as a high-end yacht forwarder and there is nothing in the factual matrix to suggest that this was anything other than a typical such request.

51. Any subjective knowledge that Mr Loro Piana might possess in relation to carriage of yachts is irrelevant to this consumer question, save to the extent that it illuminates the question of the objective contractual purpose, as noted above. To the extent relevant, Mr Loro Piana's business was historically running a luxury clothing brand and now relates to management of his wealth. His only experience of carriage of goods by sea was entering into two contracts with PML for the transport of his 16m tender, arranged through his personal representative, Mr Benussi.

52. Accordingly, Mr Loro Piana's knowledge, experience, skill and expertise do not suggest that his purpose was anything other than what it appeared to be, *viz.* moving the Yacht so that he could race and otherwise enjoy it in the Mediterranean during the European summer season, following the completion of a winter season in the Caribbean.

53. Nor does Mr Loro Piana's wealth disqualify him as a consumer. The consumer is generally the weaker party to contracts with traders and thus deserving of protection (see Recital 18 of the Brussels Regulation). The actual relative economic strength of the parties is irrelevant and *"the ECJ in its jurisprudence has set its face against a case-by-case analysis of the relative strength or weakness of contracting parties as that would militate against legal certainty"*: see Aspen Underwriting at [42] - [43].

54. PML has emphasised in its witness evidence the use made by Loro Piana SpA of the Yacht during regattas to enhance its brand. PML makes an evidential leap from this to argue that the real reason for Mr Loro Piana moving the Yacht was to promote Loro Piana SpA. This argument is misconceived.

55. Prior to owning the Yacht, Mr Loro Piana had raced using chartered in yachts in the Caribbean, demonstrating his motivation to race rather than promote Loro Piana SpA. He purchased the Yacht for his own benefit and without any assistance from Loro Piana SpA. He was the charterer of the Yacht under a finance charter with Credem and was responsible for the upkeep, including transportation costs, for the Yacht at all times (save for racing crew costs met by a yacht club of which he was a patron). He paid VAT on invoices for supplies and services provided to the Yacht and did not reclaim them. The Yacht was (correctly) registered as a leisure craft.

56. Mr Loro Piana had no contract with Loro Piana SpA, or other obligation to the company or the yacht club, in relation to the Yacht. Loro Piana SpA's only contribution was to provide clothing to the crew during regattas. The company had no involvement with the carriage of the Yacht from Antigua to Genoa and it is not mentioned in the discussions between PMS and Mr Benussi.

57. Loro Piana SpA sponsored elite sporting events, including regattas in which the Yacht participated and others, both before and after the loss of the Yacht. Mr Loro Piana permitted Loro Piana SpA to host events on board the Yacht during regattas in which Mr Loro Piana and his crew participated (whether or not Loro Piana SpA was a sponsor of the regatta) because he has an affinity with the family brand and remains a shareholder in the company. Loro Piana SpA also associated itself with Mr Loro Piana's participation in regattas to enhance the brand. Loro Piana SpA therefore benefitted collaterally from the fact that its eponymous shareholder wanted to race his sailing yacht in regattas that matched Loro Piana SpA's brand.

58. However, the collateral benefit to Loro Piana SpA was not Mr Loro Piana's purpose in entering into the booking note. Mr Loro Piana emphasised that the Yacht belonged to Mr Loro Piana (or perhaps more accurately Credem), but in any event not Loro Piana SpA, and he did with it as he saw fit to satisfy what PML accepts was his *"passion for racing"*, along with leisure time with family and friends in the Mediterranean and the Caribbean. He wanted to enjoy the use of his Yacht in the summer in Europe, including participation in various regattas. Accordingly, Mr Loro Piana (through his personal representative Mr Benussi) engaged PML to arrange carriage of the Yacht to Europe at his own cost. The suggestion that Mr Loro Piana raced his sailing yacht as a PR exercise to boost his 8% shareholding in Loro Piana SpA, rather than to fulfil the passion for sailing that led him to purchase and maintain a €27m sailing yacht, is fanciful.

59. Even if there could be doubt as to the incidental nature of Loro Piana SpA's interest in the Yacht reaching Europe for the summer, that doubt should be resolved in Mr Loro Piana's favour: see [50] of Gruber.

60. Accordingly, Mr Loro Piana contends that the booking note did not have a predominant, or more than marginal, business purpose and so he acted as a consumer within the meaning of Article 17(1).

Contentions of PML on the facts.

61. In Mr Loro Piana's application, it was said that:

(1) "The Yacht is used solely for MR LORO PIANA's private leisure purposes";

(2) "He was in the process of transporting the Yacht from Antigua (where it had been for the winter) to Europe (for the summer").

62. The first point is simply not correct. The publicly available evidence produced in answer by PML show that the Yacht, and its and Mr Loro Piana's participation in international superyacht regattas, was an integral part of Loro Piana SpA's marketing, branding and testing of the company's products which was something championed by Mr Loro Piana himself.

63. The Yacht (and its similarly named predecessors) were used as part of Loro Piana SpA's marketing of their products, as part of Mr Loro Piana and his company trying to branch away from cold weather clothing into other areas of luxury goods and all seasons wear. The Yacht was used "*as a testing ground for all of Loro Piana's fabric innovations*": Mr Loro Piana was reported as saying "*we try things in true competitions – in a regatta, my team is really stressing the products*'.

64. As for the second point, the purpose of the booking note contract was to transport the Yacht from one prestige sailing regatta in the Caribbean (i.e. the St Barths' Bucket Regatta, one of the world's most prestigious and famous superyacht regattas) to another in Europe ("***the Loro Piana Superyacht Regatta***") for the purposes of Mr Loro Piana and Loro Piana SpA's business.

65. Mr Loro Piana and the Yacht had taken part in the March 2019 Bucket Regatta and were a central plank of Loro Piana SpA's extensive marketing and promotion at that event. A large number of A-list actors, models, journalists and other kind of international "influencers" were invited by Loro Piana SpA to the event. Loro Piana SpA's theme was how wearers of their clothing might "Sail into Summer", and new lines of Loro Piana SpA's clothes were promoted at a "pop-up" boutique.

66. Loro Piana SpA specifically hired Avenue PR ("**Avenue**") an independent PR and press office to represent their "Sail into Summer" product launch at the Bucket Regatta. Avenue published an article entitled '*Sail Into Summer – LORO PIANA*' to promote the "special event" which would be taking part on St Barths. This Avenue PR release emphasised, *inter alia*, the link between the Loro Piana SpA brand and sailing, Loro Piana SpA's strategy to personalise the Loro Piana SpA brand by adopting the yachting activities of Mr Loro Piana at the regattas as brand activities of Loro Piana itself, and the Yacht was described as the Loro Piana boat and the St Barths Bucket regatta as a

regatta at which Loro Piana (i.e. the company) will compete and invite selected guests. At the event, Loro Piana SpA hosted more than 60 guests at St Barth's Le Sereno hotel, took over a seaside restaurant, served *rosé* all day and flew in a band from London for the party. In fact, the Yacht's appearance at the 2019 Barths Bucket did generate significant social media '*hype*' and '*column inches*' for Loro Piana SpA. This was a successful promotion that connected the Yacht and Mr Loro Piana's racing with Loro Piana SpA products.

67. In fact, after the Bucket Regatta, the reality is that Mr Loro Piana and Loro Piana SpA required the Yacht to travel back to Europe, to take part in another superyacht regatta that Loro Piana SpA was sponsoring and Mr Loro Piana was competing in. That was the main purpose of the booking note contract to transport the Yacht.

68. The "*yacht regatta in Sardinia*" referred to in the Wall Street Journal article was the Loro Piana Superyacht Regatta that was due to take place in Porto Cervo in northern Sardinia between 3 and 8 June 2019 (the "**Loro Piana Regatta**"). This was the Loro Piana SpA sponsored marketing event for which the Yacht was being transported under the booking note contract.

69. From 2009 onwards, Loro Piana SpA had been the title sponsor of the Loro Piana Regatta, which is organised by Yacht Club Costa Smeralda ("**YCCS**") of which Mr Loro Piana is a member. The presence of the Yacht at that regatta was intended by Mr Loro Piana and Loro Piana SpA to form another plank of its marketing strategy in a similar fashion to its attendance at the Bucket Regatta. Loro Piana SpA was both the named sponsor for the event, and would be hosting an owners' dinner.

70. PML understood from communications with Mr Loro Piana through Mr Benussi that Mr Loro Piana intended to finish the last regatta in the Caribbean on 24 March 2019, which would enable the yacht to be ready for transport in 3 to 5 days and then shipped in April. Mr Loro Piana wished to make those arrangements so that the Yacht would arrive in advance of the Loro Piana Regatta 2019 so that it could undertake some refitting. The Yacht, and the earlier boats the same name were used by Loro Piana SpA as part of its marketing routinely at the Loro Piana Regatta each year.

71. There is no direct evidence from Mr Loro Piana. He has not provided a witness statement under a statement of truth. It appears that Mr Taylor, who is a partner in Reed Smith, lawyers for Mr Loro Piana, is not even in direct contact with him. None of the matters put forward by Mr Taylor in any of his statements come from direct instructions from Mr Loro Piana. Mr Taylor's evidence is the product of multiple hearsay and should carry little, if any weight. Everything is based on:

> *"... information provided by Mr Loro Piana that has been relayed to me by his Italian lawyers, Studio Legale Mordiglia (without waiving any privilege in those communications) and, in particular to Mr Scapinello, who has had the conduct of this matter on his behalf".*

72. A number of assertions made are simply implausible. For example, in Mr Loro Piana's response to Weco's second Part 18 Request, signed with a statement of truth by Mr Taylor and not by Mr Loro Piana, Mr Taylor asserts that "[t]he only contribution to the Yacht's costs made by Loro Piana SpA was clothing for the permanent and additional

regatta crews". That does not sit easily with the sponsorship and product supply agreement appended to the RFI, which *inter alia* provides that at least 3 months before any event there will be discussions as to the "sharing of expenses [with the Sponsor] to take part in the official and/or training regattas" and other events, and Article 7 which, in addition to €250,000 in respect of clothing, refers to "the remainder of the consideration, which is not paid by "barter" since it also represents the recharging of the promotional costs defined by Article (4), shall be paid by bank transfer".

73. The Yacht, and its participation in regattas was inextricably bound up with Mr Loro Piana's "trade or profession". Mr Loro Piana is a director of Loro Piana SpA and is actively involved in running the business. Increasing the value of his shareholding is a happy consequence of his continued involvement. The use of the Yacht had a clear business purpose and he was conferring a benefit on his business. The extent to which Loro Piana SpA did, or did not, pay for this is irrelevant. At the very least, this was a "dual-use" contract, and Mr Loro Piana has failed to prove that the business-related purposes were "negligible". This would mean that the consumer jurisdiction provisions are not applicable in any event. As such, PML say that Mr Loro Piana would lose the right to consumer contract jurisdiction protections in any event.

My conclusions.

74. I can summarise my conclusions as follows:

(1) Clearly the purpose of the contract was to transport the yacht to Genoa, so that it could be used over the summer season. Although I had some evidence in relation to previous years' usage, I do not think that this is of any real assistance to me, except possibly insofar as it displays a pattern of usage which might be expected to be repeated.

(2) There was a suggestion that the question of whether the contract was a consumer contract should be determined by a consideration of whether Mr Loro Piana's business was the transport of Yachts. I do not accept this suggestion. A party who enters into a transport contract for the purpose of transporting goods to be used in its business is clearly a non-consumer contract.

(3) In my judgment, the question therefore is what the Yacht was going to be used for during the summer season, and whether that usage involved business use to more than a negligible degree, the burden being on Mr Loro Piana to show that it did not.

(4) Mr Loro Piana remained a shareholder in Loro Piana SpA and was also the deputy chairman of the company. He was also an ambassador for the company. Although I accept the submission made on his behalf that the majority of his time was spent

dealing with his personal investments, then that does not detract from the fact that he retained his connection with Loro Piana SpA.

(5) The evidence adduced on behalf of PML, taken from publicly available material, suggests that the Yacht was used for significant business purposes, including the following:

(a) Celebrities were invited on board the Yacht in order to promote Loro Piana SpA's products and to watch the Yacht during the regatta;

(b) The Yacht was used for marketing purposes, and features in many articles in which Loro Piana SpA products are publicised;

(c) Loro Piana SpA sponsored the Sardinian regatta in which the Yacht competed, thus enabling enhanced publicity to be generated;

(d) The Yacht was used as a testing ground for innovations in relation to fabrics produced by Loro Piana SpA;

(e) Yachting, and Mr Loro Piana's love of yachting, was emphasised in publicity material generated by Loro Piana SpA;

(f) The Yacht's sail carried the Loro Piana SpA name when sailing in regattas;

(g) The Loro Piana SpA "Storm System" was also advertised on the Yacht.

(6) For his part, Mr Loro Piana has produced no personal evidence at all. Mr Taylor, the partner from Reed Smith who is instructed on his behalf, has sworn three witness statements, however. In those witness statements, he makes the following points:

(a) Although it was accepted that Loro Piana SpA sponsored regattas and that the yacht participated in them, and also that the yacht featured in Loro Piana SpA promotional materials, the yacht itself was not sponsored and Mr Loro Piana received no remuneration, and met all the costs of the yacht himself.

(b) Mr Loro Piana's use of the yacht was for his personal leisure purposes, and he met the cost of the transport of the yacht for these purposes. The fact that there was a collateral benefit to Loro Piana SpA did not deprive the contract of its consumer nature.

(c) Mr Loro Piana has no operative role in the company.

75. In my judgment, the purpose of the contract was to take the Yacht to Genoa, from where it would be used for a variety of purposes. Clearly a major purpose was to indulge Mr Loro Piana's love of racing. However, there was also, in my judgment, an element of business usage, and I have concluded that it has not been shown that that business usage was no more than negligible.

76. It follows from what I have said that, in relation to this issue, too, I would hold that Mr Loro Piana has not established his consumer status. Accordingly, the EJC is valid under the Regulation tests.

The Consumer Rights Act 2015.

77. I turn, therefore, to Mr Loro Piana's alternative argument that the EJC is invalidated by reason of s.62 of the Consumer Rights Act 2015 ("the CRA").

78. That section provides as follows:

> *"62 Requirement for contract terms and notices to be fair*
>
> *(1) An unfair term of a consumer contract is not binding on the consumer….*
>
> *… (3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.*
>
> *(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.*
>
> *(5) Whether a term is fair is to be determined—*
>
> *(a)taking into account the nature of the subject matter of the contract, and*
>
> *(b)by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends."*

79. The definition of "consumer' for the purposes of the Act is set out in section 2(3) which provides that "*Consumer" means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession."*

80. Schedule 2 to the Act contains examples of terms which may be unfair. One such term is that set out in paragraph 20 of Schedule 2, which reads as follows:

> *"A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by—*
>
> *(a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,*
>
> *(b) unduly restricting the evidence available to the consumer, or*
>
> *(c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract."*

Mr Loro Piana's contentions.

81. Mr Loro Piana asserts that the EJC was indeed unfair:

(1) The present case is analogous to Standard Bank London Ltd v Apostolakis (No.2) [2002] CLC 939 (David Steel J). In Apostolakis, a wealthy Greek couple (a lawyer and an engineer) entered into forex contracts with a London bank that contained an English jurisdiction clause. The Court held (applying the same test now found in section 62(1) derived from the Consumer Directive) that the EJC was unfair. In doing so, the Court accepted the proposition that the clause (which provided for the English Court or any court where the consumers had assets to have jurisdiction for claims by the bank) should have been translated and *"carefully explained"* [50]. The Court also referred at [48] to Océano Grupo Editorial SA v Rocío Murciano Quintero [2002] 1 CMLR 43, where the European Court noted that an exclusive jurisdiction clause in favour of the trader's domicile had the potential to create a significant imbalance in the parties' rights and obligations and so fell within the Consumer Directive equivalent of Schedule 2, paragraph 20 of the CRA.

(2) As indicated in Océano Grupo, an EJC is a term that hinders the consumer's right to take legal action, which is indicatively unfair under Schedule 2, paragraph 20 of the CRA.

(3) Although the EJC in the present case was not as complex as that considered in Apostolakis, the clause was buried in the small print of PML's terms and conditions. It provided for the foreign consumer to be sued in the trader's domicile in a foreign language. The clause was not identified in the *"Key Facts"* document provided prior to contracting or otherwise explained or brought to the attention of Mr Loro Piana or Mr Benussi. It is no answer to this unfairness to point to Mr Loro Piana's wealth, as Apostolakis demonstrates.

(4) Accordingly, the clause creates a significant imbalance, contrary to the requirement of good faith because it permits Mr Loro Piana, an Italian consumer, to be sued in England (contrary to the general principle of domicile in the Brussels Regulation) without giving him adequate notice that he could be sued in a country that had peripheral connection to the carriage of the Yacht from Antigua to Genoa by Weco, a Danish company, under a contract with Zeamarine, a German company, and negotiated with an Italian company, PMS. This is substantially inconvenient and unfair to Mr Loro Piana, who has been required to instruct Italian lawyers to instruct English lawyers to protect his position in a foreign court in a foreign language. In contrast, PML is a pre-eminent yacht transport company, no doubt familiar with litigation in England, which was perfectly capable of drawing the EJC to Mr Loro Piana's attention and failed to do so. PML is also perfectly willing and able to litigate in Italy, as the investigative proceedings that it has commenced there demonstrate.

82. The unfairness question raises fact-sensitive issues that are not readily amenable to determination at this preliminary stage. Nevertheless, it is submitted that the Court can make a reliable decision on this issue or, if not, Mr Loro Piana has the better of the argument and jurisdiction is not established (following the approach set out in Kaefer).

83. PML has suggested that the CRA cannot operate to render an EJC ineffective because the Brussels Regulation implicitly excludes the operation of the CRA. However, Article 25 of the Brussels Regulation, on which the Claimants rely, defers to domestic law on questions of the substantive validity of a jurisdiction clause. The possibility of consumer rights legislation invalidating an EJC can be seen in Apostolakis and Océano Grupo

(where there was no suggestion that the Brussels Convention consumer provisions ousted Consumer Directive). Moreover, as s.62 of the CRA enacts Articles 3 and 6 of the Consumer Directive, Article 67 of the Brussels Regulation preserves its effect on jurisdiction clauses.

84. Therefore, Mr Loro Piana argues, the EJC is not binding on Mr Loro Piana as against PML, pursuant to the Brussels Regulation and/or the CRA. Article 25 is thus not engaged and the Court must decline jurisdiction.

PML's contentions.

85. PML put forward three contentions, which I will deal with in turn, as follows:

(1) First, it is argued that any question of the Court's jurisdiction over Mr Loro Piana has to be determined solely in accordance with the rules set out in the Brussels (Recast) Regulation;

(2) Secondly, it is argued that the CRA must be restricted so that it does not interfere with the operation of the Recast Regulation;

(3) Thirdly, PML argue that the term is not unfair in any event.

The Recast Regulation excludes the operation of the CRA.

86. The Recast Regulation aims to harmonise the rules regarding conflicting jurisdictions in civil and commercial matters by means of creating rules governing jurisdiction that are highly predictable. Therefore, the purpose of this Regulation is to strengthen the legal protection of persons established in the European Union by enabling the applicant to identify easily the court in which he may sue and a normally well-informed defendant to reasonably foresee in which court he may be sued: see Granarolo SpA v Ambrosi Emmi France SA **(**C-196/15) [2016] I.L.Pr. 32, [16]. This aim, which is equally applicable to consumer cases as it is to all other cases, "pursues an objective of legal certainty": Petruchová v FIBO Group Holdings Limited (C-208/18) [2019] I.L.Pr. 42, at paragraph 52. In particular, the Brussels (Recast) Regulation lays down the rules for determining the court competent to rule on a dispute in civil and commercial matters relating, in particular, to a contract concluded between a professional and a person acting for a purpose unrelated to his professional activity, so as to protect the latter in such a situation: see Petruchova, at paragraph 64. These are "special rules" of jurisdiction which in the context of consumer protection "serve to ensure adequate protection for the consumer: Česká spořitelna (C-419/11), at paragraph 45.

87. In contrast, the unfair terms provisions of Part 2 of the CRA, which gives effect to Council Directive 93/13 on unfair terms in consumer contracts ("**Directive 93/13**") as amended by the Consumer Rights Directive (2011/83/EU), *do not apply* in determining questions of consumer contract jurisdiction in cross-borders civil and commercial cases, and have no application in determining the validity of the EJC in this case. In particular, they cannot be used to override or alter the outcome under the provisions of the Brussels (Recast) Regulation. That is because, as the ECJ's case law shows, although both instruments are concerned with protecting consumers, they have different roles. The Brussels (Recast) Regulation lays down private international law, rules of *procedure* that protect consumers in relation to the question of jurisdiction and the recognition and

enforcement of judgments in civil and commercial matters, while Directive 93/13 (and thus the 2015 Act) is aimed mainly at approximating Member States' *substantive* laws with regard to unfair terms in consumer contracts.

88. In consequence, the ECJ has sought to maintain a proper line of demarcation between the scope of operation of the Brussels Recast Regulation and Directive 93/13, by refusing to permit the application of the Court's own case law under one instrument to be applied in the interpretation or application of the other.

89. Thus, in Salvoni v Fiermonte (C-347/18) [2019] I.L.Pr. 45, the District Court in Milan asked whether it could apply the Court's case law under Directive 93/13 to ascertain of its own motion whether there had been a breach of the consumer contract jurisdiction rules set out in Chap. II, s. 4 of the Brussels (Recast) Regulation when asked to issue a certificate under art.53 of that Regulation for the recognition and enforcement abroad of a judgment against a consumer; and if so, whether they might inform the consumer of any breach that was established in order to enable him to assess the possibility of availing himself of the consumer contract jurisdiction enforcement protections in art. 45 of Brussels (Recast). The ECJ refused to permit this to happen, declaring (at [44]) that:

> *"... as the Advocate General observed in points 76 and 77 of his Opinion,* ***the case-law of the Court concerning Directive 93/13 is not applicable in the context of*** *[Brussels (Recast)]* ***Regulation No 1215/2012****, which lays down rules of a procedural nature, whereas Directive 93/13 is intended to achieve minimum harmonisation of laws of the Member States concerning unfair terms in consumer contracts".*

90. As the ECJ emphasised in that case, the objective of protecting a consumer as the weaker party by rules of jurisdiction more favourable to his interests than the general rules as is stated in recital 18 to Brussels (Recast) "… is implemented by detailed procedural provisions in Regulation No 1215/2012": see paragraph 43.

91. The same lines of demarcation are true in reverse, with the Court refusing to apply to consumer cases that do not involve a cross-border situation, either:

(1) the rules contained in the Brussels (Recast) Regulation (Aqua Med SP. Z.O.O. v Skóra (Case C-266/18) [2013] 3 C.M.L.R. 1, [45] and / or

(2) the ECJ's own case-law on those provisions (e.g. Asociación de Consumidores Independientes de Castilla y León (C-413/12) [2014] 2 C.M.L.R. 24, at paragraphs 46-7.

92. As the decision in Salvoni (C-347/18) highlights, the Court sees no scope for enhancing the jurisdiction protection to consumers found in the Recast Regulation by reference to the rights and obligations imposed on a national court by Directive 93/13. For where a "cross-border situation exists", the provisions of art.17-19 of Brussels (Recast) determines "…the court which, at *international level*, has jurisdiction to hear the action brought against the consumer by the other party to the contract": see Aqua Med at paragraph 45.

93. Accordingly, it is clear from the Court's case-law that, in cross-border consumer contract cases that fall within the material scope of the Brussels (Recast) Regulation, any jurisdiction questions ***must*** be determined under the provisions of art. 17-19 of the Brussels (Recast) and ***not*** by the operation of any national consumer contract laws transposing Directive 93/13. The reasons for this are obvious. For where the requirements of art. 17-19 are met, then on questions of jurisdiction the consumer will be adequately protected. But where the requirements are *not* met, then it is beyond argument that a national court cannot apply its own consumer protection rules, whether derived from Directive 93/13 or elsewhere, to effectively re-write the consumer contract jurisdiction requirements in art. 17-19. To permit a national court effectively to ignore the specific requirements of art. 17 and to exercise international jurisdiction on the basis of national consumer contract law would drive a coach and horses through the objectives of legal certainty, uniform application, and the respect for parties' rights (party autonomy) to choose their jurisdiction all of which are central to the objectives of the Brussels (Recast) Regulation. It would amount to a prohibited extension of the "special rules" of consumer contract jurisdiction to a person for whom that protection is not justified: see Česká spořitelna at paragraph 45.

94. This is particularly important when jurisdiction (as in this case) is claimed on the basis of a valid jurisdiction (or prorogation agreement) within the meaning of art. 25 of Brussels (Recast). As recital 19 makes clear, art. 25 gives effect to the principle of party autonomy within the Member's State's rules on jurisdiction. According to the ECJ, this provision 'is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction falling within the scope of the [Brussels I regime]": Coreck Maritime GmbH v Handelsveem BV (C-387/98), [2000] I.L.Pr. 39, at paragraph 14. Party autonomy must be respected.

95. Furthermore, it is clear from the Court's case law that national consumer protection laws have ***never*** been permitted to override the consumer contract jurisdiction rules of the Brussels jurisdiction instruments. This is apparent from the early case of Benincasa v Dentalkit Srl (C-269/95) [1997] I.L.Pr. 559 which involved a franchise agreement containing an exclusive jurisdiction clause in favour of the courts of Florence. Mr Benincasa claimed that the franchise contract was a consumer contract and therefore the jurisdiction agreement was invalid. He said when he concluded the agreement he was not actually carrying on a business and therefore he should be regarded as a consumer within the meaning of art.13 of the Brussels Convention. This was based on an argument by analogy with the definition of "consumer" under the German law on consumer credit (*Verbraucherkreditgesetz*) that conferred the status of consumers upon persons applying for credit in order to pursue an activity which they had not previously taken up: see paragraph 42 of the Advocate General's Opinion. Mr Benincasa's argument failed before the Court.

96. Even after Directive 93/13 was enacted, there has ***never*** been a case where it has been argued successfully before the ECJ that the unfair terms provisions of Directive 93/13 (as amended), or any national transposition of those rules, should override, supplement, extend, or alter in any way, the operation of the jurisdiction provisions of the Brussels Convention, the Brussels I (44/2001) Regulation or the Brussels (Recast) Regulation: whether in respect of the protections now contained in art. 19 as regards jurisdiction agreements, or indeed, any other aspect of the consumer contract protections now contained in the Brussels (Recast) Regulation.

97. Mr Loro Piana cites no decision from the ECJ that would support such a claim. If there was any merit in their submissions then the point would likely have arisen in the cases which regularly come before them on this question. The cases which are relied on do not, on analysis, support Mr Loro Piana's position.

(1) The case of Océano Grupo Editorial, along with two other similar cases to which Mr Loro Piana has not referred the Court, namely Pannon GSM Zrt v Sustiké Győrfi (C-243/08), [2010] 1 All ER (Comm) 640 (C-243/08), and VB Pénzügyi Lízing Zrt Zrt. v Ferenc Schneider (C-137/08) [2011] 2 C.M.L.R. 1 are all cases under Directive 93/13 that involve internal, national *territorial* jurisdiction clauses (or perhaps better described as "venue selection clauses") which conferred jurisdiction on or near the supplier's principal place of business or registered office. These clauses conferred jurisdiction on the courts of cities were consumers were not domiciled but still in the country of their domicile. In the absence of any cross-border element, these territorial jurisdiction arrangements were not "prorogation" agreements within the meaning of art. 25 of the Brussels (Recast) Regulation, and the Court's case-law regarding the Directive 93/13 in relation to these matters is irrelevant to the determination of any questions arising under art. 17-19 or art. 25 of Brussels (Recast).

(2) The early and controversial decision in Standard Bank of London Ltd v Apostolakis (No. 2) [2002] 2 CLC 939 is the only case where a judge has been persuaded to make some entirely *obiter* observations on the possible applicability of the UK regulations implementing Directive 93/ 13 affecting cross-border jurisdiction clauses and expressed "*preliminary views upon the point*" (para. [42]). With respect, these *obiter dicta* in Standard Bank should not be followed. As the subsequent attitude of the ECJ has shown, the application of the dicta in the decision in Océano Grupo Editorial to a cross-border case was erroneous. Directive 93/13 has no role to place in deciding questions of international jurisdiction which are to be determined by the consumer jurisdiction provisions of the Brussels Recast Regulation. Standard Bank is also readily distinguishable on the facts.

98. Mr Loro Piana's attempts to rely on art. 25 and art. 67 of the Brussels (Recast) are misplaced. Art. 25 of Brussels (Recast) was amended following a recommendation in the Heidelberg Report[1] ([397]) to align with art. 5(1) of the Hague Choice of Court Convention (2005). Accordingly, a cross-border prorogation jurisdiction agreement within the meaning of art.25 confers jurisdiction on the courts of a Member State, unless under the law of that chosen Member State "*the agreement is null and void as to its substantive validity".* But as recital (20) to Brussels (Recast) makes clear, *renvoi* is not excluded, and that law includes "*the conflict-of-laws rules of that Member State*", which includes the Brussels (Recast) Regulation, which certainly does not render the EJC "null and void", and takes priority over the CRA in any event. It is wishful thinking that the CRA could apply to override a jurisdiction clause in a contract of transport that is excluded from the scope of consumer jurisdiction under art. 17(3).

99. Furthermore, as the "null and void provision" was adopted to align art. 25 with art. 5(1) of the Hague Convention, the official Hartley / Dogauchi report on that Convention is a useful tool in understanding the legislative intent. It emphasises (at [126]): "The "null and void" provision applies only to substantive (not formal) grounds of invalidity. It is

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1 **Heidelberg Report**: (Study JLS/C4/2005/03).

intended to refer primarily to generally recognised grounds like fraud, mistake, misrepresentation, duress and lack of capacity [which may include the capacity of public bodies to enter into choice of court agreements….]. None of those grounds arise in this case, and there is no suggestion that "unfairness" would constitute a ground for challenging the EJC. Art. 67 of the Brussels (Recast) does not help Mr Loro Piana either. The CRA does not contain any provisions concerning *cross-border* "jurisdiction and the recognition and enforcement of judgments" within the meaning of Art. 67.

Restrictions on the role of the CRA.

100. Further, and in any event, the CRA cannot be interpreted in any broader way so as to undermine the operation of the Brussels (Recast) Regulation. The ECJ has consistently held, that when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of Directive 93/13 in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 of the Treaty on the Functioning of the European Union ("TFEU"). This obligation to interpret national law in conformity with EU law is inherent in the system of the TFEU, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them: Karel de Grote — Hogeschool Katholieke Hogeschool Antwerpen (C–147/16) EU:C:2018:320, at paragraph 41. After all, the Brussels (Recast) Regulation is a legal act of the European Union of general application, binding in its entirety, and directly applicable in all Member States, Article 288(2) of the TFEU and remains so, during the course of the UK transition period. As a directly applicable legal act of the Union, it is a direct source of rights and duties for all those affected by its terms: see Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) [1978] 3 C.M.L.R. 263. Under the principle of the primacy of EU law, the Brussels (Recast) Regulation takes precedence over any contrary provisions of prior domestic law, and automatically renders inapplicable any conflicting domestic provisions: see paragraph 17 of Simmenthal. This principle applies to "any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness" of the jurisdiction contained in the Brussels (Recast) Regulation. Rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law: Winner Wetten GmbH (C-409/06) [2010] ECR I-8015, at paragraphs 56 and 61. Furthermore the principle of sincere cooperation laid down in Article 4(3) of the Treaty on European Union ("TEU") requires that Member States should refrain from any measure which could jeopardise the attainment of the Union's objectives: see Pringle v Government of Ireland & Others (C-370/12), [2013] 2 C.M.L.R. 2, paragraphs 148-149. This includes a national court ensuring the proper operation of the jurisdictional rules of an EU private international law instrument: see Bank Handlowy (C-116/11) [2013] I.L.Pr. 21, at paragraphs 62-63 and ground (2).

101. Accordingly, the CRA cannot be used to interfere with the operation of the consumer contract jurisdiction provisions of the Brussels (Recast). In particular, the broader definition of a consumer found in s.2(3) of the 2015 Act, which defines them as "an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft of profession", cannot be used to broaden the scope of the consumer contract jurisdiction provisions of the Brussels (Recast) in relation to "dual purpose" contracts: see the case of Benincasa, referred to above. Nor can the different burden of

proof in the CRA be used to oust the burden that is on Mr Loro Piana under the Brussels (Recast).

Not "unfair" in any event

102. If, which is denied, the CRA applied, then the EJC would only be unfair if contrary to the requirement of good faith (discussed in Director General of Fair Trading v First National Bank [2002] 1 AC 481, 494), it causes a "significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer." (s.62(4)). Whether a term is fair is to be determined by (a) taking into account "the nature of the subject matter of the contract, and (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends." (s.62(5)).

103. This is the case of a billionaire, an international businessman, who employs professional advisers to negotiate a contract on his behalf with UK company to transport a €27 million superyacht, a yacht that is both UK registered and insured in the UK. In no sensible way can Mr Loro Piana be regarded as the 'weaker party' in this transaction.

104. "All the circumstances existing at the time the term was agreed" includes, most pertinently, that this agreement was negotiated and finalised on Mr Loro Piana's behalf by a professional, legally qualified logistics manager. The conduct of negotiations on behalf of the 'consumer' by a professional adviser is a particularly relevant circumstance: Heifer International Inc v Christiansen [2007] EWHC 3015 (TCC), at paragraphs 299 and 306.

105. The effect of the jurisdiction provision is self-evident on its face. It did not need explaining to either Mr Loro Piana or to the legally qualified logistics professional Mr Benussi. It is not capable of ambiguous construction. The clause was – particularly in the case of BIFA clause 28 – in a position impossible to miss when Mr Loro Piana came to sign the documents, and in any event the contract was (presumably) being reviewed by Mr Benussi in his paid role as (amongst other things) a professional logistics manager and – given his other professed professionalisms – someone who was intimately familiar with contracts, as the highly successful international businessman Mr Loro Piana no doubt was and is. It is axiomatic, that a party who completes and signs a document cannot rely on the fact that he had neither read nor understood it: see Coys of Kensington Automobiles Ltd v Pugliese [2011] EWHC 655 (QB), at paragraph 40.

My conclusions.

106. I can express my conclusions on this aspect of the case relatively briefly.

107. I accept that, under the Consumer Rights Act, Mr Loro Piana should be regarded as a consumer. That is because, in my judgment, on the basis of the evidence before me, the purpose of the transport was mainly for non-business purposes, even though the business use could not be said to be negligible.

108. However, I do not regard the term as unfair. It will be recalled that, in order to be unfair, it has to cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer; and that in determining this question, the

nature of the subject matter of the contract, and all of the circumstances existing when the term was agreed, along with all the other terms of the contract, must be taken into account.

109. The reasons for my conclusion are as follows:

(1) Although Mr Loro Piana was a consumer for the purposes of the Act, he was an experienced businessman. He also had the assistance of a professional logistics agent to act on his behalf in making the arrangements, in the person of Mr Benussi. I accept that this last point is a very relevant one, although I do not accept that the case of Heifer International, relied on by PML, is really in point.

(2) The jurisdiction agreement did not, in and of itself, create any imbalance between the parties, still less a serious imbalance. It is said that there is a serious imbalance since Mr Loro Piana will have to instruct English lawyers, and he does not speak English. As to the second point, I do not doubt the evidence of Mr Taylor, although the evidence is not all one way. More importantly, as to the first, both parties must instruct English lawyers, with the result that there is no difference between the position of the two parties.

(3) Although it is suggested that Mr Loro Piana would not have appreciated that the contract incorporated a jurisdiction clause, such clauses are commonplace, particularly in contracts for the carriage of goods; and the contract was signed, right next to one of the jurisdiction clauses relied on, by Mr Loro Piana. I accept that in general terms, where a party has been given the opportunity to read a contract, that party cannot be heard to say that he has not taken that opportunity: see, for example, Coys of Kensington Automobiles v Pugliese [2011] EWHC 655, at [40].

110. It follows from this that I do not need to consider the other arguments put forward by PML, and I do not do so. That is because they are said to be relatively complex, and I consider that they should therefore be considered in a case in which the points are necessary for decision.

111. Finally, however, it follows from what I have said above that, since Mr Loro Piana is not entitled to pray in aid the consumer protection provisions of either the Recast Regulation or the Consumer Rights Act, then the EJC is binding as between him and PML and I so hold.

The position as between Weco and Mr Loro Piana.

112. Weco rely on two arguments to establish jurisdiction in this country.

(1) First, they rely on the provisions of Article 8(1) of the Regulation.

(2) Secondly, they argue that they are entitled to the benefit of the EJC by virtue of the Himalaya clause in the booking note.

Does the Court have jurisdiction under Article 8(1) of the Recast Regulation?

113. I start with the argument in relation to Article 8(1), which provides as follows:

"*A person domiciled in a Member State may also be sued:*

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;"

114. By reference to this provision, Weco contend that:

(1) Mr Loro Piana is domiciled in a member state;

(2) He is one of a number of Defendants sued by Weco, including PML, which is domiciled in England;

(3) The claims between Weco and the Defendants are closely interconnected, because the facts relating to the casualty will arise in each claim, and should be determined in the same way;

(4) The fact that the claim against PML was brought with a view to obtaining jurisdiction over the other Defendants is not a bar to the application of Article 8(1): see the decision of the Court of Appeal in PJSC Commercial Bank Privatbank v Kolomoivsky [2020] 2 WLR 993, at paragraph 102.

(5) There is nothing abusive about the bringing of the action, so as to bring the matter within the limits suggested by the Supreme Court in Lungowe v Vedanta Resources PLC [2019] 2 WLR 1051, at paragraphs 31 to 41.

(6) Accordingly, the English Court has jurisdiction over Mr Loro Piana.

115. Mr Loro Piana argues that Article 8(1) does not apply because:

(1) The relevant claims are not so closely connected that they raise the risk of irreconcilable judgments; and

(2) Weco's claim is an attempt to fulfil Article 8 artificially and is thus ineffective to come within the Article.

116. In more detail, the parties submissions were as set out in the paragraphs which follow.

Mr Loro Piana's submissions.

117. Article 8(1) permits a defendant to be sued in the domicile of another defendant where the claims "are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". This is a derogation from the principle of domicile set out in Article 4 and is thus construed restrictively: see paragraph 98 of PJSC Commercial Bank Privatbank v Kolomoisky [2020] 2 WLR 993 (CA).

118. As to the close connection, the danger that Article 8 guards against is the risk of irreconcilable judgments. To satisfy the close connection test *"it is not sufficient that*

there be a divergence in the outcome of the dispute, but that divergence must also arise in the same situation of fact and law": see paragraphs 20 - 21 of Cartel Damage Claims, Hydrogen Peroxide SA v Akzo Nobel NV [2015] QB 906 (ECJ).

119. Another relevant criterion when assessing the closeness of the connection is whether the defendants could reasonably have foreseen that they might be sued in the State where one of them was domiciled: see paragraphs 269 - 274 of Media-Saturn Holding GmbH v Toshiba Information Systems (UK) Ltd [2019] 5 CMLR 7 (Barling J), explaining paragraphs 22 - 24 of the Cartel Damage case. This reflects Recital 16 of the Brussels Regulation, which provides that the close connection test should *"ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen"*.

120. In the present case, Weco has claimed declarations of non-liability against Mr Loro Piana and against PML. For the close connection test it is therefore necessary to consider the claims that Mr Loro Piana has brought and that PML might bring. Mr Loro Piana's claim against Weco arises out of his interest in the Yacht and the damages that he has personally suffered as a result of the loss. The applicable law may be English or Italian law, depending on the validity of the Himalaya contract, the application of Article 6 of the Rome I Regulation to Mr Loro Piana as a consumer and/or the application of Article 4 of the Rome II Regulation.

121. PML has not advanced any claim against Weco and it is not clear on what legal basis, applying which applicable law, PML would pursue such a claim. Weco's own contribution claim against PML is advanced under English law, which may or may not be the same applicable law for Mr Loro Piana's claim against Weco, depending on the factors set out above.

122. Whatever the applicable law for the PML/Weco claims, there is no difficulty with the English Court either deferring a decision on these claims pending the outcome of the decision of the Italian Court in Mr Loro Piana's claims, or granting a declaration of indemnity: see e.g. Shepherd Homes Ltd v Encia Remediation Ltd [2007] EWHC 1710 (TCC) (Jackson J) at paragraphs 734 - 738. The issues in these contingent claims would be quite different to Mr Loro Piana's claims against Weco, as they would focus on apportioning responsibility between Weco and PML for Mr Loro Piana's losses, quite possibly under a different applicable law. Mr Loro Piana does not need to be involved in that litigation to avoid irreconcilable judgments. Accordingly, the claims do not arise out of *"the same situation of law and fact"*.

123. It would also not have been reasonably foreseeable by Mr Loro Piana that he would be sued in England by Weco, the Danish bareboat charterer of the Vessel performing a voyage from Antigua to Genoa, merely on the basis that the forwarder, PML, was English. There is no direct contractual connection between Weco and either of PML or Mr Loro Piana. Weco would not have a claim for compensation in respect of the loss of the Yacht so it is unlikely that a consumer in Mr Loro Piana's position could have foreseen being sued by Weco arising out of the loss of the Yacht at all, let alone in England for a negative declaration. In any event, the convoluted, contingent claim by Weco against PML is not a matter that would have been in Mr Loro Piana's reasonable contemplation.

124. Taken together, these factors demonstrate that the close connection test in Article 8(1) is not satisfied.

125. Second, and in any event, Article 8(1) will not be satisfied by *"an artificial fulfilment of the express condition of a close connection"* (although it is legitimate to commence proceedings against a defendant with the sole object of being able to sue another defendant in the same jurisdiction): see Kolomoisky at paragraph 102. Weco's claim against PML for a negative declaration in the present case is highly artificial, to the extent of being contrived: PML has never intimated a claim against Weco and it is not obvious what claim PML would pursue against Weco. Accordingly, Mr Loro Piana submits that Weco seeks to satisfy Article 8(1) on an artificial and thus inadmissible basis.

Weco's submissions.

126. A claimant with a sustainable claim against an anchor defendant who intends to pursue the claim to judgment against that defendant and a foreign defendant joined as a co-defendant, is entitled to rely on Article 8(1) of the Regulation even if its sole object in commencing proceedings against the anchor defendant was to be able to sue the foreign defendant in the same proceedings (though that is not the factual case here): JSC Commercial Bank Privatbank v Kolomoisky [2019] EWCA Civ 1708 at paragraphs 102-111 (per David Richards and Flaux LJJ).

127. "*Irreconcilable*" means a '*divergence in the outcome of the dispute* [which arises] *in the context of the same situation of law and fact'*: Freeport plc v. Arnoldsson (C-98/06) [2007] E.C.R. I-839 at paragraphs 39-40. The two claims do not need to have identical legal bases: this is only one relevant factor amongst others: Terre Neuve SARL v Yewdale Ltd and ors [2020] EWHC 772 (Comm) at paragraph 64(5), per Bryan J.

128. A difference in legal basis between the actions brought against the various defendants does not preclude the application of Article 8(1), provided that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled. The reasoning is stronger if, as in the main proceedings, the national laws on which the actions against the various defendants are based are substantially identical: Painer v. Standard Verlags GmbH (C-145/10) [2012] E.C.D.R. 6 at paragraphs 81-82.

129. The simple answer to the jurisdictional challenge is thus that the Court has jurisdiction to hear and determine Weco's claim against the Yacht Interests for a declaration of non-liability under Article 8 as this claim is so closely connected with Weco's claim against PML for the same declaration that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

130. Weco claim's for negative declarations against the Yacht Interests and PML will require it to establish that the casualty was not caused by its fault and/or that it is entitled to rely on exclusions of liability in the booking note (via the Himalaya clause), including in respect of deck cargo. Weco's claims against all three Defendants will thus involve an identical factual inquiry as to the cause of the casualty. They also involve the same legal question, namely whether Weco can rely on the booking note exclusions. Although the special jurisdiction under Article 8(1) is available even where the legal basis for the claims against the defendants are distinct (see Freeport plc (supra.)), in this case the legal basis is the same as both the Yacht Interests' and PML's claims against

Weco would arise in bailment and/or negligence (there being no relevant contractual relationship between any of the Defendants and Weco, other than the Himalaya clause). The connection between the claims is amplified by the fact that both claims will be governed by English law under the EJCs (which PML accepts).

131. The single set of proceedings in this jurisdiction will avoid the possibility of different Courts coming to different factual conclusions as to why the Yacht was lost, and in addition, whether Weco is at fault and/or liable for the same. It follows that a single set of proceedings is required to avoid a divergence of outcome in the context of the same situation of law and fact, to adopt the test in Freeport plc. The requisite close connection between Weco's claims against P&M and the Yacht Interests is amply made out.

132. The risk of inconsistent decisions if the dispute between Weco and the Yacht Interests is not determined here is illustrated by the Yacht Interests' allegations in the recently commenced Italian proceedings.

(1) As set out above, the conclusion of London Offshore Consultants (appointed by the Yacht Interests' insurers) is that the Yacht was lost because her cradle was defective without any fault on the part of the Vessel or her crew. That is also Weco's case.

(2) PML has acknowledged service and indicated that it intends to defend Weco's claim for relief against it.

(3) In the Italian proceedings, Mr Loro Piana alleges that the yacht was lashed and secured to the deck of the ship in a completely inadequate manner, and that neither the Master nor officers checked or intervened.

133. In response to the points taken by Mr Loro Piana, Weco say:

(1) Insofar as Mr Loro Piana focusses on the basis of his and PML's claims, actual or potential, against Weco, their analysis is confused. The issue is whether there is a close connection between Weco's claims against the Defendants (the irreconcilable and concurrent resolution of which Article 8 is designed to avoid), not vice versa: Freeport (supra.), at paragraphs 39-41. Hence, the Court needs to be satisfied that the anchor claim is sustainable (see Senior Taxis Aereo v Agusta Westland [2020] EWHC 1348 (Comm)), not the potential claims of the defendants. Secondly, Mr Loro Piana implies that the causes of action sought to be deflected by Weco need to be the same to be closely connected. Even if directed at Weco's claims rather than the Defendants', there is no requirement that the two claims have identical legal bases: Terre Neuve SARL (supra.). Third and in any event, if it matters, the legal route by which Weco intends to establish non-liability as against the Yacht Interests and PML is the same.

(2) Mr Loro Piana argues that it was not foreseeable that he would be sued in the English High Court by Weco. This is a non-point since the legal basis for Weco's primary claim against the Defendants is the same, such that there is no requirement of foreseeability: Painer (supra). In any event, it is difficult to understand why it was not foreseeable that the owner of the Vessel would sue the Yacht Interests in England given that the primary contract- the booking note - provides for exclusive English jurisdiction. At the very least, Mr Loro Piana must have envisaged that any litigation against PML would, if commenced in accordance with the booking note

(and not in breach *per* the Italian proceedings), ensue in this jurisdiction. It was foreseeable that, in such an event, PML (or indeed the Italian parties) might seek to join Weco as a party, prompting Weco to counterclaim for a declaration of non-liability not only against PML but also against the Italian parties. The imperative of minimising the possibility of concurrent proceedings is such that English proceedings involving Weco were always foreseeable. The Italian parties' attempt to argue that being sued by Weco was not foreseeable is an attempt to take advantage of their decision to sue PML (and now Weco) in Italy in breach of the EJCs.

(3) It is said that Weco's claim against PML is artificial to the point of being contrived. This is not so. Weco has brought proceedings against PML precisely because, so far as is possible, it wants to have any possible liabilities it may face determined in a single forum at the same time. There is an obvious possibility that PML might seek to pass on to Weco any liability that it might have to the Yacht Interests. It is notable that PML has indicated that it will defend Weco's claim for a declaration of non-liability to PML. It matters not that PML had not intimated a claim before Weco commenced. This would amount to an argument that a claim for a declaration of non-liability can only serve as an anchor if it is responsive to the threat to litigation. This cannot be correct. No such requirement is disclosed by Article 8. It would be unprincipled to penalise a claimant for taking the initiative to pre-emptively seek a negative declaration. So far as the anchor claim itself is concerned, the only relevant threshold question is whether the claimant has a good arguable case: Senior Taxi (supra.). There is and can be no suggestion that Weco's claim against PML does not meet this threshold. Further, it is not the case that a contingent claim, premised on liability which is denied, cannot be an anchor claim: FKI Engineering Ltd & Anr v De Wind Holdings Ltd & Anr [2008] EWCA Civ 316 at paragraphs 13-14. Finally, there is no reason for the Court to take an adverse view of a claim for negative declaratory relief: Messier Dowty Ltd v Sabens S.A. [2000] 1 WLR 2040 at paragraph 36; and AG Tesauro's opinion in Owners of Cargo lately laden on board the ship Tatry v Owners of the ship Maciej Rataj (C-406/92) [1999] QB 515 at paragraph 23.

(4) Bad faith or abuse is required for a claim to be stigmatised as artificial in the sense contended for by the Yacht Interests: Senior v Agusta at paragraph 65. For examples, see paragraphs 86-87 of Privatbank (supra.), e.g. commencing proceedings against a fictitious anchor defendant. No allegation of abuse or bad faith could be levelled at Weco in this case.

My conclusions.

134. First, I start with the relevant test for the purposes of Article 8(1). In this regard, I was referred to three decisions, namely Painer v Standard Verlags GmbH [2012] E.C.D.R. 6, Cartel Damage Claims, Hydrogen Peroxide SA v Akzo Nobel NV [2015] QB 906, and Media-Saturn Holding GmbH v Toshiba Information Systems (UK) Ltd [2019] 5 CMLR 7.

135. In its decision in Painer, the ECJ had to deal with the question of whether proceedings brought in different member states for the same copyright infringements on different national law bases could be related. It was held that those proceedings might be related. In considering the true meaning and effect of Article 8(1), the Court said this:

"80 However, in assessing whether there is a connection between different claims, that is to say a risk of irreconcilable judgments if those claims were determined separately, the identical legal bases of the actions brought is only one relevant factor among others. It is not an indispensable requirement for the application of Article 6(1) of Regulation No 44/2001 (see, to that effect, Freeport, paragraph 41).

81 Thus, a difference in legal basis between the actions brought against the various defendants, does not, in itself, preclude the application of Article 6(1) of Regulation No 44/2001, provided however that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled (see, to that effect, Freeport, paragraph 47).

82 That reasoning is stronger if, as in the main proceedings, the national laws on which the actions against the various defendants are based are, in the referring court's view, substantially identical.

83 It is, in addition, for the referring court to assess, in the light of all the elements of the case, whether there is a connection between the different claims brought before it, that is to say a risk of irreconcilable judgments if those claims were determined separately. For that purpose, the fact that defendants against whom a copyright holder alleges substantially identical infringements of his copyright did or did not act independently may be relevant.

84 In the light of the foregoing considerations, the answer to the first question is that Article 6(1) of Regulation No 44/2001 must be interpreted as not precluding its application solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned. It is for the referring court to assess, in the light of all the elements of the case, whether there is a risk of irreconcilable judgments if those actions were determined separately."

136. In the case of Cartel Damage, the same language was used by the ECJ, at paragraph 23 of its judgment. The relevant passage is as follows:

"23. Nevertheless, the court points out that, even in the case where various laws are, by virtue of the rules of private international law of the court seised, applicable to the actions for damages brought by CDC against the defendants, such a difference in legal basis does not, in itself, preclude the application of article 6(1) of Regulation No 44/2001 , provided that it was foreseeable by the defendants that they might be sued in the member state where at least one of them is domiciled: Painer's case, para 84."

137. It would appear likely that the reference to Painer was probably intended to be to paragraph 81, not paragraph 84. However, in any event, then I do not think that this case adds materially to what the ECJ had said previously.

138. That brings me to the decision of Barling J in the Media-Saturn case. He dealt with this issue at paragraphs 269-273.

"269. The Panasonic defendants submit that neither PME nor PI could reasonably have foreseen that they might be sued in the English courts in relation to the CPT cartel. In support of this they refer to the following features: the Decision had no UK addressee; the only Panasonic addressees were Japanese companies, as were the Toshiba addressees; the anchor defendant, PE, had not participated in the cartel, had not sold the cartelised product or CTVs, and had not been made a party to any other regulatory process or civil claim relating to the cartel. In these circumstances, there was no reason for PME or PI to think that they might be sued in the English courts in a claim in which PE was used as an anchor defendant. Nor could PME and PI have foreseen that they would be sued in England in proceedings with TIS, an unrelated party, as an anchor defendant. TIS was not an addressee of the Decision, and did not sell the cartelised product during the relevant period. In addition, none of the claimants is UK-domiciled; they do not have retail outlets in the UK; and all the relevant CTV purchases were made outside the UK.

270. Ms Abram submitted that, although one could have a debate about whether the foreseeability criterion is part of the "close connection" condition or is a separate hurdle in addition to that condition, such a debate would be arid: in either case the foreseeability criterion had to be satisfied on its own merits, albeit that it fed into the "close connection" requirement. She also contends that the claimants are wrong to suggest that the question of foreseeability only arises in cases where the claims against the anchor and the non-anchor defendants have different legal bases. Their reliance on CDC for that proposition is, she submits, misplaced: the case law in question decides that art.8(1) can apply even where the claims have different legal bases; it does not decide that the foreseeability requirement is inapplicable where the claims have the same legal base.

271. The relevant passages in CDC are as follows:
"22. As regards, finally, the risk of irreconcilable judgments resulting from separate proceedings, since the requirements for holding those participating in an unlawful cartel liable in tort may differ between the various national laws, there would be a risk of irreconcilable judgments if actions were brought before the courts of various Member States by a party allegedly adversely affected by a cartel.

23. Nevertheless, the Court points out that, even in the case where various laws are, by virtue of the rules of private international law of the court seised, applicable to the actions for damages brought by CDC against the defendants in the main proceedings, such a difference in legal basis does not, in itself, preclude the application of Article 6(1) of Regulation No 44/2001 , provided that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled (see judgment in Painer, C-145/10, EU:C:2011:798 , paragraph 84 [It appears that this reference should in fact be to [81] of Painer .]).

24. That latter condition is fulfilled in the case of a binding decision of the Commission finding there to have been a single infringement of EU law and, on the basis of that finding, holding each participant liable for the loss resulting from the tortious actions of those participating in the infringement. In those

circumstances, the participants could have expected to be sued in the courts of a Member State in which one of them is domiciled."

272. I accept Ms Abram's submission that foreseeability is not only relevant in cases where different legal bases for claims are in play. The statement of the ECJ in Reisch Montage is quite general in that regard, and that decision is expressly referred to by the ECJ in CDC . It is perhaps understandable that the Court should have emphasised foreseeability when referring to a case in which different legal bases for the claims existed, as in such a situation it might be less likely to be satisfied.

273. However, it seems to me that Ms Abram's wider argument is in danger of treating the statement of the ECJ in Reisch Montage as adding a free-standing and distinct criterion of foreseeability to the preconditions of application expressly set out in art.8(1). If that criterion were to be applied generally, and without reference to those express preconditions, there would be a risk of the EU law principle of legal certainty being compromised, instead of respected as Reisch Montage expressly requires. That case states that the special rule in art.8(1) must be interpreted so as to ensure legal certainty. The special rule's express precondition is that "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments …". Therefore, by virtue of Reisch Montage , it is those words that must be interpreted strictly so as to respect legal certainty and thereby ensure foreseeability . In other words, foreseeability is inextricably linked to the closeness of the connection between the two sets of claims, and the criterion will be satisfied if a sufficiently close connection of the kind described in art.8(1) exists."

139. I would respectfully adopt what Barling J says in this passage. Hence, in my judgment, there is no separate requirement of foreseeability in Article 8; such foreseeability is simply part of the inquiry into whether there is a sufficiently close connection between the relevant claims.

140. Furthermore, in the present case, it seems to me that there is clearly a good arguable case, to say the least, that Mr Loro Piana would have foreseen that all claims relating to the casualty would be determined in the English Courts, given the existence of the binding English EJC. Although I see the force in some of the arguments that Mr Loro Piana put forward (as summarised in paragraph 123 above), then it cannot be said that it was unforeseeable that proceedings would be brought in England.

141. I turn therefore to the question of whether there is such a close connection between the claims. The first issue under this head is what the relevant claims are. In my judgment, it is clear from the wording of Article 8 itself that the connection must be between the claims against the various Defendants. In the current case, Weco makes claims against PML, Mr Loro Piana and Credem. What is therefore required is a close connection between those claims, which are for negative declaratory relief.

142. I accept Weco's submission that there clearly is a close connection between their claims against PML and their claims against the Italian parties. As Weco have pointed out, the factual material relating to the cause of the casualty will be common to both sets of claims, and is likely to play a very substantial part in the process of decision making.

In my judgment, it is clearly desirable that these factual issues be determined in the same forum.

143. Nor, in my judgment, is there anything abusive about Weco's proceedings. There is no suggestion that Weco's claim against PML is unarguable, and no application to strike out. In those circumstances, applying the approach taken by the Court of Appeal in Kolomoivsky and the Supreme Court in the Vedanta case, there is no abuse of process in bringing proceedings which are arguable for the purposes of founding jurisdiction over other parties.

144. This brings me, lastly, to Mr Loro Piana's suggestion that, procedurally, this Court should stay these proceedings pending the determination of factual matters in Italy, to which I have made reference at paragraph 122 above. In my judgment, this suggestion is clearly ill founded. For the reasons I have already given, I take the view that Mr Loro Piana's claims in Italy should not go forward as against PML; I consider the position in relation to PMS below. Weco have, in my judgment, established jurisdiction as of right in this Court, and this Court should therefore exercise jurisdiction, absent an application for a stay (which is not suggested here and which would be difficult, if not impossible, to square with the lis alibi pendens regime in the Recast Regulation, since this court is first seised in relation to Weco's claim).

145. For all of the above reasons, I hold that Weco has established jurisdiction in relation to the claim against Mr Loro Piana under Article 8(1) of the Recast Regulation and the challenge made by Mr Loro Piana to the jurisdiction of this Court fails.

146. Strictly speaking, this makes it unnecessary for me to deal with Weco's alternative argument, based on the Himalaya clause in the booking note. However, since it was fully argued, and since it is relevant to the position of PMS, then I propose to deal with the point and I turn to do so.

The argument based on the Himalaya clause.

147. I start with the provisions of the Himalaya clause itself. It will be remembered that that clause (which was clause 17 in the booking note) and which has been set out above, provides (for ease of reference) as follows:

> *"It is hereby expressly agreed that no servant or agent of the Company (including every independent contractor from time to time employed by the Company) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss, damage or delay arising or resulting directly or in-directly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption from liability, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Company or to which the Company is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Company acting as aforesaid and for the purpose of all the foregoing provisions of this clause the*

Company is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the agreement evidenced by this Booking Note."

148. For an analysis of how the Himalaya clause operates, I was referred by both parties to the decision of the House of Lords in The Starsin [2004] 1 AC 715. In particular, I was referred to the analysis of Lord Hoffman at paragraph 93 of the judgment, which reads as follows:

> *"93. A Himalaya clause in a contract of carriage is designed to create contractual relations between the shipper and any third parties whom the carrier may employ to discharge his obligations. It does so without infringing the English doctrines of privity of contract and consideration, which, until the Contracts (Rights of Third Parties) Act 1999, prevented third parties from claiming benefits under contracts. The way it works is this. The shipper makes an agreement through the agency of the carrier with the third party servant or contractor. Such third parties may have authorised the carrier in advance to contract on their behalf or they may afterwards ratify the agreement. The terms of the agreement are that if such a third party renders any services for the benefit of the cargo owner in the course of his employment by the carrier, he will be entitled to the exemptions and immunities set out in the clause. At that stage, the agreement is not a contract. The third party makes no promise to the shipper to render any services and, until he has actually rendered them, no contract has come into effect. It is the act of rendering the services which provides the consideration and brings into existence a binding contract under which the third party is entitled to the exemptions and immunities. The efficaciousness of the clause to achieve these results has been affirmed by the decision of the Privy Council in New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd (The Eurymedon) [1975] AC 154 . The theory of the agreement which becomes enforceable conditionally upon the act providing consideration was developed by Sir Garfield Barwick CJ in his dissenting judgment in the High Court of Australia in Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (The New York Star) (1978) 139 CLR 231 and adopted by the Privy Council when it affirmed his judgment on appeal: see The New York Star [1981] 1 WLR 138 ."*

149. Here, Weco argues that it is entitled to the benefit of the EJC pursuant to the terms of the Himalaya clause, having acted as a servant, agent or subcontractor of PML in performing the carriage of the goods. Mr Loro Piana, for his part, argues that Weco were not a servant or agent of PML; and that even if they were, the Himalaya clause is not apposite to enable such a servant or agent to rely on the terms of an EJC.

Mr Loro Piana's contentions.

150. Himalaya clauses are given effect at common law on the (artificial) basis that the shipper (Mr Loro Piana) agrees in the bill of lading to the putative Himalaya contract and this becomes a binding contract when the carrier's servant then performs their service, whether or not they know about the Himalaya clause. As Lord Hoffmann

explained at [93] of The Starsin [2004] 1 AC 715 (HL) (cited above), *"the third party makes no promise to the shipper to render any services and, until he has actually rendered them, no contract has come into effect"*.[2]

151. In The Mahkutai [1996] AC 650 (PC), the Himalaya clause purported to extend to agents of the carrier *"all exceptions, limitations, provision, conditions and liberties herein benefiting the carrier"*. Lord Goff, giving the Board's judgment, held that this was inapposite to incorporate into the Himalaya contract an English exclusive jurisdiction clause. The clause was concerned with terms inserted to benefit the carrier and therefore *"cannot extend to include a mutual agreement, such as an exclusive jurisdiction clause, which is not of that character"* (p.666E-F). The Court drew support from the function of a Himalaya clause to *"prevent cargo owners from avoiding the effect of contractual defences available to the carrier"*, a function not assisted by extending the clause to the EJC (p.666G). The Court also referred to the principle in Thomas v Portsea [1912] AC 1 (HL) that general words of incorporation are ineffective to incorporate a jurisdiction clause (pp.666H - 667A) as militating against the inclusion of an exclusive jurisdiction clause within the Himalaya clause.

152. Applying The Mahkutai and Thomas v Portsea, clause 17 is no more apt to incorporate the EJC in the present case. Like The Mahkutai, the clause is concerned with terms that benefit the principal (PML). Its function is therefore typical of a Himalaya clause in permitting servants and agents to rely upon the defences available to the carrier. The addition of the word *"right"* adds nothing to *"provision"* in The Mahkutai. The words *"whatsoever nature"* are also ineffective to refer to the EJC because it is well established that this does not overcome the Thomas v Portsea objection that the EJC is ancillary to the contract: see The Channel Ranger [2014] 1 Lloyd's Rep. 337 (Males J) at [38] (which the Court of Appeal affirmed at [2015] QB 366). Moreover, the function of a Himalaya clause is not to *"confer rights and obligations on non-contracting parties"*, such as those found in an EJC, as Morison J explained in Bouygues v Caspian (No.2) [1997] 2 Lloyd's Rep. 485, 490. Accordingly, the technical differences in wording between the clause in The Mahkutai and clause 17 do not justify a different result.

153. In any event, Weco was not a *"servant or agent"* of PML. If the booking note is a forwarding contract, Weco was not a servant or agent of PML in performing its forwarding obligations. Weco was acting as the agent of Zeamarine, the contracting carrier under the contract of carriage.

Weco's contentions.

154. The relevant words of the Himalaya clause are "…every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to [PML] or to which [PML] is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Company…". The wording is immediately to be contrasted with the wording of the Himalaya clause in The "Mahkutai" [1996] AC 650 which provided, "every such servant, agent and subcontractor shall have the benefit of all exceptions,

[2] See also Lord Hobhouse at [153].

limitations, provision, conditions and liberties herein benefiting the carrier as if such provisions were expressly made for their benefit…".

155. The two wordings are plainly distinguishable. The key point is that in The "Mahkutai" the Himalaya clause only passed on the benefit of exceptions etc *benefitting the carrier*. The ratio of the Privy Council decision is at 666F, namely that the words do not extend to mutual agreements in the contract, such as the exclusive jurisdiction clause. There is no such limitation in clause 17; on the contrary, Weco drew attention, in particular, to the words *"of whatsoever nature."* The effect of the Himalaya clause in the instant case is to extend to agents the applicability of all clauses that applied to PML, even if those clauses were not solely for PML's benefit within the booking note contract itself.

156. The EJC is within the meaning of the word *"condition"*. In itself, the word denotes a term of a contract. Consistently with this, the EJC appear below the headings "*BOOKING NOTE TERMS AND CONDITIONS*" and "*BIFA STANDARD CONDITIONS*". The conditions in question are those "*herein contained*", i.e. the terms and conditions of the booking note of whatsoever nature. The resulting breadth of "condition" cannot be overridden or cut down by the heading "*Exemptions and immunities of all servants and agents of the Company*" on which the Yacht Interests rely: *Lewison, Interpretation of Contracts* (6th ed.), §5.13.

157. Further, pursuant to the EJC PML had both a *"right"* to sue in England (and to be sued exclusively in England), and an immunity from being sued anywhere else. The Himalaya clause affords that *"right"* and "immunity" to Weco. This construction is supported by Wyndham Rather Ltd v Eagle Star [1925] 21 Ll. L. Rep 214 where the Court of Appeal held that an insurance slip subject to the usual conditions of the insurer's policy incorporated a submission to arbitration. Weco's construction also gives effect to the parties' commercial expectation that there would be a single forum for litigating disputes arising out of the carriage of the Yacht on the Vessel, given that their contractual relationships are inextricable and governed by a single document: see by analogy the presumption in favour of one-stop adjudication in respect of a COA and guarantee in Stellar Shipping Co LLC v Hudson Lines [2010] EWHC 2985 at paragraph 54.

158. In The "Mahkutai" Lord Goff observed at p.666G-H that the function of a Himalaya Clause "is to prevent cargo owners from avoiding the effect of contractual defences available to the carrier…by suing in tort persons who perform the contractual services on the carrier's behalf", whereas making available the benefit of an exclusive jurisdiction clause does not abet the solution of that problem. That is not right. Foreign courts very often do not give the same effect to contractual defences as the English courts do. Indeed, in the present case. Mr Loro Piana is seeking to disapply English law in the Italian proceedings against PML, arguing that all clauses of the booking note and/or Heavylift Rider Conditions are null, invalid or unenforceable as a matter of Italian law. The contractual defences which a Himalaya Clause extends to servants and agents are thus liable to be defeated or frustrated in a foreign court applying its own law. The enforceability of the EJC, which include English choice of law agreements, is therefore necessary to preserve the efficacy of the protections the Himalaya Clause.

159. Further, the Thomas v Portsea line of authority should be limited to those cases where a bill of lading purports to incorporate the terms of a charterparty and directly analogous cases: see Habas Sinai v Sometal [2012] 1 CLC 448. This is a very different case.

160. Bouygues v Caspian (No.2) [1997] 2 Lloyd's Rep 485, which is relied on by the Italian parties, does not advance matters either. Morison J held that the Himalaya Clause in that case, which applied exceptions etc. "*to and for the benefit*" of sub-contractors *et al* (p.486), was "*in substance and form no different from that which was before the Privy Council*" in The "Mahkutai", and followed Lord Goff's reasoning in that case: p.490. If necessary, Weco will contend Bouygues was to that extent wrongly decided. It is certainly wrong to say, as a blanket proposal, that the function of a Himalaya clause is not to confer rights on non-contracting parties. It depends on the wording of the particular clause. Clause 17 expressly gives agents rights applicable to PML under the booking note.

161. Finally, Weco falls within the definition of "***persons who are or might be his servants or agents from time to time***" (emphasis added). PML performed the booking note as principal. Weco is the bareboat charterer of the Vessel and bailee or sub-bailee of the Yacht, and in those capacities it was delegated performance of PML's obligations under the booking note. It was therefore PML's servant or agent.

My conclusions.

162. Firstly, in my judgment, it is clear that Weco was a servant or agent of PML, so that it is entitled to claim the benefit of the Himalaya clause. As I have found, the contract between Mr Loro Piana and PML was a contract of transport, under which PML undertook to carry the goods. That obligation was in fact subcontracted to Zeamarine, who in turn subcontracted it to Weco. In that regard, Weco were therefore performing the obligations of PML.

163. However, that simply raises the question of whether, as a matter of construction of the Himalaya clause in this case, the clause serves to provide the benefit of the EJC to Weco. Clearly, in this regard, the most relevant authority is the decision in The Makhutai [1996] AC 650.

164. In view of the importance of this authority both to the issue as between Weco and Mr Loro Piana and as between PMS and Mr Loro Piana, I think it necessary to set out *in extenso* the passages from the judgment of Lord Goff in that case. He said:

> ***"The exclusive jurisdiction clause***
>
> *The Himalaya clause provides that, among others, subcontractors shall have the benefit of "all exceptions, limitations, provision, conditions and liberties herein benefiting the carrier as if such provisions were expressly made for their benefit." The question therefore arises whether the exclusive jurisdiction clause (clause 19) falls within the scope of this clause.*
>
> *In The Eurymedon [1975] A.C. 154 , 169 and The New York Star ÜtbÜdc1Ý [1981] 1 W.L.R. 138 , 143 Lord Wilberforce stated the principle to be applicable, in the case of stevedores, to respectively "exemptions and limitations" and "defences and immunities" contained in the bill of lading. This is scarcely surprising. Most bill of lading contracts incorporate the Hague-Visby Rules , in which the responsibilities and liabilities of the carrier are segregated from his rights and immunities, the latter being set out primarily in article IV, rules 1 and 2 , exempting the carrier and the ship from liability or responsibility for loss of or damage to the goods in certain*

specified circumstances; though the limitation on liability per package or unit is to be found in article IV, rule 5 , and the time bar in article III, rule 6 . Terms such as these are characteristically terms for the benefit of the carrier, of which subcontractors can have the benefit under the Himalaya clause as if such terms were expressly made for their benefit.

It however by no means follows that the same can be said of an exclusive jurisdiction clause, here incorporating, as is usual, a choice of law provision relating to the law of the chosen jurisdiction. No question arises in the present case with regard to the choice of law provision. This already applies to the bill of lading contract itself, and may for that reason also apply to another contract which comes into existence, pursuant to its terms, between the shipper and a subcontractor of the carrier such as the shipowners in the present case. But the exclusive jurisdiction clause itself creates serious problems. Such a clause can be distinguished from terms such as exceptions and limitations in that it does not benefit only one party, but embodies a mutual agreement under which both parties agree with each other as to the relevant jurisdiction for the resolution of disputes. It is therefore a clause which creates mutual rights and obligations. Can such a clause be an exception, limitation, provision, condition or liberty benefiting the carrier within the meaning of the clause?

First of all, it cannot in their Lordships' opinion be an exception, limitation, condition or liberty. But can it be a provision? That expression has, of course, to be considered in the context of the Himalaya clause; and so the question is whether an exclusive jurisdiction clause is a provision benefiting the carrier, of which servants, agents and subcontractors of the carrier are intended to have the benefit, as if the provision was expressly made for their benefit. Moreover, the word "provision" is to be found at the centre of a series of words, viz. "exceptions, limitations . . . conditions and liberties," all of which share the same characteristic, that they are not as such rights which entail correlative obligations on the cargo owners.

In considering this question, their Lordships are satisfied that some limit must be placed upon the meaning of the word "provision" in this context. In their Lordships' opinion the word "provision" must have been inserted with the purpose of ensuring that any other provision in the bill of lading which, although it did not strictly fall within the description "exceptions, limitations, . . . conditions and liberties," nevertheless benefited the carrier in the same way in the sense that it was inserted in the bill for the carrier's protection, should enure for the benefit of the servants, agents and subcontractors of the carrier. It cannot therefore extend to include a mutual agreement, such as an exclusive jurisdiction clause, which is not of that character.

Their Lordships draw support for this view from the function of the Himalaya clause. That function is, as revealed by the authorities, to prevent cargo owners from avoiding the effect of contractual defences available to the carrier (typically the exceptions and limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the carrier's behalf. To make available to such a person the benefit of an exclusive jurisdiction clause in the bill of lading contract does not contribute to the solution of that problem. Furthermore to construe the general words of the Himalaya clause as effective to make available to servants, agents or subcontractors a clause which expressly refers to disputes

arising under the contract evidenced by the bill of lading, to which they are not party, is not easy to reconcile with those authorities (such as T.W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd. [1912] A.C. 1) which hold that general words of incorporation are ineffective to incorporate into a bill of lading an arbitration clause which refers only to disputes arising under the charter.

Furthermore, it is of some significance to observe how adventitious would have been the benefit of the exclusive jurisdiction clause to the shipowners in the present case. Such a clause generally represents a preference by the carrier for the jurisdiction where he carries on business. But the same cannot necessarily be said of his servants, agents or subcontractors. It could conceivably be true of servants, such as crew members, who may be resident in the same jurisdiction; though if sued elsewhere they may in any event be able to invoke the principle of forum non conveniens. But the same cannot be said to be true of agents, still less of subcontractors. Take, for example, stevedores at the discharging port, who provide the classic example of independent contractors intended to be protected by a Himalaya clause. There is no reason to suppose that an exclusive jurisdiction clause selected to suit a particular carrier would be likely to be of any benefit to such stevedores; it could only conceivably be so in the coincidental circumstance that the discharging port happened to be in the country where the carrier carried on business. Exactly the same can be said of a shipowner who performs all or part of the carrier's obligations under the bill of lading contract, pursuant to a time or voyage charter. In such a case, the shipowner may very likely have no connection with the carrier's chosen jurisdiction. Coincidentally he may do so, as in the present case where the shipowners happened, like Sentosa, to be an Indonesian corporation. This of course explains why the shipowners in the present case wish to take advantage of the exclusive jurisdiction clause in Sentosa's form of bill of lading; but it would not be right to attach any significance to that coincidence.

In the opinion of their Lordships, all these considerations point strongly against the exclusive jurisdiction clause falling within the scope of the Himalaya clause. However in support of his submission that the exclusive jurisdiction clause fell within the scope of the Himalaya clause in the present case, Mr. Gross, for the shipowners, invoked the decision of the Privy Council in The Pioneer Container [1994] 2 A.C. 324 . That case was however concerned with a different situation, where a carrier of goods subcontracted part of the carriage to a shipowner under a "feeder" bill of lading, and that shipowner sought to enforce an exclusive jurisdiction clause contained in that bill of lading against the owners of the goods. The Judicial Committee held that the shipowner was entitled to do so, because the goods owner had authorised the carrier so to subcontract "on any terms," with the effect that the shipowner as sub-bailee was entitled to rely on the clause against the goods owner as head bailor. The present case is however concerned not with a question of enforceability of a term in a sub-bailment by the sub-bailee against the head bailor, but with the question whether a subcontractor is entitled to take the benefit of a term in the head contract . The former depends on the scope of the authority of the intermediate bailor to act on behalf of the head bailor in agreeing on his behalf to the relevant term in the sub-bailment ; whereas the latter depends on the scope of the agreement between the head contractor and the subcontractor, entered into by the intermediate contractor as agent for the subcontractor, under which the benefit of a term in the head contract may be made available by the head contractor to the subcontractor. It does not follow that a

decision in the former type of case provides any useful guidance in a case of the latter type; and their Lordships do not therefore find The Pioneer Container of assistance in the present case.

In the event, for the reasons they have already given, their Lordships have come to the conclusion that the Himalaya clause does not have the effect of enabling the shipowners to take advantage of the exclusive jurisdiction clause in the bill of lading in the present case."

165. In my judgment, the considerations identified by Lord Goff in this authoritative statement apply equally in the present case, despite minor differences in the wording of the clause.

166. As a matter of the wording of the clause, the Privy Council considered that the words "exception, limitation, condition, liberty or provision" were not broad enough to encompass an exclusive jurisdiction clause. Their reasons for so holding were threefold, and were as follows:

(1) First, they analysed the purpose of the Himalaya clause, which was to extend defences which were available to the carrier to the carrier's servants or agents, so as to avoid the possibility that the allocation of risk in the contract might be subverted by the simple expedient of suing the servant or agent in tort. An exclusive jurisdiction clause was not a defence of this sort; it was a term which was for the mutual benefit of both parties. Weco argued that it was such a defensive clause, because it might be necessary to ensure that defences were given proper effect (since some jurisdictions might not do so). Whilst I can see the practical force in this argument, I do not think that this makes the jurisdiction clause itself a defence.

(2) Secondly, the Privy Council made reference to authorities, including Thomas v Portsea, that indicated that clauses in bills of lading purporting to incorporate the terms of charters were not apposite to incorporate dispute resolution clauses that related to disputes under the charter. Weco argued that these authorities should be limited to the particular question with which they dealt, namely the incorporation of charterparty arbitration clauses into bill of lading contracts, and they referred me to the decision of Christopher Clarke J (as he then was) in Habas Sinai ve Tibbi Gazlar Isthisal Endustrie AS v Sometal SA [2010] EWHC 29. In that case, the question was whether an arbitration clause that had been contained in at least some previous contracts between the two contracting parties was incorporated by reference in a contract which simply provided that the terms of that contract were to be the same as in previous contracts. A distinction was drawn in the case between a "one contract case" where the terms being incorporated were standard terms or from other contracts between the same parties and a "two contract case" where the terms being incorporated came from a contract between different parties. After a consideration of the authorities, beginning with Thomas v Portsea, Christopher Clarke J said this:

> *"52. I do not accept that the present case is to be regarded as a "two-contract" case. Whilst, literally speaking, there is more than one contract to be considered, being the June contract and whatever other contracts between the same parties are to have some of their terms incorporated, the relevant distinction is between incorporation of the terms of a contract made between*

(a) the same and (b) different parties. In short there is a material distinction between categories 1 and 2 on the one hand and categories 3 and 4 on the other. In relation to the latter two categories a more restrictive approach to incorporation is required. That should not, however, mean that a similarly restrictive approach should apply to cases in categories 1 and 2. I agree with Langley J that, if that were so, the exception would swallow up the rule. It is important that it should not do so given that the precise rationale of the rule is debatable; its retention is partly attributable to the desirability of not changing an approach established " for better or worse "; and that the rule is not easily congruent with ordinary principles of construction. Further there is good reason not to apply a more restrictive approach in relation to cases in category 2, where the parties have already contracted on the terms said to be incorporated, than to those in category 1, where the party resisting incorporation is either more or at least as likely to be unfamiliar with the standard term relied on as is the party resisting incorporation in category 2…"

In my judgment, in this case what is involved is clearly a case in which Weco are claiming that a clause in a contract between different parties (PML and Mr Loro Piana) is incorporated, via a contract contained in the Himalaya clause, to govern their non-contractual relationships with the Yacht Interests. This seems to me to be covered by the Thomas v Portsea line of authorities, and I respectfully agree with the Privy Council that those authorities are difficult to square with the proposition that an exclusive jurisdiction clause should be regarded as incorporated by reference via a Himalaya clause.

(3) This latter conclusion is reinforced by reference to the words of the EJC itself, which refer to disputes arising out of or in connection with the booking note. The disputes between Weco and the Yacht Interests arise out of the alleged torts and breaches of bailment on the part of Weco. They do not arise out of the booking note; and only arise in connection with the booking note in the limited manner that they arise out of the actual performance of the carriage undertaken by PML in the booking note. However, whilst there seems to be room for argument in this regard, I would not rest my decision on this ground.

(4) The third consideration identified by Lord Goff was the adventitious result that giving the subcontractor the benefit of such a clause would have. As he said, the EJC would have been chosen by the carrier to reflect a preference for suit in the courts of the place where he carries on business. To extend the benefit of the clause to a party which may well be domiciled elsewhere may mean that all sorts of parties in different parts of the world find that they are entitled and obliged to litigate in the country in which the carrier does business, which is not an obviously desirable result. Such a conclusion clearly goes a long way beyond the original function of the Himalaya clause.

167. For my part, I take the view that I should follow The Makhutai, and hold that the benefit of the EJC is not available to Weco. The wording relied on as differentiating this case from the Makhutai does not, in my view, do anything of the sort.

(1) First, Weco placed reliance on the fact that the clause referred to "conditions" and the EJC was such a condition. However, in the Makhutai, the clause also referred to conditions. The question was what sort of condition the subcontractor was entitled to take the benefit of. The answer given was defensive conditions.

(2) Secondly, Weco placed reliance on the reference to conditions, limitations etc "of whatsoever nature". Again, I think that these words must be taken to refer to terms which have the relevant characteristics. Here, the relevant characteristic is that the term gives a right to a defence.

(3) Thirdly, Weco relied on the reference to "rights" in this clause. Again, I do not think that this extension of the wording of the clause meets the fundamental points made by the Privy Council in The Makhutai, which I have set out above.

168. Accordingly, I conclude that Weco are not entitled to the benefit of the EJC pursuant to the Himalaya clause.

169. I believe that this conclusion makes it unnecessary for me to express any concluded view on one further dispute between the parties, which related to the Sea Waybill.

(1) As I have noted above, that Sea Waybill incorporated an EJC which provided for German jurisdiction. The Sea Waybill also incorporated a Himalaya clause. Hence, Mr Loro Piana argued that Weco, as subcontractors both under the booking note and the Sea Waybill, were parties to inconsistent EJCs and could not rely on either of them.

(2) Weco, for its part, argued that the Sea Waybill had never been intended to be a contract of carriage at all, and referred me to the decision of HHJ Pelling QC in The NorTrader [2020] EWHC 1371, for the proposition that although the parties named in a bill of lading would normally be presumed to be the parties to the contract of carriage evidenced therein, this was not necessarily the case. I quite accept this proposition.

(3) Weco went on to contend that the Sea Waybill was not a contract of carriage at all, because the parties thereto had never intended there to be such a contract. In this regard, reliance was placed on a letter from Zeamarine's lawyers, Holman Fenwick and Willan. As a result, Weco argued that the EJC in the Sea Waybill was irrelevant.

170. In my view, I am not really in a position to determine whether the parties did indeed intend the Sea Waybill to evidence a contract of carriage between Zeamarine and Mr Loro Piana, and I should not do so if I do not have to, since Zeamarine are not before me and I have seen very little evidence on the point. Since I have already determined that Weco are not entitled to the benefit of the EJC under the booking note irrespective of this further argument on the part of Mr Loro Piana, I do not propose to address the issue further.

171. Finally, I should record that the Yacht interests raised a further argument, in relation to the EJC, which is that if the EJC was indeed binding as between Weco and Mr Loro Piana (which I have held it is not) then it would be invalidated by reason of the insurance provisions of the Recast Regulation. They asked, after seeing my draft judgment, that

this argument should be recorded, in case this matter goes further, and I am content to record the fact that the argument was raised. The Yacht interests also accepted that this argument is of academic interest only in the light of my conclusions on other matters, in particular Mr Loro Piana's status as a non-consumer

172. Overall, my conclusion is that the English Court has jurisdiction in relation to the claim made by Weco against the Yacht Interests pursuant to Article 8(1) of the Recast Regulation.

The position as between PMS and Mr Loro Piana.

173. PMS rely on two arguments to establish jurisdiction in this country.

(1) First, they also argue that they are entitled to the benefit of the EJC by virtue of the Himalaya clause in the booking note.

(2) Secondly, they argue that, by virtue of the "conditional benefit" principle, having sued on the booking note in Italy, Mr Loro Piana is bound by the terms of that booking note including the EJC.

174. Again, I should record under this heading the argument that I have referred to in paragraph 171 above, to the effect that the Himalaya clause was not a contract of transport. For the reasons already noted, this argument is academic, but I record the fact that it was made

175. I can deal very briefly with the first of these arguments. Just as in the case of Weco, although I accept that PMS were an agent within the meaning of Article 17, I hold that that clause does not serve to give the benefit of the EJC to PMS.

176. The position is different in relation to PMS's second argument. Under this head, it was argued that Mr Loro Piana had brought suit in Italy under the booking note; that he had therefore sought to take the benefit of that contract as against PMS; and that he was bound to accept the burden of the contract, including the EJC.

PMS's contentions.

177. As a starting point, it is important for the Court to have in mind how Mr Loro Piana puts his case in the Italian Proceedings. In particular the Court was invited to note the following:

(1) Having identified himself, PML and PMS as the parties, the claim asserts "the agreement entered into between the parties is documented by the "booking note" issued by Peters & May Limited".

(2) He asserts a contractual liability on the part of PMS and asks the Court to "find and declare the contractual and/or tort liability of the defendant companies…"

(3) The contract is asserted by Mr Loro Piana to be a Contract of Carriage within the meaning of the Rome 1 Regulation consistent with the allegation that "the claimant contacted Peters and May Limited…a company specialized in transporting

yachts...which it personally engaged to transport the yacht My Song from the Caribbean Islands to Italy at the end of the Winter Season" (emphasis added).

178. Mr Taylor, say PMS, on behalf of Mr Loro Piana, confirms that the claim against PMS in the Italian Proceedings is in contract.

179. Mr Loro Piana cannot legitimately bring a claim (the Italian Proceedings) deriving from, and reliant upon, the contractual relationship set out in the booking note whilst ignoring the exclusive jurisdiction clause. To apply a traditional 'conditional benefit' analysis, if Mr Loro Piana sues under the contract, and he has done, his claim is subject to the terms of the contract including the jurisdiction clause – see *eg Youell v Kara Mara Shipping* [2000] 2 Lloyds Rep 102. "As long as a party in substance seeks to assert rights under or in accordance with the agreement containing the dispute resolution agreement, it would seem to be an inevitable conclusion that those rights can only be asserted consistently with the dispute resolution provision": see Joseph on Jurisdiction and Arbitration Agreements and their Enforcement 3rd Edn. Para.7-17. The cases in this area deal with actions by transferees/assignees. The reasoning applies *a fortiori* to a claim by an original party to the contract. Importantly in this context the Himalaya clause is irrelevant. The jurisdiction clause applies in its own right since it is a condition of the contract under which Mr Loro Piana is suing.

180. To attempt to bring a claim in contract by the contrivance of suing a local agent – and moreover to use the action against that local agent to seek to impose Italian proceedings on PML pursuant to Article 8 Brussel Recast is bordering on abusive.

181. In *Dell Emerging Markets (EMEA) Ltd v 1B Maroc.com* [2017] EWHC 2397 (Comm) a similar tactic was employed. The exclusive jurisdiction clause in that case referred to "any disputes arising out of or in connection with this contract". It was held that this was wide enough to encompass claims against an affiliate which was not a party to the contract in circumstances where the Claimant was asserting contractual obligations against the affiliate (judgment paragraphs 14 to 18). As noted by Teare J in relation to the claim against the affiliate: "it would be inequitable or oppressive and vexatious for a party to a contract…to seek to enforce a contractual claim arising out of that contract without respecting the jurisdiction clause within that contract.": see paragraph 34. Again, the Himalaya Clause is irrelevant to this analysis.

182. In any event, such contractual relationship can only arise if Mr Loro Piana is in fact himself relying on the provisions of the Himalaya clause – the only contract pleaded in the Italian action is the booking note and the only mechanism which makes PMS a party to that contract to any extent is the Himalaya Clause. Mr Loro Piana cannot "take the plums without the duff" in this fashion. Either his case is that the Himalaya Clause is invalid, in which case there is no contract between PMS and himself, or he takes the clause in its entirety. In light of his pursuit of a claim in contract in the Italian Proceedings he has in effect waived by election any right to argue that the Himalaya Clause is invalid.

Mr Loro Piana's contentions.

183. As I understood the position, by the end of the hearing, the only contention put forward in opposition to this analysis was that the claim in contract in Milan was not being made pursuant to the booking note, but on some other (unspecified) contract. This case was

put forward on the basis of instructions given by some unspecified party, and on the basis of a letter produced on the eve of the hearing from the Italian lawyer who represents Mr Loro Piana in Milan, a Mr Scapinello.

184. In that letter, Mr Scapinello says as follows:

> *"I have been provided with a copy of the skeleton argument filed by Peters & May*
> *Srl and wish to clarify a point raised in paragraphs 26 to 31 of that document. Mr Loro Piana's claim against Peters & May Srl in Italy is not based on the Booking Note. It is no part of his case in Italy that Peters & May Srl is a party to the Booking Note or bound by its terms and Mr Loro Piana does not claim damages against Peters & May Srl for breach of the Booking Note. It was not our intention when drafting the Writ of Summons to make any such argument."*

185. Although the other parties objected to this letter being admitted, that objection was never in fact argued out. I propose therefore to take the letter into account.

My conclusions.

186. First, I do not understand the principle of conditional benefit to be in dispute. That principle was considered in the Maroc case, to which PMS made reference, and where Teare J said as follows:

> *"34. I respectfully agree with the approach of David Steel J. in Sea Premium and with the obiter dictum of Popplewell J. in The MD Gemini . The reason why the jurisdiction clause can be enforced by an injunction in those cases and in the present case is that it would be inequitable or oppressive and vexatious for a party to a contract, in the present case IB Maroc, to seek to enforce a contractual claim arising out of that contract without respecting the jurisdiction clause within that contract. If the approach of Longmore LJ in the Yusuf Cepinioglu is applicable to the present case the reason is simply that IB Maroc, when seeking to enforce a contractual right, is bound to accept that its claim must be "handled through the English courts" as required by the contract in question. As with the claim by Dell UK it is accepted that there is no strong reason for not granting the injunction sought."*

187. That principle has also recently been considered by the Court of Appeal and Supreme Court in The Atlantik Confidence. In the Court of Appeal [2019] 1 Lloyd's Rep 221, the principle was succinctly summarised as follows:

> *"If a party, X, acquires rights arising under a contract between A and B, X can only enforce those rights consistently with the terms of that contract. The principle was crisply explained by Hobhouse LJ (as he then was) in The Jay Bola [1997] 2 Lloyd's Rep. 279 , at p.286, with regard to rights acquired by insurers from voyage charterers:*

"...the rights which the insurance company has acquired are rights which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligation of the time charterers to pay that award. Likewise, the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of a dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognising the obligation to arbitrate."

See too, The Tilly Russ, Case C-71/83 [1984] ECR 2417 , at [24] – [26]. These authorities lend no support to Underwriters' case. Nor, for that matter, does Youell v Kara Mara Shipping [2001] Lloyd's Rep. IR 553 , at [56] and following.

57. Secondly, a jurisdiction clause is, by its nature, concerned with proceedings. Had the Bank commenced proceedings against Underwriters to enforce its insurance claim it would, doubtless, have been required to do so in accordance with the English jurisdiction clause contained in the Policy. But it did not do so and that, by itself, is an end of the matter. A mere assertion of its rights, short of commencing proceedings, would not, without more, result in the Bank being bound by the jurisdiction clause in the Policy.

58. Thirdly and in any event, like Teare J, I do not read the Letter of Authority as entailing an assertion of the Bank's rights. I have nothing to add to Teare J's observations (at [51]) on this point.

59. Fourthly, in the circumstances, it is unnecessary to lengthen this judgment by embarking on a consideration of the position which would or might have prevailed had negative declaratory relief been sought. Suffice to say, it was not.

60. It follows that I would dismiss Underwriters' appeal on this Issue."

188. The Supreme Court endorsed this approach at [2020] 2 WLR 919. The matter was dealt with in paragraphs 26 to 30, as follows:

"26. The Bank's entitlement to receive the proceeds of the Policy in the event that there was an insured casualty rests on its status as an equitable assignee. It is trite law that an assignment transfers rights under a contract but, absent the consent of the party to whom contractual obligations are owed, cannot transfer those obligations: Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd [1902] 2 KB 660 , 668-670 per Collins MR. An assignment of contractual rights does not make the assignee a party to the contract. It is nonetheless well established that a contractual right may be conditional or qualified. If so, its assignment does not allow the assignee to exercise the right without being subject to the conditions or qualifications in question. As Sir Robert Megarry V-C stated in Tito v Waddell (No 2) [1977] Ch 106 , 290, "you take the right as it stands, and you cannot pick out the good and reject the bad". This concept, which has often been described as "conditional benefit", is to the effect that an assignee cannot assert its claim under a contract in a way which is inconsistent with the terms of the contract. Several examples of its application or consideration were cited to the court. See, for example, Montedipe SpA v JTP-RO Jugotanker ("The Jordan

Nicolov") [1990] 2 Lloyd's Rep 11 , 15-16 per Hobhouse J; Pan Ocean Shipping Co Ltd v Creditcorp Ltd ("The Trident Beauty") [1994] 1 WLR 161 , 171 per Lord Woolf; Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH ("The Jay Bola") [1997] 2 Lloyd's Rep 279 , 286 per Hobhouse LJ; Youell v Kara Mara Shipping Co Ltd [2000] 2 Lloyd's Rep 102 , paras 58-62 per Aikens LJ; Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS ("The Yusuf Cepnioglu") [2016] 1 Lloyd's Rep 641; [2016] Bus LR 755 , paras 23-25 per Longmore LJ; and Aline Tramp SA v Jordan International Insurance Co ("The Flag Evi") [2017] 1 Lloyd's Rep 467 , para 40 per Sara Cockerill QC, sitting as a Deputy High Court Judge.

27. In my view, the formulation of the principle by Hobhouse LJ in "The Jay Bola" , which the Court of Appeal approved in "The Yusuf Cepnioglu" , is the best encapsulation. In "The Jay Bola" the insurers of cargo for the voyage charterer asserted rights, which had been assigned to them by the voyage charterer by subrogation under foreign law, by raising court proceedings in Brazil against the owners and the time charterer. On the application of the time charterers, Morison J granted an anti-suit injunction against the insurers because the arbitration clause in the voyage charter regulated the means by which the transferred right could be enforced. The Court of Appeal upheld his order. Hobhouse LJ stated ([1997] 2 Lloyd's Rep 279, p 286):
"... the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognizing the obligation to arbitrate."

This formulation emphasises the constraint on the assertion of a right as being the requirement to avoid inconsistency and, whether the clause is an arbitration clause, as in "The Jay Bola" , or an exclusive jurisdiction clause, as in Youell (above), it is the assertion of the right through legal proceedings which is in conflict with the contractual provision that gives rise to the inconsistency.

28. In Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA [2016] 5 SLR 455 , para 55, the Singapore Court of Appeal, commenting on "The Jay Bola" and the proposition that an assignee does not become a party to the contract but would not be entitled to enforce its rights against the other party without also recognising the obligation to arbitrate, stated:
"This approach of entitlement rather than obligation may be more easily reconcilable with the consensual nature of arbitration. This is because the assignee is only taken to submit to arbitration at the point it elects to exercise its assigned right."

29. In the present case the Bank did not commence legal proceedings to enforce its claim. Indeed, it did not even assert its claim but left it to the Owners and the Managers to agree with the Insurers the arrangements for the release of the proceeds of the insurance policy by entering into the Settlement Agreement. It is not disputed that the Bank was not a party to the Settlement Agreement and the Bank derived no rights from that agreement. The Letter of Authority, which the Bank produced at the request of the Owners and the Managers, enabled both the Insurers and Willis Ltd to obtain discharges of their obligations and to that end it

was attached to the Settlement Agreement. The Letter of Authority facilitated the settlement between the Insurers and the Owners and provided the Owners/Managers with a mechanism by which the Bank as mortgagee, assignee and loss payee could receive its entitlement. At the time of payment of the proceeds of the Policy there was no dispute as to the Bank's entitlement and no need for legal proceedings. There was therefore no inconsistency between the Bank's actions and the exclusive jurisdiction clause. The Bank therefore is not bound by an agreement as to jurisdiction under article 15 or article 25 of the Regulation.

30. The Insurers argue that, if they had refused to pay the proceeds of the Policy to the Bank and had commenced proceedings against the Bank in England seeking negative declaratory relief, the Bank would have been bound by the exclusive jurisdiction clause. They submit that it makes no sense to distinguish a claim for negative declaratory relief from the Bank's claim. This is because the Bank's right to sue for an indemnity under the Policy and the Insurers' right to sue for a declaration that it is not liable to the Bank are the same cause of action: Gubisch Maschinenfabrik KG v Palumbo (Case 144/86) [1987] ECR 4861 , paras 15-19. This incoherence, it is submitted, militates against the Bank's analysis. I disagree. The Bank is not a party to the contract contained in the Policy. The Bank is not bound by that contract to submit to the jurisdiction of the English courts if the Insurers raise an action in England. If the Insurers' claims fall within section 3 of the Regulation, the Insurers may bring proceedings against the Bank only in the courts of the member state of the Bank's domicile, that is The Netherlands. I turn then to that question."

189. This being the position as a matter of law, the fundamental issue between the parties was whether Mr Loro Piana had in fact made a claim on the booking note contract in Milan, so as to come within this principle. In this regard, PMS relied on what was said in the writ of summons, which has been summarised above; whereas Mr Loro Piana relied on what was said in Mr Scapinello's letter.

190. I do not think that I need to make any final determination in this regard. The question is whether, applying the Kaefer test, PMS have shown a good arguable case that they are entitled to the benefit of the EJC. In my judgment, having regard to what is said in the writ of summons in Italy, they have clearly satisfied this requirement.

191. Following the argument, I was provided with a further letter from Mr Loro Piana, in which he undertook to this Court not to pursue any contractual claim on the booking note (my emphasis). It was suggested that this should assuage any concern on my part. However, it does not, and indeed my concerns remain just as great. The probable suggestion from that letter is that it is Mr Loro Piana's intention to pursue tortious claims in Italy. In my judgment, given the width of the EJC, such claims would also be caught by it. Thus, the pursuit of a tortious claim would still be a breach of the EJC, and any such claim should equally be stayed pursuant to the EJC.

192. Accordingly, Mr Loro Piana's challenge to the jurisdiction of this court as against PMS cannot succeed, and I dismiss it.

The position of Credem.

193. I turn next to the position of Credem, the owner of the yacht. The dispute in this regard can be simply stated. It is Credem's case that:

(1) It is not party to the booking note, and thus not bound by the EJC as against PML;

(2) It would not reasonably have been understood to be a party to the EJC, since Mr Loro Piana held himself out as the Owner of the yacht;

(3) It has not sued PMS in Italy, and cannot thus be bound on the principle of conditional benefit;

(4) Weco and PMS cannot rely on the Himalaya clause as against Credem;

(5) Weco's claim against Credem under Article 8(1) fails for the same reasons as does the claim against Mr Loro Piana.

194. In my judgment, the position here is as follows.

195. In relation to the claim on the booking note against PML, then the evidence before me is insufficient to make any final determination. On the one hand, Mr Loro Piana, in the booking note, warrants that he has the authority of the Owner to make the contract on its behalf, and there is no dispute but that Credem is the Owner. On the other hand, it is Mr Taylor's evidence (though the source for his evidence is not identified) that Mr Loro Piana was not an agent from Credem. It seems to me that in these circumstances, there is a plausible evidential basis for the assertion that Credem is a party to the booking note and bound by the EJC. If and to the extent that any argument to the contrary was pursued, and it is not clear to me that it was, then I hold that the formal requirements of Article 25 of the Regulation are satisfied by the terms of the booking note. As regards the argument that the true position must be ascertained by reference to the factual matrix at the time, then there is in my judgment again insufficient evidence to determine this point at this stage, with the result that, again, a plausible evidential basis suffices.

196. In relation to the claim made against Mr Loro Piana under Article 8(1), Credem accepts that if, as I have held, jurisdiction against Mr Loro Piana is established, jurisdiction under Article 8 will also have been established against it.

197. This leaves the position as between PMS and Credem. PMS relied on the following arguments, in submissions served after the hearing (at my request) that PMS was entitled to rely on the EJC as against Credem for the following reasons:

(1) First, Credem was party to the booking note contract. For the reasons set out in relation to Mr Loro Piana, I have concluded that there is an arguable case in this regard.

(2) However, the question that remains is whether PMS are a party to that contract. On the face of the contract, they are not. The service provider is clearly identified as PML

(3) PMS sought to get round this problem by relying on the Himalaya clause. For the reasons set out in relation to Weco, earlier, I have concluded that the Himalaya clause does not extend the benefit of the EJC to PMS

(4) By way of alternative PMS sought to suggest that if they were sued by Credem on the booking note, then they would be entitled to rely on the EJC because of the principle of conditional benefit; and that they could pre-empt the question by suing for negative declaratory relief. In this connection, they relied on the decision in Follen Fischer AG v Ritrama Spa [2013] QB 523. In response, Credem pointed to the decision of the Supreme Court in The Atlantik Confidence, *ref supra*, the relevant passages of which I have set out above. They submitted that that case made clear that the conditional benefit argument could only apply where a party had in fact commenced proceedings, and here Credem had not. I accept that submission.

(5) Nor do I think that the Follen Fischer case assists PMS. There the question was whether the provisions in the Regulation relating to tort applied to claims for negative declaratory relief in relation to the question of whether there had been no tort, brought in the courts of the country which had jurisdiction in relation to claims in tort. The Court held that such a claim was permissible, since it was the obverse to a positive claim in tort, which could be brought in that jurisdiction. That case is of no assistance in relation to the question of whether a party can bring negative declaratory relief proceedings in relation to an EJC where that party has no current grounds for saying that it is a party to that EJC

198. Overall, therefore, I conclude that there is no current entitlement vested in PMS to rely on the EJC as against Credem. Whether, in the future (if, for example, Credem sought to bring proceedings against PMS) is something that would have to be considered when that question arose.

Summary of conclusions.

199. I can summarise my conclusions as follows:

(1) There is a good arguable case that PML is entitled to rely on the EJC as against both Mr Loro Piana and Credem. The Milan proceedings against PML should therefore be stayed, in favour of the proceedings in England.

(2) There is a good arguable case that Weco is entitled to found jurisdiction against PML, Mr Loro Piana and Credem under Article 8(1) of the Recast Regulation. The English Court was first seised of these proceedings.

(3) There is a good arguable case that PMS is entitled to the benefit of the EJC (as against Mr Loro Piana) by reason of the principle of conditional benefit, on the basis that Mr Loro Piana, by (at least arguably) bringing proceedings on the booking note contract in Italy against PMS, became bound to comply with the terms of the EJC. Again, therefore, the Milan proceedings against PMS should be stayed, in favour of the proceedings in England.

(4) This leaves the position as between PMS and Credem. Here, in my judgment, there is no good arguable case that PMS may currently rely on the EJC as against Credem, since they cannot rely on either the Himalaya clause or the conditional benefit

argument. Whether they would be able to do so if proceedings were brought is a matter that I cannot and do not determine.

200. I would like to express my thanks to all Counsel and their teams for their assistance. In addition, I would be grateful if Counsel could draw up an order to give effect to this judgment.