Neutral Citation Number: [2015] EWHC 811 (Comm)

Case No: 2014 FOLIO 1109

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

Royal Courts of Justice
Rolls Building
7 Rolls Building
Fetter Lane, London, EC41 1NL

Date: 25/03/2015

Before :

MR JUSTICE BLAIR

- -

Between :

IMPALA WAREHOUSING AND LOGISTICS (SHANGHAI) CO. LTD	**Claimant**
- and –	
WANXIANG RESOURCES (SINGAPORE) PTE. LTD	**Defendant**

- -
- -

Simon Picken QC and Jawdat Khurshid (instructed by **Reed Smith LLP**) for the **Claimant**
James Collins QC (instructed by **Edwin Coe LLP** agents for **Rodgers Liu & Assoc. Solicitors (Asia) Pte Ltd**) for the **Defendant**

Hearing dates: 10-12 March 2015

- -

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.

.....

MR JUSTICE BLAIR

Mr Justice Blair :

1. This case concerns warehouse receipts, a common instrument in trade and finance, and specifically whether because of an exclusive jurisdiction clause said to have been incorporated in the receipts, the claimant warehouse company is entitled to an anti-suit injunction preventing the defendant from pursuing proceedings in the Shanghai courts which the claimant says are based on the receipts.

2. The defendant says that its proceedings in Shanghai are "non-contractual" and so governed by the law of the People's Republic of China. It says that a ruling of the Shanghai courts that the clause does not apply is conclusive, and that in any event that under English law principles the clause was not incorporated. Further, it says that even if the claimant is correct, the case is not one in which an injunction should be granted.

3. The factual background is what is said to have been a major fraud concerning metal held at a bonded warehouse in Qingdao which came to light towards the end of May 2014, leading to the authorities placing the warehouse in lockdown. It appears that warehouse receipts were issued to multiple lenders in respect of the same cargo. There are other cases pending in respect of this matter in the English courts and in the PRC courts.

4. It should be noted that, when used in trade and financing, these documents are given various names, though probably the most common is "warehouse receipts". In this case, the documents are called "warehouse certificates". The court was told that in Chinese it is the same word, and can be translated either way.

The parties

5. The claimant is Impala Warehousing and Logistics (Shanghai) Co. Ltd, a company incorporated in the PRC. Until January 2014, it was known as NEMS Warehousing and Logistics (Shanghai) Co. Ltd. It is part of the Impala Terminals Group which is owned by the Trafigura Group. It will be referred to as "Impala Shanghai".

6. The defendant is Wanxiang Resources (Singapore) Pte Ltd, a company incorporated in Singapore. It is a trading company and is part of the Wanxiang Group, which is one of the largest privately owned conglomerates in China. In 2013 it had a turnover of about US$10 billion. It will be referred to as "Wanxiang".

7. Wanxiang usually finances its trading using lines of credit from its banks. The credit and collateral arrangements particularly at issue in this case are with Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A, known as Rabobank International. It will be referred to as "Rabobank", the relevant branch being its Singapore Branch.

The proceedings

8. An interim anti-suit injunction against Wanxiang was granted by Teare J in this court *ex parte* but on notice to Wanxiang on 19 September 2014. Both sides were represented at that hearing.

9. There was a further hearing before Teare J on 17 December 2014. Handing down judgment on 15 January 2015, he refused Impala Shanghai's application for a final anti-suit injunction, and for an interim mandatory injunction requiring Wanxiang to discontinue the Shanghai proceedings. He also refused Wanxiang's application to discharge the injunction granted on 19 September 2014. He granted Impala Shanghai's application for a speedy trial, and directions were given that the claim should continue under the Part 8 procedure.

10. The trial took place between 10 and 12 March 2015. Pursuant to directions given on 15 January 2015, there was a considerable body of documentary and factual evidence before the court. Since the Part 8 procedure was used, there were no pleadings, the parties' cases being set out in their written submissions.

11. There were a considerable number of witness statements before the court. The oral evidence was as follows: (1) for Impala Shanghai, Mr Charles Bucknall, Head of LME Warehousing, Business Development Director of the Impala Group; (2) for Wanxiang, Ms Selena Sun, Deputy Finance Manger of the company, who gave evidence by video-link from Singapore.

12. Expert evidence on PRC law was given for Impala Shanghai by Mr Li Hai, and for Wanxiang by Professor Chen Zhidong. Both are senior and respected figures in their field.

13. In terms of relief, Impala Shanghai seeks (1) a final mandatory injunction requiring Wanxiang to discontinue the proceedings against it in Shanghai, and (2) a final prohibitory injunction restraining Wanxiang from commencing or continuing proceedings other than in the English courts against Impala Shanghai "arising out of or in connection with" two warehouse certificates issued by Impala Shanghai on 15 May 2014.

The facts

14. As noted, this trial has come on quickly under the Part 8 procedure, and not every factual query in what is overall a very complex picture can be answered. For example, it is not possible (or necessary) to follow precisely what was happening to the goods particularly during the period April – May 2014 when Wanxiang was dealing with them, though some idea is useful. Some of the surrounding factual matters are strongly disputed.

15. For the purposes of the issue for decision, and on the material before the court, the facts as I find them are as follows.

What happened to the aluminium

16. The metal to which the dispute relates consists of 5004.343 metric tonnes (net weight) of aluminium ingots shipped from Russia to Qingdao at the end of 2012.

17. It seems that the aluminium was stored at a bonded warehouse operated by Qingdao Port (Group) Co. Ltd. Dagang branch (There is a dispute about the adequacy of the security arrangements at the warehouse which need not be resolved.) The fact that the aluminium was in a bonded warehouse meant that it was free at that stage of customs

formalities or import duties. The evidence is to the effect that this shipment was part of a much larger amount of metal at the warehouse.

18. A warehouse receipt was issued by Qingdao Port (Group) Co. Ltd Dagang branch to Impala Shanghai dated 25 January 2013.

19. Mr Bucknall says that based on this warehouse receipt, and at the request of Qingdao Decheng Resources Co. Ltd ("Decheng"), a trading company known to Impala, Impala Shanghai issued a warehouse certificate to Deutsche Bank AG, London branch, on 29 January 2013. He says that his assumption is that Deutsche Bank had been financing the goods on behalf of Decheng.

20. As noted, Impala Shanghai did not operate the warehouse. Mr Bucknall's evidence was that because of applicable regulations, space was leased by Impala Shanghai through a Chinese intermediary called Qingdao Hongtu Logistics Co. Ltd.

21. Mr Bucknall says that the aluminium remained stored on this basis for over a year.

22. In fact, the next development as regards the goods appears to have been on 15 April 2014, when Wanxiang entered into a sale and purchase agreement with Decheng to purchase 5004.343 MT of aluminium stored at the warehouse, in other words the same amount as the original shipment.

23. That purchase was financed by Australia and New Zealand Banking Group Ltd ("ANZ"), Singapore branch. On 21 April 2014 (following a release by Deutsche Bank) Impala Shanghai issued a warehouse certificate in favour of ANZ.

24. Ms Sun says that on 15 May 2014, in order to accommodate business requirements, it requested that the original warehouse certificate be split. Accordingly, on 15 May 2014, Impala Shanghai issued two warehouse certificates, one for 4954.343 MT, and the other for the small balance of 50 MT.

25. At this time, Rabobank was Wanxiang's financing bank, and the warehouse certificates were made out by Impala Shanghai in its favour. These are the documents on which Impala Shanghai places primary reliance in support of its application for an anti-suit injunction. They are described further below.

26. There was other trading activity by Wanxiang as regards the metal around this time. Impala Shanghai says that the documents show that Wanxiang bought and sold the goods three times. It is not necessary to make precise findings. Impala included in its closing submissions a diagram based on the material before the court showing sale and purchase contracts between 15 April 2014 and 16 May 2014, which was broadly accepted by Wanxiang.

27. On or about 27 May 2014, the Chinese authorities placed the warehouse in lockdown as part of a criminal investigation. Neither Impala Shanghai nor Wanxiang has had access to the warehouse since.

28. The parties are in dispute as to what has happened to the 5004.343 MT of aluminium. According to Wanxiang's evidence, based on verbal information, it can safely be assumed that the cargo went to Korea in April 2014, or earlier. If that is the case, the

warehouse certificates issued subsequently by Impala Shanghai would relate to aluminium that was not in the warehouse at the time of issue.

29. Impala Shanghai's position is that the fate of the goods is not known—they might remain in the warehouse, or they might not. According to an 18 April 2014 stock report, the goods were still in the warehouse then, but Impala Shanghai says that some suspicion has fallen on the third party company which executed the stock report, which might be unreliable.

30. On 27 May and 4 June 2014, Wanxiang repaid the loan advanced by Rabobank, and Rabobank endorsed the two warehouse certificates in blank and delivered them to Wanxiang. By letter of 4 July 2014, Rabobank stated that it had been repaid in full its liabilities in connection with the warehouse certificates, and asked Wanxiang to provide Impala with notice that the warehouse certificates had been transferred to Wanxiang.

Wanxiang's proceedings in Shanghai against Impala Shanghai

31. On 5 August 2014, Wanxiang commenced proceedings in the Shanghai No. 1 Intermediate People's Court seeking an order that Impala Shanghai deliver to it 5004.343 MT of aluminium ingots, or if delivery cannot be made, pay as damages US$8,925,245.74. Impala Shanghai's case is that Wanxiang is bringing the claim founded on the warehouse certificates which Rabobank transferred to it, but Wanxiang does not accept this.

32. On 11 September 2014, Impala Shanghai objected to jurisdiction on the ground that under the warehouse certificates, the English courts had exclusive jurisdiction. On 26 September 2014, the court ruled against this objection, on the ground that England has no connection with the dispute.

33. On 9 October 2014, Impala Shanghai petitioned for appeal. On 2 December 2014, the Higher People's Court of Shanghai Municipality dismissed the appeal on the basis that the warehouse certificates were receipts, and that there was no evidence to prove that Impala Shanghai and Wanxiang had reached a consensus in respect of the jurisdiction clause.

34. On 19 and 24 December 2014 respectively, Wanxiang and Impala Shanghai asked the Intermediate People's Court to adjourn the proceedings pending resolution of the anti-suit proceedings in England. The court did not accede to these applications. There was a further hearing on 21 January 2015, but the court declined to accept a further application for an adjournment. No further information is before this court as to the current status of the Shanghai proceedings.

<u>The Collateral Management Agreement</u>

35. Impala established (or re-established) its Shanghai office in 2011, and thereafter sought to develop its business, including with Wanxiang. Doing business with a trading company involved negotiating a tripartite collateral management agreement with the bank or banks which would be providing the company with credit for its trading activities.

36. In the present case, the relevant bank (as indicated above) was Rabobank, which had a facility agreement (subsequently amended) with Wanxiang dated 21 May 2009, the credit limit current at the relevant time being US$160m.

37. On 2 November 2012, Impala Shanghai sent Wanxiang a sample of collateral management agreements entered into with other banks. These annexed a form of warehouse certificate in similar format (though some expressly referred to the collateral management agreement, and others did not).

38. In the event, a previous agreement entered into in 2012 with another of Rabobank's clients served as the template.

39. The Collateral Management Agreement ("CMA") was made on 30 April 2013 between Rabobank, Wanxiang, and North European Marine Services Ltd ("NEMS"). This is a UK company which has since been renamed Impala Terminals UK Ltd ("Impala UK"), and like Impala Shanghai is part of the Impala Group. The way the structure was described to Rabobank in earlier emails was that Impala UK is "our global HQ", whereas Impala Shanghai is "the agent for handling goods in China". It is Impala Shanghai that would issue the warehouse certificates in the form annexed.

40. The CMA describes its role in the recitals. It is recorded that the bank has agreed to grant credit facilities to Wanxiang secured by a pledge over goods by Wanxiang. It recites that NEMS (i.e. the company now renamed Impala UK) carries on the business of a collateral manager, and that Wanxiang and the bank are to appoint it to manage and control the receipt and release of the goods and to provide collateral management services. These may be rendered through its agent.

41. Among the terms agreed:

    (1) Clause 2.2 contains an acknowledgement by NEMS of the bank's pledge over the goods to be purchased by Wanxiang and stored in the warehouse facilities.

    (2) Clause 3.1 provides that NEMS may render the services described in the Agreement by an agent.

    (3) Clause 4 provides that the goods shall be stored in "Warehouse Facilities".

    (4) Clause 5 provides for Warehouse Certificates to be issued in the format prescribed in Annex III.

    (5) Clause 8 provides for the limitation of NEMS' liability for loss.

    (6) Clause 14.1 provides that, "This Agreement shall be construed in accordance with the laws of Singapore and the Parties hereto shall submit to the non-exclusive jurisdiction of the Courts of Singapore".

The Warehouse Certificates

42. The Warehouse Certificates issued by Impala Shanghai on 15 May 2014 are in the form prescribed in Annex III of the CMA (taking account of the name change noted above).

43. On their face, the certificates state:

> "Herewith we undertake to deliver to you, against presentation of this original warehouse certificate, duly endorsed.
>
> This warehouse certificate and all disputes arising from it shall be subject to the Terms and Conditions of IMPALA.
>
> Received in apparent good order and condition, unless stated otherwise.
>
> Issued TO ORDER OF Rabobank International, Singapore Branch"

44. The certificates go on to set out their respective packages, being 4954.343 MT and 50 MT in accordance with the split set out above.

45. At the bottom, the certificates state "please note additional conditions of the warehouse certificate printed at the back of this page".

46. On the back are various terms, including:

> "The Goods are received and stored under the Terms and Conditions of Impala, which updated by Impala from time to time. The latest version of the Terms and Conditions of Impala is posted on the official website of Impala at www.impalaterminals.com.
>
> …
>
> This Warehouse Certificate itself and all disputes arising from it shall be subject to the Terms and Conditions of Impala."

47. Impala Shanghai's case is that this is a reference to the UK Warehousing Association Contract Conditions for Logistics on the Impala Terminals website. Clause 10 provides that:

> "All contracts between the Company and the Customer and any claims relating to the Goods shall be governed by the law of England and disputes dealt with exclusively by the English courts."

The basis for Impala Shanghai's application for an anti-suit injunction is that this clause is incorporated into the warehouse certificates.

48. The link to the webpage containing the terms and conditions (along with others which are inapplicable) is contained in Annex IV to the CMA, immediately following the form of the Warehouse Certificate in Annex III.

The issues

49. Impala Shanghai's case is as follows. Wanxiang's claim in the Shanghai courts is under the Warehouse Certificates. This claim is contractual in nature, and/or a claim in bailment on the terms set out in the Warehouse Certificates. It thereby falls within the exclusive English jurisdiction clause it contends is incorporated in the certificates. There are no "strong reasons" why an anti-suit injunction should not be granted. Alternatively, injunctive relief is appropriate on the grounds that Wanxiang has been guilty of "vexatious" conduct.

50. In response, Wanxiang makes a number of points, which can be summarised as follows:

    (1) The claim that Wanxiang has behaved with vexatious conduct is hopeless.

    (2) Wanxiang's claim in the Shanghai proceedings is to be characterised as "non-contractual". The claim is understood in English terms as a claim in bailment on terms, but whether or not it is treated as being "on terms" has to be determined by the law that governs the "non-contractual" claim, and that law is Chinese law. The Chinese Court having determined that, as a matter of Chinese law, Wanxiang's claims are not subject to the exclusive jurisdictions clause, "that is the end of Impala Shanghai's case".

    (3) Alternatively, the English jurisdiction clause was not incorporated. In that regard, the relevant transaction was carried out under the CMA, with a Singapore jurisdiction clause.

    (4) In any case, the court should not grant an injunction, because there are "strong reasons" for not doing so in circumstances where (as is common ground) an English judgment will not be enforceable against Impala Shanghai in China.

51. As regards the underlying commercial issues in this dispute, Wanxiang's opening submission asserts that the claim in Shanghai "… is akin to an English claim in negligence and/or conversion against a bailee". It continues, "The merits issue that arises in these circumstances is whether or not Impala Shanghai can rely on the terms in the Warehouse Certificates so as to limit its liability in tort – i.e. is this a bailment or sub-bailment "on terms" (and if so, which terms)".

52. Impala Shanghai's closing submission asserts that "… it very much matters in monetary terms that the underlying claim is determined in England because the effect of the limitation provisions in Impala's terms and conditions is that a claim of approximately US$10 million will be reduced to about US$1 million, yet it is likely that the Chinese Court will refuse to apply those provisions". Without commenting on the accuracy of this assertion, which does not arise for decision, taken with the other claims, it is to be inferred that the sums at stake may be substantial.

53. At the interlocutory stage, an applicant must show to a "high degree of probability" that it is entitled as of right to restrain the foreign proceedings (*Malhotra v Malhotra* [2013] 1 Lloyd's Rep 285 at [68] et seq, Walker J). That is because an interlocutory injunction restraining the foreign proceedings may in effect decide the matter. This application has come on for trial, and the parties are agreed that so far as factual, the issue has to be decided on the balance of probabilities.

Warehouse receipts

54. Warehouse receipts are common instruments in trade and finance, and may contain, or evidence, a contract between the warehouse and the party on whose behalf the goods are stored. In the present case, the receipts in dispute were made payable to the order of the bank which was providing finance for trading in warehoused metal. The receipts thereby constituted the bank's security, or more accurately an essential part of it.

55. A warehouse receipt represents goods in the possession of a warehouse. The document gives a description of the goods, and is a receipt for the goods stored. At common law, warehouse receipts are not treated as negotiable documents of title (unlike bills of lading). However, though not in itself conferring possession of the goods on the holder, possession of a warehouse receipt in effect gives the holder the right to possession of the goods. The evidence in this case, for example, is that without receiving the receipt back, the warehouse will not release the goods. See generally Cook and Wynne, *Warehouse receipts past, present and future*, (1998) International Banking and Financial Law at p.8.

56. Where a financing institution gives credit against the goods, in the ordinary course it will require security, in this case by way of pledge (see generally Beale, Bridge, Gullifer, and Lomnicka, *The Law of Security and Title-Based Financing*, 2nd ed, ch.5). In terms of legal analysis, a pledge is a possessory security, which at common law can be constituted by the warehouse "attorning" to the pledgee, that is acknowledging that it holds the goods for the pledgee, thereby giving the pledgee constructive possession (*Chitty on Contracts*, 31st ed, 33-120).

57. The way this works in practice in a case like the present has been described as follows by Patrick Yung, *Pledge by constructive delivery in Hong Kong*, (2013) International Company and Commercial Law Review, 273:

> "A commodity trader commonly uses the goods of the transaction as security to raise finance for the payment of the goods. Nonetheless, actual delivery is rarely used in practice to complete a pledge for various reasons. For physical goods, the banks usually do not have the capacity or are unwilling to deal with the pledged physical goods themselves because of different practical problems. As to a bill of lading, the document is usually not available to the purchaser in most circumstances. To start with, a supplier will not easily release the bill of lading to the buyer until a substantial or full payment is made by the purchaser in order to protect its own position. In some other cases, a freight forwarder will be involved to consolidate assignments by different shippers or by the same shipper acquiring goods from different suppliers which are destined for the same port in order to enjoy a discounted freight rate. There will only be a single bill of lading issued to the forwarder in the forwarder's name. Finally, in local transactions or in the case of Hong Kong, cross-border transactions between Hong Kong and southern China, no sea/air transportation may be required and hence simply no bill of lading is available.

> Instead, the purchaser creates a pledge by an attornment with the financing bank. The purchaser will deliver to the financing bank certain documents relating to the goods, such as a warehouse receipt or a cargo receipt, coupled with an acknowledgement from the purchaser (if the goods are in the custody of the purchaser) or from a third party (if the goods are in the custody of a third party) that the purchaser or the third party is holding the goods on behalf of the bank."

58. The principles were explained by Lord Wright in *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 at 58:

> "At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledgor had the actual goods in his physical possession, he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him; there was thus a change of possession and a constructive delivery: the goods in the hands of the third party became by this process in the possession constructively of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodier (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated as a transfer of the possession of, as well as the property in, the goods."

59. In some countries, warehouse receipts are the subject of specific statutory provision. The evidence in this case shows that the Contract Law of the People's Republic of China deals specifically with Warehousing Contracts in Chapter 20, and among the provisions, is the obligation on the warehouse to deliver a receipt. In the United States, the Uniform Commercial Code (Article 7 - documents of title) deals with warehouse receipts in Part 2.

Discussion and conclusions

(1) The argument that Wanxiang has acted vexatiously

60. The principles governing the grant of anti-suit injunctions are not in issue. An anti-suit injunction may be ordered i) Where there is a legal right not to be sued in the foreign court where, for example, the foreign proceedings are a breach of a

jurisdiction or arbitration clause, or ii) Where there is no legal right not to be sued in the foreign court, but there is an equitable right because the pursuit of proceedings in the foreign court is vexatious and oppressive (*Kallang Shipping SA v Axa Assurances Senegal* [2006] EWHC 2825 (Comm) at [20], Gloster J).

61. Impala Shanghai's argument under the second head that Wanxiang has been guilty of vexatious conduct has no merit. It is based on the fact that Wanxiang's legal argument in this court has as it was put "flip-flopped". Whilst it is true that with a change in counsel, Wanxiang's legal analysis has significantly changed, that does not render its conduct vexatious. This is a case in which there is a genuine and difficult dispute as to jurisdiction.

(2) The argument that the claim in Shanghai is non-contractual

(a) Wanxiang's argument

62. Wanxiang argues as follows:

(1) It says that the "first task" is to characterise the claim in the Shanghai courts and determine the applicable law. In this regard, the terms "contractual" and "non-contractual" are given autonomous meanings. Rome I determines which law is applicable to contractual claims, and Rome II determines which law is applicable to non-contractual claims (this is a reference to Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), and Regulation (EC) 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II)).

(2) Applying European court case law, Wanxiang's claim can only be characterised as contractual if there is an agreement freely entered into between Wanxiang and Impala Shanghai (citing *Jakob Handte & Co. GmbH v Societe Traitements Mecano- Chimiques des Surfaces* [1992] ECR I-3667, and *Réunion Européenne S.A. v Spliethoff's Bevrachtingskantoor B.V.* [2000] QB 690), which there was not.

(3) Even if the relationship between Wanxiang and Impala Shanghai is characterised as a bailment on terms, because there is no privity of contract between them, and Wanxiang does not claim as assignee, the claim must (following *Réunion*) be characterised as "non-contractual" (as in a "matter relating to tort, delict or quasi-delict" under the analogous provisions in the Brussels Regulation).

(4) In that regard, it is not enough to view the way that the claim is treated under PRC law and in the Chinese courts, or at least this is not determinative. The fact that the Shanghai court has itself classified Wanxiang's claim as contractual is not determinative either, because the court can re-classify the case.

(5) In summary, whether this was a bailment "on terms" has to be determined by the law that governs a "non-contractual" claim, which is Chinese law, having regard to the general rule in Article 4 of Rome II that the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the

> country in which the damage occurs. The Chinese court has already determined that, as a matter of Chinese law, Wanxiang's claims are not subject to the exclusive jurisdiction clause, and this court cannot go behind that determination.

(b) The court's conclusion on Wanxiang's argument

63. Impala Shanghai points out that at the earlier hearing, Wanxiang's previous counsel stressed that "… any claim against Impala Shanghai, which was not a party to the CMA, had to be brought under the warehouse certificates. That was the only contract to which Impala Shanghai was a party" ([2015] EWHC 25 (Comm) at [9]). However, whilst it is correct that the argument now put is the opposite of what was earlier submitted on Wanxiang's behalf, the question for the court is whether the current contention is correct.

64. It is important to keep in mind the question the court has to decide, namely whether Impala Shanghai can rely on the exclusive English jurisdiction clause in the warehouse certificates that it issued (assuming that the clause was incorporated as a term, which is a different question). In assessing Wanxiang's argument to the contrary, the following matters appear to be relevant.

65. The correct starting point is to see how the claim in the Shanghai courts is in fact put, because it is that claim in respect of which Impala Shanghai seeks its anti-suit injunction.

66. Wanxiang's Civil Complaint of 5 August 2014 gives the facts and reasons on which it relies (the plaintiff being Wanxiang and the defendant being Impala Shanghai) as follows:

> "On 15 April 2014, the Plaintiff obtained according to the law the warehouse certificates for the corresponding goods of 5,004.343 tonnes of aluminium ingots issued by the Plaintiff pursuant to the Sale and Purchase Agreement entered into with Qingdao Decheng Mining Co., Ltd., a party not involved in the case. Subsequently, because of financial needs, the Plaintiff created pledges on the warehouse certificates with Australia and New Zealand Banking Group Limited, Singapore Branch and Rabobank International, Singapore Branch respectively. Based on this, the Defendant re-issued the corresponding warehouse certificates … the corresponding goods are 50 tonnes of aluminium ingots and 4954.343 tonnes of aluminium ingots, totalling 5,004.343 tonnes of aluminium ingots, which is fully consistent with the amount in the original warehouse certificate. The Plaintiff has redeemed the latest warehouse certificates from the bank(s) and is lawfully holding them after the endorsement by Rabobank International, Singapore Branch.
>
> The Defendant understands very clearly that the Plaintiff is the holder of the warehouse receipts, that is, the title owner of the goods. The Defendant sent a letter to the Plaintiff on 6 June 2014, in view of the Plaintiff's previous enquiry, confirmed

> that the Plaintiff was the owner of the goods under the specific warehouse certificates (that is, the goods under the warehouse certificates of this case). …
>
> In view of the above facts, the Plaintiff considers that the warehouse certificates are evidence of title to the goods which could be transferred lawfully and validly, and the Defendant as the issuer of the warehouse certificates should fulfil its responsibility to supervise and obligation to deliver the goods under the warehouse certificates. Now as the Defendant has expressed clearly that it cannot deliver the goods, the Plaintiff, for the purpose of protecting its interest, hereby commences this case with this Court pursuant to the provisions of Contract Law of the People's Republic of China and other relevant laws and regulations and requests this Court to render a judgment according to the law and grant its claims."

67. The Warehouse Certificates are attached to the Civil Complaint. It is plain that the claim is based on the Warehouse Certificates (and that Wanxiang's claim as owner is based on the Warehouse Certificates).

68. As to characterisation, it was recognised on behalf of Wanxiang at the hearing in this court on 17 December 2014 that the terms of the warehouse certificates give rise to a cause of action in contract or bailment against Impala Shanghai (see [2015] EWHC 25 (Comm) at para 20(ii)).

69. Further, the Shanghai courts are proceeding on the basis that the claim is contractual. In its ruling dated 26 September 2014, the Shanghai No.1 Intermediate Court described the case as a dispute over a "warehousing contract", involving "a warehousing contractual legal relation" between the parties. In its ruling dated 2 December 2014, the Higher People's Court of Shanghai said that there "is merely an ordinary warehousing contractual legal relationship between the parties of this case".

70. Further, this analysis is consistent with the fact that the Contract Law of the People's Republic of China deals specifically with Warehousing Contracts in Chapter 20. Among the provisions, is the obligation on the warehouse to deliver a receipt.

71. In that regard, there is a difference in the expert evidence. The evidence of Impala Shanghai's expert is that the receipt is a proof of contract in practice, and if the parties cannot provide any other evidence or documents to the contrary, then the certificate will be accepted as the whole and complete contract. Wanxiang's expert was of the opinion that there was no commercial contract by consensus between Wanxiang and Impala Shanghai on the basis that Wanxiang merely obtained the warehouse certificates from another party. I prefer the evidence of Impala Shanghai's expert on this point, since there seems no reason why the interposition of a bank financing the transaction by which Wanxiang purchased goods in the warehouse should affect the analysis.

72. In the cross-examination of Impala Shanghai's expert, it was put (though not accepted) that if the technical requirements of the PRC Contract Law as regards Warehousing Contracts are not met, the owner of the goods would have a property

law remedy to recover its property. Professor Chen accepted this, and I prefer his evidence in this regard.

73. However, this makes little difference on the facts. Referring to the requirements of Article 387 of Chapter 20 of the Contract Law, Wanxiang's closing submissions assert that a claim under property law fills the "huge lacuna in PRC law" if the true owner holding blank-indorsed warehouse receipts could not recover the goods from the warehouse if the warehouse did not "sign or seal" the endorsement. There is no suggestion that this is an issue in this dispute.

74. Turning to the cases cited by Wanxiang in support of its contention that its claim should be characterised as a claim in tort/delict under Rome II:

(1) In the *Réunion* case, the court held at [26] that an action by which the consignee of goods found to be damaged seeks redress for the damage relying on the bill of lading, not against the person who issued that document on his headed paper, but against the person whom the plaintiff considered to be the actual maritime carrier, falls within the scope of matters relating to tort, delict or quasi-delict within the Brussels Convention and not of matters relating to a contract. In the present case, however, the position is different, because the person seeking redress (Wanxiang) is relying on the certificates issued by the warehouse, that is Impala Shanghai.

(2) In the *Jakob Handte* case it was held at [16] that a claim by a sub-buyer against a manufacturer was not contractual, the situation not being one in which there was an obligation freely assumed by one party towards another ([15]). However, Wanxiang is not in the position of a sub-buyer. It is seeking to enforce the warehouse receipts issued by Impala Shanghai to the bank which the bank has endorsed and delivered to it. The obligations were "freely assumed" by Impala Shanghai as issuer of the certificates towards the holder.

75. For the above reasons, Wanxiang's claim should not in my opinion be characterised as a claim in tort/delict. (If it was, consideration would have to be given to Article 14 of Rome II which allows parties to agree to submit non-contractual obligations to the law of their choice "where all the parties are pursuing a commercial activity … by an agreement freely negotiated before the event giving rise to the damage occurred". This may apply on the facts of this case, but no detailed submissions were made by Impala Shanghai on the point, and no further consideration is necessary.)

76. It was accepted on behalf of Wanxiang in closing oral argument that the issue of a warehouse receipt to a party depositing goods in a warehouse, or (as here) a party purchasing goods already in the warehouse, will bind that party to the terms of the warehouse receipt. On an English law analysis, there is a bailment on terms, and the underlying relationship with the warehouse is contractual. What is said to make the difference is that in this case the purchase was financed by a bank, so that the contractual nexus is broken. There is however no commercial reason that the terms of the warehouse receipt should apply to the purchaser in one case but not the other.

77. In his judgment of 15 January 2015, Teare J said that, "Looked from the viewpoint of English law one can readily understand that Wanxiang has a claim against Impala

Shanghai in bailment upon the terms of the warehouse certificates" ([2015] EWHC 25 (Comm) at [12]).

78. Quoting from its submissions, it is accepted by Wanxiang that "to an English lawyer [the claim] looks very much like a claim in bailment", and further accepted that "the question of whether or not Wanxiang's claim should be characterised as contractual or non-contractual must be determined by the English court applying its own rules of private international law". On that basis the argument falls down, because the bailment was plainly on terms. In a commercial transaction like this, no warehouse would accept goods for storage except on terms. The only real issue is whether it was on the terms of the CMA, and if on the terms of the Warehouse Certificates, whether the exclusive jurisdiction clause was incorporated.

79. In that regard, the CMA is not referred to in the material placed before the Shanghai courts. A statement has been made by Wanxiang's lawyer to the effect that he did not file it as a "matter of strategy", because it refers to a foreign jurisdiction clause, namely Singapore. A more convincing explanation is that the CMA, as a collateral management agreement, had no further relevance once the borrowing from Rabobank was repaid, and was correctly perceived as having nothing to with the claim. That is also consistent with the letters sent by Rabobank at the time.

80. In *The Pioneer Container* [1994] 2 AC 324, the question was whether ship owners could rely on an exclusive jurisdiction clause in "feeder" bills of lading to which the plaintiffs were not parties. Upholding the decision of the Hong Kong courts, this question was answered in the affirmative (pp 339-340). The court applied the reasoning in *Elder, Dempster & Co. Ltd. v Paterson Zochonis & Co. Ltd.* [1924] AC 522, to the effect that notwithstanding the absence of any contract between the shippers and the shipowners, the shipowners' obligations as bailees were effectively subject to the terms upon which the shipowners implicitly received the goods into their possession (p. 339H – p.340A).

81. I consider that the same principle applies here. So far as this was a bailment rather than a contract, it was a bailment on terms. An autonomous interpretation of the choice of law provisions in Rome I and II does not lead to the classification of the claim brought in the Shanghai courts as non-contractual. I do not accept Wanxiang's submissions in this regard, and turn to the incorporation issue.

(3) The argument that the exclusive jurisdiction clause was not incorporated

82. The factual position as regards the reference to the Impala website in the Warehouse Certificates is set out above. In particular:

(1) Each Warehouse Certificate states on its face that:

> "This warehouse certificate and all disputes arising from it shall be subject to the Terms and Conditions of IMPALA."

On the face of the certificate therefore, there is a clear reference to all disputes arising from the certificate being subject to Impala's terms and conditions.

(2) On the rear of the certificate, the place where the terms and conditions is located is identified:

> "The latest version of the Terms and Conditions of Impala is posted on the official website of Impala at www.impalaterminals.com."

(3) The webpage containing the terms and conditions is identified in Annex IV of the CMA.

83. The incorporation issue was dealt with by Teare J in his judgment given on 15 January 2015 ([2015] EWHC 25 (Comm). He said that reference to the web site revealed "three sets of standard terms. One relates to warehousing, another to website terms of use and the third to freight. In my judgment it is clear that those which relate to warehousing are the relevant terms. They contain at clause 10 an agreement to English law as the governing law and an exclusive jurisdiction clause in favour of England" (para 15).

84. He set out the test for incorporation as follows:

> "16. As a matter of English law where terms are incorporated it must be shown that the party seeking to rely on the conditions has done what is reasonably sufficient to give the other party notice of the conditions; see *Chitty on Contracts* Vol.1 para.12-014. Here, the first page refers to the warehouse certificate as being subject to the Terms and Conditions of Impala. At the base of the page the reader is invited to refer to the reverse of the page for additional conditions. On the reverse the reader is referred to Impala's web-site for its Terms and Conditions. Thus the holder of the warehouse certificate knows that the certificate is subject to Impala's Terms and Conditions. He is referred to the reverse of the certificate. On the reverse he is told where to find the Terms and Conditions. I consider that these steps are reasonably sufficient to give the holder notice of the conditions. In this day and age when standard terms are frequently to be found on web-sites I consider that reference to the web-site is a sufficient incorporation of the warehousing terms to be found on the web-site."

85. He rejected a submission by Wanxiang that the website was difficult to follow and that any reader would have been confused as to which terms were applicable saying: "I disagree. The warehousing terms were clearly applicable to a warehousing contract. The web-site [terms of use] and freight terms were clearly inapplicable to a warehousing contract".

86. It is not in dispute that the judge applied the correct test to incorporation, and no substantial challenge has been made to his analysis of the websites, which in any case I accept.

87. It was accepted by Wanxiang that it had a proper opportunity to find out what the terms were if it wanted to do so. As Impala Shanghai says, it follows that there is no

longer any issue that Wanxiang had notice of Impala's Terms and Conditions, as they appeared on Impala's website. In any case, on the evidence, I am satisfied that it had notice of the terms.

88. Wanxiang's case in this respect as advanced in closing submissions can be considered under two main heads: (a) the CMA applied to these transactions, and (b) in the context of the CMA, the Warehouse Certificates were merely receipts. Consequently, it is argued, the terms of the warehousing agreement are those set out in the CMA rather than the website terms and conditions referred to in the Warehouse Certificates. Further, even if the Warehouse Certificates represented a separate contract between Rabobank and Impala Shanghai (as principal, rather than agent), the exclusive jurisdiction clause was not incorporated.

(a) Wanxiang's argument that the CMA applied to the transactions

89. On the face of it, the CMA did apply to these transactions, at least so far as the bank was involved in them, since the bank appears to have been financing the purchase of metal by Wanxiang (though Impala Shanghai disputes this), and Warehouse Certificates were issued to Rabobank which on the face of it indicate that the bank was funding the transactions, which funding would of course be collateralised on the metal.

90. Impala Shanghai raises three reasons why this is wrong:

(1) No notice was given that the goods were to be stored pursuant to the CMA – despite the clear requirements that such notice be given as contained in clauses 4.2 and 4.6 of the CMA, and despite what was done in relation to an earlier cargo of copper concentrates. However, as Wanxiang says, these clauses are concerned with identifying, inspecting and then approving the warehouse facilities at which cargoes were to be stored, not identifying individual cargoes that were to be stored at approved warehouse facilities. By the time that Wanxiang came to deal with the aluminium, the relevant warehouse facility had already been established as a "Warehouse Facility" for the purposes of the CMA.

(2) The parties did not act as though the CMA applied to the Goods – in contrast to the position in relation not only to the copper concentrates cargo but also a cargo of copper cathodes in respect of which weekly reports were sought by Rabobank and provided by Impala UK pursuant to clause 9.1 of the CMA and Annex I, paragraphs 3 and 4. However, as Wanxiang says, this is not surprising on the facts, since there were only 12 days between the issue of the Warehouse Certificates and the discovery of the problems at the warehouse on 27 May. Impala Shanghai relied on reports from Qingdao Hongtu Logistics Co. Ltd to ascertain that the cargoes were at the facility, but it appears that the last report was issued by Hongtu on 18 April 2014.

(3) The evidence concerning the financing of the goods, specifically whether they were ever subject to a Rabobank pledge and, even if they were, whether that remained the case up to early June 2014 is, Impala Shanghai says, "obscure and unsatisfactory". It is common ground that the CMA only applies to cargoes which are the subject of a pledge with Rabobank.

91. As to this last point, there was force in Mr Bucknall's evidence that, "We had a CMA, but … 80 per cent of our business in Qingdao, 65 per cent of our business globally within China, was not CMA related. So unless someone says, 'This is under the terms of the CMA', which they had done previously, and which most other people will do -- I mean, you will have noticed that in some of the warehouse certificates they actually refer to specifically to the CMA that they're actually involved in. Now in this instance … it wasn't mentioned at all." It is also correct that the Warehouse Certificates did not make any reference to the CMA.

92. Further, I accept Impala Shanghai's submission that the factual picture is obscure. Wanxiang says that this is because trading metals can involve multiple sales and repurchases which can make the picture look complicated. Impala Shanghai may be right to say that under the various sale contracts, the Warehouse Certificates must have changed hands several times.

93. On balance, however, I accept Wanxiang's submission that the Rabobank financing was provided pursuant to the Rabobank Facility in place of the earlier ANZ financing. This is demonstrated by the fact that Warehouse Certificates were issued by Impala Shanghai on 15 May 2014 to the order of Rabobank, with whom there was a CMA to which Wanxiang was a party entered into the previous year.

94. I further accept Wanxiang's submission that the financing was secured, or was considered as secured, by a pledge. That is because the aluminium ingots fell within the definition of "Goods" in the CMA, and pursuant to clause 3.1, all "Goods" were pledged to Rabobank. Whether such a pledge would have actually provided effective security to Rabobank does not fall to be considered, since the bank was repaid in full. (A suggestion that repo financing might have been involved which fell outside the CMA was not pursued in closing by Impala Shanghai.)

95. It follows that I accept Wanxiang's case to the extent that the CMA applied to these transactions so far as the bank was involved in them.

(b) Wanxiang's argument that in the context of the CMA, the Warehouse Certificates were merely receipts

96. Wanxiang's argument is that in the context of the CMA and as between Wanxiang, Rabobank, Impala UK and Impala Shanghai, the Warehouse Certificates were merely receipts. It argues that:

(1) The terms governing the provision of services were set out in the CMA. Clause 5.3 provided that Impala UK was to issue a warehouse certificate to Rabobank in respect of each consignment of goods. But clause 3.1 allowed Impala UK to render the services through its agent, and the definition of "Warehouse Certificate", coupled with the identification of Impala Shanghai in Annex III (and its address in the notice clause) was sufficient to identify Impala Shanghai as the agent of Impala UK (for at least this part of the service).

(2) Although Impala UK was named as the principal in the CMA, the true principal was Impala Shanghai. It negotiated the CMA, performed all relevant

functions and invoiced and received payment for all services pursuant to CMAs.

(3) As between Wanxiang, Rabobank and Impala UK, the standard terms referred to in the Warehouse Certificates did not override the terms that had been expressly agreed and set out in a signed written contract, namely the CMA.

(4) In this respect, the position is conceptually identical to that where a cargo owner charters a vessel. The terms of the charter will be set out in a charterparty, but the vessel owner will typically issue bills of lading in respect of individual parcels that are loaded onto the vessel. When issued or indorsed to a third party, the bill of lading evidences the terms of the contract of carriage, but when issued or indorsed to the charterer, it is a mere receipt: Scrutton on Charterparties and Bills of Lading, 22nd ed, Articles 49-50.

97. The factual background is (as noted) that on 2 November 2012, Impala Shanghai sent Wanxiang a sample of collateral management agreements entered into with other banks annexing a form of warehouse certificate. The CMA that was entered into with Rabobank on 30 April 2013 was therefore in a form that Wanxiang agreed to, including as to the warehouse certificate, other alternatives being available.

98. Further, the terms of the actual Warehouse Certificates which are the subject of this case were agreed by Wanxiang and Rabobank at the time that Wanxiang split the cargo (see above). On 15 May 2014, Rabobank asked that drafts of the replacement certificates be forwarded to Wanxiang "for checking". Impala Shanghai complied with this request by email of 15 May 2014. After checking with its Shanghai office, Wanxiang confirmed that the drafts were acceptable to it by an email later that day. Rabobank also confirmed that the drafts were acceptable, later that day asking Impala Shanghai to "proceed" with the split.

99. Impala Shanghai (through Impala Singapore, presumably for convenience given that that the Rabobank branch was in Singapore) then issued the Warehouse Certificates to Rabobank. On the evidence, Impala UK was not involved in this process.

100. There are no grounds in the court's view to upset the agreed contractual structure either by treating Impala Shanghai as "true principal" (a point which was only raised in closing) or by treating Impala Shanghai as Impala UK's agent for the purposes of issuing the Warehouse Certificates. Impala Shanghai was not a party to the CMA. The agreed structure provided for Impala UK to provide services under the CMA, but the Warehouse Certificates were to be issued by Impala Shanghai, a Chinese company, in circumstances in which it was envisaged that warehouse facilities would be in China.

101. Further, there is no analogy with the status of a bill of lading where the cargo owner is also charterer. The Warehouse Certificate is not (as is argued by Wanxiang) a mere receipt, but as the evidence in this case shows, for practical purposes it represents the cargo, which will not be released to one party where there is an outstanding certificate in the name of another party.

102. (A further argument on behalf of Wanxiang that being in a document which was a mere receipt notice was not given of the terms on which Impala Shanghai was prepared to contract with Rabobank and/or Wanxiang is rejected.)

103. On these grounds, I accept Impala Shanghai's contention that the CMA does not apply, and that on the facts of this case it is the Warehouse Receipts that govern, and that the exclusive jurisdiction clause was incorporated in the Warehouse Receipts.

104. There is a further point as follows. As noted above, the loan advanced by Rabobank was repaid on 27 May 2014 (in relation to the 50 MT) and on 4 June 2014 (in relation to the 4954.343 MT). As noted above, after being repaid, Rabobank endorsed the Warehouse Certificates and delivered them to Wanxiang. From that point onwards, the goods were plainly no longer subject to a pledge in favour of Rabobank. Since there was no longer any collateral, one would not expect the Collateral Management Agreement to continue to apply to the goods.

105. In argument on its behalf, Wanxiang disputed this, maintaining that the CMA certainly applied when the warehouse certificates were issued upon which the terms were "fixed". In agreement with Impala Shanghai, I do not accept this. The CMA governed the tripartite relations between the bank and the parties so long as the security was in place. Thereafter, the relationship was between the owner of the goods and the warehouse. The terms of clause 2.7 of the CMA does not affect this conclusion as was suggested: this clause protects the bank's interest in the goods, but that interest only subsists until it is repaid. This is not therefore (as was suggested) a case of competing jurisdiction clauses.

106. Finally, this court respectfully notes that the Shanghai courts have reached a different conclusion as to the incorporation of the exclusive jurisdiction clause, and has carefully considered the reasoning in that regard. However, it considers that the conclusion reached is required by the applicable rules in this jurisdiction, and reflects the considerable amount of further evidence which has been placed before this court, as well as the arguments that have been advanced by the two parties.

(4) The argument that the court should not in any event grant an injunction

107. The final issue for decision is whether Wanxiang is correct to argue that, notwithstanding the above conclusions, the court should nevertheless decline to grant an anti-suit injunction, the burden being on it to make good this submission.

(a) The principles

108. The principles upon which the court grants an anti-suit injunction in the case of an exclusive jurisdiction clause are set out in *Donohue v Armco Inc* [2002] 1 Lloyd's Rep. 425 (Lord Bingham):

> "24 If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by

> restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in *The Eleftheria* [1970] P 94, at pp. 99–100, Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. …"

109. The court continued that:

> "25 Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause. That was the result in *Mackender v Feldia AG* [1967] 2 QB 590; *Unterweser Reederei GmbH v Zapata Off-Shore Co* ('*The Chaparral*') [1968] 2 Ll Rep 158; *The Eleftheria* [1970] P 94; *DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar ('The Sennar') (No. 2)* [1985] 1 WLR 490; *British Aerospace plc v Dee Howard Co* [1993] 1 Ll Rep 368; *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588; *Aggeliki Charis Compania Maritima SA v Pagnan SpA* ('*'The Angelic Grace*') [1995] 1 Ll Rep 87; and *Akai Pty Ltd v People's Insurance Co Ltd* [1997] CLC 1508."

110. As to the approach taken by the courts of other countries, the court went on to say that:

> "A similar approach has been followed by courts in the US, Canada, Australia and New Zealand: see, for example, *M/S Bremen v Zapata Off-Shore Co* (1972) 407 US 1; *Volkswagen Canada Inc v Auto Haus Frohlich Ltd* [1986] 1 WWR 380; *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 559; and *Kidd v van Heeren* [1998] 1 NZLR 324."

111. In summary, where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it.

(b) Application to this case

112. Wanxiang argues that:

(1) Impala Shanghai does not rely on an exclusive jurisdiction clause in a contract between it and Wanxiang, it relies on an exclusive jurisdiction clause in a contract between it and Rabobank.

(2) The *Donohue v Armco Inc* test does not apply when the injunction is sought against someone who is not a direct party to the contract containing the exclusive jurisdiction clause, since the defendant is not "breaching" the contract by bringing proceedings in another jurisdiction.

(3) In such a case, the existence of the exclusive jurisdiction clause is still relevant (even highly relevant), but the basis for the injunction is the prevention of unconscionable conduct, not the restraint of a breach of contract. Equity intervenes to protect the applicant's contractual rights, not because the defendant is bound by them but because equity requires him to recognise them. When looking at whether or not conduct is unconscionable, this is more flexible than the simple application of the "strong reasons" test in cases where both parties are party to and bound by the same contract.

113. Nothing more need be said about the argument that Impala Shanghai relies on an exclusive justification clause in a contract between it and Rabobank.

114. As to (2) and (3), given that it is accepted that the existence of the exclusive jurisdiction clause is still "highly relevant" to the question whether or nor an injunction should be granted, it is doubtful that these arguments make much difference.

115. In principle however, at least in the case of commercial transactions, I consider that where an exclusive jurisdiction clause is a term of a warehouse receipt, the court should treat the clause in the same way as if it was in a contract between the warehouse and the party claiming under the receipt. This is so even if at common law the relationship is analysed as a bailment on terms, rather than under a contract. The same rationale applies, because the parties proceed on the basis that disputes are only to be decided in a particular jurisdiction, and the courts respect this under the principle of party autonomy. There is no reason to apply a test other than that in *Donohue v Armco Inc*, that is, that effect should ordinarily be given to the clause in the absence of strong reasons for departing from it.

(c) The case as to "strong reasons"

116. In relation to "strong reasons", the approach is as set out in *The Eleftheria* [1969] 1 Lloyd's Rep 237 at 242, Brandon J, namely that the court "should take into account all of the circumstances of the particular case", the following being identified:

> "(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial religious or other reasons be unlikely to get a fair trial".

117. Wanxiang relies on the following. The evidence on issues of fact is in China (and to a lesser extent Singapore), but not in England. Any tort and/or property-based claims will be governed by Chinese law. Impala Shanghai is based in China, and does business there. Wanxiang is based in Singapore, but is the subsidiary of a Chinese company doing business in China. The dominant connections are all with China or Singapore not England. Wanxiang genuinely desires a trial in China, which is the "natural forum".

118. In substance, the same submissions were made at the last hearing, and were dealt with by Teare J ([2015] EWHC 25 (Comm) as follows:

> "28. Mr. Fletcher relied upon a number of matters in this regard. First, he said that the resolution of the claim against Impala Shanghai will depend on investigations, witnesses and evidence in China. This is true but the claim against Impala Shanghai is simple. Having stated that they have received the goods into their possession they are bound to deliver them from the warehouse. If they cannot do so they will, in all probability, be liable. It is difficult to see what investigations, witnesses or evidence will be required to establish Wanxiang's claim. Second, he said that there are likely to be many similar claims in China and it is desirable that they all proceed in the same jurisdiction. There is some force in this point but since the claims are separate and proof of liability ought to be simple (see the last point) I am not persuaded that this would be a "strong" reason for not enforcing the clause. Third, he said that the Claimant is Chinese, the warehouse is in China and the goods are in China. I am not persuaded that this adds anything to the first point. Mr. Fletcher's fourth to sixth points were in essence the same, namely, that the exclusive jurisdiction clause had not been the subject of specific negotiation and choice and so should be accorded little weight. However, the question is whether the fact that the exclusive jurisdiction clause, although validly incorporated in the contract between the parties, had not been the subject of specific negotiation amounts to a strong

> reason for not enforcing the clause. I do not consider that it would be such a reason."

119. It is now clear that the factual picture in this case is much more complex than was apparent at the earlier hearings of this matter. However, I agree with Teare J's conclusions, and need not add to them.

(d) The parties' arguments as to prejudice

120. The real issue between the parties has focused on prejudice, and in particular, as is common ground, the fact that any judgment of the English Court would not be enforceable in China, given the absence of a reciprocal enforcement arrangement.

121. As to this, Teare J said:

> "29. Lastly, it was said that Wanxiang would suffer prejudice if they had to litigate in England because any judgment of the English court would not be enforceable in China. This is because there is no reciprocal enforcement arrangement between England and China. A similar point was made at the last hearing but no specific reference was made to the absence of a reciprocal enforcement arrangement. I did not consider that the point then made was a strong reason for not enforcing the jurisdiction clause because I expected the parties to respect a decision of this court. However, an inability to enforce a judgment is a form of prejudice specifically mentioned by Brandon J. in The Eleftheria. The question which therefore arises is whether Wanxiang's inability to enforce any judgment of this court in its favour against Impala Shanghai in China would be a strong reason for not giving effect to the exclusive jurisdiction clause. Having reflected upon this matter, and in the absence of any suggestion as to how this prejudice could be reliably avoided, I have reached the conclusion that it would be such a reason."

122. Impala Shanghai says that as reflected by the fact that the judge gave directions for expert evidence on issues relevant to the "strong reasons" question, at the handing down of his judgment he acknowledged that he had not made a binding determination in this regard (what he had to say was necessarily obiter) and that the point remains to be decided. No submission has been made to the contrary, and I accept this. In any case, a great deal more material is available to the court following the trial.

123. The parties' contentions are as follows.

124. Wanxiang argues that:

(1) Any English judgment will not be enforceable against Impala Shanghai in China (and there is no evidence that Impala Shanghai has assets anywhere else).

(2) Wanxiang suggested that one way to address this prejudice would be for Impala Shanghai to provide security for the claim, but Impala Shanghai refused.

(3) The parties have been negotiating a possible arbitration agreement, but:

a) Impala Shanghai's offer was expressly "conditional (condition precedent) upon Rabobank's agreement to arbitrate in the terms set out". Rabobank did not agree, and recently declined. Since then Impala's solicitors have been prepared to consider various other options, but have made no firm or unconditional offer.

b) Arbitration would have been attractive if all potentially interested parties (including Rabobank) took part, but without Rabobank, and in circumstances where Impala Shanghai is making it clear that it is going to take a title to sue point, arbitration will not protect against any prejudice. Rabobank can be joined to court proceedings without its consent, but can only be joined to arbitral proceedings if it agrees.

c) In any event, the possibility of arbitration is not a relevant consideration. Impala Shanghai is not entitled to use the exclusive jurisdiction clause and the threat of an unenforceable judgment to coerce Wanxiang into an arbitration.

(4) Impala Shanghai has suggested a device to get around the fact that English judgments cannot be enforced in China: an agreement to pay any sum adjudged to be due in proceedings in England. But this does not work in China:

a) In order to make good its claim in China under a Chinese agreement to pay the judgment sum, Wanxiang would have to rely on the judgment to establish that sum. But

i) Article 544 of the Supreme People's Court Judicial Interpretation on the Application of the Civil Procedure Law of PRC is to the effect that the absence of any international treaty, or reciprocity, does not just bar enforcement: it also bars "recognition".

ii) If an English judgment will not be recognised, Wanxiang will not be able to establish the sum due under any Chinese law contract.

b) Any such agreement would be an obvious attempt to circumvent the Chinese rules on recognition and enforcement. For that reason it would not be enforced.

c) Impala's expert has not been able to identify a single case from anywhere in China, ever, where this device has been used.

d) It is clear that no such undertaking could compel the Chinese court to grant an order for delivery up. Even if the Chinese court was prepared to recognise an English judgment as establishing the rights of the parties, the English judgment could not dictate what remedies the Chinese court granted. If the goods can still be located and if (as Impala Shanghai contends) its liability is limited, this remedy has potential to be far more valuable to Wanxiang than any award of damages. It is plain that the most appropriate court to grant any such remedy is the Chinese court, as the defendant, Impala Shanghai, and the goods (if they can still be located) are both in China.

125. Impala Shanghai argues that:

(1) It cannot be right that a party can get round an agreement on jurisdiction in this way. There can be no prejudice in holding the parties to their contractual bargain.

(2) In the present case, Wanxiang had plenty of notice of the terms and conditions incorporated into the Warehouse Certificates.

(3) At the time that this notice was being given to Wanxiang, it knew that Impala Shanghai is a Chinese company and also that the goods were to be stored in China.

(4) In such circumstances, the fact that Impala Shanghai is a Chinese company and that the goods were to be stored in China cannot now be used as reasons why the agreement as to exclusive English jurisdiction should be displaced.

(5) To allow Wanxiang now to sidestep the exclusive English jurisdiction clause on the basis that these matters constitute 'strong reasons' would be perverse.

(6) In any event, Impala Shanghai has gone to great lengths to accommodate any prejudice by offering arbitration and a Chinese law/jurisdiction agreement to do whatever the English court might order, only to be met by intransigence on Wanxiang's part.

(7) It is clear that Wanxiang is looking for problems rather than trying, like Impala Shanghai, to overcome any prejudice which might exist. In these circumstances, any prejudice there might be is not prejudice which it is open to Wanxiang to invoke in aid of its 'strong reasons' objection.

(8) As to the particular matters raised by Wanxiang:

a) There is no justification for Wanxiang's request that Impala Shanghai provide security for its claim. That is not expressed as a pre-condition for the operation of the exclusive English jurisdiction clause. It is not open to Wanxiang, in effect, to re-write the clause by insisting on security being provided.

b) In any event, Impala Shanghai has offered arbitration and that would avoid any prejudice to Wanxiang because it is common ground that any arbitral award would be enforceable in China.

i) The arbitration offer was originally made on 29 January 2015, and Impala Shanghai has gone a considerable distance in accommodating requests made by Wanxiang – including agreeing that the arbitration should take place in Hong Kong.

ii) The intention was that the arbitration should cover all disputes under the CMA and the Warehouse Certificates, and that it should involve Impala Shanghai, Impala UK, Wanxiang and Rabobank.

iii) However, Rabobank last week refused to take part. Accordingly, Impala Shanghai has asked Rabobank to confirm that it will not bring any claim under the CMA. If that agreement is forthcoming, then Wanxiang would have no reason not to agree to what Impala Shanghai has offered.

iv) Impala Shanghai has also suggested that there be an arbitration only as between Impala Shanghai, Impala UK and Wanxiang (and so without Rabobank) in relation to the Warehouse Certificates and the CMA. Wanxiang's position in relation to that proposal is still awaited.

v) If necessary, Impala Shanghai would be willing to arbitrate only the Warehouse Certificate issues – not the CMA and so without the involvement of Impala UK and Rabobank. Again, this would remove all risk of prejudice for Wanxiang.

(9) As regards the agreement to honour any judgment of this court:

a) There is no reason why Impala Shanghai's alternative suggestion would not work. What its expert had to say on this matter was compelling and obviously correct.

b) Wanxiang's expert suggested that such an agreement would not be regarded as valid in China, but his evidence on this was unconvincing.

c) He overlooked in particular the fact that enforcement of the agreement to honour would not bring into play the provisions in PRC law concerning enforcement of foreign judgments.

(10) As to Wanxiang's suggestion that the agreement on offer only addressed "a money award, not any order for delivery":

a) Wanxiang is looking for problems.

b) Impala Shanghai would obviously be willing to agree to honour any order for delivery up if that is what Wanxiang would like, indeed, such an offer has now been made.

(11) Impala Shanghai has shown a willingness to do whatever it takes to overcome any risk of prejudice for Wanxiang, and Impala Shanghai will abide by whatever condition the court might impose on the grant of the injunctive relief which it seeks. (In oral argument, the provision of security was excluded from this.)

(12) Impala Shanghai has the impression that, in contrast, Wanxiang is looking for problems and for reasons not to agree to measures which will overcome such problems as might exist. If this is the case, then Wanxiang's "strong reasons" objections fall away – the burden of establishing such reasons being on Wanxiang.

(e) Discussion and conclusion

126. Teare J handed down his decision on 15 January 2015, saying that in the absence of any suggestion as to how this prejudice could be reliably avoided, Wanxiang's inability to enforce any judgment of this court in its favour against Impala Shanghai in China would be a strong reason for not giving effect to the exclusive jurisdiction clause.

127. Following that decision, Impala Shanghai's lawyers offered to refer the dispute to an arbitration including Rabobank. Wanxiang's lawyers agreed in principle on 12 February 2015, whilst expressing a preference for arbitration in Hong Kong. This was debated between the parties' lawyers over the next few days.

128. Perhaps not surprisingly Rabobank refused to participate. On 3 March 2015, its lawyers emailed as follows: "… we note that the arbitration proposal is conditional on the Bank also agreeing to arbitrate and therefore the Bank has given preliminary consideration to its own position. You will recall our letter of 8 July 2014 where we made it clear that the Bank has no interest in the goods and the Bank does not believe it is the proper party to any actions concerning the goods in question. Having considered this matter further, the Bank has concluded that it is unlikely to agree to the proposal for a tripartite arbitration."

129. Wanxiang points out that in correspondence, Impala has said that its "offer to arbitrate is without prejudice to our client's contention that Rabobank remains the contractual party to the Warehouse Certificates" (letter of 29 January 2015). (The court was not addressed as to whether that stance is consistent with its submissions at trial, as set out above.) This enables Wanxiang to say that arbitration would be "less sure" as a remedy without Rabobank. On the other hand, this appears to be of limited significance in circumstances where Rabobank does not itself maintain an adverse claim to the goods.

130. On 4 March 2015, Impala Shanghai's lawyers suggested (subject to instructions) an arbitration between Wanxiang, Impala Shanghai, and Impala UK only.

131. At about the same time, a suggestion was put forward that Impala Shanghai could instead issue a Chinese law/jurisdiction payment undertaking to Wanxiang, containing a promise to pay any English judgment. Wanxiang's lawyers' response was put in its skeleton argument for the trial beginning on 10 March 2015, and was to the effect that such an agreement would be unenforceable in China.

132. On 9 March 2015, Wanxiang's lawyers sent (subject to instructions) their own arbitration proposal. There are two points that have stood in the way of agreement to this. The first is the requirement that the interim injunction should be discharged to allow Wanxiang to participate in the current Shanghai proceedings. The second is the requirement that Impala Shanghai should give security by way of a bank guarantee securing any award in favour of Wanxiang up to US$5m.

133. The position reached at trial, therefore, is that the parties had reached a stalemate. Impala Shanghai submits that this was caused by the unreasonable attitude adopted by Wanxiang. In my view, the exchanges between the lawyers show that Wanxiang could perhaps have done more to reach an agreement by the time of the hearing, but that it was not being actively obstructive. It is possible that with a little more time the parties could have agreed (and can still agree).

134. The position in the court's view is as follows. While the parties have made efforts to agree an arbitration, and are effectively in agreement both as to the mechanics of the arbitral procedure, and that it can proceed without the participation of Rabobank, the apparent sticking points relate to the ongoing Shanghai proceedings, and Wanxiang's requirement for security.

135. As regards the provision of security, there is force in the submission of Impala Shanghai that this would place Wanxiang in a stronger position than it presently is by converting an unsecured claim to a secured claim. On the other hand, as Wanxiang says, the provision of security would cancel out the prejudice inherent in the unenforceability of an English judgment in China. Neither party appears to have mooted a compromise leaving the question of security to the arbitrators to decide.

136. Impala Shanghai's alternative suggestion offering an undertaking governed by PRC law with PRC jurisdiction by which Impala Shanghai would agree to abide by any final judgment (i.e. after any appeal) of the English court is on the face of it attractive. However, I accept Professor Chen's evidence that there are doubts as to whether such an agreement would be recognised in China. On any view, the matter is not clear, and that is sufficient to rule it out for present purposes.

137. The court's conclusion is as follows. On the point of principle, neither party cited a case where the fact that an English judgment is not enforceable in a particular foreign country has been treated as a "strong reason" for refusing to grant an anti-suit injunction based on an English exclusive jurisdiction clause. However, Impala Shanghai's submission to the effect that it can never be a strong reason cannot be correct: see *The Eleftheria* as approved in *Donohue v Armco Inc*, both supra. I do however accept that the circumstances in which it may amount to a "strong reason" may be rare, not least because non-enforceability may be foreseen or foreseeable as a risk when the exclusive jurisdiction clause is agreed.

138. In my view, a situation which could potentially arise as a "strong reason" for refusing to grant an anti-suit injunction is where the claim involves property, particularly a claim to recover property, and a judgment of the English court would not be recognised or enforced by the courts of the *situs* to the defendant's detriment. As a practical matter, the courts of the *situs* will decide what happens to property situated there. Wanxiang submits that this is the position in the present case.

139. However, on the facts its argument is undermined by its evidence to the effect that it is a "safe assumption" that the goods were shipped to Korea prior to the Warehouse Certificates being issued. If this is in fact the position, its claim in the Shanghai courts would in substance appear to be its alternative damages claim, rather than a claim for delivery up. (Impala Shanghai says that the goods might remain in the warehouse, or they might not, it does not know, see above.)

140. As regards the other arguments, I reject Wanxiang's assertion that the possibility of arbitration is not a relevant consideration because Impala Shanghai is "not entitled to use the exclusive jurisdiction clause and the threat of an unenforceable judgment to coerce Wanxiang into an arbitration". It is not a question of coercion. In my view, a refusal to take up a reasonable offer of arbitration by which prejudice may reliably be avoided is a legitimate consideration in deciding whether or not the non-enforceability of a judgment is a strong reason not to grant an injunction to which the other party would otherwise be entitled.

141. Wanxiang raises the question of "clean hands", because at the original hearing Impala Shanghai told the court that its ultimate parent was Impala (MI) LLC, a company that was said to have substantial net assets. Teare J required the undertaking to be given by Impala MI as well as Impala Shanghai. In fact, Impala MI has ceased to exist and its assets have been transferred to a different Impala company. On 10 March 2015, by consent a bank guarantee for £100,000 was put in its place. Wanxiang rightly submits that this misinformation should not have been provided to the court by Impala Shanghai and should have been corrected earlier. However, it is overall of limited significance, and does not affect the outcome.

Conclusion

142. It is relevant that both Wanxiang and Impala Shanghai are part of major international commercial groups. Such market participants are aware of the importance of dispute resolution clauses. In this case, various alternatives were offered by Impala, and the form of the warehouse certificates in question was approved by Wanxiang prior to issue. On their face the words appear, "This warehouse certificate and all disputes arising from it shall be subject to the Terms and Conditions of IMPALA", with a reference to a website on the reverse side. In such circumstances, it is not commercially unreasonable to hold the parties to the exclusive jurisdiction clause.

143. Applying the law set out above, the court's conclusion is that in principle Impala Shanghai is entitled to a final prohibitory injunction and a final mandatory injunction. The parties can make submissions as to the terms of the injunction at the hand down of the judgment.

144. An order of this kind is made *in personam* against a party subject to the court's jurisdiction by way of requiring compliance with agreed terms. It does not purport to have direct effect on the proceedings in the PRC. This court respects such proceedings as a matter of judicial comity.

145. Impala states in its closing submissions that it will abide by whatever condition the court might impose on the grant of the injunctive relief which it seeks. In oral closing submissions, it was stated on its behalf that if the court was to make an order requiring as a condition of the anti-suit relief that it agree to arbitrate, then it would

have a choice whether to agree and get the order, or not agree and not get the order (this was stated in the context of the scope of the arbitration which it has put forward).

146. I will hear the parties at hand down on the question of conditionality, and also whether on the particular facts of this case, there should be liberty to apply in the event of changed circumstances.