Neutral Citation Number: [2022] EWHC 3323 (Comm)

Case Nos: CL-2020-000467
CL-2020-000522

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 21 December 2022

Before :

MR SIMON SALZEDO KC (sitting as a Judge of the High Court)

- -

Between :

AON UK LIMITED **Claimant**

- and -

LAMIA CORPORATION SRL & OTHERS **Defendants**

And Between:

TOKIO MARINE KILN SYNDICATES LIMITED & OTHERS **Claimants**

- and –

BISA SEGUROS Y REASEGUROS & OTHERS **Defendants**

- -

- -

Andrew Mitchell KC and Laura Newton, instructed by **CMS Cameron McKenna Nabarro Olswang LLP**, for the **Claimant in claim number CL-2020-00046**

Richard Southern KC and Koye Akoni, instructed by **DLA Piper UK LLP**, for the **Claimants in claim number CL-2020-000522**

Ben Elkington KC and Ben Smiley, instructed by **Penningtons Manches Cooper LLP**, for the **6th to the 48th Defendants in claim number CL-2020-000467 and the 7th to 49th Defendants in claim number CL-2020-000522**

Hearing dates: 20 – 21 September 2022

- - - - - - - - - - - - - - - - - - - -

Approved judgment

This judgment was handed down remotely at 10.30am on 21st December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

…….

MR SIMON SALZEDO KC (sitting as a Judge of the High Court) :

1. I have heard argument at the return date for applications for interlocutory anti-suit injunctions (the "**Applications**") made by the claimants in each of these two actions, in which final anti-suit relief is amongst the relief claimed.

The Parties

2. In Claim No CL-2020-000467 (the "**Aon Action**"), the 6th to the 48th defendants are certain individuals (the "**Individuals**") who are also the 7th to 49th defendants in Claim No CL-2020-000522 (the "**TMK Action**").

3. These 43 Individuals include the only six survivors of an aeroplane crash (the "**Accident**") in which another 71 persons died. The other 37 Individuals are personal representatives of some of the deceased. The Accident occurred in the early hours of 29 November 2016 when LaMia Flight CP 2933 from Viru Viru International Airport, Bolivia (the "**Aircraft**") crashed into mountainous terrain a few kilometres from its intended landing at Jose Maria Cordoba International Airport in Colombia. In short, the Aircraft ran out of fuel and subsequent investigations have suggested that management and flight crew of LaMia Corporation SRL ("**LaMia**") were at fault in permitting this to occur and in failing to declare an emergency in time to save the situation.

4. LaMia is the first defendant in the Aon Action and the second defendant in the TMK Action. LaMia's civil liabilities during the period from 10 April 2016 to 10 April 2017 were insured under AVN1-C Policy No. 2000046 issued on 12 May 2016 (the "**Insurance Policy**"). The insurer under the Insurance Policy was Bisa Seguros y Reaseguros SA ("**Bisa**"), which is the first defendant in the TMK action.

5. At least in formal contractual terms, the Insurance Policy was placed with Bisa by LaMia's broker, Estratégica SRL Corredores de Seguros y Reaseguros ("**Estratégica**").

6. The Insurance Policy was 100% facultatively reinsured under Policy No. AF1639901 (the "**Reinsurance Policy**"). The Reinsurance Policy was underwritten by a panel of 13 London underwriters who are the claimants in the TMK Action (the "**Reinsurers**") led by Tokio Marine Kiln syndicate 0510 at Lloyd's ("**TMK**").

7. The Reinsurance Policy was placed (again, at least in formal contractual terms) by Bisa through its local broker Aon Benfield Argentina SA ("**Aon BA**") and the wholesale broker in London, Aon UK Limited ("**Aon**"). Aon is the claimant in the Aon Action.

8. Both Policies had an aggregate limit of indemnity of USD 25 million and both were governed by Bolivian law and subject to the exclusive jurisdiction of the courts of Bolivia. They were on back to back terms generally and it has been suggested (though I make no finding about this) that the arrangements could be described as fronting.

9. Aon and the Reinsurers apply for anti-suit injunctive relief against the Individuals in the circumstances I will describe in more detail below. The other defendants to the two Actions were not represented before me though I was informed that they were aware of the Applications.

10. Those other defendants to both Actions (the "**Other Defendants**") are: (i) **LaMia CA**, an associated company of LaMia, which was also an insured under the Insurance Policy; (ii) Kite Air Corporation Limited ("**Kite**") which owned the Aircraft; (iii) **Mr Albacete**, who is said to have owned Kite; (iv) **Mr Rocha**, who is said to have been an officer of LaMia. In addition, Bisa is a defendant to the TMK Action.

Facts and procedural history

11. On 30 March 2016, Ms Loredana Albacete of LaMia ("**Ms Albacete**", who was Mr Albacete's daughter) wrote by email to Mr Simon Kaye of Aon asking about the possibility of per trip insurance for a flight transporting a football team from Bolivia to Venezuela and back. Mr Kaye promised to approach underwriters, but noted that before they would offer terms underwriters would require a satisfactory proposal concerning LaMia's debt arising from unpaid premiums under earlier insurances. The emails suggest that LaMia was short of funds and looking to perform this one flight in the hope of winning more business from the same source and thus, from the sound of the emails, be able to return to operating generally. The emails also make clear that it was urgent to obtain cover if the potential contract was to be taken up by LaMia.

12. On 5 April 2016, LaMia paid the outstanding premiums and there was email correspondence involving Estratégica as well as Aon. LaMia made clear that it wished to take the minimum level of cover that was compatible with applicable regulations in order to keep the premium to the lowest possible level. At one point (on 5 April 2016), Mr Kaye advised Estratégica that the US Department of Transport would require a limit of at least USD 41,375,000, which would mean LaMia should purchase cover with a limit of USD 50 million, adding "*however, we would always recommend that they purchase the highest limit they can*".

13. A quotation was obtained from AIG on 6 April 2016, but LaMia considered it to be too expensive and asked Aon (both directly and through Estratégica) to seek more competitive terms. Later that day, Aon reported to LaMia that it had provided an alternative quote to Estratégica. Estratégica in turn reported to LaMia on available terms for a liability only policy, which might suffice to enable LaMia to take on the immediate contract. LaMia responded (to Estratégica, copying Aon) asking if the terms could ensure that the crew was covered and that war hull risk was included, but also asking if the premium could be reduced by reducing the limit of cover from US$ 50 million to

US$ 25 million. Aon (through Mr Kaye) replied on 7 April 2016 stating that they would discuss with underwriters and seek to formalise the quote.

14. In an email on 7 April 2016 timed at 15:20, Mr Kaye of Aon wrote to Ms Albacete of LaMia as follows:

> "For our compliance purposes, please kindly review the **Important Information** detailed below which is applicable to any placement effected via the Aon Global Broking Centre London. … **Important Information** We would like to draw your attention to the Client Information Document and Terms of Business Agreement (TOBA) attached."

15. The email attached a document entitled "Terms of Business Agreement", version 11.1 dated July 2015, (the "**TOBA**"). The evidence suggests that a similar TOBA had been sent to Ms Albacete in March 2015 and that earlier versions had also been sent to LaMia in earlier years.

16. The TOBA included the following provisions:

> "**0. Introduction**
>
> 0.3 These are our terms of business which together with any schedules, demands and needs statement and service level agreement shall govern our appointment by you. These terms of business apply to all Services (defined under the section below headed "Our Services") that we provide to you after these terms of business come into force, including any future Services provided in connection with insurance contracts that were placed by us, or any subsidiary of Aon plc ("Aon Group Member"), for you before these terms of business came into force.
>
> 0.4 If you have any questions about these terms of business, in particular in relation to the "Our Obligations and Liability to You" clause set out below, please raise them with us within 30 days, otherwise we will assume you are in agreement with them. To the extent that you do not respond, your agreement will be deemed to have been given by the continuation of your normal business relationship with Aon UK Limited.
>
> 0.5 Our permitted business is advising customers on insurance contracts (recommending specific insurance policies to customers); arranging (bringing about) deals in insurance contracts (e.g. introducing a customer to an insurer); making arrangements with a view to transactions in insurance contracts (e.g. helping a customer to fill in a proposal form); dealing as agent in insurance contracts (entering into an insurance contract with a customer on behalf of an insurer); assisting in the administration and performance of an

insurance contract (e.g. notifying insurance claims to an insurer and negotiating settlement of the claim on a customer's behalf); and agreeing to carry on any of the above regulated activities.

…

1 Client

1.1 These terms of business shall apply to you and to each member of your company, practice, partnership and/or any other legal and/or natural person who is either entitled as a matter of law to rely on the Services or we have agreed in writing may rely on the Services ("you/your"). You warrant that you have authority to enter into these terms of business on your own behalf and on behalf of the said members and persons (each a "Beneficiary"). If we place reinsurance for you, then where we refer in these terms of business to "insurance", "insurance contract" and "insurer", these phases shall also, where appropriate, refer to "reinsurance", "reinsurance contract" and "reinsurer", respectively.

…

2 Our Services

…

2.3 If we carry out any other insurance broking related services for you, such services will also be subject to these terms of business, subject to the remuneration clause below.

…

4 Our Obligations and Liability to You

4.1 We shall exercise reasonable skill and care in the performance of our Services.

4.2 All representations (whether express or implied) and all implied conditions, warranties and terms as to the provision of the Services by us, are excluded to the extent permitted by law or regulation.

4.3

4.3.1 In no event will we be liable to you for any indirect, incidental, special, consequential, exemplary, punitive or reliance damages (including, without limitation, lost or anticipated revenues, lost business opportunities or lost sales or profits).

4.3.2 To the fullest extent permitted by law, and except for damages resulting solely and directly from fraud or intentional misconduct by us, Aon UK Limited's liability for all time to you for any and all damages, costs, and expenses (including but not limited to lawyers' or attorneys' fees), whether based on contract, tort (including negligence), or otherwise, in connection with or related to the Services (including a failure to provide a service) or any other services that we provide shall be limited to a total aggregate amount of GBP1,000,000 or such higher amount: as we may agree with you from time to time by express agreement, signed by both of us, provided that where any additional amount is payable in relation to a higher limit, the higher limit does not take effect until and unless that payment is made.

4.3.3 The single total aggregate liability limitation in this clause 4.3 also applies to:

i) claims and liabilities asserted by Beneficiaries, your employees and agents against UK Limited;

ii) claims and liabilities asserted by Beneficiaries, your employees and agents against Aon Group Members, their employees and agents; and

iii) claims and liabilities asserted by you against Aon Group Members, their employees and agents,

so that the total of all such claims combined cannot exceed the amount set out in this clause.

However nothing in these terms of business shall create, imply, or operate as an admission, that our related companies, employees and agents owe or accept any duty or responsibility to you or to your related companies, employees and agents.

4.3.4 Where any claim or loss arises partly due to an error or omission by us and partly due to an error or omission by you (including a Beneficiary or an, employee or agents of you or a Beneficiary), you indemnify us for all damage and loss arising from the error or omission by you (including Beneficiaries, and employees or agents of you or a Beneficiary).

4.3.5 To the fullest extent permitted by law, we have no liability for any claim or liability asserted by you or by a Beneficiary for any loss or damage arising by reason of or arising out of an error or omission by you or a Beneficiary.

4.3.6 To the fullest extent permitted by law, any claim against us or an Aon Group Member, or against an employee or agent of us or an Aon Group Member brought by you (or a Beneficiary, or an employee or agent of you or Beneficiary) in connection with or related to the Services (including a failure to provide a service) or any other services that we or an Aon Group Member provides including, but not limited to, any contractual, common law or statutory causes of action, must be brought no later than:

i) one year from the date that you become aware, or, in the exercise of reasonable diligence, should have become aware, of the grounds for any such claim; or

ii) two years from the date upon which the work that gives rise to the claim was first commenced,

whichever is soonest, and any claim or demand brought after this period is forever extinguished and barred.

You acknowledge and agree that this provision shall take precedence over and supersede any statutes of limitation or repose that would otherwise apply.

4.3.7 We are not liable for any actual or alleged errors or omissions by a placing broker, co-broker, sub-broker, correspondent broker or other agent that is not an Aon Group Member and all such liability is entirely and for all time excluded.

4.3.8 We are not responsible for any loss you or a Beneficiary may suffer as a result of our calculation or estimation of the premium and statutory charges that apply to your insurance.

4.4 Both you and we agree that the foregoing limitations and exclusions are reasonable, based on the level of risk assumed by us in connection with the Services we provide and the fees and/or brokerage earned under these terms of business.

4.5 If any Services or any other insurance brokering, insurance administration and/or insurance consulting services are agreed by us to be provided to you or to a Beneficiary, and they are provided by any Aon Group Member, our agents, representatives or sub-contractors (each, including Aon Group Members, a "Provider"), then Aon UK Limited accepts sole responsibility for the acts and omissions of any such Provider and for the acts and omissions of its own and any such Provider's directors, officers, employees and representatives. Accordingly, you agree that any claim you may have in respect of such acts and omissions may only be brought against Aon UK Limited and not the individual or Provider concerned, each of whom shall have

the express benefit of this paragraph and the right to rely on and enforce its terms.

4.6 We will not be responsible for providing any legal, accounting, taxation, regulatory, or other specialist advices ("Specialist Advices") that may be required as a result of issues arising from our appointment by you. If Specialist Advices are required, you acknowledge and agree that they will be sought by you from an appropriately qualified person or entity.

4.7 In the event that you have appointed, retained or engaged another party to assist in the Services then you agree that our liability will not be increased due to any limitation of liability which may have been agreed in relation to that party.

4.8 In no event will we be liable for any losses arising in any way, directly or indirectly, from:

(a) the supply by you of any information which is untrue, unfair, incomplete, inaccurate or misleading;

or

(b) any criminal, fraudulent, dishonest or negligent act or omission, misrepresentation, or default, on your part.

4.9 Where the Services and/or Deliverables (as defined in the clause headed "Ownership, Intellectual Property and Use of Information" below) include an assessment of risk, you acknowledge that such an assessment is an expression of our opinion only and not a statement of fact, and any decision to rely upon any such assessment of risk is solely your responsibility, and we will not be liable to you for any losses which may be incurred as a result of any reliance placed on such an opinion.

4.10 If you or any of your Beneficiaries, employees and/or agents claim or make demands against us or any Aon Group Member, Aon UK Limited employee or Aon UK Limited agent for a total amount in excess of the amount set out in clause 4.3, then you agree to indemnify us and all Aon Group Members, Aon UK Limited employees and Aon UK Limited agents for all

liabilities, costs and expenses incurred by us or our Aon Group Members, Aon UK Limited employees and Aon UK Limited agents in excess of that amount.

…

13 Assignment

You may not assign your rights under these terms of business without first informing us in writing and obtaining our prior

written consent, which we will not unreasonably withhold or delay. We may assign our rights under these terms of business or sub-contract or outsource any of the Services or any other insurance brokering, insurance administration and/or insurance consulting services without your prior consent.

…

14 Entire Agreement and Conflict

These terms of business including for the avoidance of doubt any schedules, demand and needs statement, service level agreement, letter of engagement, constitute the entire agreement between you and us with regard to our appointment and supersedes all proposals, prior discussions and representations, oral or written between both you and us relating to the subject matter. In the event of any conflict between these terms of business, any schedules, demand and needs statement, services level agreement, letter of engagement, the letter of engagement, service level agreement, demand and needs statement, schedules and terms of business shall prevail in order listed, save where this would cause us to be in breach of any legal or regulatory obligations in which case the applicable terms of these terms of business shall take precedence. We shall be sole judge of what constitutes such a breach.

…

17 Third Party Rights

A person who is not a party to these terms of business has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any term of these terms of business, other than in the case of a Provider and/or their respective directors, officers, employees and representatives.

…

21 Governing Law and Jurisdiction

These terms of business shall be governed by and construed in accordance with the Laws of England and Wales and any dispute arising out of or in connection with it [sic] shall be submitted to the exclusive jurisdiction of the Courts of England and Wales.

…"

17. In reply later the same day, Ms Albacete wrote:

"I have read and reviewed the information attached. I confirm being in full understanding of this information."

18. On 7 April 2016 Mr Kaye sent Estratégica a quote for a policy with a limit of USD 25 million. His covering email stated, among other things:

> "Policy is subject to the following:
>
> - Geographical exclusion clause LSW617H – note this include [sic] Colombia and Peru. We have discussed with the underwriter and any flights to these destinations will be subject to their agreement.
>
> … Please explain the client that we have proceeded to obtain the formal quote based on **USD 25,000,000** limit … If the client requires a higher limit please advise urgently."

19. Following a query from Ms Albacete made directly to Mr Kaye about the difference in the premium, Mr Kaye emailed to Ms Albacete on 8 April 2016 saying:

> "The original indication for a liability limit of USD 50m was USD120,000 plus 10% additional premium for war liabilities AVN 52, totalling USD132,000
> For a USD25m limit, the price is USD125,000 (including war liabilities up to USD25m). So the saving is USD7,000 for the lower limit
> We have already advised underwriters that the limit required is USD25m, however if you would prefer to purchase a higher limit of USD50m please confirm and we will re-negotiate and will confirm the premium. We can however do this at any time during the policy period if required
>
> …
>
> Trust this explains and await your advices regarding the limit of liability"

20. Also on 8 April 2016, Mr Kaye emailed Ms Albacete stating

> "whilst it is entirely your decision to purchase a liability limit on USD 25,000,000 we would also recommend that you purchase the highest limit available/possible. We are conscious that for the number of passenger seats on your aircraft this is a relatively low limit. If you wish us to look into pricing options for us to increase the limit we will be happy to do so"

21. Mr Kaye also emailed Estratégica on 8 April 2016, copying Aon BA and Mr Albacete stating:

> "For the record would suggest that you advise LaMia that the USD 25,000,000 limit may be all that is required to satisfy local regulations, however this is a low limit and we would encourage them to buy a higher limit of liability if at all possible."

22. Also on 8 April 2016, Aon issued a "Certificate of Reinsurance" for the year commencing on 10 April 2016, naming Bisa as the reinsured and covering the legal liability of the insured (LaMia and associated companies) up to a "Combined Single Limit (Bodily Injury/Property Damage) of USD 25,000,000 any one occurrence and in the annual aggregate in respects of products liability." The Certificate also stated as follows:

> "Aon is not an insurer (or reinsurer) of any of these coverages. Except in the case of Aon's fraud or deliberate misstatement, this Certificate is issued without any liability in any circumstances on the part of Aon UK Limited, or the members of the Aon group of companies or their respective directors and staff, past and present. Claims against Aon in respect of or arising out of this Certificate must be brought exclusively in the English courts and will be governed by English law."

23. The more detailed Reinsurance Policy bore unique market reference B0823AF1639901. Both the Certificate and the Reinsurance Policy made clear that they were subject to clause LSW617H which restricted the geographical scope of cover by excluding, among other territories, Colombia and Peru.

24. As I have mentioned already, the Insurance Policy was issued a little later, on 12 May 2016. It was in the Spanish language, but it is common ground that it was on back to back terms with the Reinsurance Policy and that it was expressed to be subject to the same geographical restrictions pursuant to LSW617H.

25. On 11 May 2016, Ms Albacete told Estratégica that LaMia was to fly a football team to Medellin in Colombia on 17 May 2016 and asked how to proceed in the light of the geographical exclusion. Estratégica passed the query onto Aon and on 13 May 2016, an email was scratched on behalf of TMK with the words "Noted and agreed this flight only. Please advise estimated sport team exposures?". It seems from an email in the bundles that this flight never took place and it also seems likely from the correspondence that "estimated sport team exposures" were not provided.

26. LaMia did attempt to fly a football team (the Brazilian team, Chapecoense) from Bolivia to Colombia departing on 28 November 2016, leading to the tragic Accident which is at the heart of this dispute.

27. On 1 December 2016 (the third day after the Accident), the Reinsurers agreed to indemnify LaMia up to the policy limits (ie USD 25 million) without prejudice to coverage issues, including the geographical exclusion. Reinsurers' message to Aon referred to indemnifying the Insured, while Aon's message to all parties stated that Reinsurers would indemnify LaMia and that "Reinsurers are now prepared to handle the liability aspect in the normal manner."

28. A Deed of Release dated 20 February 2017 was entered into between Bisa and the Reinsurers (the "**Deed of Release**"). The Deed of Release explained its purpose in Recital C as follows:

> "Bisa shall decline coverage under the Insurance. Without Prejudice and considering the humanitarian effects of the Event

> [ie, the Accident] Reinsurers wish to establish and administer, without any admission of liability under the Reinsurance Contract, a humanitarian assistance fund for the benefit of the 68 Passengers affected by the accident and entitled to compensation, and otherwise to relieve Bisa of certain Other obligations, costs and expenses which may, but for this Deed, have been subject to an indemnity under the Reinsurance Contract. In consideration of this, Bisa now wishes to fully and irrevocably release and waive any rights it may have under the Reinsurance Contract in respect of the Event."

29. Clause 2 of the Deed of Release provided:

> "Under this Deed, Releasor [Bisa and, broadly, affiliates] irrevocably and unconditionally releases and discharges and forever waives any and all rights, liabilities, actions, claims, demands of whatever kind or nature (including, without limitation, any causes of action arising under the laws of Bolivia, Brazil, Colombia, Venezuela or any other jurisdiction) whether or not presently known to the Parties or to the law, certain or contingent reported or unreported, suspected or unsuspected by Releasor, which Releasor now owns or holds, or has at any time hereto before owned or held, or which may hereafter accrue, pursuant to or arising under or in respect of the Reinsurance Contract against the Releasees [the Reinsurers and, broadly, affiliates], or any of them, arising out of, resulting from, or connected in any manner of whatever kind or nature with, the Event."

30. Other clauses of the Deed of Release provided that: Bisa would not commence any proceedings against the Reinsurers and would indemnify the Reinsurers against any proceedings that might be commenced under or with respect to the Reinsurance Policy; the Reinsurers would provide up to $25 million to a fund to be administered by a Fund Administrator for the victims of the Accident (the "**Humanitarian Fund**"), with payments to be made "in return for appropriate releases provided by such payees in favour of LaMia, Bisa and Reinsurers"; the Reinsurers would take over the defence of Bisa from any coverage claim brought by LaMia; all claims or coverage claims would be presented by Bisa to the Fund Administrator who would refer them to the Reinsurers; third party rights under the Contracts (Rights of Third Parties) Act 1999 were excluded.

31. Clause 17 of the Deed of Release provided:

> "GOVERNING LAW
>
> This Deed shall be governed by and construed in accordance with English law. The Parties agree that the English courts shalt have exclusive jurisdiction to adjudicate any dispute which arises in connection with this Deed."

32. On the following day, 21 February 2017, Bisa sent to LaMia the Declinature Letter, which denied coverage for the Accident on grounds including: the geographical

exclusion; unpaid premiums; breach of condition precedent of due diligence; failure to communicate the increased risk occasioned by transporting a sports team; exclusion of losses caused by criminal acts of the management of the insured.

33. On 18 May 2017, LaMia wrote to Bisa accepting Bisa's declinature on the grounds given in the Declinature Letter relating to geographical exclusion, unpaid premiums and the breach of condition precedent. LaMia requested that Bisa provide ex gratia payments to the victims of the Accident and offered to sign a settlement and waiver of any claims under the Insurance Policy.

34. The Colombian Civil Aviation Authority published its report into the Accident on 16 August 2017, the conclusions of which were summarised in the following terms (in translation from the original Spanish):

> "The investigation identified the following contributing factors:
>
> - Premature configuration of the aircraft for landing during the descent over GEMLI holding pattern, considering the absence of thrust, this configuration affected the plane's gliding distance to the runway of Rionegro airport.
>
> - Latent deficiencies in the planning and execution of Non-Regular Transport flights by the aircraft operator, related to the insufficient supply of the amount of fuel required.
>
> - Specific deficiencies in the flight planning of CP 2339, by the operator of the aircraft.
>
> - Lack of supervision and operational control of the flight by the Operator, who did not supervise planning of the flight, its execution, or maintaining a follow-up of the flight that would have allowed providing support to the crew with decisions making.
>
> - Absence of timely calls for "priority", or declaring an "emergency" or others by the aircraft crew members during the flight, and especially when fuel depletion was imminent in the descent phase and when performing a holding pattern which would have alerted air traffic services to provide the necessary support.
>
> - Organizational and operational deviations on the part of the Operator in the application of fuel management procedures, as it did not comply in practice with the approval given by the Bolivian DGAC in the process of certification of the company.
>
> - Delay for CP 2933 approach clearance to Rionegro, caused by its late request for priority, and its late declaration of fuel emergency, these added to the traffic density holding over VOR RNG."

35. The Brazilian Federal Senate established a Parliamentary Committee of Inquiry which issued on 12 March 2020 a summons addressed to Aon (and also to Aon Benfield Limited, "**ABB**") (the "**Summons**"), asking them the appear at a meeting on 17 March 2020 to give testimony. The invitation appears to have been extended later to a meeting on 31 March 2020. The Summons explained that the Committee of Inquiry had been established to "find out the situation of the relatives of the victims of the crash concerning the plane carrying the Chapecoense players, coaching staff and managers, as well as the relatives of the journalists and guests who lost their lives and, also, to investigate and identify the reasons why the relatives have not yet received due compensation"

36. Aon replied to the Summons on behalf of itself and ABB with a thirteen page letter dated 30 March 2020 (the "**Aon Letter**") acknowledging the invitation to participate in a hearing on 31 March 2020. Aon explained that it was party to a class action in Brazil and that other lawsuits were pending in other jurisdictions and that it had been advised by lawyers not to attend the hearing, but that it hoped the content of the Aon Letter would nevertheless assist the Committee of Inquiry.

37. In the following summary, I have added emphasis to indicate certain passages upon which the Individuals rely in the Aon Application for reasons I will explain later.

38. At an early point of the letter, paragraph 1.2, Aon stated "Aon UK considers that there is no legal relationship between Aon UK as reinsurance broker and LaMia as Insured."

39. The Aon Letter explained in detail, including in several Schedules, the chain of insurance and reinsurance and Aon's role as reinsurance broker, and denied that ABB had any role in the process whatsoever. Aon stated that its direct client relationship was with Aon BA whose client was Bisa and that Aon itself "had no involvement in the placing of the insurance policy for LaMia with Bisa."

40. The Aon Letter went on to set out the correspondence from early April 2016 in which the limit of liability was discussed, making it tolerably clear that there had been direct communications between Aon and LaMia on that subject. The essential point made in this section of the letter was that the decision to buy cover only up to USD 25 million was LaMia's alone and not the responsibility of Aon.

41. The Aon Letter then set out that LaMia had failed to disclose that it intended to fly a sports team on the Chapecoense flight, though it had made such disclosures previously in respect of other flights. It described the geographical exclusion and the correspondence in May 2016 concerning an exception to that exclusion and stated that LaMia had not raised the issue prior to the Chapecoense flight.

42. Next, the Aon Letter set out that the Reinsurers had provided coverage without prejudice to their liability to do so and had then determined that they had no liability and that Aon's role had simply been to pass on messages in this respect. Aon stated that it was not involved in any decisions relating to the Humanitarian Fund.

43. Schedule 1 of the Aon Letter was entitled "London and International Insurance/Reinsurance Market". At 1.10, it was explained that in general a reinsured is the client of reinsurance brokers and that reinsurers have no contractual relationship with the ultimate insured. The next few paragraphs continued to explain the general

position with regard to the chain of insurance and reinsurance placements. At paragraph 1.14, it was stated that Schedule 3 was a diagram setting out the parties and that "These are 1.14.1 Bisa … 1.14.2 [Aon BA] … 1.14.3 Aon UK – Aon UK acted on behalf of [Aon BA] in placing Bisa's reinsurance policy in the London Market. Aon does not have, in this structure, a contractual or other legal relationship with Bisa, the Reinsurers or with the Insured. Neither Aon UK nor [Aon BA] has any supervisory role in respect of Bisa or any other Reinsured. 1.14.4 Reinsurers …"

44. Later in Schedule 1, Aon UK stated: "… Given the number of parties involved …, it is not unusual for the parties to communicate directly with one another. Whilst the parties understand the contractual relationships, in order to ease the flow of communications, it is accepted and understood that there are times when emails in respect of insurance/reinsurance placements may be sent from, for example, wholesale brokers to parties that are not their clients. Typically this occurs when there is a need to communicate a message quickly. Thus, there are instances of Aon UK corresponding directly with LaMia – usually when the relevant contracting parties are copied in. This does not impact on the contractual chain and does not change the relationships".

45. Going back in time to examine another part of the history, on 25 October 2017, Podhurst Orseck PA, a Florida law firm ("**Podhurst**") wrote to the Fund Administrator concerning Podhurst's representation of certain victims of the Accident.

46. On 27 October 2018, a Complaint was filed in the Circuit Court for Miami-Dade, Florida, USA by some thirty-eight of the Individuals against LaMia, Kite, Mr Rocha and Mr Albacete (the "**Florida Defendants**"), alleging wrongful death and/or negligence (the "**Florida Proceedings**"). Further of the Individuals were later added as Plaintiffs (the plaintiffs at any given time in the Florida Proceedings I will refer to as the "**Florida Plaintiffs**"; for most of the relevant period, these were the same persons as the 43 Individuals).

47. Between late 2019 and early 2020, there were negotiations between the Florida Plaintiffs, represented by Podhurst, and the Florida Defendants (or at least LaMia, which is the important person for present purposes), represented by Mr Arturo Bravo. The negotiations proceeded towards a "Coblentz Agreement"[1] under which LaMia would admit liability for quantified damages in return for the Plaintiffs' undertaking not to seek to enforce the resulting judgment against LaMia. The commercial value of such an agreement appears to be that it may provide a basis for further proceedings against other – more solvent - parties, such as the defendant's insurers.

48. In February and March 2020, the Individuals say that a binding agreement was reached. The last draft was produced by Podhurst on 27 February 2020 and on 2 March 2020, Mr Bravo said that he was sending it to his clients for signature.

49. However, no signatures were forthcoming and on 18 March 2020, Mr Bravo filed a motion to withdraw as counsel for the Florida Defendants based on "irreconcilable differences" between himself and his clients. That motion was granted on 24 April 2020. By the same order, LaMia was ordered to appoint new counsel, which it failed to do. As a result, a default judgment was entered against it on 29 June 2020.

[1] So named for *Coblentz v Am Sur Co of New York* 416 F.2d 1059.

50. In the meantime, an Amended Complaint was filed to add further Plaintiffs, for which permission was granted by the District Court on 21 April 2020. From that date, the Florida Plaintiffs were the 43 Individuals.

51. The Florida Plaintiffs filed a motion to confirm and enforce the alleged settlement agreements. This was heard on 21 July 2020 when it was apparently not defended by any of the Florida Defendants. The Florida Plaintiffs (ie, the Individuals) obtained judgment following the hearing on 21 July 2020, in accordance with a version of the settlement agreements approved by the Court (the "**Settlement Agreements**"), and the judgment was formally entered on 12 August 2020 (the "**Florida Judgment**").

52. Under the Settlement Agreements, LaMia admitted liability for damages caused by the Accident and the Florida Defendants acknowledged and stipulated that there was no liability coverage under the Insurance Policy. The parties to the Settlement Agreements agreed that the Florida Defendants had requested coverage from BISA and the Reinsurers under the Insurance Policy, that BISA had refused coverage and that BISA and the Reinsurers had established the Humanitarian Fund, while continuing to deny coverage.

53. The Settlement Agreements contained an assignment by the Florida Defendants to the Florida Plaintiffs of the Florida Defendants' causes of action against any broker involved in placing the Insurance Policy or the Reinsurance Policy.

54. The Settlement Agreements quantified the damages to which each Florida Plaintiff was agreed to be entitled. The sums so specified totalled USD 844,100,000.

55. On 24 July 2020, Aon issued the Claim Form in the Aon Action, to which the initial Defendants were LaMia and the Other Defendants (but not the Individuals). Aon pleaded that Aon's "business dealings with LaMia and/or [LaMia CA] were governed by a contract, the terms of which were set out in the … TOBA." Aon recited the existence of the Settlement Agreements and the fact that they purported to assign claims from LaMia to the Florida Plaintiffs and that "Aon therefore anticipates that it is likely to face purportedly assigned claims brought by the Individuals imminently, either in their own names or in the name of some or all of the purported assignors." Aon claimed that the purported assignment of LaMia's claims was invalid because it was prohibited by clause 13 of the TOBA. Aon sought a declaration that it had no liability to any of the defendants to the Aon Action and that there were no claims that could be assigned. More detailed declarations claimed included that: the business relationship between Aon and LaMia was governed by the TOBA; any purported assignment was invalid; Aon owed no duty of care to any of the defendants to the Aon Action; Aon acted with reasonable skill and care; and any claim was time barred or limited by provisions of the TOBA.

56. On 11 August 2020, the Florida Plaintiffs filed a Motion to join Bisa and TMK and unidentified other underwriters (in effect, the Reinsurers) to the Florida Judgment and a Motion for leave to file a Third Party Complaint and Second Amended Complaint (the "**2020 Draft Complaint**") against Bisa, the Reinsurers and Aon.

57. On 14 August 2020, the Reinsurers issued the Claim Form in the TMK Action. They sued Bisa, LaMia and the Other Defendants (but not the Individuals). The Reinsurers pleaded that the Florida Plaintiffs had threatened to join one or more of the Reinsurers

and Bisa to the Florida Proceedings, pursuant to rights that LaMia and the Other Defendants were alleged to have assigned to the Florida Plaintiffs. The Reinsurers pleaded that the Florida Plaintiffs' proposed claim against them was to recover around USD 844 million on the basis that the Reinsurers had failed in bad faith to defend LaMia and the Other Defendants in the Florida Proceedings.

58. I interpose that it is common ground between the Florida law experts whose reports I have read that Florida law provides for a cause of action for damages against an insurer who fails in bad faith to defend its insured which is not limited by any limit of liability that the insurance contract might have provided for. In other words, the action for USD 844 million was a potentially available claim under Florida law if the Reinsurers were insurers of LaMia and they had failed to provide a defence to LaMia acting in bad faith.

59. Against this background the Reinsurers sought a declaration of non-liability to Bisa, LaMia and the Other Defendants and an injunction restraining the same defendants from commencing or continuing any relevant proceedings in Florida or elsewhere.

60. On 20 August 2020, the hearing of the Florida Plaintiffs motions to join Bisa, Aon and TMK was fixed for 1 September 2020. On 31 August 2020, TMK filed a Notice of Removal which had the effect of removing the Florida Proceedings from the Miami-Dade County Court (the "**State Court**") into the Federal United States District Court for the Southern District of Florida (the "**District Court**"). The filing of this Notice therefore had the effect of staying the progress of the Florida Proceedings including the applications that had been fixed for hearing on 1 September 2020.

61. On 2 September 2020, the District Court directed an Initial Planning and Scheduling Conference to take place on 6 November 2020.

62. On 4 September 2020, TMK filed in the District Court its response to the Florida Plaintiffs' Motion for leave to file a Third Party Complaint. This filing argued that the Judgment was void for lack of service and that the Florida courts lacked personal jurisdiction over TMK.

63. On 10 September 2020, the Florida Plaintiffs filed a motion to stay proceedings in the District Court pending submission of their motion to remand the proceedings back to the State Court.

64. On 14 September 2020, TMK filed in the District Court its response to the Florida Plaintiffs' motion to join Bisa and TMK to the Florida Judgment, opposing that motion on grounds including technical defects in the judgment against LaMia, TMK's status as a reinsurer, not LaMia's insurer, and the fact that LaMia accepted there was no coverage.

65. On 21 September 2020, TMK filed a response to the Florida Plaintiffs' motion to stay proceedings pending remand. That motion for a stay was granted by the District Court on 21 September 2020. It is not clear from the judgment whether the decision was made before or after the Court had seen TMK's filing of the same day.

66. The Florida Plaintiffs filed their motion to remand back to the State Court on 19 October 2020.

67. In England, on 23 October 2020, Cockerill J granted permission to Aon to serve out of the jurisdiction the Claim Form in the Aon Action upon all the defendants to that action. Unusually, Aon requested an oral hearing of this application and Cockerill J's reasons for granting it have neutral citation [2020] EWHC 3776 (Comm).

68. TMK filed a Response in opposition to the Florida Plaintiffs' motion to remand on 17 November 2020.

69. On 23 November 2020, the Reinsurers amended the Claim Form in the TMK Action to join the Individuals as defendants and to recite the motions issued by the Individuals in the State Court and to add relief against the Individuals in the form of declarations of non-liability and (final) anti-suit injunctions.

70. The Florida Plaintiffs' Reply to TMK's Response to the Florida Plaintiffs' motion to remand was filed on 3 December 2020.

71. On 14 January 2021, Aon applied to join the Individuals as defendants to the Aon Action and for permission to serve them out of the jurisdiction. The relief sought included declarations of non-liability and a final anti-suit injunction against the Individuals.

72. On 29 January 2021, Aon applied for permission to serve an application for an anti-suit injunction upon the Individuals by alternative means, namely by sending it to Podhurst.

73. Also on 29 January 2021, Cockerill J gave the Reinsurers permission to serve the Claim Form in the TMK Action out of the jurisdiction, including on the Individuals, and extended its validity for 12 months. The order provided that pending further directions, the Defendants were not required to file a defence or an application disputing jurisdiction, nor were the Claimants required to file a Particulars of Claim.

74. On 1 February 2021, the District Court decided to remand the Florida Proceedings to the State Court.

75. On 12 February 2021, TMK applied in the State Court to transfer the Florida Proceedings to the Complex Business Litigation section. On the same date, the Florida Plaintiffs applied to strike TMK's transfer motion and applied to transfer the Florida Proceedings to Judge Zilber. This last motion was denied on 2 March 2021.

76. On 5 March 2021, Cockerill J gave permission to Aon to make the amendments to join the Individuals to the Aon Action and to serve them through Podhurst. The (Re-Re-) Amended Claim Form was issued on 8 March 2021.

77. On 12 March 2021, the Reinsurers filed an application in the TMK Action to serve an application for an anti-suit injunction on the Individuals through Podhurst.

78. On 15 March 2021, Aon issued its application against the Individuals for an anti-suit injunction.

79. On 18 March 2021, the Florida Plaintiffs' Motion to File a Third Party Complaint was listed for hearing on 21 April 2021.

80. On 23 March 2021, TMK's Motion to Transfer to the Complex Business Litigation section was denied on the ground that TMK was not a party to the proceedings.

81. Also on 23 March 2021, Podhurst received Aon's application for an anti-suit injunction.

82. On 24 March 2021 in the TMK Action, Andrew Baker J gave the Reinsurers permission to serve the Individuals through Podhurst and made directions for an on notice hearing of the application for an anti-suit injunction.

83. On 31 March 2021, the Reinsurers made an urgent without notice application for anti-suit relief against the Individuals, which was granted by Henshaw J. His judgment has neutral citation number [2021] EWHC 951 (Comm). As appears from that judgment, the basis of the urgent application was that the hearing date on 21 April 2021 gave rise to a risk that the Reinsurers would submit to the jurisdiction of the Florida Court by responding to the Florida Plaintiffs' motion, and that the service on Podhurst of Aon's anti-suit injunction application would give rise to a risk that the Individuals could themselves seek anti-suit relief against the Reinsurers from the Florida court.

84. Henshaw J granted the injunction for the following reasons:

> "12 I have had regard to the principles set out in Ust-*Kamenogorsk Hydropower Plant JSC v AES Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 at [20], and *SAS Institute Inc v World Programming Limited* [2020] EWCA Civ 599 at [90] and following. I bear in mind in particular the need to proceed with caution in the light of considerations of comity, especially when granting an injunction that is not sought in order to enforce an arbitration or exclusive jurisdiction clause.
>
> 13 I am satisfied that there is a good arguable case that proceedings against the applicants in the courts of Miami would be vexatious and oppressive and that an injunction is necessary to protect the jurisdiction of the English court, for the following reasons:
>
> (1) The English court has a sufficient interest in the matter because England is the natural forum for any claims against the applicants. All but one of the applicants is an English company domiciled in England. The tenth claimant was domiciled in England at the time of the accident but has since redomiciled in Luxembourg. Permission has already been given for these proceedings to be served out of the jurisdiction and the question of the applicants' liability is already before this court in that sense. The cause of the accident itself is no longer in issue.
>
> (2) It appears that the brokers, Aon, against whom the Miami plaintiffs assert related claims, rely on an exclusive jurisdiction clause in their contracts with LaMia, and Aon have commenced proceedings in England too.

(3) Any claim by the Miami plaintiffs against the applicants must arise in connection with the reinsurance contract, since the applicants have no other connection with the accident, and therefore must address the validity and effect of the deed of release. That deed is subject to English law and the exclusive jurisdiction of the English courts. This is the position whether the Miami plaintiffs are claiming against the applicants as assignees of LaMia's rights against BISA, as assignees of BISA's rights against the reinsurers, or on any other basis.

(4) The Miami plaintiffs, in their 11 August 2020 second amended complaint, base their claims on breach of contract and the inclusion of unconscionable terms and conditions in what is variously described as the flight insurance policy and the reinsurance policy; and on common law bad faith in connection with the flight insurance and/or reinsurance policies.

(5) However, neither the Miami plaintiffs nor LaMia, as insured carrier, were parties to any contract with the applicants. Insofar as they claim as assignees, the assignment provided for in the settlement agreement between the Miami plaintiffs and the Miami defendants was of claims against the brokers and associated persons, including the brokers' own insurers: not of claims against BISA, as insurer, still less against the applicants, as reinsurers. On the contrary, the whole premise of those claims against the brokers would seem to be that, as clause 4.2 of the settlement agreement recorded:

> "Given the language of flight insurance policy, there is no liability coverage for the subject accident under the flight insurance policy."

Equally, the claims alleging bad faith appear to be rooted in contract, at least in the sense of relating to the formation and/or terms of the insurance and reinsurance contracts, and probably, in fact, based on implied terms in those contracts. However, the Miami plaintiffs are neither parties to any contract with the applicants nor assignees of any rights against them.

(6) On the evidence I have seen, the applicants have set up an ex gratia fund equal to the relevant limit of indemnity under the policy ($25 million) for the benefit of the families of the victims of the accident.

(7) In all these circumstances, there is a good case on the evidence before me that it is indeed unconscionable for the Miami plaintiffs to seek to pursue the applicants in the courts of Miami at all, and a fortiori for sums greatly in excess of the limit of indemnity for which the contract of reinsurance was written and which has been made available to them on an ex gratia basis.

> 14 I have also considered the case law on delay and its connection with comity, which I summarised in my judgment in *Daiichi Chuo Kisen Kaisha v Chubb Seguros Brasil SA* [2020] EWHC 1223 (Comm) at [54] and following. I am satisfied for present purposes that there has not been delay on the applicants' part likely to have materially increased the perceived interference with the process of the Miami court or led to a waste of its time or resources. The present proceedings were commenced in a timely manner and the applicants had intended to apply on an inter partes basis for an interim anti-suit injunction until very recent events suggested that it was necessary to proceed as a matter of urgency. The applicants have not yet been made parties to the proceedings in Miami and have not submitted to that court's jurisdiction.
>
> 15 Considering the balance of justice, I am satisfied, for the purposes of the interim relief sought today, pending a return date in about three weeks' time, that there is a risk of significant prejudice to the applicants if relief is not granted because there is good reason to fear that steps may be taken in Miami to preclude the applicants from exercising their rights, in the way I have already outlined. Conversely, on the evidence before me, there is no reason to believe that an interim injunction would cause serious or irrevocable prejudice to the Miami plaintiffs. The balance of justice lies in favour of granting the interim relief sought."

85. The injunction granted by Henshaw J was served on Podhurst by email on 31 March 2021 and by process server on 7 April 2021.

86. On 12 April 2021, TMK served its detailed (41 page) Response to the Florida Plaintiffs' Motion to file a Third Party Complaint.

87. On 14 April 2021, Aon filed a without notice application for an anti-suit injunction against the Individuals, which was heard by Foxton J on 19 April 2021. As Foxton J recorded in his judgment with neutral citation [2021] EWHC 1074 (Comm), the without notice application was made because of the listing of the Individuals' Motion to file a Third Party Complaint and an apparent omission of Podhurst to reply to a request from Aon to adjourn that hearing.

88. Foxton J's reasons for granting the without notice injunction were as follows:

> "5. Turning to the requirements for anti-suit relief, it is obviously necessary for this court to have jurisdiction over the Individuals if it is to grant any form of injunctive relief against them. Cockerill J has already held, when granting permission to serve the application for antisuit relief out of the jurisdiction, that the requirements for establishing jurisdiction have been established to the requisite standard of arguability and I do not propose to revisit that conclusion. Second, Aon must establish to a high degree of probability, as it is sometimes put, that the claims that

> the Individuals seek to assert against them in the Florida proceedings fall within the exclusive jurisdiction clause in the TOBA, which is binding on them. On the evidence before me it is clear that LaMia expressly consented to the TOBA as regulating and governing the service Aon was providing in relation to the placing of these insurances. Mr Mitchell has taken me to contemporary email exchanges making that clear. The wording of the jurisdiction clause in the TOBA is in the widest possible form with the usual wide connectors of arising out of or relating to. I accept that the Individuals were not themselves, of course, involved in the dealings with Aon that culminated in their work in relation to the insurances, but Mr Mitchell has taken me through the Florida complaint, and I am satisfied, that whether put expressly in contract or in tort, the claims which the Individuals are seeking to advance are premised on the alleged non-performance or defective performance of the contractual services which Aon had agreed to provide pursuant to the TOBA. Whichever legal theory one adopts - whether those claims are brought by the Individuals as assignees or as third party beneficiaries of contractual rights or whether one looks at the matter more generally as a complaint being brought about failure to perform a contract which under some legal theory gives a third party to the contract a right of complaint - I am satisfied to a high degree of probability that those claims cannot be asserted without at the same time subjecting those third parties to the condition which attaches to the rights which they are in substance seeking to enforce, namely the condition that they be brought only within this jurisdiction.
>
> 6 Having satisfied myself to a high probability on the information before me that the claims brought by the Individuals fall within the contractual promise to sue here, and that the Individuals cannot assert those claims without at the same time complying with that promise, the authorities make it clear that I should grant an antisuit injunction unless there are strong reasons for not doing so. I have been unable to detect any such strong reason in this case. My attention has been drawn to the fact that the Florida proceedings have been underway for a substantial period and it might be said that Aon UK Limited could have moved for injunctive relief before now. However on the basis of Mr Foss's witness statement it is clear that there has been activity in relation to the claims, and active engagement with them, and in particular that there was an understandable desire on Aon UK Limited's part to seek to resolve these issues at an on notice hearing which would have been preferable. It has been the recent developments in Florida which have necessitated the urgent application today."

89. Also on 19 April 2021, the Individuals gave notice that they wished to cancel the hearing that had been fixed for 21 April 2021 in the light of the anti-suit injunction that

had been granted by Henshaw J on 31 March 2021. The Florida Proceedings have thus been paused as a result of the without notice injunction orders in each of the two Actions.

90. A further amended draft Second Amended Complaint and Third Party Complaint was provided in draft on 30 June 2021 (the "**2021 Draft Amended Complaint**"). This is the document that now sets out the Individuals' proposed claims in the Florida Proceedings and I will refer to it further below. The claims now proposed are not identical to those contained in the 2020 Draft Complaint, which were in issue at the without notice stage of the two anti-suit injunctions. In particular, claims against Aon based on the assignments in the Settlement Agreements were included in the 2020 Draft Complaint but deleted from the 2021 Draft Complaint.

91. Directions were given in both the TMK Action and the Aon Action for an on notice hearing of the return date for the injunctions granted without notice by Henshaw J and Foxton J respectively. By Consent Orders, it was ordered that the Individuals should state in their Acknowledgments of Service whether they intended to contest jurisdiction (which they did), but that they were not required to make any application contesting jurisdiction until after the resolution of the anti-suit injunction applications.

92. The hearing of the return date of both injunctions was (after several amendments to the directions to accommodate additional evidence and other reasons for more time being required) fixed for July 2022. Unfortunately, no Judge was available to hear it and the hearing was re-fixed for 2 days on 20 and 21 September 2022, when it came before me. I received further evidence and written submissions on 29 September 2022 and 3 October 2022.

Personal Jurisdiction

93. In both Actions, the Individuals have indicated in their Acknowledgments of Service an intention to challenge this Court's jurisdiction over them, but the effect of certain procedural orders made by consent has been to extend their time to issue any such challenge until after the determination of the anti-suit Applications. Such a challenge could have been considered preliminary to or as part of these applications. If the Court does not have, or should not exercise, jurisdiction over the Individuals, then the anti-suit injunctions should not be continued. However, all parties invited me to decide the Applications on the basis that the consent orders to which I have referred have postponed the issue of jurisdiction to some other occasion.

Aon's Application

A quasi-contractual claim?

94. Aon's application is put primarily on the basis that the claim which the Individuals wish to bring against Aon in Florida is in substance a contractual claim which falls within the exclusive English jurisdiction clause in the TOBA. If this is right, then the injunction should normally be granted unless there are strong reasons not to do so, which Aon says are absent in the present case.

95. The legal principles governing this primary basis for Aon's application were largely common ground before me. The authorities in this area generally do not distinguish

between interlocutory and final relief, perhaps because in many anti-suit cases, the interlocutory decision will for practical purposes be final.

96. Since the Individuals were not party to the TOBA they are not contractually bound by the jurisdiction agreement within it. Nevertheless, as Foxton J explained in *QBE Europe SA and another v Generali España de Seguros y Reaseguros* [2022] EWHC 2062 (Comm) ("***QBE Europe***") at [12] – [16], English law does not necessarily treat such a jurisdiction agreement as irrelevant. If the claim arises from the contract in the relevant sense, then the jurisdiction agreement in that contract is a highly significant factor in the decision whether to grant an anti-suit injunction. Indeed, Foxton J stated at [16]:

> "In this 'derived rights' context, it is now clear (at least to Court of Appeal level) that an application for ASI relief will be approached by reference to the same decision-making framework as that which applies in a wholly contractual context."

97. The first issue in dispute between the parties to the Aon Action is whether the TOBA was agreed as a contract between Aon and LaMia. It is common ground that the test I must apply to that question is whether there is a high degree of probability that the contract (including the jurisdiction clause) was made, as stated by Christopher Clarke J in *Transfield Shipping v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (QB) at [52].

98. I have set out above the correspondence by which Aon says the TOBA was agreed. Cockerill J was persuaded at the hearing of Aon's without notice application for permission to serve out of the jurisdiction and Foxton J was similarly persuaded at the hearing of Aon's without notice Application for anti-suit relief that this correspondence does show to the necessary standard that the agreement was made.

99. However, before me, Mr Elkington KC for the Individuals submitted that the statements in the Aon Letter, especially those which I have underlined above, cast sufficient doubt on that question that it could not be said that the agreement was made at all to a high degree of probability. Mr Elkington KC emphasised that the Aon Letter appears to have been drafted with the assistance of legal advice and the importance of the occasion to which it was directed. As Mr Elkington KC also emphasised, and Mr Mitchell KC for Aon accepted, at least some of those emphasised passages were not literally accurate if the TOBA had been agreed.

100. In my judgment, the statements made in the Aon Letter, which must of course be read in the context of the whole letter, do not cast significant doubt on whether the TOBA was agreed. The (objectively assessed) purpose of the Aon Letter was to persuade the Brazilian Senate that there were no circumstances in which Aon could be liable for the losses caused by the Accident. In the course of that exercise, the Aon Letter was at pains to explain Aon's role in the chain of contract as reinsurance broker, as well as the warnings it had given about the level of cover.

101. Read in its context, the statement "Aon does not have, in this structure, a contractual or other legal relationship with Bisa, the Reinsurers or with the Insured" was intended to communicate that Aon was not an insurer and did not owe a duty of care to LaMia, but

does not necessarily imply that a contract like the TOBA did not exist. The same goes for the other statements relied upon by the Individuals.

102. Setting the evidence of the emails against the evidence of the Aon Letter, the agreement of the TOBA as a contract binding Aon and LaMia clearly passes the threshold of high degree of probability.

103. The next issue raised by Mr Elkington KC was that the TOBA did not apply to the circumstances of this dispute. The basis of that argument was that the email by which the TOBA was sent to LaMia referred to "the Important Information detailed below which is applicable to any placement effected via the Aon Global Broking Centre London" and there was no such placement in this case. That argument does not reduce the contrary likelihood below a high degree of probability for two reasons. First, on the basis of the evidence before the Court, the context in which the TOBA was sent appears to have been the negotiations for the relevant insurance cover, not some other transaction. Secondly, the terms of the TOBA itself are such that it is intended to cover all relations between Aon and their possible customer, not just those for a particular placement. As I read the emails and the totality of the evidence currently available, that was understood by Ms Albacete for LaMia and it was the basis of the agreement of the TOBA.

104. Then Mr Elkington KC pointed out that clause 0.3 of the TOBA states that these terms "shall govern our appointment by you" and that there was in fact no appointment by LaMia of Aon. However, the same clause also states that "These terms of business apply to all Services (defined under the section below headed 'Our Services')" and that section defines "our services" to include any "other insurance broking related services". This is wide enough to cover whatever characterisation may be given to the direct communications between Aon and LaMia. It follows that the exclusive jurisdiction provision at clause 21 is wide enough to cover any claim that LaMia might make against Aon arising out of the placing of the Insurance Policy or the Reinsurance Policy or any advice Aon may have given.

105. Having considered each of these points individually, I should also stand back and consider whether taking them altogether they are sufficient to take Aon's case that the jurisdiction agreement in the TOBA was agreed and does apply to Aon's role in the placing of the Insurance Policy and the Reinsurance Policy below the threshold of high degree of probability. Standing back in that way, I remain satisfied that the threshold is indeed passed. I accept there is a logical possibility that more complete evidence could lead to the conclusion that the TOBA was not agreed or was not intended to apply to the relevant circumstances, but that possibility does not seem to me to rise to the level of any significant probability.

106. Finally, the Individuals argue that their claim against Aon does not arise from the contract in the relevant sense to engage the doctrine that would require me to apply "the same decision-making framework as that which applies in a wholly contractual context". Aon submitted that the issue is whether as a matter of English law, the claim that the Individuals wish to bring in Florida is in essence or in substance a contractual claim in content. Mr Elkington KC for the Individuals said that he accepted Aon's analysis on this point. For further explanation of that formulation, reference may be made to *QBE Europe* at [23] to [27], to which I have had regard in considering this issue.

107. In seeking to apply the "high degree of probability" test to this issue, I have regard to the "peculiar" nature of foreign law as an issue of fact (see *Bumper Development Corporation v Commissioner of Police* [1991] 1 WLR 1362 at 1369D – 1370H). The analysis of the claim involves assessing the expert evidence of Florida law. As such, it is possible that a different decision about the content of Florida law would be reached after hearing the experts cross-examined at trial than would be arrived at following a hearing based on paper evidence alone. However, foreign law differs from other issues of fact in that it does not depend on documentary or witness evidence which is not before the court at the interlocutory stage, and because there is an element of (English) legal analysis in the determination of the ultimate question of how to characterise the claim. I therefore think that my task is to assess any disputed issues of Florida law by applying the "high degree of probability" standard to any question of preferring one expert view over another, but then to make an analytical assessment of the consequences of that finding to answer the ultimate question of English law whether the claim is or is not in essence or substance contractual.

108. I now need to refer in more detail to the 2021 Draft Amended Complaint. The Appendix to this Judgment is the last two sections of the 2021 Draft Amended Complaint, containing the ninth and tenth Counts. Count IX sets out the claims that the Individuals wish to pursue against Aon under the heading "Count IX Negligent Procurement of Inadequate Insurance Against Aon Limited UK".

109. The starting point is that the claim treats Aon as an insurance broker to LaMia with obligations to ensure that LaMia had appropriate cover (2021 Draft Amended Complaint paragraph 259). Of course, Aon make the point that they were reinsurance brokers to Bisa, not insurance brokers to LaMia, but for present purposes (characterising the Florida law claim against Aon), it must be assumed that the Florida Plaintiffs have a sufficient case about that.

110. The duty is said to arise not only in contract as between Aon and LaMia, "but is also a duty sounding in tort, and arising from Aon's undertaking to procure insurance." Paragraph 259 of the 2021 Draft Amended Complaint goes on to set out that in Florida law a third party who succeeds in an action against a tortfeasor may then proceed with a claim against the tortfeasor's insurance broker. This, it is said, is a direct claim, not one made as assignee of LaMia's rights. As Aon points out, by the 2021 Draft Amended Complaint the Individuals appear to be disclaiming any intention to proceed as assignees of LaMia's rights.

111. At paragraph 260, the 2021 Draft Amended Complaint pleads that it was foreseeable to Aon that any failure to exercise reasonable care in its duties as insurance broker to LaMia could cause harm to LaMia's passengers. Paragraph 261 pleads "on information and belief" and by reference to the emails of May 2016 to which I have referred at paragraph 25 above that LaMia did not understand the geographic exclusion contained in the Insurance Policy.

112. Paragraph 262 of the 2021 Draft Amended Complaint encapsulates the alleged breach of duty as being "To the extent that the 2016-2017 policy does not provide any coverage for Plaintiff's [sic] damages here, AON failed to secure adequate and sufficient insurance for LaMia." Particulars are then given including an allegation that Aon did not properly explain to LaMia the geographical exclusion or the risk that LaMia was running by taking out a policy with such a low limit.

113. The claim goes on to allege that if Aon had complied with its duties, then LaMia would have had coverage for flights within South America, implicitly it may be said to allege that there would have been a higher limit of liability under the Insurance Policy and finally it is suggested that if Aon had advised LaMia of the risk of a judgment exceeding its insurance coverage, then "LaMia may well never have operated the subject flight at all."

114. Finally, damage is alleged at paragraph 265 in the following terms: "Because of AON UK Limited's negligence in negotiating and obtaining an insufficient insurance policy on behalf of LaMia, both LaMia and Plaintiffs have suffered significant harm. Under Florida law, Plaintiffs are entitled to recover from AON for compensatory damages".

115. The Individuals adduced expert evidence of Florida law from Barbara J Pariente, whose many impressive qualifications include a period of service as Chief Justice of the Supreme Court of Florida. Justice Pariente issued a first report dated 29 June 2021 ("**Pariente Aon 1**"), which was the day before the 2021 Draft Amended Complaint was dated. Pariente Aon 1 referred to a "Draft Amended Complaint", but I think this must be a reference to the 2020 Draft Complaint, as the report includes references to assigned claims.

116. Pariente Aon 1 takes the form of answers to 12 questions. Question 8 was "Does Florida law recognize claims for negligence procurement of inadequate insurance against insurance brokers?" The answer unsurprisingly is "yes", though it is given in more detail than that. Question 9 was "Under Florida law, may a tort victim assert a direct claim of negligent procurement against a tortfeasor's insurance broker?" The answer to that question was also positive, but the detail is important to the categorisation of the claim, so I set it out in full here:

> "In my opinion, the answer is that a tort victim would be entitled to bring a direct claim for negligence against the tortfeasor's insurance broker. See generally *Hamer v. Kahn*, 404 So. 2d 847, 850 (Fla. 4th DCA 1981). Over five decades ago, the Supreme Court of Florida established that a third party beneficiary, who is not a formal party to a contract, may sue for damages as a result of the acts of one of the parties to the contract. *See Thompson v. Commercial Union Ins. Co. of New York* ,250 So. 2d 259 (Fla. 1971). Plaintiffs' allegations against AON in the Draft Amended Complaint lawsuit is not based under the insurance contract but for negligence in the procurement of insurance. Under the reasoning of *Thompson*, plaintiffs should be permitted to bring a direct action against the insurance broker even without an assignment from the insured for negligence in procuring an insurance policy with a purported geographic exclusion when the broker knew or should have known that the insured, in this case LaMia, was in the business of transporting professional soccer teams to matches within South America, including Colombia.
>
> Florida law recognizes that, in addition to the obligations imposed by virtue of the insurance broker's fiduciary status to its insured, insurance brokers also owe a common law tort duty

> to properly procure insurance coverage. See *Wachovia Ins. Serv., Inc. v. Toomey*, 994 So.2d 980, 990 & n.4 (Fla. 2008) (citing *Romo v. Amedex Ins. Co.*, 930 So.2d 643, 654 (Fla. 3d DCA 2006) and 5 *Florida Torts* § 150.24 (2007) (explaining that liability for the failure to procure insurance coverage can be "through breach of contract *or* negligence") (emphasis added). As explained in Sheridan, insurance brokers as professionals are charged with the duty to exercise reasonable care in the performance of their obligations, including the duty to "exercise reasonable care and skill to obtain the appropriate coverage." Sheridan, 391 So. 2d at 234.
>
> [Authorities on meaning of "reasonable care" omitted]
>
> Plaintiffs would be able to make the argument that a reasonable person would not have written a policy of insurance that excluded one of the countries they knew or should have known the insured would be flying to. In short, Plaintiffs' proposed claims against AON are not based on the contract of insurance and in my opinion plaintiffs would be entitled to bring a direct action against AON for negligent procurement of inadequate insurance."

117. Taking this account at face value, the direct claim that Florida law may permit a victim to bring against the tortfeasor's insurance broker would appear to be a claim that is based upon an allegation of breach of the broker's duties to the tortfeasor, which – as in English law – may well be coextensive in contract and in tort.

118. Question 10 was whether or not the Individuals would be bound by the TOBA as to the provisions for choice of law and exclusive jurisdiction in England. When framed that way, Pariente J's answer that they would not be bound as a matter of Florida law is not surprising to English legal eyes. Pariente Aon 1 cited two cases – *Mendez v Hampton Ct Nursing Ctr LLC* 203 So. 3d 146 (Fla.2016) ("***Mendez***") and *Jacocks v Cap.Com.Real Est. Grp Inc.*, 310 So. 3d 71, 71 (Fla 4th DCA 2021) ("***Jacocks***") – in each of which a Florida court had held that a plaintiff was not bound by an arbitration agreement in a contract between a defendant and a non-party where the plaintiff's claim (respectively, for maltreatment of a care home resident, and for legal malpractice) against the defendant was not a claim to enforce that contract, even though the contract was part of the essential background to the establishment of the duty of care to the Plaintiff. Pariente Aon 1 opined that these cases would apply to the Individuals' claim against Aon, because those claims were "not actions to enforce or otherwise benefit from the TOBA", but were "tort claims" and "do not arise out of the TOBA document".

119. Aon filed evidence from Juan Ramirez Jr, whose impressive qualifications included a term as Chief Judge of the Third District Court of Appeal in Florida. Judge Ramirez' first report ("**Ramirez 1**") was dated 17 September 2021. Ramirez 1 set out authorities for the proposition that Florida courts enforce choice of law agreements even where the claim is brought in tort rather than contract and even where it is brought by a non-party to the contract:

> "Second, … there is no legal basis for ignoring a choice-of-law contractual provision when the plaintiff sues only in tort and not for breach of contract. There is no support for treating a choice-of-law provision differently in a tort action as opposed to a contract claim. In fact, *Mazzoni Farms* itself involved a tort -- fraudulent inducement. 761 So. 2d at 309; see also *Johns v. Ponto*, 684 So. 2d 830, 831 (Fla. 2d DCA 1996) (stating that "fraudulent inducement is an independent tort in that it requires proof of facts separate and distinct from the breach of contract"). Florida courts have consistently applied *Mazzoni Farms* to tort actions. See, e.g., *Briceno v. Sprint Spectrum, L.P.*, 911 So. 2d 176, 179 (Fla. 3d DCA 2005) (applying *Mazzoni Farms* to a tort action for invasion of privacy). Florida courts have enforced forum selection clauses against non-parties, even when the non-party sues in tort. See *Deloitte & Touche v. Gencor Indus.*, 929 So. 2d 678, 683-84 (Fla. 5th DCA 2006) (enforcing a mandatory forum selection clause in an action alleging negligent audit work and applying the clause in a subsidiary's contract to the subsidiary's parent company); *East Coast Karate Studios, Inc. v. Lifestyle Martial Arts, LLC*, 65 So. 3d 1127, 1129-30 (Fla. 4th DCA 2011) (enforcing a forum selection clause against two non-parties to the agreement)."

120. Ramirez 1 distinguished the cases of *Mendez* and *Jacocks* on the grounds that in each of those cases, the Plaintiff had direct dealings with the Defendant and their causes of action arose from those dealings, rather than the contract between the Defendant and the third party. In the present case, by contrast, the Individuals had no relevant dealings with Aon, so their causes of action were entirely derived from the contractual relationship, if any, between Aon and LaMia. Judge Ramirez went on to explain this point in more detail. In his opinion, the only basis that the Individuals have for suing Aon would be as third party beneficiaries of Aon's contract with LaMia.

121. Ramirez 1 also expressed the view that a Florida Court would apply the TOBA's forum selection clause and for that reason reject jurisdiction over the claims of the Individuals.

122. Justice Pariente prepared a Supplemental Report dated 10 February 2022 ("**Pariente Aon 2**") which responded to Ramirez 1. Pariente Aon 2 did not engage with the passage I have quoted above about the application of choice of law agreements to claims by non-parties, nor with the grounds given in Ramirez 1 for distinguishing the analysis in *Mendez* and *Jacocks*. Nevertheless, Pariente Aon 2 did repeat the author's view that because the Individuals' claims were in tort and were not seeking to enforce LaMia's contractual rights against Aon, in Florida law, their claims in Florida would not be governed by the choice of law provisions in the TOBA.

123. Judge Ramirez prepared a supplemental report ("**Ramirez 2**") dated 28 April 2022, which pointed out that Pariente Aon 2 had not engaged with the authorities cited in Ramirez 1 on the issue of the applicability of the TOBA choice of forum and choice of law clauses or with Judge Ramirez's reasons for distinguishing *Mendez* and *Jacocks*. He summarised his view thus:

> "As set forth in my prior report, my opinion that the TOBA governs the Individuals' claim, and thus that the TOBA's choice-of-law provision also applies here, is centered on the fact that the Individuals' claim against Aon UK can only be based on a third-party beneficiary theory, or by stepping into the shoes of LaMia through an assignment. Either way, the Individuals are bound by the TOBA."

124. Reminding myself that the question for me is whether, as a matter of English law, the proposed claim in Florida would be contractual in substance or essence, it is important to identify the basis in Florida law of the Individuals' cause of action. As Judge Ramirez points out, in Pariente Aon 1, it is made clear that the basis of the claim is a theory that the Individuals are arguably third party beneficiaries of the obligations owed by Aon to LaMia, in accordance with Florida authorities like *Thompson v. Commercial Union*. The obligations between Aon and LaMia may be contractual, or may have arisen in tort, or both. However, whichever is the case, Aon and LaMia agreed that the TOBA would have effect between them, including its jurisdiction provisions.

125. The clear overall effect of the Florida law expert evidence is that the Individuals' claim against Aon is a claim to take the benefit of Aon's obligations to LaMia (if any). Given that there was absolutely no direct contact between the Individuals and Aon, this is not surprising, though I base my finding on my assessment of the expert evidence, not on any opinion I may have of how English law would analyse the situation. In case it is relevant, I also find that the overall effect of the Florida law evidence is that (as a result of the derivative nature of the claim) Florida law would recognise that any claim that the Individuals may have against Aon would be subject to the TOBA's terms as to choice of forum and choice of law.

126. Mr Elkington KC sought to rely upon the exclusion of third party rights at clause 17 of the TOBA as showing that the Individuals' claim against Aon could not be a claim to benefit from Aon's obligations to LaMia. I do not accept this argument. If he is right, then it may be that his clients' claim is unsustainable if that is the effect of clause 17, but that cannot lead me to a different conclusion about the nature of the claim, insofar as it is sustainable at all, upon my assessment of the expert evidence of Florida law.

127. The argument between the parties before me focussed on the question whether the Individuals' claim against Aon was "free-standing" arising from a duty owed directly to the Individuals, or was derived from Aon's obligations to LaMia, of which the Individuals were entitled to take advantage. As I have said, I resolve that argument in favour of Aon on the basis of the Florida law evidence.

128. However, it seems to me that this case may raise another issue which is worthy of consideration. On the basis that there is a claim in Florida law as alleged by the Individuals, that claim – as I have found – would be a claim for loss caused by the breach of Aon's obligations to LaMia. In the 2021 Draft Amended Complaint, the underlying obligation of Aon to LaMia is put as being "not solely derived from Aon's contractual obligations to LaMia, but is also a duty sounding in tort, and arising from Aon's undertaking to procure insurance." That appears to allege concurrent contractual and tortious liability in a way that is familiar to an English lawyer.

129. If LaMia were bringing a claim against Aon, then (in English law, which under the TOBA would govern such claim) it would be entitled to proceed in either contract or tort or both, as LaMia considered most favourable to itself. If it proceeded in tort, then the contract would be relevant to that claim only "in so far as it does, on its true construction in accordance with the proper law of the contract, have the effect of excluding or restricting the tortious claim": per Robert Goff LJ in *Coupland v Arabian Gulf Oil* [1983] 1 WLR 1136 at 1153E-F. See also per Purchas LJ in v *Pacific Associates v Baxter* [1990] 1 CB 993 at 1022G-H: "However, with great respect to Lord Brandon the absence of a direct contractual nexus between A and B does not necessarily exclude the recognition of a clause limiting liability to be imposed on A in a contract between B and C, when the existence of that contract is the basis of the creation of a duty of care asserted to be owed by A to B." And to similar effect to his earlier statement in *Coupland* but in a different context, see per Lord Goff in *White v Jones* [1995] 2 AC 207 at 268. These authorities were discussed by Moore-Bick LJ (giving judgment in the High Court) in *MAN v Freightliner* [2005] EWHC 2347 (Comm) at [411], where he drew a distinction between situations where the third party's claim was brought on a third party beneficiary theory and those where the defendant's duty to the claimant (as a third party, or non-party to the contract) was imposed from a direct nexus between the claimant third party and the defendant. In cases in the former category, it might be appropriate to say that the duty of care owed by the defendant to the claimant was conditioned or limited by any relevant terms of the contract.

130. If it arises in the present case (and, as I have said, the matter was not argued this way before me), I would hold that in a case like this one, where the alleged duty of care arising between the defendant (Aon) and its primary obligor (LaMia) was a duty to perform obligations that were the subject of a contract between those parties (the TOBA), the terms of that contract should be treated as restricting or conditioning such duty of care. The contractual undertaking of LaMia not to sue Aon other than in England and Wales in respect of "any dispute arising out of or in connection with" the TOBA is one that restricts or conditions any tortious duty of care arising between Aon and LaMia in relation to the same events.

131. Therefore, the obligation owed in tort by Aon to LaMia of which the Individuals claim the benefit is one which is conditioned or restricted by LaMia's contractual agreement not to bring such claims other than in the courts of England and Wales. It may be said that this does not make the obligation a contractual one. In that respect, the position would be analogous to the one considered by Colman J in *West Tankers Inc v Ras Reuinone Adriatica di Sicurta: The "Front Comor"* [2005] 2 Lloyd's Rep 257 at [33], where insurers were subrogated to an underlying tortious claim which was subject to a contractual agreement to arbitrate. As pointed out by Thomas Raphael KC in *The Anti-Suit Injunction* (2nd ed) at 10-26: "This situation is not capable of being resolved by considering whether the transferred tortious rights are in themselves contractual." The analogy is not complete, because in *The Front Comor*, the relevant claim was subrogated, so its relationship with the underlying obligations was more tightly drawn than in the present case. Nevertheless, it seems to me that if, as I have held, the underlying obligation in the present case is conditioned by the jurisdiction agreement, then a claim to enforce that obligation should be treated as one that is subject to an obligation in equity not to sue in a non-contractual forum, which is the basis of the "quasi-contractual" anti-suit cases. The characterisation of the underlying obligation as

arising in tort rather than contract does not alter that view, as Colman J held in *The Front Comor*.

132. Accordingly, this is a "quasi-contractual" case for an anti-suit injunction, and the injunction should be granted unless there are strong reasons not to do so.

Strong reasons not to grant anti-suit relief?

133. The Individuals submit that there are strong reasons, principally in the form of delay, but also comity. Comity on its own is not generally a "strong reason" (*QBE* at [11]). However, in this case, the Individuals' submissions about comity are closely intertwined with those about delay, so I will consider them together.

134. The principles relating to delay in this context were set out by Leggatt J in *Magellan Spirit APS v Vitol SA (The "Magellan Spirit")* [2016] 2 Lloyd's Rep 1 at [61] – [63]:

> "61. In *The Angelic Grace* the Court of Appeal held that the English court need feel no diffidence about granting an anti-suit injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. The proper approach to delay in this context has recently been considered by Walker J in *Essar Shipping Ltd v Bank of China Ltd (The Kishore)* [2016] 1 Lloyd's Rep 427, in a judgment which both parties in the present case accepted as correctly stating the law. Walker J emphasised that the need to apply for an injunction promptly and before the foreign proceedings are too far advanced are separate and cumulative principles (see para 42). Thus, injunctive relief may be refused if the foreign proceedings have advanced too far, even if the application cannot be criticised for lack of promptness. Equally, lack of promptness alone may justify refusal of an injunction, even if there has been no significant progress in the foreign proceedings and no detrimental reliance upon the delay. As Walker J observed at para 43:
>
> > "The starting point is that it is generally desirable to resolve issues speedily. Moreover, there are significant dangers to the interests of the parties and to the public interest if applications for coercive relief are delayed. If such applications are made promptly they are inherently likely to be much less complicated than will be the case at a later stage. Where a party seeking coercive relief does not act promptly, the other side is likely to be understandably aggrieved by the delay. An anti-suit injunction is a particularly intrusive form of relief, barring a party from access to justice in the forum that it would prefer. In the particular context of anti-suit and anti-enforcement injunctions, lack of promptness will increase the danger that such injunctions, although they are granted against a party and are not directed to the foreign court, will nevertheless be seen as inappropriately interfering with the jurisdiction of the foreign court."

> 62. A further principle established by *The Angelic Grace* and emphasised in *Essar* is that steps taken in the foreign proceedings to challenge the court's jurisdiction do not justify delay in applying to the English court for an anti-suit injunction."

135. These statements were *obiter* because Leggatt J rejected the claim on jurisdictional grounds and, as the passage also makes clear, the principles adopted from the earlier decision of Walker J were common ground. However, I did not understand any party in this case to differ from them.

136. Mr Elkington KC for the Individuals also relied upon the following statement of Henshaw J in *Daiichi Chuo Kisen Kaisha v Chubb Seguros Brasil SA (The "Southern Explorer")* [2020] 2 Lloyd's Rep 137, which I also understood to be accepted by the other parties before me:

> "52. The conventional rule of equity, that the court has no discretion to refuse an injunction to enforce a clear negative covenant, does not apply to injunctions to restrain foreign proceedings because of the tensions with comity which are inherent in the indirect interference with the foreign court which the anti-suit injunction involves: see Raphael para 7.13, footnote 15.
>
> 53. The case law indicates that applications for anti-suit injunctions must be made promptly, in interests of both fairness to the respondent and comity towards the overseas court. In *The Angelic Grace* Millett LJ stated:
>
> > "… if an injunction is granted, it is not granted for fear that the foreign court may wrongly assume jurisdiction despite the plaintiffs but on the surer ground that the defendant promised not to put the plaintiff to the expenses and trouble of applying to that court at all. Moreover, if there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign court, far less offence is likely to be caused if an injunction is granted before that court has assumed jurisdiction than afterwards, while to refrain from granting it at any stage would deprive the plaintiff of its contractual rights altogether. In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign court in breach of an arbitration agreement governed by English law, the English court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced." (Page 96 col 2.)
>
> 54. A failure to seek relief promptly can of itself be a strong reason not to grant an anti-suit injunction: see *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425, per Lord Bingham: "a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct" (para 24). Delay is an "extremely relevant factor in the exercise of any discretion whether to grant

relief" (*Toepfer International GmbH v Molino Boschi Srl* [1996] 1 Lloyd's Rep 510 , page 515 col 2 per Mance J).

137. Henshaw J's judgment contains a useful survey of several other authorities where delay has been considered, to which I have also had regard. Among those authorities, an especially helpful statement is that of Phillips J in *ADM Asia-Pacific Trading Pte v PT Budi Semesta Satria* [2016] EWHC 1427 (Comm) at [54]:

> "The task for the Court is not to look at periods of delay and attribute blame for them, but to consider whether the application was made promptly and how far and with what consequences the foreign proceedings have progressed. Whilst ADM was plainly entitled to challenge the jurisdiction in Indonesia, doing so did not remove the need to apply promptly for an anti-suit injunction, if one was to be sought at all."

138. At [61] Henshaw J quoted a passage from Raphael op cit at paragraph 8.21 which included the following words:

> "Fourth, and perhaps most importantly, the courts will take into account the extent to which the delay was justifiable or excusable in the circumstances; and will weigh delay against the importance of enforcing the forum clause. Even delay that can be criticized will often not be sufficient to justify refusing an injunction and thus permitting a breach of contract to continue."

139. Those words from Raphael have also been adopted by Butcher J in *VTB Bank PJSC v Mejlumyan* [2021] EWHC 1386 (Comm) at [41] and by Calver J in *Specialised Vessel Services Ltd v MOP Marine Nigeria Ltd* [2021] EWHC 333 (Comm) at [35]. Earlier supporting authorities are set out in Raphael's footnote 32.

140. The Individuals' case concerning delay by Aon was summarised in their Skeleton Argument thus:

> "AON has been aware of the Florida Proceedings since 2018. By 24th July 2020 when it issued its Claim Form it was aware of the Settlement Agreements, including the assignments to the Individuals of the Florida Defendants' causes of action against AON. At that point it stated that it was likely to face claims brought by the Individuals "imminently" (A/29/177). Thus it could, and should, have sought an ASI in July 2020. Yet it was not until 15th March 2021, nearly 8 months later, that AON issued its application for an ASI.

141. The Individuals further draw attention to the extensive activity in the Florida Courts during the period of Aon's alleged delay which I have summarised above in setting out the facts. They argue that if Aon was going to seek anti-suit relief, then it should have done so much earlier than it did, in order to avoid the waste of parties' and judicial resources in Florida. As I understood the Individuals' point on comity (over and above the ordinary considerations of comity, which are not decisive in a contractual or quasi-contractual anti-suit case), it was that it would demonstrate a lack of respect of the

courts of Florida to grant relief which would cause to be wasted the expenditure of judicial resources in Florida that Aon's delay permitted to occur.

142. The delay issue was raised in the Individuals' skeleton argument, though not in its evidence and I did not have the benefit of any evidence or written argument on the point from Aon, though of course I did hear oral submissions.

143. I accept Mr Mitchell KC's submission that time did not begin to run for the purposes of the assessment of delay until the Individuals sought leave to file a new complaint which would have joined Aon, which occurred on 11 August 2020. I also accept Mr Mitchell KC's concession that time did "start to tick" as from that date. As he accepted, on 20 August 2020, when the Court set a date to hear the application for joinder on 1 September 2020, the matter became urgent. However, he said, the urgency went into abeyance after TMK issued their application to remove the case to the Federal Court on 31 August.

144. Aon has not given any explanation of why it did not act between 20 August 2020 and 31 August 2020. One possible inference is that Aon was aware that TMK planned to issue the application which it did issue on 31 August 2020 and for that reason, the matter was not as urgent as it might have appeared. Mr Mitchell KC was not able to assist on whether that was the fact, but if it was not the fact, then I find it hard to understand why Aon did not make an urgent application for anti-suit relief between 20 August 2020 and 31 August 2020.

145. After 31 August 2020, Aon submitted, the issue had ceased to be urgent because there was no immediate prospect of joinder to the Florida Proceedings while the applications concerning which court or list they would be allocated to remained outstanding.

146. As I have set out above Aon's application to join the Individuals to the Aon Action was issued on 14 January 2021 and their application to serve an application for interlocutory anti-suit relief out of the jurisdiction by alternative means was issued on 29 January 2021. Aon said in the Fourth witness statement of Mr Foss dated 29 January 2021 that it proposed to finalise and issue its application for an anti-suit injunction, which was then in draft, after its application for permission to serve had been determined. Mr Foss explained that Aon's intention was that the anti-suit application should be made on notice "because it anticipates that there should be sufficient time for such an application to be determined in that way (if alternative service is permitted and can be achieved speedily) before the threatened Florida proceedings against Aon materially progress." Aon's application was heard and allowed on 5 March 2021 and the application for the injunction was formally issued on 15 March 2021.

147. In the circumstances, I do not think it would be right to characterise any of the passage of time after 29 January 2021 as being due to any lack of promptness on Aon's part. However, the period from 20 August 2020 to 29 January 2021 is a different matter. I cannot see that in the context of anti-suit relief in the circumstances of this case, it was "prompt" to approach the court in relation to the anti-suit injunction for the first time some 4 months after becoming aware that the Individuals were seeking to join Aon to the Florida Proceedings. The fact that applications were being made and decided in the Florida Proceedings (even though Aon does not seem to have been active in those) exacerbates the lack of promptness and raises issues of comity.

148. However, unlike some cases of lack of promptness, Aon can say that the Florida Proceedings had not got very far against it (indeed, had not been commenced against it) and that it was aware that by reason of the procedural disputes between TMK and the Individuals, real progress was unlikely to be made for the time being. Aon was not itself responsible for those procedural disputes (as far as the evidence before me discloses), but it was aware that they would occupy judicial resources in Florida and mean that the Individuals (or their attorneys) would be incurring legal costs.

149. The lack of promptness on Aon's part falls to be assessed in that context and also weighed against the desirability of enforcing what I have found to be a relevant jurisdiction agreement. I do not think that Aon's delay was justified, though it was excusable. My assessment on balance is that Aon's delay, when weighed against the jurisdiction agreement, is not a strong reason to refuse relief on the quasi-contractual basis nor sufficient to undermine the exercise of my discretion in Aon's favour.

150. The Individuals also submitted that I should treat the mis-statements in the Aon Letter as a discretionary factor against the grant of anti-suit relief. I reject that submission. In my assessment the Aon Letter when read as a whole in its context was not misleading in any material respect even though it contained statements which were not literally accurate. If this is a factor at all, it has minimal weight.

151. Accordingly, I will continue the anti-suit injunction in favour of Aon on the basis of the jurisdiction agreement in the TOBA.

Vexatious or oppressive?

152. It was submitted on behalf of Aon by Ms Newton who handled the oral advocacy on this issue that the Florida Proceedings were vexatious and oppressive.

153. The parties agreed that the relevant principles in this regard were set out by Toulson LJ in in *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2010] 1WLR 1023 at [50]:

> (1) Under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do.
>
> (2) It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression, but, where a matter is justiciable in an English and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive.
>
> (3) The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of forum non conveniens, it is generally necessary to show that (a) England is clearly the more appropriate forum ("the natural forum"), and (b) justice requires

> that the claimant in the foreign court should be restrained from proceeding there.
>
> (4) If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity.
>
> (5) An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to different factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.
>
> (6) The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive."

154. In support of the argument that England is clearly the more appropriate forum for the Individuals' claim against Aon, Aon relies on the facts that Aon is domiciled in England and all the relevant acts were done by Aon in England. While Aon is part of a global group, Aon itself has no presence in Florida and does no business there. Aon says that its potential witnesses and disclosable documents are all in England. On the other hand, none of the Individuals is in Florida, though it is fair to say that their locations in South America are closer to Florida than they are to England. The Individuals might well need to give evidence of causation or loss.

155. Against these factors, the Individuals rely upon the fact that the Florida courts have already adjudicated upon their claims against the Other Defendants, but this seems to me to be a factor of little weight because the form of that adjudication was the approval after an unopposed hearing of an unsigned settlement agreement. In those circumstances, it cannot be said that the Florida judiciary has developed knowledge or expertise about these claims.

156. The Individuals also draw attention to the fact that they have a contingency fee agreement with Podhurst which, they say, makes it hard for them to litigate in England. To assist me in assessing this factor, I permitted the Individuals to file a further witness statement after the hearing to explain as much of their position in relation to

representation as they wished to reveal. The third witness statement of Mr Marks of Podhurst dated 29 September 2022 set out that the Individuals have contingency fee agreements with Podhurst. He said that

> "At the time that our clients retained us, it was not certain in which jurisdiction(s) litigation-related work would unfold. For that reason among others, our contracts with our clients are not limited by geography, they expressly contemplated that the scope of our retention may be multi-jurisdictional in nature, and they entitle our firm to a contingent-fee payment regardless of the jurisdiction where our clients obtain a recovery."

157. Mr Marks accepts that one possibility would be for the Individuals to continue to retain Podhurst and also retain English lawyers to conduct litigation in England on damages-based or contingent fee agreements. In that scenario, the Individuals would be liable to pay out of any damages recovered the fees of both Podhurst and the English lawyers. Other possibilities are discussed and rejected by Mr Marks, but it seems to me that the matters I have set out are sufficient to demonstrate that there is no overriding impossibility for the Individuals conducting litigation in England. They may well incur greater legal fees if they do that, but that would be the consequence of the terms of their "multi-jurisdictional" agreement with Podhurst, rather than any legitimate advantage of one forum over another.

158. The Individuals make the point that one of the issues in the proceedings may be the validity of the Settlement Agreements. Ms Newton argued that now that reliance on the assignments had been abandoned, it was unlikely that reliance would be placed on the Settlement Agreements at all. Indeed, Count IX of the 2021 Draft Amended Complaint does not rely on the Settlement Agreements, other than obliquely by referring to the risk of an "excess judgment" that it is alleged Aon should have advised about. It therefore appears that the risk that assessing the validity of the Settlement Agreements will be a substantial issue in any trial of Individuals' claim against Aon is very small.

159. The Individuals rely on the evidence of Justice Pariente that a Florida court would accept jurisdiction over the claim against Aon and apply Florida law to it. Judge Ramirez disagrees on both points. But in any event, it seems to me that these are not factors favouring one forum over another in circumstances where the English court would also accept jurisdiction over the claim and apply to it a suitable governing law.

160. Considering in the round all these factors, as well as the more minor ones to which the parties have referred in their arguments, I do think that England is clearly the most appropriate forum for any claim that the Individuals may bring against Aon. However, as Toulson LJ made clear in the passage I have cited from *Deutsche Bank AG v Highland Crusader*, that does not conclude the inquiry as to vexation and oppression.

161. In *Barclays Bank v Homan* [1993] BCLC 680, Glidewell LJ (with whom Mann and Leggatt LJJ agreed) said:

> "In my view, in relation to the circumstances of the present case, the principles to be derived from the judgment of the Privy Council in Aerospatiale can be summarised as follows:

> i) If the only issue is whether an English or a foreign court is the more appropriate forum for the trial of an action, that question should normally be decided by the foreign court on the principle of forum non conveniens, and the English court should not seek to interfere with that decision.
>
> ii) However if, exceptionally, the English court concludes that the pursuit of the action in the foreign court would be vexatious and oppressive and that the English court is the natural forum, i.e. the more appropriate forum for the trial of the action, it can properly grant an injunction preventing the plaintiff from pursuing his action in the foreign court.
>
> iii) In deciding whether the action in the foreign court is vexatious and oppressive, account must be taken of the possible injustice to the defendant if the injunction be not granted, and the possible injustice to the plaintiff if it is. In other words, the English court must seek to strike a balance."

162. In my judgment, the present case is governed by those principles. Aon has not identified any factor showing vexation or oppression that goes beyond demonstrating that (in English law), England is the natural forum for the claim and Florida is not. The Florida law evidence demonstrates that the same issue is one that is capable of debate in a Florida court. In those circumstances, comity requires this court to refrain from taking steps to prevent the Florida court from making its own determination of whether it is right for it to hear this claim.

163. Accordingly, had I not decided to continue Aon's injunction on quasi-contractual grounds, I would not have done so on the grounds of vexation and oppression.

The Reinsurers' Application

164. The Reinsurers' application is put solely on the grounds of vexation and oppression. They accept that they must demonstrate both that England is clearly the most appropriate forum for determining the Individuals' potential claim against Reinsurers and that the pursuit of that claim in Florida is vexatious or oppressive.

Natural forum

165. The claim against the Reinsurers of bad faith failure to defend has (it is common ground) four elements that the Florida Plaintiffs must establish, taking it for present purposes as arguable that the Reinsurers should be treated as insurers of LaMia: (1) the existence of coverage; (2) wrongful refusal to defend the claim made in the Florida Proceedings against LaMia; (3) the reasonableness of the settlement between the Individuals and LaMia; (4) if the Reinsurers had defended the claim on behalf of LaMia, then it could and would have been settled within policy limits.

166. The Reinsurers make the point that they are all domiciled in England and Wales, save that one of them has re-domiciled to Luxembourg on 1 March 2019 for reasons unconnected with this dispute. The Individuals are, as noted above, generally located

in South America, but not in Florida. The Reinsurers wrote a Policy in favour of Bisa that was governed by Bolivian law and had no obvious connection with Florida.

167. The Reinsurers say that at the heart of the dispute between the Individuals and themselves will be the Deed of Release, which is subject to English law and the exclusive jurisdiction of the English courts. They have sued Bisa in England for declarations that the Deed of Release is valid and binding and for indemnity under it against any liability that they may have to the Individuals. The Reinsurers say that it is desirable for the questions between themselves and the Individuals to be resolved by the same court as deals with the issue between themselves and Bisa arising from the Deed of Release.

168. One connection between the two issues is that if the Deed of Release is valid and binding then, the Reinsurers say, it follows that they did not have any obligation to defend Bisa and therefore cannot be liable in Florida law for failing in bad faith to do so.

169. The Reinsurers also say that if I continue the injunction in favour of Aon, as I have decided to do, then that means that the Aon claims will be tried in this Court (if at all) and that is another factor in favour of this Court as the forum for the dispute between the Individuals and the Reinsurers.

170. All of the matters I have just set out are factors in favour of England as the natural forum. However, they are weakened by the fact that there is no evidence that Bisa disputes the binding force of the Deed of Release, which makes it difficult to view the Reinsurers' claim in this Court as a true centre of gravity for the overall dispute. It was submitted that there was a real issue about this by reference to paragraph 100 to 107 of the first witness statement of Mr Taylor, but I cannot find in those paragraphs any indication that Bisa has taken a position contrary to Reinsurers' claims. The only other matter relied upon by Reinsurers in this respect is that Bisa has indicated an intention to dispute jurisdiction in respect of the claim that Reinsurers have brought against them. One possible ground for such a jurisdiction application might be that there is no serious issue to be tried because Bisa has never disputed the matters in respect of which Reinsurers seek declarations. I have no evidence whether that is Bisa's position, but the fact that it is possible shows that their expression of intention to contest jurisdiction does not demonstrate that there is a real dispute in the absence of any other evidence.

171. On the other side of the scale is the fact that the Individuals' claim against Reinsurers is a claim for alleged breach of a duty that arises in Florida law to defend Florida proceedings brought against the insured. Of the four matters that have to be established in the claim against the Reinsurers that I have adumbrated at paragraph 165 above, the first (coverage) involves issues of fact and Bolivian law concerning whether coverage existed in the first place and issues of fact and English law concerning the effect of the Deed of Release, but the second and third and fourth are issues entirely centred on Florida. On the face of it, therefore, this cause of action has a strong focus on Florida and involves the assessment of events that took place within the Florida Proceedings themselves.

172. The Reinsurers say that the dispute will be focussed on the Deed of Release. However, they have not suggested that they will concede the other aspects of the cause of action, so I find it impossible to say that the Deed of Release will in truth be the main focus of

the dispute, though I have no doubt it will play a prominent role in the Reinsurers' defence.

173. As with the claims against Aon, each party's Florida law expert has expressed opposing views as to whether the Florida court would accept jurisdiction over the claims. Mr Southern KC for the Reinsurers did not seek to persuade me that Florida was not an available forum for the dispute. In any event, if the Reinsurers' expert is proved right, and the Florida court does not accept jurisdiction, then that will change matters and the Reinsurers will quickly cease to be oppressed or vexed by any Florida suit.

174. Weighing up all of these factors, I am not able to say that England is clearly the most appropriate forum for the trial of the Individuals' claim against the Reinsurers. I think that would be a paradoxical conclusion bearing in mind that the claim arises only in Florida law and largely concerns events that took place within the context of Florida proceedings.

175. If that conclusion is right, then it disposes of the Reinsurers' application, but I will go on to consider vexation and oppression in case I am wrong about forum.

Vexation and oppression

176. The Reinsurers' essential argument on vexation and oppression is that the claim against them is so obviously and clearly a bad one that it could not be pursued in good conscience. It is therefore a vexatious claim in the relevant sense. It is oppressive because it will put the Reinsurers to great expense to defend it and expose them to the obvious pressure of facing a claim for so large a sum of money (over US$ 800 million).

177. Any case that a proposed claim in the foreign forum is so clearly a bad one that it should be restrained by this Court raises an obvious comity issue. If the claim is so clearly bad, then why does it require the intervention of this Court, as opposed to the foreign court before which the claim is or will be brought, to bring it to an end? That question is all the more acute where, as here, the claim exists only in the law of the foreign forum and is not one with a straightforward analogue in English law. In such circumstances, a judgment by this Court, based on reading expert reports which describe an unfamiliar cause of action in Florida law, would necessarily be less satisfactory than a judgment of the Florida court itself.

178. I do not propose to traverse most of the authorities that have considered these issues, save to say that I respectfully adopt the summary of their effect by Males J in *Vitol Bahrain EC v Nasdec General Trading LLC* [2013] EWHC 3359 (Comm) at [49] - [58]. However, I should mention the leading Court of Appeal authority on this issue of *Star Reefers Pool Inc v JFC Group* [2012] 1 Lloyd's Rep 376, where Rix LJ (with the agreement of Sullivan and Lewison LJJ) said at [38]-[39]:

> "In sum, I do not know of any case which has gone as far as this in finding unconscionable conduct on the part of a foreign party who has not agreed to litigate or arbitrate in England; has been the first to issue court proceedings; has an arguable, if apparently, at any rate to English eyes, weak case under the admittedly applicable law of the foreign forum; therefore has a legitimate juridical advantage in seeking to litigate in Russia,

> which is the forum of its domicile and its disputed obligation; and who has not submitted to or participated in the English proceedings.
>
> In consequence, there is, as it seems to me, something of a touch of egoistic paternalism in an English court injuncting continuation of the foreign proceedings in such a case. In my judgment, Star Reefers' application for an anti-suit injunction should have failed at this point of the argument."

179. That description does not quite fully apply to the present case, because Florida is not the Individuals' domicile and because, as a formal matter, the Individuals have not been first to issue proceedings, though they were first to seek to do so. But it seems to me that those are rather fine distinctions and that in substance, the position here is not unlike that summarised by Rix LJ.

180. There are some powerful points that can be, and have been, made on Reinsurers' behalf to the effect that the claim is obviously a bad one:

i) By the Deed of Release, the Reinsurers' contractual counterparty, Bisa, released all claims under the Reinsurance Policy. This took place before the commencement of the Florida Proceedings. In circumstances where the Reinsurers had made an ex gratia payment of their full limit of indemnity, it could not be said that this was some kind of sham or bad faith arrangement. Having made this agreement and paid in full, Reinsurers had no further obligation to take part in proceedings concerning the underlying liabilities. This is a powerful argument. On the evidence before me it looks like it is correct as a matter of English law (which governs the Deed of Release) and the facts.

ii) Bisa declined cover and LaMia accepted the declinature formally in writing. This also took place before the Florida Proceedings were commenced. The consequence would appear to be (though this is a matter of Florida law) that no insurer had any obligation to defend LaMia.

iii) Even in the absence of the Deed of Release and the declinature, the evidence before this Court strongly supports the Reinsurers' case that Bisa in fact had no liability to LaMia because there was no coverage, for several reasons but most clearly because of the geographical exclusion of flights to Colombia. I accept that on an assessment of the factual material before this Court, that is correct.

iv) LaMia did not request that Bisa or Reinsurers intervene to defend the proceedings. The evidence of Florida law suggests that this may well mean that there is no liability for bad faith failure to defend. Justice Pariente points to facts which she suggested might amount to an acknowledgment of the obligation, but those facts preceded the declinature in Feb 2017 and its acceptance in May 2017, which were not mentioned in Justice Pariente's evidence.

v) By the Settlement Agreements to which the Individuals now seek to join the Reinsurers, LaMia and other Florida Defendants stipulated and acknowledged again that there was no insurance coverage for the Accident. It is hard to see that there could be an obligation on insurers consistently with that stipulation.

vi) There is no basis in the evidence for the assertion that the claim could have been settled within policy limits.

181. These are cogent points. I did not find the Individuals' answers to them to be persuasive on their merits. If it were my task to try the Individuals' claim against the Reinsurers on the papers and submissions I have heard, I would have no hesitation in dismissing it. However, I remind myself that that is not my task. Instead, I have to assess whether the claim is one that could not be pursued in good conscience so as to make it vexatious and oppressive for the Individuals to require the Reinsurers to answer it in Florida rather than England.

182. The Individuals relied on Florida law expert reports from Justice Pariente dated 29 June 2021 and 10 February 2022. Reinsurers' Florida law expert, Raoul G Cantero is a former Florida Supreme Court Justice who made reports dated 15 September 2021 and 26 April 2022. His evidence was as impressive as the others that I have referred to already. These Florida law experts were agreed on two important matters:

i) The Reinsurers "would have a fair opportunity to be heard" in Florida on all of the objections – jurisdictional, procedural and substantive - that they may wish to raise.

ii) The claim is neither frivolous nor vexatious as a matter of Florida law. It is fair to say that these terms are not understood identically in Florida to their use in England. "Vexatious" in particular is a term that Justice Cantero says may only be applied to unrepresented litigants. However, "frivolous" is closer to its use in England. Justice Cantero says that a frivolous claim is one which is completely without merit, or contradicted by overwhelming evidence or having been undertaken to harass or injure another or which asserts false factual statements. In other words, he says, an action will not be considered frivolous as long as the complaint alleges some justiciable issue, emphasising the word "some". Justice Cantero concludes on this point: "Given this high bar, it would be difficult for a Florida court to characterise claims against Tokio Marine as 'frivolous' under section 57.105 Florida Statutes".

183. Because of these two factors, I think that comity requires that this Court refrains from making an order that would indirectly interfere with the ability of the Florida court to adjudicate on a case that is properly before it. Moreover, it is impossible to characterise the Individuals' claims as unconscionable in circumstances where they are before a Court which will ensure a proper hearing for all the defendants' arguments and which – on the evidence before me – would not see those claims as being frivolous or vexatious. Accordingly, even if I had been persuaded that England was clearly the appropriate forum, I would have held that the claims are not vexatious and oppressive in the relevant sense and refused the injunction on that ground.

Delay

184. In those circumstances, I will deal as briefly as I can with delay.

185. Reinsurers say (by way of submissions rather than evidence, which reflects the fact that delay was only raised as an issue in submissions) that they issued their Notice of Removal on 31 August 2020 to remove the Florida Proceedings from the State Court

because they feared that it might not have been possible to prepare and obtain anti-suit relief in the short time before the hearing on 1 September 2020.

186. After that, Reinsurers say, the urgency had dissipated, so they could not have applied without notice. They say that they acted reasonably promptly to prepare a substantial application to join the Individuals in England and serve them out of the jurisdiction, that was issued on 25 November 2020. That application was heard and determined on 29 January 2021 and it was only after that that the Reinsurers prepared an application for anti-suit relief which was filed on 12 March 2021.

187. In my assessment, this chronology does not amount to acting with appropriate promptness in the circumstances, especially where TMK itself was engaging actively in the Florida Proceedings. A matter of a few weeks from 20 August 2020 to prepare an application that included anti-suit relief might have been excusable or even justifiable. It is possible that even more time than that was required to identify addresses for service for each of the Individuals. But I see no basis upon which the leisurely stages by which the Reinsurers in fact proceeded could be described as "prompt".

188. Accordingly, had I been found that the conditions for the grant of an injunction in favour of Reinsurers were otherwise met, I would have considered their delay to be a very material factor against such relief.

Conclusion

189. I will continue the injunction in favour of Aon but discharge the injunction in favour of the Reinsurers.

APPENDIX TO JUDGMENT – EXTRACT FROM DRAFT AMENDED COMPLAINT

"COUNT IX

NEGLIGENT PROCUREMENT OF INADEQUATE INSURANCE AGAINST AON LIMITED UK

258. The Plaintiffs re-allege and incorporate the allegations of paragraphs 1–201 here.

259. **Duty:** At all times material, AON Limited UK, in its capacity as an insurance broker, was responsible for procuring sufficient and adequate flight insurance and reinsurance for LaMia, Kite, Mr. Albacete, and Mr. Rocha Venegas. As an insurance broker, AON had a duty to ensure that LaMia had the appropriate insurance coverage commensurate with LaMia's express requests and known or reasonably knowable business needs. *See, e.g.*, *Caplan v. La Chance*, 219 So.2d 89, 90 (Fla. 3d DCA 1969). *See also Frenz Enter., Inc.*, 696 So.2d at 872 (third party may seek to recover against tortfeasor's insurance broker after being successful in its action against tortfeasor). This duty is not derived solely from AON's contractual obligations to LaMia, but is also a duty sounding in tort, and arising from AON's undertaking to procure insurance. *See Sheridan v. Greenberg*, 391 So.2d 234 (Fla. 3d DCA 1980). Indeed, under Florida's common law, insurance brokers owe insureds a fiduciary duty. *See Southtrust Bank v. Exp. Ins. Serv., Inc.*, 190 F. Supp. 2d 1304, 1308 (M.D. Fla. 2002); *Wachovia Ins. Servs., Inc. v. Toomey*, 994 So.2d 980, 989 (Fla. 2008). Moreover, Florida law recognizes that a third-party victim may assert a cause of action *directly* against a tortfeasor's insurance broker. *See Hamer v. Kahn*, 404 So.2d 847 (Fla. 4th DCA 1981); *see also Frenz Enter., Inc*., 696 So.2d at 872 (third party may seek to recover against tortfeasor's insurance broker after being successful in its action against tortfeasor). Plaintiffs' claim against AON is therefore a direct claim, is not based on any assignment of LaMia's rights against AON.

260. AON Limited UK knew or reasonably should have foreseen that the failure to exercise reasonable care in any of its duties as an insurance broker to procure insurance on behalf of LaMia created a broad zone of risk that posed a general threat of harm to the occupants of LaMia's flights, among other persons.

261. Upon information and belief, at the time of issuance of the 2016-2017 policy, LaMia did not know about the geographic exclusion for Colombia and specifically about the likelihood that the insurers and/or reinsurers would deny coverage on that basis. LaMia's failure to anticipate the insurers and reinsurers' later invocation of that exclusion does not bar a claim for negligence on the part of AON. *See, e.g., Miles v. AAA Ins. Co.*, 771 So.2d 607, 608–09 (Fla. 3d DCA 2000) (failure of insureds to read policy does not completely preclude recovery against broker). Moreover, our investigation reveals that prior to the accident, LaMia, AON and the Reinsurers shared an understanding that the purported Colombia exclusion would not bar coverage for flights to Colombia. Namely, in May of 2016, AON's local affiliate conveyed to LaMia that Tokio Marine and the other Reinsurers did not believe that a flight to Medellin, Colombia would violate any terms of the policy or otherwise preclude coverage. Indeed, in the context of the May 2016 endorsement to the policy, LaMia might reasonable have understood this message to constitute formal notice that any purported geographic exclusion for Colombia had been rescinded.

262. **Breach:** To the extent that the 2016-2017 policy does not provide any coverage for Plaintiff's damages here, AON failed to secure adequate and sufficient

insurance for LaMia. For example, as detailed above, AON UK Limited knew that LaMia was highly likely if not certain to fly to Colombia. It was a likely destination for LaMia's soccer-team flights and an express destination for one of LaMia's prospective flights for an Argentine soccer team scheduled to play a match in Medellin. Despite AON's knowledge of LaMia's near-certain business in Colombia, the flight insurance policy that AON UK Limited brokered and obtained on LaMia's behalf purports to contain a territorial exclusion for accidents that occur in Colombia. The policy also had insufficient policy limits to cover the foreseeable and expected claims of travelers on board LaMia flights, including the Plaintiffs.

263. AON did not fully explain the purported Colombia exclusion to LaMia or its impact on coverage. Such explanation was warranted given that the exclusion was a notable change from LaMia's prior AON-brokered insurance policies. The policy also had insufficient policy limits to cover the foreseeable and expected claims of travelers on board LaMia flights, including our clients. Although LaMia was aware of the policy's limits before entering into the policy contract, AON failed to properly advise LaMia of the extremely high risk of an excess judgment given that LaMia's business consisted of flights for soccer teams, which almost by definition entail a large number of passengers with significant incomes.

264. **Causation:** Had AON properly complied with its aforementioned duties, it would have procured an insurance policy that was at least commensurate with LaMia's most basic needs, *e.g.*, coverage for flights in South American countries. The flight insurance policy AON UK Limited ultimately obtained left LaMia exposed in numerous respects, and it deprived the Plaintiffs of obtaining compensation for their significant injuries and damages. Moreover, had AON properly advised LaMia of the risks of an excess judgment, LaMia may well have never operated the subject flight at all.

265. **Damages:** Because of AON UK Limited's negligence in negotiating and obtaining an insufficient insurance policy on behalf of LaMia, both LaMia and Plaintiffs have suffered significant harm. Under Florida law, Plaintiffs are entitled to recover from AON for compensatory damages.

WHEREFORE, the Plaintiffs demand judgment against AON UK Limited for compensatory damages, costs, and such other relief as this Court deems appropriate, and further demand trial by jury of all issues triable as of right by a jury.

COUNT X

CLAIM AGAINST TOKIO MARINE AND THE OTHER REINSURERS TO ENFORCE THE CONSENT JUDGMENTS AGAINST LAMIA

266. The Plaintiffs re-allege and incorporate the allegations of paragraphs 1–201 here.

267. The Plaintiffs assert this count in the alternative to Count IX against AON.

268. In Florida, when a tort victim obtains a judgment against an alleged tortfeasor/insured, the victim may then assert a claim to collect on that judgment from the tortfeasor's insurer. Such claims have three basic elements that the tort victim/plaintiff has the burden of proving: the existence of coverage, the insurer's wrongful refusal to defend the claim, and the reasonableness of the settlement between the tort victim and the alleged tortfeasor. *See*

U.S. Fire Ins. Co. v. Hayden Bonded Storage Co., 930 So.2d 686, 691 (Fla. 4th DCA 2006). And generally speaking, when the tort victim prevails on such a claim, it is entitled to the full amount of the judgment, rather than to the limits of the policy.

269. Importantly, there is no requirement that the insured/tortfeasor formally assign its rights against its insurers to the tort victim. *See Rosen v. Fla. Ins. Guar. Ass'n*, 802 So.2d 291, 294 (Fla. 2001). Moreover, the fact that the plaintiff/tort victim may covenant not to execute on any judgment against the insured/tortfeasor does not extinguish the insured/tortfeasor's liability, nor does it bar the plaintiff/tort victim's cause of action against the insurer. *See id.* at 295.

270. The Plaintiffs and LaMia entered into a settlement agreement, which provided for entry of a judgment in favor of Plaintiffs and against LaMia in amounts totaling $844 million. As part of that agreement, LaMia admitted liability.

271. The issues of liability and the full extent of the Plaintiffs' damages have been resolved in this binding settlement agreement, and thus our clients' claims against LaMia's insurers are ripe and have accrued.

272. At all material times, LaMia's insurers and reinsurers have refused to defend claims against LaMia arising from the Chapecoense crash.

273. Under Florida law, an insurance company "acts at its peril in refusing to defend its insured and will be held responsible for the consequences." *Fla. Farm Bureau Mut. Ins. Co. v. Rice*, 393 So.2d 552, 556 (Fla. 5th DCA 1980).

274. Tokio Marine and the John Doe Reinsurers acted as LaMia's true insurers on the 2016-2017 policy: they negotiated the terms of the policy, they held all the risk on the policy, theYysolicited and received information about LaMia's activities even after the policy was already in place, and they assumed full responsibility for claims-handling under the policy after the accident.

275. Florida courts recognize that reinsurers may assume liabilities typically borne by insurers in several scenarios, among others: where the reinsurer assumes the insurer's liabilities, *see Banco Ficohsa v. Aseguradora Hondurena*, S.A., 937 So.2d 161, 165 (Fla. 3d DCA 2006), *see also* Restatement (Second) of Torts § 324A; and where the insurer acts as the agent of the reinsurer, *see Law Offices of David J. Stern P.A. v. SCOR Reinsurance Corp.*, 354 F. Supp. 2d 1338, 1344 (S.D. Fla. 2005).

276. Here, Tokio Marine and the John Doe Reinsurers assumed the duties and liabilities of BISA. Tokio Marine and the John Doe Reinsurers also assumed a principal-agent relationship with BISA, wherein BISA was merely a conduit for the Reinsurers' activities and interests related to LaMia's insurance policy, and BISA acted for and on behalf of the Reinsurers.

277. Accordingly, Tokio Marine and the John Doe Reinsurers are liable to LaMia and to Plaintiffs to the same and full extent of BISA's liabilities, and had legal duties to act in good faith toward LaMia.

278. Specifically, Tokio Marine and the John Doe Reinsurers had a good-faith duty to LaMia to properly handle the claims against LaMia arising from the subject accident. Among other things, Tokio Marine and the John Doe Reinsurers had duties to defend the claims against LaMia, to properly investigate those claims, and to reasonably attempt to settle those claims within the applicable policy limits.

279. Plaintiffs are entitled to recover the full extent of these excess judgments.

280. The 2016-2017 policy provided coverage for claims arising from the subject accident, including the claims settled between LaMia and the Plaintiffs and which are now subject o final judgments of this Court. To the extent that BISA, Tokio Marine, and/or the

John Doe reinsurers assert the geographic exclusion as a coverage defense, these Defendants could have and should have nevertheless defended the claims against LaMia pursuant to a reservation of rights as to this purported coverage defense. Moreover, the May 2016 endorsements and the May 2016 emails between Ms. Albacete and AON's Bolivian affiliate make clear that all relevant insurance entities did not view a flight to Medellin as violating the terms of the policy and indeed that the insurers and reinsurers likely rescinded the exclusion for Colombia.

281. To the extent that BISA, Tokio Marine, and/or the John Doe reinsurers assert other coverage defenses, these Defendants could have and should have nevertheless defended the claims against LaMia pursuant to a reservation of rights as to those purported coverage defenses. In any event, any other purported coverage defenses are also without merit. For example, any claim that coverage was not available under the policy based on a purported lapse in premium payment is without merit because, among other things: (1) the policy does not provide for automatic cancellation of coverage based on a lapse in premium payments; (2) the policy contains provisions that require opportunity to make up any late payments; and (3) the policy contains provisions requiring written notice before coverage is cancelled or terminated. Neither BISA nor the reinsurers advised LaMia that coverage would be cancelled based on any purported lapse in payment prior to the accident, and did not advise aviation authorities of any lapse in coverage, as they had done for the 2015-2016 policy.

282. Likewise, any claim that LaMia violated the terms of the policy because a flight for a soccer team was an aggravated liability risk has no foundation in the policy language, and in any event was repeatedly waived by BISA and the reinsurers, who were keenly aware both before and after the issuance of the policy that LaMia's business consisted almost exclusively of flights for soccer teams.

283. Finally, any claim that the conduct of the pilots was criminal or would otherwise void coverage under the policy is without merit and without foundation in the policy language.

284. Tokio Marine and the other reinsurers' refusal to defend the claims against LaMia was wrongful. Not only did Tokio Marine and the other reinsurers have an affirmative duty to defend the claims, but they also strove to circumvent their duties by settling their claims under the misleading guise of a "humanitarian assistance fund." Then, having had an opportunity to settle the claims against LaMia for the reasonable amount of $25 million—and indeed having received express demands from our clients to do so—Tokio Marine and the reinsurers again refused to settle or defend the claims.

285. Tokio Marine's wrongful and bad-faith conduct went further. Namely, Tokio Marine's made representations to our clients and other claimants in the LaMia air disaster that Tokio Marine knew or reasonably should have known were false. For example, Tokio Marine has repeatedly represented that coverage under the policy was automatically suspended or terminated based on a brief lapse in LaMia's premium payments, but this coverage defense is entirely without foundation in the policy itself.

286. The settlement amounts reflected in the *Coblentz* agreements and consent judgments against LaMia were reasonable. Although a detailed description of each case is beyond the reasonable scope of this witness statement, suffice it to say that the vast majority of our clients' decedents were professional soccer players in their prime years, with high incomes and in many cases even higher earning prospects. Most of them tragically left behind a significant number of survivors, including wives and children. Accordingly, the damages suffered by most of our clients would conservatively be in excess of $10 million in any given individual case.

287. The settlement amounts also reflect the culmination of good-faith negotiations

and discussions between our firm, on behalf of our clients, and attorneys and representatives of LaMia. These negotiations took place over several months, specifically addressed the settlement amounts for each of our clients' cases, and ultimately resulted in final agreements that were enforced by the Court in Miami-Dade County and reflected in final consent judgments entered by that Court.

288. In short, as a result of Tokio Marine and the Other Reinsurers' breaches of their duties to LaMia, LaMia is now exposed to judgments significantly in excess of the insurance policy limits. And under Florida law, our clients are entitled to recover the full extent of these excess judgments.

WHEREFORE, the Plaintiffs demand judgment against Tokio Marine and the John Doe Reinsurers for all damages available, including the full extent of their damages as negotiated in the settlement agreement entered into with Tokio Marine's insured and reflected in the judgments entered against LaMia. The Plaintiffs request a trial by jury."