IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 297

Originating Summons No 126 of 2018

Between

(1) Oro Negro Drilling Pte Ltd
(2) Oro Negro Decus Pte Ltd
(3) Oro Negro Fortius Pte Ltd
(4) Oro Negro Impetus Pte Ltd
(5) Oro Negro Laurus Pte Ltd
(6) Oro Negro Primus Pte Ltd

… *Plaintiffs*

And

(1) Integradora de Servicios Petroleros Oro Negro SAPI de CV
(2) Alonso Del Val Echeverria
(3) Gonzalo Gil White

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure — Injunctions — Prohibitory injunction to restrain breach of negative covenant]
[Companies — Memorandum and articles of association]
[Conflict of Laws — Restraint of foreign proceedings]

TABLE OF CONTENTS

INTRODUCTION **1**

A PRIMER ON MEXICAN INSOLVENCY LAW **3**

THE PARTIES **6**

THE PLAINTIFFS 6

THE DEFENDANTS 7

PERFORADORA 8

THE BACKGROUND **9**

THE BOND AGREEMENT 9

THE PLAINTIFFS' POWER TO COMMENCE RESTRUCTURING PROCEEDINGS 12

THE BOND TRUSTEE'S POWER TO DECLARE EVENTS OF DEFAULT 13

THE LITIGATION IN MEXICO 13

The concurso petitions *13*

The litigation in the Concursos *19*

The litigation in the first defendant's and Perforadora's concursos *22*

Conclusion *24*

THE LITIGATION IN SINGAPORE 26

THE LEGAL BASIS FOR GRANTING FINAL RELIEF **31**

THE PLAINTIFFS' CASE 31

THE THIRD DEFENDANT'S CASE 33

THIRD DEFENDANT: BREACH OF IMPLIED CONTRACT 34

Version No 2: 03 Dec 2025 (20:30 hrs)

Isaacs' Case *36*
Chaly Mah *37*
Tengku Dato Ibrahim *38*
Oro Negro (CA) *39*
Conclusion *40*
FIRST DEFENDANT: INDUCING BREACH OF CONTRACT 42
The elements of the tort *42*
The first defendant's intention *44*
(1) Before the Shareholders' Resolutions 44
(2) In passing the Shareholders' Resolutions 47
Conclusion *48*
THE GROUNDS FOR OPPOSING FINAL RELIEF 49
ABUSE OF PROCESS 50
Duplicate proceedings *51*
(1) Identity of parties 52
(2) Same or similar issues 57
(3) Same or similar relief 60
Collateral attack *62*
RES JUDICATA 64
BREACH OF JUDICIAL COMITY 64
Anti-suit injunction *65*
(1) Effect of the injunctions 66
(2) Nature of the injunction 67
Anti-enforcement injunction *69*
(1) Effect of the injunction 70
(2) *Sun Travels* distinguished 71

Version No 2: 03 Dec 2025 (20:30 hrs)

Interference with or nullification of Mexican judgments *74*

RELIEF SOUGHT IS FUTILE **75**

CONCLUSION **77**

Version No 2: 03 Dec 2025 (20:30 hrs)

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Oro Negro Drilling Pte Ltd and others
v
Integradora de Servicios Petroleros Oro Negro SAPI de CV and others

[2023] SGHC 297

General Division of the High Court — Originating Summons No 126 of 2018
Vinodh Coomaraswamy J
6, 10 March 2023

23 October 2023

Vinodh Coomaraswamy J:

Introduction

1 All six plaintiffs are companies incorporated in Singapore[1] and have their centre of main interests in Mexico.[2] The first plaintiff is the sole shareholder of the remaining five plaintiffs. Until September 2017, all of the plaintiffs were under the control, either directly or indirectly, of the three defendants.

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1 3rd Defendant's Written Submissions dated 27 February 2023 ("D3WS") at Annex A; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 5; 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 7.

2 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 20; Certified Transcript of 6 March 2023 at p 63 lines 14–23 and p 68 lines 19–24.

2 All six plaintiffs and the first defendant have been insolvent since, at the latest, September 2017. In September 2017, the defendants purported to cause all six plaintiffs to commence restructuring proceedings in the courts of Mexico. Those proceedings are still pending. The objective of those proceedings is to restructure the plaintiffs as part of a broader restructuring of the first defendant and its group of companies (the "Integradora Group").[3]

3 This originating summons is, in substance, just one battle in a war that has been waged over the past six years in Singapore, Mexico, Norway[4] and the United States[5] between the Integradora Group's bondholders and its shareholders for *de facto* control of the plaintiffs' assets and their restructuring. A critical threshold question in the Mexican proceedings is this: who has authority to represent the plaintiffs in those proceedings? Is it the lawyers whom the plaintiffs appointed in August 2017, when the defendants still owned and controlled the plaintiffs? Or is it the lawyers whom the plaintiffs appointed in September 2017, following an event of default and after bondholders had assumed *de jure* ownership and control of the plaintiffs?

4 The plaintiffs commenced this originating summons in January 2018 seeking declarations and permanent injunctions regarding the defendants' right to control the plaintiffs and to use that control to carry into effect the restructuring proceedings. I have now determined this originating summons in the plaintiffs' favour and entered final judgment accordingly.

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3 3rd Affidavit of Gonzalo Gil White dated 3 November 2022 at para 17(a).

4 7th Affidavit of Roger Arnold Hancock dated 13 May 2022 at para 18.4.

5 Certified Transcript of 6 March 2023 at p 65 lines 4–13.

Version No 2: 03 Dec 2025 (20:30 hrs)

5 The third defendant has appealed against my decision. I therefore now set out the grounds for my decision.

A primer on Mexican insolvency law

6 There have already been two interlocutory appeals in this originating summons. The Court of Appeal heard those appeals together and determined them in a single judgment handed down in November 2019 (see *Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAPI de CV and others and another appeal (Jesus Angel Guerra Mendez, non-party)* [2020] 1 SLR 226 ("*Oro Negro (CA)*")).

7 In *Oro Negro (CA)* (at [5]–[34]), the Court of Appeal narrated the events in the proceedings in Mexico up to September 2018. An update on the events in Mexico since September 2018 requires some understanding of Mexican law. I therefore set out now a brief primer on Mexican law in so far as it is relevant to the issues before me.

8 The type of restructuring proceedings commenced in the plaintiffs' names in Mexico in September 2017 (see [2] above) is a *concurso mercantile* (hereafter, "*concurso*"). A *concurso* is governed by the Mexican Business Reorganisation Act, known in Spanish as the *Ley de Concursos Mercantiles* ("LCM").[6]

9 A *concurso* is a statutory, court-supervised restructuring procedure available to an insolvent commercial debtor to restructure its business and debts. It is a mode of debtor in possession restructuring analogous both to a creditors'

[6] 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 9(a).

Version No 2: 03 Dec 2025 (20:30 hrs)

scheme of arrangement under Singapore and English insolvency law and to proceedings under Chapter 11 of the US federal Bankruptcy Code. Like these analogues, the purpose of a *concurso* is to protect a debtor who is in default of its payment obligations from individual creditor action in order to give the debtor the breathing space to formulate a restructuring or reorganisation plan for the collective benefit of its creditors and other stakeholders.

10 A *concurso* is territorially limited to Mexico. Therefore, although a company incorporated outside Mexico may file a *concurso* petition, any reorganisation will be confined to the company's business and assets in Mexico.

11 A debtor commences a *concurso* by filing a *concurso* petition with the designated Mexican court.[7] I shall refer to that court as the "*concurso* court". The *concurso* court deals with a *concurso* petition in three stages.

12 In the first stage, the *concurso* court appoints an examiner to establish that the debtor is indeed insolvent and is therefore entitled to present a *concurso* petition. If that is established, the *concurso* court formally admits the *concurso* petition and declares the debtor to be "in *concurso*".

13 At the second stage, the *concurso* court appoints a conciliator (a *conciliador*). The conciliator's objective is to build a consensus between the debtor and its creditors on a reorganisation plan that is viable for the debtor and acceptable to the creditors.[8] In order to achieve this objective, the conciliator is given broad powers to oversee the management of the debtor, to sell the debtor's

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7 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 9(c).

8 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 55.

Version No 2: 03 Dec 2025 (20:30 hrs)

non-core assets[9] and even, with the approval of the *concurso* court, to displace the debtor's directors in conducting its day to day affairs.[10]

14 If the debtor and its creditors agree on a reorganisation plan by the requisite majorities and within the stipulated time, and if the plan is approved by the *concurso* court, the plan takes effect. Once the plan has been implemented, the *concurso* comes to an end.

15 A *concurso* proceeds to the third stage only if the debtor cannot be reorganised, *eg*, because no plan can be agreed within the time stipulated, because the *concurso* court does not approve the plan that has been agreed with creditors or because the plan cannot be implemented in accordance with its terms. At the third stage, the *concurso* court appoints a liquidator to realise the debtor's assets and to repay creditors *pari passu*.

16 Legal issues may arise while a debtor is in *concurso*. A party seeks the *concurso* court's decision on these legal issues by filing a motion in the *concurso* court.[11] If a party is aggrieved by the decision of the *concurso* court on the issue, it can challenge the decision in one or both of two ways. First, the party may file a further motion to the *concurso* court itself. At the hearing of the motion, the *concurso* court has the power to reconsider or revoke its initial decision. Second, the party may bring an appeal against the decision on constitutional grounds to a separate court known as the *amparo* court.

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9 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 53.

10 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 54.

11 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at paras 9 and 29.

Version No 2: 03 Dec 2025 (20:30 hrs)

17 The *amparo* court has the power to annul a *concurso* court's decision but does not have the power to go further and to decide the underlying legal issue for itself. The *amparo* court must instead remit the issue to the *concurso* court for reconsideration in light of the *amparo* court's reasons for annulling the *concurso* court's decision.

18 It is also possible, in certain circumstances, to appeal from a decision of the *amparo* court to a division of the Mexican Federal Court.[12]

19 I can now summarise the background in so far as it is relevant to these grounds of decision.

The parties

The plaintiffs

20 As I have mentioned, all six plaintiffs are companies incorporated in Singapore.[13] The first plaintiff is a holding company whose only assets are all of the shares in the second to sixth plaintiffs. The second to sixth plaintiffs are each a special purpose vehicle incorporated to own a single offshore jack-up drilling rig operating in Mexico.[14] I shall refer to them collectively as "the SPVs" and to their jack-up drilling rigs simply as "the rigs".

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12 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 52.

13 D3WS at Annex A; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 5; 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 7.

14 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 13; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 12.

Version No 2: 03 Dec 2025 (20:30 hrs)

21 As I have also mentioned, the first plaintiff was a wholly owned subsidiary of the first defendant until September 2017.[15] The first plaintiff is now a wholly owned subsidiary of the bondholders' nominee upon and by reason of an event of default declared in September 2017 (see [44] below).

The defendants

22 The first defendant is a company incorporated in Mexico. Like the plaintiffs, the first defendant also has its centre of main interests in Mexico. The first defendant's ultimate holding company is a Mexican company known as Petróleos Mexicanos ("Pemex"). Pemex is the Mexican state-owned gas and oil monopoly.[16] The first defendant, through the Integradora Group, provides integrated and diversified oilfield services in the oil industry to Pemex and its subsidiaries.

23 Although the first defendant was duly served with this originating summons in September 2018,[17] it did not appear before me to oppose the plaintiffs' application for final judgment. I have nevertheless considered the plaintiffs' case against the first defendant on the merits rather than proceeding purely based on the first defendant's default.

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15 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at paras 22–23.

16 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 20(b).

17 1st Affidavit of C Sivah dated 1 February 2021 at paras 7–8.

Version No 2: 03 Dec 2025 (20:30 hrs)

24 The second defendant was a director of all of the plaintiffs until September 2017.[18] He is also the chief legal counsel for the first defendant and an alternate director of the first defendant.[19]

25 In 2019, the plaintiffs settled its claims against the second defendant. As a result, the plaintiffs no longer seek any relief of any kind against him. The plaintiffs discontinued this originating summons as against him in November 2019 with no order as to costs.[20] The judgment I have entered on this originating summons therefore does not extend to the second defendant.

26 The third defendant was a director of all of the plaintiffs until September 2017.[21] He is also a director of the first defendant.[22] The third defendant is the only defendant who appeared before me to oppose the plaintiffs' application to enter final judgment on this originating summons.

Perforadora

27 A company that features in the background to this originating summons but who is not a party to it is a company called Perforadora Oro Negro S de RL de CV ("Perforadora").[23]

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18 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 9.

19 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 13.

20 HC/ORC 7913/2019 dated 22 November 2019, extracted 27 November 2019; Notice of Discontinuance dated 28 November 2019.

21 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 9.

22 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 10.

23 D3WS at para 14 and Annex A; 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 11.

Version No 2: 03 Dec 2025 (20:30 hrs)

28 Perforadora is a company incorporated in Mexico. It is a subsidiary of the first defendant, who owns 99.25% of its shares. The remaining 0.75% of its shares is owned by another subsidiary of Pemex. Perforadora chartered each rig from each SPV under a bareboat charter and then sub chartered each rig to a subsidiary of Pemex for deployment in offshore oil drilling operations in Mexico.[24]

The background

The bond agreement

29 To raise the funds that each SPV needed to purchase each rig, the first plaintiff issued over US$900m in bonds in January 2014.[25] The terms on which it issued the bonds are set out in a bond agreement (as subsequently amended and restated).[26] The third defendant signed the bond agreement in his capacity as a director of the first plaintiff.[27]

30 The bond agreement is governed by Norwegian law. It appointed a reputable financial institution in Norway as the trustee for the bondholders (the "Bond Trustee").[28] The bond agreement also provides – but only for the benefit of the Bond Trustee – that the courts of the Kingdom of Norway are to have exclusive jurisdiction over any disputes arising under it. The bond agreement

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24 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 14.

25 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 14.

26 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 1018.

27 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 1099.

28 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 16.

Version No 2: 03 Dec 2025 (20:30 hrs)

expressly gives the Bond Trustee the power to take proceedings relating to a dispute under the bond agreement in any court that has jurisdiction.[29]

31 The bonds are supported by a guarantee from the first defendant[30] and a charterer's undertaking from Perforadora.[31]

32 Clause 13.5(a) of the bond agreement requires the first plaintiff to procure that its own constitution and the constitutions of the SPVs are all amended to provide expressly that:[32]

(a) the Bond Trustee is entitled to appoint one director of each plaintiff (the "Independent Director");

(b) the Independent Director's vote is required "under all circumstances and in all cases" in order for any plaintiff to commence any insolvency or restructuring proceeding anywhere in the world, including without limitation a *concurso* (an "Insolvency Matter");

(c) each plaintiff is obliged to give its Independent Director at least 48 hours' written notice of any meeting at which an Insolvency Matter is to be considered;

(d) each plaintiff is obliged to give its Independent Director the board materials and such books and records of that plaintiff as are reasonably necessary for the Independent Director to evaluate all matters

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29 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 1098.

30 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 1119.

31 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 1104.

32 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 1069.

Version No 2: 03 Dec 2025 (20:30 hrs)

related to the Insolvency Matter that is to be considered at the meeting; and

(e) other than in relation to an Insolvency Matter, the Independent Director has no right to information or right of access to any plaintiff's books and records or to attend or vote at any meetings.

33 As security for its obligations under the bond agreement, the first plaintiff charged all of its shares in the SPVs to the Bond Trustee for the benefit of bondholders.[33] As security for its obligations under its guarantee, the first defendant charged all of its shares in the first plaintiff to the Bond Trustee for the benefit of bondholders.[34] The charges oblige the first plaintiff and the first defendant to procure that all of the plaintiffs: (a) amend their constitutions to incorporate and entrench a new article (see [35] below); and (b) appoint the Bond Trustee's nominee as Independent Director.

34 In September 2016, the Bond Trustee gave notice under the bond agreement and charges requiring the plaintiffs to appoint Mr Noel Cochrane Jr ("Mr Cochrane") as the Independent Director of each plaintiff.[35] Mr Cochrane was duly appointed. He has held office as a director of each plaintiff uninterrupted from September 2016 to the present day.

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33 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 1215– 1438.

34 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 1175–1214.

35 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at paras 17–18 and p 1439.

Version No 2: 03 Dec 2025 (20:30 hrs)

The plaintiffs' power to commence restructuring proceedings

35 In compliance with cl 13.5(a) of the bond agreement and the charges, all of the plaintiffs amended their constitutions in April 2016 to insert a new article in identical wording.[36] For convenience, I will refer to this article as "Art 115A" even though it bears a different number in three of the plaintiffs' constitutions.[37]

36 The second defendant signed the first defendant's resolution in writing (in the first defendant's capacity as the sole shareholder of the first plaintiff) amending the first plaintiff's constitution to insert Art 115A.[38] He also signed all but one[39] of the first plaintiff's resolutions in writing (in the first plaintiff's capacity as the sole shareholder of each SPV) amending each SPV's constitution to insert Art 115A.[40]

37 Art 115A prohibits each plaintiff and its directors from carrying into effect an Insolvency Matter (see [32(b)] above) unless two conditions are met.[41] First, that plaintiff's shareholder must vote in favour of doing so by passing an ordinary resolution to that effect. Second, that plaintiff's Independent Director must vote in favour of doing so, presumably at a duly convened meeting of the

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36 D3WS at para 18; Plaintiffs' Written Submissions dated 27 February 2023 ("PWS") at para 4; 7th Affidavit of Roger Arnold Hancock dated 13 May 2022 at pp 95–96.

37 PWS at para 4; 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 29.

38 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 909.

39 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 863.

40 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at pp 764, 810, 816 and 966.

41 PWS at para 4; D3WS at para 18; 7th Affidavit of Roger Arnold Hancock dated 13 May 2022 at pp 95–96.

Version No 2: 03 Dec 2025 (20:30 hrs)

directors of that plaintiff. The full text of Art 115A is set out in *Oro Negro (CA)* at [18].

38 As required by the bond agreement and the charges, Art 115A is entrenched by a further article in each plaintiff's constitution preventing that plaintiff from amending its constitution in a manner inconsistent with the bond agreement without first securing a resolution of the bondholders approving the amendment.

The Bond Trustee's power to declare events of default

39 Clause 15.1(a) of the bond agreement gives the Bond Trustee the power to declare an event of default under the bonds if the first plaintiff fails to fulfil any payment obligation under the bond agreement.[42]

40 Clause 15.1(g) of the bond agreement[43] gives the Bond Trustee the power to declare an event of default under the bonds if any of the six plaintiffs, the first defendant or Perforadora, in any jurisdiction, takes any step in relation to an Insolvency Matter.[44]

The litigation in Mexico

The concurso *petitions*

41 Between 2015 and 2017, Pemex took certain actions which threatened the solvency of both Perforadora and the plaintiffs and thereby risked triggering

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42 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 1079.

43 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at p 1081.

44 D3WS at para 17(b); 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 15(b).

Version No 2: 03 Dec 2025 (20:30 hrs)

an event of default cl 15.1(a) of the bond agreement (see *Oro Negro (CA)* at [20]).[45]

42 On 31 August 2017, the second and third defendants exercised their powers as directors (at that time) of all six plaintiffs to grant a power of attorney on behalf of each plaintiff to ten named lawyers[46] in a Mexican firm called Guerra González y Asociados (the "Guerra Lawyers").[47] Each power of attorney was, by its express terms, a "General Power of Attorney for litigations … with all general authorities and even with the special authorities" empowering the Guerra Lawyers, among other things, to "file … all kinds of proceedings"[48] on each plaintiff's behalf. It is common ground that the scope of these powers of attorney extends to filing *concurso* Petitions on the plaintiffs' behalf.

43 The second and third defendants intended these powers of attorney to empower the Guerra Lawyers to file a *concurso* petition in the plaintiffs' names without complying with Art 115A. It was their view when they granted these powers of attorney to the Guerra Lawyers that Art 115A was ineffective both: (a) as a legal impediment to filing a *concurso* petition as a matter of Mexican insolvency law and public policy; and (b) as a fetter on their fiduciary duty as directors of each plaintiff to act in the best interests of that plaintiff.[49]

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45 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 17.

46 D3WS at para 101(b); 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at pp 1656–1708.

47 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 18.

48 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 32.1 and pp 1656–1708.

49 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 19(a).

Version No 2: 03 Dec 2025 (20:30 hrs)

44 On 11 September 2017, the Guerra Lawyers filed a *concurso* petition in Mexico on behalf of Perforadora.[50] This constituted an event of default under cl 15.1(g) of the bond agreement (see [39] above).[51] A declaration of an event of default would allow the Bond Trustee to displace the defendants' ownership and control of the plaintiffs and to vest it in the bondholders' nominee. This raised the prospect of the SPVs (under bondholders' ownership and control) terminating Perforadora's charters of the rigs and requiring Perforadora to deliver possession of the rigs to the SPVs. The Guerra Lawyers therefore also sought orders from the *concurso* court to restrain the SPVs from doing just that.[52] At the same time, the defendants took steps to engage the Guerra Lawyers to file *concurso* petitions on the plaintiffs' behalf "in the event that it became necessary to do so", *ie*, in the event that it became necessary to prevent the SPVs from terminating the bareboat charters and taking possession of the rigs.[53]

45 Thus, on 20 September 2017, the first defendant (in its capacity as the sole shareholder of the first plaintiff) executed a resolution in writing resolving, among other things: (a) to engage the Guerra Lawyers to file a *concurso* petition on behalf of the first plaintiff; and (b) to empower the Guerra Lawyers by way of a power of attorney to, among other things, seek or resist any kind of proceedings on behalf of the first plaintiff.[54] On the same day, the first plaintiff (in its capacity as the sole shareholder of each SPV) executed resolutions in

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50 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 19.

51 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 20.

52 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 21.

53 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 22.

54 D3WS at para 23; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 21.

Version No 2: 03 Dec 2025 (20:30 hrs)

writing to the same effect for each SPV.[55] I shall refer to these resolutions of all six plaintiffs as "the Shareholders' Resolutions".

46 On 25 September 2017, as a result of the Perforadora *concurso* petition (see [44] above), the Bond Trustee declared an event of default under cl 15.1(g) of the bond agreement.[56] The Bond Trustee thereupon exercised its power under the bond agreement to submit to the plaintiffs pre-signed letters from the second and third defendants resigning as directors of each plaintiff and to appoint in their place Mr Roger Hancock ("Mr Hancock") and Mr Roger Bartlett ("Mr Bartlett") with effect from 25 September 2017.[57] On May 2022, Mr Lambertus Hendrik Veldhuizen ("Mr Veldhuizen") was appointed as a director of the SPVs.[58]

47 On 29 September 2017, the Guerra Lawyers filed a *concurso* petition on behalf of the first defendant.[59] Also on 29 September 2017, the Guerra Lawyers filed six *concurso* petitions, one in the name of each plaintiff.[60] I shall refer to these six petitions as "the Petitions", and to the *concurso* proceedings thereby commenced as "the *Concursos*".

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55 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 32.2.

56 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 21 and p 1515.

57 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 22.1 and p 1511.

58 PWS Annex B, page 2; Certified Transcript of 6 March 2023 at p 10 lines 5–24.

59 D3WS at para 26.

60 D3WS at para 26.

Version No 2: 03 Dec 2025 (20:30 hrs)

48 The third defendant accepts that, on the day the Guerra Lawyers filed the Petitions, the plaintiffs' directors had failed to comply with Art 115A.[61] It is not disputed that the Bond Trustee and the plaintiffs' directors who were in office on 29 September 2017 (see [46] above) were entirely unaware that the Guerra Lawyers had filed the Petitions.[62] No plaintiff could even convene a meeting of its directors to resolve to carry into effect the Shareholders' Resolutions (see [44] above). No possibility therefore even arose of Mr Cochrane being given at least 48 hours' prior notice in writing of any such meeting or of Mr Cochrane voting in favour of carrying the Shareholders' Resolutions into effect at such a meeting, both as required by Art 115A.[63]

49 On 3 October 2017, Pemex caused its subsidiary to terminate its contract with Perforadora. The immediate and automatic contractual consequence was to terminate each sub charter between each SPV and Perforadora for each rig.[64]

50 On 4 October 2017, the Bond Trustee exercised its power to perfect its security under the charges by procuring the transfer of all of the first defendant's shares in the first plaintiff to the bondholders' nominee, OND Pte Ltd.[65] On and after 4 October 2017, therefore, the bondholders, through the Bond Trustee and their nominee, assumed *de jure* ownership of the first plaintiff and, through the plaintiff, of all of the SPVs.

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61 Certified Transcript on 6 March 2023 at p 3 lines 12–30.

62 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 26.

63 PWS at para 4; 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 30.

64 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 59.

65 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 22.2.

Version No 2: 03 Dec 2025 (20:30 hrs)

51 On 5 October 2017, the *concurso* court admitted Perforadora's *concurso* petition (see [44] above).[66]

52 The plaintiffs' shareholder (OND Pte Ltd) and its directors (Mr Hancock, Mr Bartlett and Mr Cochrane) learned of the Petitions for the first time on 6 October 2017.[67] As a result, on 9 October 2017, the directors of each plaintiff passed a directors' resolution resolving:[68]

(a) to revoke all authority previously given by that plaintiff to any person to represent that plaintiff, whether by way of a power of attorney or otherwise;

(b) to appoint nine named lawyers from a Mexican law firm called Cervantes Sainz Abogados S.C. (the "Sainz Lawyers") to represent that plaintiff in all Mexican proceedings in respect of any disputes with the first defendant and Perforadora and in all negotiations with Pemex; and

(c) to grant a power of attorney to the Sainz Lawyers clothing them with the necessary authority.

53 From this point forward, both the Guerra Lawyers (relying on the August 2017 powers of attorney) and the Sainz Lawyers (relying on the October 2017 powers of attorney) claim to be the lawful legal representatives of the plaintiffs in the *Concursos* as well as in the first defendant's and Perforadora's *concursos*. It therefore avoids confusion to describe the litigation after October

66 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 26.

67 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at para 28.

68 D3WS at para 27; 1st Affidavit of Noel Blair Hunter Cochrane Jr dated 26 January 2018 at pp 1734–1739.

Version No 2: 03 Dec 2025 (20:30 hrs)

2017 by reference to the lawyers who took certain steps rather than by reference to the clients they claimed to represent in taking those steps.

54 On 31 October 2017, the *concurso* court admitted the first defendant's *concurso* petition (see [47] above).[69]

The litigation in the Concursos

55 The admission of the plaintiffs' Petitions[70] was delayed for than four years by litigation in the *Concursos* over whether the Guerra Lawyers were entitled to file the Petitions and to maintain the Concursos in light of: (a) the plaintiffs' directors' undisputed failure to comply with Art 115A before carrying into effect the Shareholders' Resolutions and authorising the Guerra Lawyers to file the Petitions; and (b) the revocation of the August 2017 powers of attorney by the plaintiffs' new directors in October 2017.[71]

56 The litigation in the *Concursos* took the following course.

57 In May 2018, on the Sainz Lawyers' application, the *concurso* court dismissed the Petitions on the grounds that the plaintiffs' directors had failed to comply with Art 115A before carrying into effect the Shareholders' Resolution and filing the Petitions.[72] The Guerra Lawyers filed a motion inviting the *concurso* court to reconsider its decision. In June 2018, the *concurso* court

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69 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 26.

70 1st affidavit of Gonzao Gil White dated 14 July 2022 at para 45.

71 D3WS at para 32; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at paras 30–48.

72 D3WS at para 38; 1st Affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at Tab 5; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 31(c).

Version No 2: 03 Dec 2025 (20:30 hrs)

dismissed the motion.[73] The Guerra Lawyers appealed to the *amparo* court.[74] In September 2018, the *amparo* court annulled the *concurso* court's decision and directed it to consider whether Art 115A was in conflict with principles of Mexican insolvency law.[75]

58 In September 2019, the *concurso* court reaffirmed its decision to dismiss the Petitions for failure to comply with Art 115A.[76] The Guerra Lawyers again appealed to the *amparo* court.[77] In October 2020, the *amparo* court again annulled the *concurso* court's decision and directed it to consider whether it had the power to disapply Art 115A for the sole purpose of considering whether to admit the Petitions on the grounds that Art 115A was in conflict with principles of Mexican insolvency law and Mexican public policy.[78]

59 In December 2020, the *concurso* court reaffirmed its decision to dismiss the Petitions for failure to comply with Art 115A.[79] The Guerra Lawyers again appealed to the *amparo* court.[80] In June 2021, the *amparo* court again annulled the *concurso* court's decision. It directed the *concurso* court to consider whether cl 15.1(g) of the bond agreement (and therefore the declaration of an event of default and the transfer of the first defendant's shares in the first plaintiff to

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73 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 32.

74 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 33.

75 D3WS at para 41; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 33–34.

76 D3WS at para 44; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 35.

77 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 36.

78 D3WS at para 46; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 36.

79 D3WS at para 47; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 37.

80 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 38.

Version No 2: 03 Dec 2025 (20:30 hrs)

OND Pte Ltd) and Art 115A were nullified by Art 87 of the LCM.[81] Art 87 of the LCM renders unenforceable any term in a contract that imposes a detriment on a merchant by the mere fact of commencing insolvency or restructuring proceedings, *eg*, by filing a *concurso* petition. Contractual terms that have this effect are commonly called *ipso facto* clauses.

60 On 1 December 2021, the *concurso* court finally admitted the Petitions.[82] It held that, "for the sole and exclusive" purpose of considering whether to admit the Petitions, Art 87 of the LCM had the effect of excluding the legal impediments in Art 115A for filing a *concurso* petition.[83] The *concurso* court rested its power to disapply Art 115A on the fact that each plaintiff, although incorporated in Singapore, had its centre of main interests in Mexico and was, until September 2017, ultimately owned by another company (*ie*, the first defendant) that also had its centre of main interests in Mexico and whose separate *concurso* had been admitted in October 2017 together with the *concurso* of its subsidiary Perforadora.[84]

61 In January 2022, the Sainz Lawyers appealed to the *amparo* court against the *concurso* court's decision admitting the Petitions. The decision of the *amparo* court is pending.[85]

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81 D3WS at paras 49–52; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at paras 40–41.

82 3rd Affidavit of Gonzalo Gil White dated 3 November 2022 at para 17.

83 D3WS at para 53–54; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 45; 3rd Affidavit of Daniel Alejandro Diaz Alvarez dated 17 May 2022 at p 258.

84 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at paras 44–45.

85 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 48.

Version No 2: 03 Dec 2025 (20:30 hrs)

The litigation in the first defendant's and Perforadora's concursos

62 In parallel with the litigation in the *Concursos*, litigation took place in the first defendant's and Perforadora's *concurso* on another relevant issue. The issue there was whether the *concurso* court should suspend the effects of the event of default, and thereby suspend the effect of the transfer of ownership and control of the plaintiffs to the bondholders' nominees (see [46] above), on the grounds that cl 15.1(g) of the bond agreement was nullified by Art 87 of the LCM or Mexican public policy. The outcome of this litigation would determine, as a matter of Mexican insolvency law and for all practical purposes, whether Perforadora could retain possession of the rigs or could be compelled to deliver possession of the rigs to the SPVs.

63 The litigation in the first defendant's and Perforadora's *concursos* took the following course.

64 In September 2018, the Guerra Lawyers filed a motion seeking to suspend the effects of the event of default on the basis that cl 15.1(g) of the bond agreement contravened Art 87 of the LCM and Mexican public policy.[86] In October 2018, the *concurso* court dismissed the motion on the basis that it did not have jurisdiction to decide it. The *concurso* court pointed out that the bond agreement was governed by Norwegian law and that the Bond Trustee had the benefit of a one-sided exclusive jurisdiction clause in favour of the courts of Norway.[87]

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86 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 28(b).

87 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 51.

Version No 2: 03 Dec 2025 (20:30 hrs)

65 In February 2019, the *concurso* court dismissed the Guerra Lawyers motion for reconsideration.[88] The Guerra Lawyers' further appeal to the *amparo* court was dismissed.[89] The Guerra Lawyers filed a further appeal to the Mexican federal court.[90]

66 In October 2020, the Mexican federal court held that the *concurso* court did indeed have the jurisdiction to determine whether Art 87 of the LCM and Mexican public policy nullified cl 15.1(g) of the bond agreement for the purposes of a *concurso*.[91] The federal court's reasoning proceeded as follows. The validity of cl 15.1(g) of the bond agreement was governed by Norwegian law and was subject to the jurisdiction of the Norwegian courts. But the effect of cl 15.1(g) was to allow Perforadora to be dispossessed of the rigs and thereby to end any prospect of a successful *concurso*. The issue before the *concurso* court was whether, in light of its effect on Perforadora's *concurso*, cl 15.1(g) was unenforceable under Art 87 of the LCM and contrary to Mexican public policy. That issue is governed by Mexican law, not Norwegian law.[92] A *concurso* court in Mexico seised of a *concurso* filed under Mexican law had the jurisdiction to decide the issue.

67 In February 2021, the *concurso* court suspended the effects of the Bond Trustee's declaration of an event of default. It held that cl 15.1(g) of the bond agreement imposes a detriment on the first plaintiff by the mere fact of Perforadora commencing insolvency or restructuring proceedings. Art 87 of the

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88 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 51.

89 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 52.

90 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 52.

91 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 52.

92 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 52.

Version No 2: 03 Dec 2025 (20:30 hrs)

LCM therefore empowered the *concurso* court to "legally disregard" cl 15.1(g) even though it was a stipulation bargained for between the Integradora Group and the bondholders. The *concurso* court therefore "revoked" cl 15.1(g) and "rendered invalid" all consequences flowing from the declared event of default.[93]

68 By decisions in August 2022[94] and November 2022,[95] the *concurso* court relied on its February 2021 decision to recognise the Guerra Lawyers as the "legal representatives"[96] of the plaintiffs in filing the Petitions and in maintaining the *Concursos* pursuant to the Shareholders' Resolutions and the August 2017 powers of attorney.

Conclusion

69 As a result of the *concurso* court's decisions in February 2021 (see [67] above) and in December 2021 (see [60] above), *the Concursos* now continue on the basis that: (a) the plaintiffs' directors did not have to comply with Art 115A in order to carry into effect the Shareholders' Resolutions and file the Petitions; and (b) the Guerra Lawyers (and not the Sainz Lawyers) have the authority to represent the plaintiffs in the *Concursos* and in the first defendant's and Perforadora's *concursos*.[97]

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93 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 55.

94 2nd Affidavit of Gonzalo Gil White dated 3 November 2022 at paras 18–21.

95 3rd Affidavit of Gonzalo Gil White dated 3 March 2023 at paras 4–9.

96 D3WS paragraph 106(d), Annex B at S/No 82; 3rd Affidavit of Gonzalo Gil White dated 3 March 2023 at para 7.

97 D3WS at para 58.

Version No 2: 03 Dec 2025 (20:30 hrs)

70 In particular, and subject only to appeal in Mexico, the current position is the Mexican courts is that:

(a) OND Pte Ltd did not become the sole shareholder of the first plaintiff with effect from 4 October 2017;

(b) the first defendant did not cease to be the sole shareholder of the first plaintiff with effect from 4 October 2017 and continues to this day to be the first plaintiff's sole shareholder;

(c) the second and third defendants did not resign from office with effect from 25 September 2017;

(d) Mr Hancock, Mr Bartlett and Mr Cochrane were not appointed directors of the plaintiffs with effect from 25 September 2017;

(e) Mr Veldhuizen was not appointed a director of the SPVs with effect form 16 May 2022; and

(f) the plaintiffs:

(i) did not revoke the Guerra Lawyers' authority to represent the plaintiffs in the *Concursos* with effect from 9 October 2017 by revoking the August 2017 powers of attorney; and

(ii) did not confer authority on the Sainz Lawyers to represent the plaintiffs in *Concursos* with effect from 9 October 2017 by granting the October 2017 powers of attorney.

Version No 2: 03 Dec 2025 (20:30 hrs)

The litigation in Singapore

71 The plaintiffs filed this originating summons in Singapore in January 2018. That was about four months after the Guerra Lawyers filed the Petitions and about four months before the *concurso* court dismissed the Petitions for the first time in May 2018.

72 The originating summons as filed seeks final judgment against the defendants for:

(a) a declaration that the Petitions were invalidly filed for failure to comply with Art 115A;

(b) a declaration that the defendants have no authority to maintain the Petitions on behalf of the plaintiffs or to deal with the plaintiffs' assets; and

(c) injunctions to prevent the defendants from commencing, continuing or maintaining the Petitions or any other Insolvency Matter on behalf of any of the plaintiffs whether in reliance on the Shareholders' Resolutions or otherwise.[98]

73 In January 2018, on the plaintiffs' *ex parte* application, a judge of the General Division of the High Court (the "General Division") granted interim injunctions in terms of [72(c)] above until this originating summons had been heard and determined.[99]

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98 HC/OS 126/2018 dated 26 January 2018.

99 HC/ORC 724/2018 dated 30 January 2018, extracted 30 January 2018.

Version No 2: 03 Dec 2025 (20:30 hrs)

74 In September 2018, on the defendants' *inter partes* application, the same judge discharged the interim injunctions.[100]

75 In September 2019, the Court of Appeal in *Oro Negro (CA)* allowed the plaintiffs' appeal and restored the interim injunctions (at [105]).[101] Those interim injunctions then remained in force from September 2019 up to March 2023, when I entered final judgment in favour of the plaintiffs in this originating summons. That judgment, among other things, granted permanent injunctions in terms of the interim injunctions.

76 In March 2020, the plaintiffs joined four of the Guerra Lawyers as defendants to this originating summons.[102] The final hearing of this originating summon was held in abeyance while the plaintiffs attempted to serve the originating process on the named Guerra Lawyers in Mexico.[103] For various reasons, including the Covid-19 pandemic and the fact that service had to be effected through the judicial authorities of Mexico, over two years elapsed without service being effected. On 4 May 2022, the plaintiffs elected to discontinue the proceedings against the Guerra Lawyers[104] and to have this originating summons heard and determined on the merits.

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100 HC/ORC 6132/2018 dated 14 September 2018, extracted 18 September 2018.

101 CA/ORC 149/2019 dated 12 September 2019, extracted 24 September 2019.

102 HC/ORC 1880/2020 dated 16 March 2020, extracted 16 March 2020.

103 Certified Transcript of 6 March 2023 at p 59 lines 25–28.

104 Notice of Discontinuance dated 4 May 2022.

Version No 2: 03 Dec 2025 (20:30 hrs)

77 The plaintiffs now seek final judgment against only the first and third defendants[105] in the following substantive terms:

(a) A declaration that each of the Shareholders' Resolutions is incapable of enabling the plaintiffs to seek a *concurso* or any other Insolvency Matter, without first securing Mr Cochrane's vote in favour of doing so.[106]

(b) A declaration that the first and third defendants have no authority to cause, and shall not cause, the plaintiffs to continue and/or maintain any *concurso* or any other Insolvency Matter in Mexico or elsewhere purportedly on behalf of the plaintiffs.[107]

(c) A declaration that the first and third defendants have no authority to act for any of the plaintiffs or to deal with the plaintiffs' assets in any matter.[108]

(d) An injunction to restrain the first and third defendants from relying on and/or continuing to rely on the Shareholders' Resolutions to cause the plaintiffs to continue or maintain any *concurso* or any other Insolvency Matter in Mexico or elsewhere purportedly on behalf of the plaintiffs.[109]

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105 Certified Transcript of 6 March 2023 at p 59 lines 29–31.

106 PWS at para 1.1.

107 PWS at para 1.2.

108 PWS at para 1.3.

109 PWS at para 1.4.

Version No 2: 03 Dec 2025 (20:30 hrs)

(e) An injunction to restrain the first and third defendants from continuing or maintaining any *concurso* or any other Insolvency Matter or other legal action in Mexico or elsewhere purportedly on behalf of the plaintiffs.[110]

(f) An order that the defendants pay to the plaintiffs damages to be assessed.

78 After hearing arguments from the plaintiffs and the third defendant, I have entered final judgment in this originating summons for the plaintiffs against the first and third defendants in the following substantive terms:

(a) A declaration that none of the Shareholders' Resolutions is sufficient in itself to authorise or empower any director of any of the plaintiffs to carry into effect any Insolvency Matter.[111]

(b) A declaration that the only directors of the first plaintiff (as the term "director" is defined in s 4 of the Companies Act 1967 (2020 Rev Ed) (the "Companies Act")) as at the date of my judgment are Mr Cochrane, Mr Hancock and Mr Bartlett, with effect from the dates of their respective appointment.[112]

(c) A declaration that the only directors of each SPV (as the term "director" is defined in s 4 of the Companies Act) as at the date of my

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110 PWS at para 1.5.

111 HC/JUD 114/2023 dated 28 March 2023 at para 1.

112 HC/JUD 114/2023 dated 28 March 2023 at para 4.

Version No 2: 03 Dec 2025 (20:30 hrs)

judgment are Mr Cochrane, Mr Hancock, Mr Bartlett and Mr Veldhuizen with effect from the dates of their respective appointment.[113]

(d) A declaration that neither the first defendant nor the third defendant have the authority of, or a power conferred by, any of the plaintiffs to cause or attempt to cause any of the plaintiffs to do any of the following:[114]

(i) to commence, continue or maintain any Insolvency Matter (as defined in Art 115A) in Mexico or elsewhere, purportedly on behalf of any the plaintiffs; or

(ii) to instruct legal representatives in Mexico or elsewhere to commence, continue or maintain any Insolvency Matter (as defined in Art 115A) in Mexico or elsewhere purportedly on behalf of any of the plaintiffs.

(e) An injunction restraining the first and third defendants from commencing, continuing or maintaining any Insolvency Matter (as defined in Art 115A) in Mexico or elsewhere purportedly on behalf of any the plaintiffs.[115]

(f) An injunction restraining the first and third defendants from instructing legal representatives in Mexico or elsewhere to commence, continue or maintain any Insolvency Matter (as defined in Art 115A) in Mexico or elsewhere purportedly on behalf of any of the plaintiffs.[116]

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113 HC/JUD 114/2023 dated 28 March 2023 at para 5.

114 HC/JUD 114/2023 dated 28 March 2023 at para 6.

115 HC/JUD 114/2023 dated 28 March 2023 at para 7.

116 HC/JUD 114/2023 dated 28 March 2023 at para 8.

Version No 2: 03 Dec 2025 (20:30 hrs)

(g) An order that the third defendant pay damages to the plaintiffs, such damages to be assessed, for his breach of the implied contract between himself and each plaintiff which incorporates as a term the substance of Art 115A.[117]

The legal basis for granting final relief

79 In order to secure final judgment against the first and third defendants, each plaintiff must establish a legal basis on which I can enter that judgment. That basis must either be a cause of action recognised by Singapore law as a basis for granting the final relief that the plaintiffs seek or a statutory basis for granting such relief.

The plaintiffs' case

80 Each plaintiff's primary legal basis for judgment rests on contract and proceeds as follows.[118] Each plaintiff asserts that it has an implied contract with the third defendant that incorporates as a term the substance of Art 115A.[119] The plaintiffs are entitled to enter final judgment against the third defendant for declarations, injunctions and damages as prayed for because he breached Art 115A by carrying into effect the resolutions of the plaintiffs' shareholders to file the Petitions without Mr Cochrane's vote of approval.[120] The plaintiffs are entitled to enter final judgment against the first defendant for declarations and

117 HC/JUD 114/2023 dated 28 March 2023 at paras 7–8.

118 PWS at paras 28–41.

119 PWS at paras 28–30.

120 PWS at paras 31–32.

Version No 2: 03 Dec 2025 (20:30 hrs)

injunctions as prayed for because it induced the third defendant to breach his implied contract with each plaintiff.[121]

81 Each plaintiff's alternative legal basis for relief rests on the Companies Act and proceeds as follows. The third defendant is in breach of s 157A of the Companies Act.[122] That section requires the business of a company to be managed by its directors, *ie*, to the exclusion of its shareholders.[123] The effect of s 157A of the Companies Act is therefore to put it outside the power of any shareholder to cause a company to commence legal proceedings, especially restructuring proceedings. In breach of s 157A of the Companies Act, the first defendant bypassed the plaintiffs' directors and instructed the Guerra Lawyers to file the Petitions.[124] As for the third defendant, he breached his duties under s 157 of the Companies Act by failing to act honestly and by failing to use reasonable diligence in the discharge of his duties. He did so by carrying into effect the Shareholders' Resolutions without complying with Art 115A.[125] These breaches of the Companies Act by the first and third defendants enliven the court's general power to grant a statutory injunction under s 409A of the Companies Act to restrain the breach.[126]

82 Each plaintiff also claims that the first and third defendants have participated in an unlawful means conspiracy by which they combined to cause each plaintiff to pass the Shareholder's Resolutions and to execute the powers

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121 PWS at para 40.

122 PWS at paras 55–57.

123 PWS at para 56.

124 PWS at para 56.

125 PWS at para 57.

126 PWS at paras 55–58.

Version No 2: 03 Dec 2025 (20:30 hrs)

of attorney in favour of the Guerra Lawyers in order to cause them to file the Petitions in breach of Art 115A.[127]

The third defendant's case

83 The third defendant concedes that the plaintiffs have established a legal basis for granting the final relief that they seek.[128] He opposes the plaintiffs' application on grounds that are either procedural (see [130] below) or that are directed to the exercise of my discretion to grant declarations and injunctions (see [130(c)] below). He does not seek to argue that the plaintiffs have established no legal basis on which to grant final relief.

84 I nevertheless consider that I must satisfy myself on the merits that the plaintiffs have established a legal basis for final relief against the first and third defendants rather than to allow that issue to go by concession. I say that for three reasons.

85 First, identifying a legal basis for granting final relief is fundamental. Without such a basis, I do not consider that I have the power to enter any sort of judgment against the first and third defendants. I consider it particularly important to establish that legal basis on the merits in a case such as this, where the third defendant submits that granting the plaintiffs the relief they seek will nullify the decisions of the Mexican courts leading to the findings summarised at [69]–[70] above and raise issues of judicial comity.

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127 PWS at paras 52–54.

128 Notes of evidence, 6 March 2023, at p 5, line 13 to 20.

Version No 2: 03 Dec 2025 (20:30 hrs)

86 Second, it is the plaintiffs' stated intention to enforce my judgment in Mexico. I consider it necessary to satisfy myself, on the merits rather than by concession, that the plaintiffs have established a legal basis for the final relief lest the failure to do so proves, in itself, to be an obstacle to enforcement. The third defendant has already taken the position before me that I should not give any weight to a January 2019 decision of the Norwegian court on cl 15.1(g) of the bond agreement in favour of the Bond Trustee because the Norwegian court did not, for a different reason, consider it necessary to satisfy itself on the merits that the plaintiffs had established a basis for the final relief that it granted them.[129]

87 Finally, the plaintiffs seek final relief, not just against the third defendant but also against the first defendant. The first defendant is not represented before me and is not bound by the third defendant's concession as to the legal basis for granting relief against him. I must therefore satisfy myself on the merits that the plaintiffs have established a legal basis for final relief against the first defendant. That legal basis, as will be seen, depends on establishing a legal basis for final relief against the third defendant. It is therefore necessary, in any event, for me to be satisfied that the plaintiffs have established a legal basis for relief against the third defendant.

Third defendant: breach of implied contract

88 I accept the plaintiffs' submission that the legal basis for granting the final relief they seek against the third defendant lies in an implied contract between each of them and the third defendant that incorporates as a term the substance of Art 115A.

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129 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 24(b).

Version No 2: 03 Dec 2025 (20:30 hrs)

89 One of the central issues on appeal in *Oro Negro (CA)* was whether the plaintiffs had a good arguable case that the second and third defendants were contractually bound by Art 115A by virtue *only* of their having accepted appointment as directors of the plaintiffs (at [56]). The plaintiffs relied on *Anglo-Austrian Printing and Publishing Union (Isaacs' Case)* [1892] 2 Ch 158 ("*Isaacs' Case*"), *Chee Kheong Mah Chaly and others v Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571 ("*Chaly Mah*") and *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors v Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd)* [2013] 8 MLJ 280 ("*Tengku Dato Ibrahim*") to submit that accepting appointment as a director was enough in itself for Art 115A to bind the second and third defendants (see *Oro Negro (CA)* at [57]). The second and third defendants argued that there must be something more than merely accepting appointment as a director for Art 115A to bind them (see *Oro Negro (CA)* at [57]).

90 The Court of Appeal (at [60]) accepted that the plaintiffs had indeed established a good arguable case on this central issue, *ie*, a case with sufficient merit to support interlocutory relief. As the plaintiffs now seek final relief against the first and third defendants, I have to determine not whether the plaintiffs merely have a good arguable case on this issue but whether they have established that case on the merits. With respect, I come to the same conclusion as the Court of Appeal on the merits.

91 The Court of Appeal in *Oro Negro (CA)* analysed *Isaacs' Case*, *Chaly Mah* and *Tengku Dato Ibrahim* in detail before concluding that the plaintiffs had a good arguable case. I analyse the same three cases briefly before concluding that the plaintiffs have more than a good arguable case but have in fact

Version No 2: 03 Dec 2025 (20:30 hrs)

established the third defendant is bound by an implied contract which incorporates as a term the substance of Art 115A.

Isaacs' Case

92 I begin with *Isaacs' Case*. In that case, Sir Henry Isaacs signed a company's memorandum and articles of association in his capacity as a subscribing shareholder for one share in the company. The company's articles of association also expressly appointed him as a director of the company upon incorporation. Under the articles, a person was qualified to hold office as a director only if he subscribed for 100 shares of £10 each in the company. A director appointed upon incorporation was given one month after incorporation to subscribe for the shares. The articles provided that, if the director failed to do so: (a) he would be deemed to have agreed to subscribe for the 100 shares; and (b) the company was thereupon entitled to allot the shares to him forthwith.

93 Sir Henry acted as a director of the company from incorporation until it went into liquidation. But he failed to subscribe for 99 additional shares in the company within one month of incorporation, or indeed at all, as required by the articles.

94 The company went into liquidation just 16 months after incorporation. The question arose whether Sir Henry was a contributory for 100 shares or only for his one subscriber share, *ie*, whether he had an obligation to contribute an additional £990 to the company's capital for the benefit of its creditors, arising from the 99 shares for which had failed to subscribe.

95 At first instance, Stirling J accepted that Sir Henry *qua* director of the company was not a party to the express statutory contract comprising the

Version No 2: 03 Dec 2025 (20:30 hrs)

company's memorandum and articles of association even though Sir Henry *qua* shareholder was a party to that contract. Stirling J held that Sir Henry *qua* director was nevertheless bound by an implied contract with the company to subscribe for an additional 99 shares in the company within one month after his appointment as a director. As Stirling J held (at 164–165):

> … [T]here ought to be inferred an agreement between [Sir Henry] and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration, and all the benefits which those articles provide for directors. …

96 On appeal, Lindley, Bowen and Kay LJJ affirmed Stirling J's judgment. They held unanimously that the articles amounted to the company's offer to Sir Henry of the terms on which he was to become a director of the company and that he had accepted the company's offer by his conduct in taking up appointment as a director and especially in acting as a director of the company until it went into liquidation. The acceptance being by conduct, the fact that Sir Henry had signed the memorandum was not essential to bring the implied contract into existence.

Chaly Mah

97 The second case the Court of Appeal analysed in *Oro Negro (CA)* is *Chaly Mah*. In that case, a company's articles provided that every officer of the company was entitled to be indemnified out of the assets of the company against any liabilities he may incur in the discharge of his office. The question was whether this provision was incorporated into the contract between the company and an accounting firm appointed to office as its auditors.

Version No 2: 03 Dec 2025 (20:30 hrs)

98 Answering the question in the affirmative, the Court of Appeal held that the auditors had clearly accepted their appointment to their office on the footing of the articles. The Court of Appeal accepted that the articles constitute a contract only between a company and its members and generally do not bind third parties (see *Hickman v Kent Or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881). But the Court of Appeal also held that in the particular circumstances of a case, a separate contract between the company and a third party who is not directly bound by the articles can incorporate provisions from the articles of association (see *Chaly Mah* at [24]).

Tengku Dato Ibrahim

99 The third case that the Court of Appeal analysed in *Oro Negro (CA)* is *Tengku Dato Ibrahim*. In that case, directors of a company sued the company seeking to be indemnified against legal fees they had incurred in successfully defending a derivative action brought against them *qua* directors by a minority shareholder of the company. Article 170 of the company's articles of association gave the directors an express right to such an indemnity. The directors had contracts of employment with the company. But they were not able to point to any words, whether in writing or even in conversation, incorporating Art 170 into their contracts of employment.

100 Mohamad Ariff J in the High Court of Malaya at Kuala Lumpur began his analysis by accepting that "relatively little may be required to incorporate the articles by implication" into a contract between a company and its director (at [19]), citing the *dictum* of Stanley Burton J in *Globalink Telecommunications Ltd v Wilmbury Ltd* [2003] 1 BCLC 145 at [30]:

> The articles of association of a company are as a result of statute a contract between the members of the company and

Version No 2: 03 Dec 2025 (20:30 hrs)

> the company in relation to their membership. The articles are not automatically binding as between a company and its officers as such. In so far as the articles are applicable to the relationship between a company and its officers, the articles may be expressly or impliedly incorporated in the contract between the company and a director. They will be so incorporated if the director accepts appointment 'on the footing of the Articles,' and relatively little may be required to incorporate the articles by implication: *per* Ferris J at para [26] of his judgment [in *John and others v Price Waterhouse (a firm) and another* [2002] 1 WLR 953).

101 Mohamad Ariff J went on to hold that the reason "very little" may be required to incorporate a term in a company's articles of association into a contract between the company and a director is because it is an obvious and necessary condition of appointing a person to the office of a director of a company that he is so appointed precisely on the footing of the company's articles (at [27]):

> … [H]ow else can directors be appointed to the board except on 'the footing of the articles'? It is an obvious necessary precondition for a valid board appointment. In this sense, the view that 'it takes very little' to incorporate the articles into the director's contract can be more readily and realistically understood. …

He therefore held that it was obvious that the directors had been appointed "on the footing of the articles" of the company, and that the right to an indemnity conferred by Art 170 had been incorporated as a term of the contract between the directors and the company (at [29]).

Oro Negro (CA)

102 As a result of its analysis of these cases, the Court of Appeal in *Oro Negro (CA)* held that the plaintiffs had established a good arguable case that an implied contract incorporating as a term the substance of Art 115A arose between each plaintiff and the second and third defendants because their consent

Version No 2: 03 Dec 2025 (20:30 hrs)

to appointment to the office of a director in a plaintiff gave rise to an agreement that each of them would serve that plaintiff based on the terms of the plaintiffs' constitution.

103 The Court of Appeal gave four reasons for its holding that the plaintiffs had a good arguable case on this issue. First, it did not lie in a person's mouth to say that he was not familiar with a company's constitution at the time he accepted appointment as a director of the company (at [70]). Second, the only reasonable inference on the facts of *Oro Negro (CA)* was that the second and third defendants must have agreed that their terms of service as directors were to incorporate the terms of the plaintiffs' constitutions (at [70]). Third, it did not matter that Art 115A was inserted into the plaintiffs' constitutions after the second and third defendants had accepted appointment. That was because they continued to serve as directors after it had been inserted (at [71]). Finally, and in any event, the second and third defendants knew the content of Art 115A because they had signed all of the internal corporate documentation that had been necessary to insert that article into each plaintiff's constitutions as required by the bond agreements and the charge (at [71]).

Conclusion

104 In my view, the rule to be extracted from the authorities is that where a term in a company's constitution imposes an obligation or confers a right on a person appointed to an office within a company, including but not limited to the office of director, and that person is aware of that term, accepts appointment as a director of the company and thereafter acts as a director of the company, that term is *prima facie* incorporated into an implied contract between that person and the company. All of this is, of course, subject to contrary agreement. Therefore, no implied contract will arise if the company and the officer enter

Version No 2: 03 Dec 2025 (20:30 hrs)

into an express and separate contract which: (a) excludes the relevant terms in the constitution; (b) is inconsistent with the terms in the constitution; or (c) expressly provides that it sets out exclusively the terms on which the officer has been appointed to his office.

105 The implied contract is like any other contract. If the director acts contrary to that term, he is in breach of the implied contract. A breach of the contract carries the usual consequences, typically an award of damages for the breach and, in appropriate cases, an award of equitable relief such as an injunction or specific performance.

106 In the present case, Art 115A expressly obliged each director of each plaintiff "not [to] carry into effect…any filing for…*concurso* mercantile or judicial restructuring" for that plaintiff unless "the Independent Director (whose vote is necessary) has voted in approval". That obligation in Art 115A was a term of the third defendant's contract *qua* director with each plaintiff.

107 The third defendant does not dispute – indeed, cannot credibly dispute – that he was aware of Art 115A when he acted as a director of each plaintiff or, more accurately, continued to act as a director of each plaintiff after Art 115A had been inserted into its constitution. Furthermore, he was personally involved in inserting Art 115A into each plaintiff's constitution.

108 Liability in contract is strict. It therefore makes no difference to the third defendant's liability for breach of his implied contract that he acted, as he claims, out of the best of motives, *ie*, in accordance with what he believed to be the best interests of the plaintiffs, in accordance with what he believed to be his fiduciary duties, and with a genuine belief that complying with Art 115A was

Version No 2: 03 Dec 2025 (20:30 hrs)

inconsistent with those duties and with a genuine belief that Art 115A was ineffective under Mexican law.[130]

109 Art 115A required Mr Cochrane's vote of approval before the third defendant could carry into effect the content of the Shareholders' Resolutions, *ie*, to cause each plaintiff to file a *concurso* petition. I find that the third defendant did cause each plaintiff to file a *concurso* petition without Mr Cochrane's vote of approval. The third defendant has accordingly breached the implied contract between himself and each plaintiff. He is liable in the usual way for damages to each plaintiff for the loss he has caused it to suffer by reason of his breach and to be restrained by inunction from continuing his breach.

110 Given that I have accepted the plaintiffs' primary legal basis in contract for granting final relief (see [80] above), it is unnecessary for me to consider the plaintiffs' alternative basis under the Companies Act (see [81] above) or its further alternative basis in the tort of conspiracy (see [82] above).

First defendant: inducing breach of contract

111 I accept the plaintiffs' submission that the legal basis for granting the final relief they seek against the first defendant lies in its inducement of the third defendant to breach his implied contract with the plaintiffs.

The elements of the tort

112 A person is liable in tort for inducing a breach of a contract if: (a) the person acts with the requisite knowledge of the existence of the contract, even if it lacks knowledge of the precise terms of the contract; (b) the person had the

130 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 19.

Version No 2: 03 Dec 2025 (20:30 hrs)

intention – which is to be determined objectively – to interfere with the performance of the contract; and (c) the contract in question is a valid one (see *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [17]).

113 A contract for the purposes of this tort must include the implied contract that arises between a director and a company incorporating a term in the company's constitution that imposes an obligation or confers a right on the director. There is no basis on which to suggest otherwise. Indeed, where the term in the constitution touches on the internal corporate governance of a company, as Art 115A does, the tort of inducing a breach of contract can be seen as a valuable ancillary legal right for shareholders to ensure proper corporate governance.

114 The first defendant cannot credibly dispute that it was aware of the existence of each plaintiff's constitution and of the second and third defendants' obligation *qua* directors to comply with Art 115A in each constitution. At the material time, the first defendant was the sole shareholder of the first plaintiff and the first plaintiff was the sole shareholder of the second to sixth plaintiffs. As the plaintiffs put it, that makes the first defendant the "ultimate parent" of all six plaintiffs.[131]

115 It is quite rightly not suggested that the implied contract between the plaintiffs and the third defendant is in any sense invalid.

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131 PWS at para 44.

Version No 2: 03 Dec 2025 (20:30 hrs)

The first defendant's intention

116 The main question I have to decide is therefore whether the first defendant intended to interfere with the third defendant's obligation under Art 115A not to carry into effect the first defendant's resolution to file a *concurso* petition without Mr Cochrane's vote of approval. In my view, the first defendant clearly intended to do so, both *before* it executed the Shareholder's Resolutions on 20 September 2017 and *by* executing the Shareholders' Resolutions on that date.

117 I shall first consider the first defendant's intent before it executed the Shareholders' Resolutions. The only way to approach the first defendant's state of mind is inferentially, by considering the conduct of the defendants taken together. For this purpose, I bear in mind that the third defendant was a director of the first defendant in August and September 2017.

(1) Before the Shareholders' Resolutions

118 On 31 August 2017, the second and third defendants granted the August 2017 powers of attorney to the Guerra Lawyers on behalf of the plaintiffs (see [42] above). This took place around the time when two key events occurred. The first was the breakdown of talks between the first defendant and bondholders.[132] The second was Pemex's refusal to implement certain amendments to the sub charters for the rigs, which led the first defendant to apprehend that Pemex would terminate the sub charters.[133] There was therefore an objective basis at this time – which I find the first and third defendants must

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132 PWS at para 45.

133 PWS at para 45; 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at at para 17.

Version No 2: 03 Dec 2025 (20:30 hrs)

have realised – for believing that the plaintiffs would soon be, if not already, insolvent or in severe financial distress.

119 The third defendant's evidence is that both he and the second defendant granted the August 2017 powers of attorney because they believed that it was in the best interests of all of the plaintiffs to seek protection from creditors through self-initiated restructuring proceedings, and to do so in Mexico, being the plaintiffs' centre of main interests.[134] His evidence is that doing so was also consistent with his fiduciary duties to each plaintiff. He says also that he understood at the time, *ie*, on 31 August 2017, that Art 115A was ineffective as being contrary to Art 87 of the LCM and Mexican public policy and would not operate to restrain the third defendant from carrying out his fiduciary duty to act in the best interests of the plaintiff.[135]

120 I do not accept that the third defendant "understood" any of this in August 2017. As my recounting of the litigation in Mexico has shown, whether Art 115A is or is not effective as a condition precedent to filing a *concurso* petition under Art 87 of the LCM is a hotly contested issue on which the Mexican courts themselves have been deeply divided for four years, until the *amparo* court's decision in December 2021. Despite that, the issue continues to be contested, as that decision is itself on appeal. The third defendant is not a psychic and his claimed understanding in August 2017 may well be contradicted on appeal.

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134 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 19.

135 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 20.

Version No 2: 03 Dec 2025 (20:30 hrs)

121 Further, I do not accept that complying with Art 115A would have been inconsistent with the fiduciary duties that the third defendant owed to the plaintiffs. Art 115A does not prevent the plaintiffs' directors from commencing self-imitated Insolvency Matters in respect of any of the plaintiffs. It merely requires Mr Cochrane's vote of approval in order to do so. Mr Cochrane himself owes fiduciary duties to the plaintiffs. He would breach those duties if he simply did the bondholders' bidding, just as the third defendant would breach those duties if he simply did the first defendant's bidding. There is no basis on which to suggest that Mr Cochrane would have withheld his vote of approval if it was otherwise in the best interests of the plaintiffs to file restructuring petitions. It is an important point that Art 115A is not an absolute bar on the plaintiffs' commencing self-initiated Insolvency Matters. It is merely a bar on the first defendant's right, as the first plaintiff's sole shareholder, to dictate how and where the plaintiffs are to be restructured, without regard to the bondholders' bargained for rights and interests.

122 In my view, the third defendant intended on 31 August 2017, at the very latest, to carry out a plan to put the rigs out of the reach of bondholders by carrying into effect the Shareholders' Resolutions without Mr Cochrane's vote of approval, and without even allowing him an opportunity to vote, in breach of Art 115A. The third defendant's reliance on Art 87 of the LCM and his fiduciary duties to the plaintiffs as justifications for bypassing Mr Cochrane are nothing but disingenuous *ex post* facto rationalisations.

123 I am further satisfied that the third defendant's intent can properly be attributed to the first defendant. The third defendant was a director of the first defendant at the material time. The second defendant was chief legal counsel for the first defendant at the material time. The first defendant was, at that time,

Version No 2: 03 Dec 2025 (20:30 hrs)

dealing with the apprehended insolvency of itself and of the plaintiffs in substance as a single economic problem to be solved, even if the first defendant's *concurso* was to be initiated separately from the plaintiffs' *concursos* as a matter of legal form.

124 I therefore consider that the first defendant intended, before the Shareholders' Resolutions were passed, to induce the third defendant to breach his implied contract with the plaintiffs.

(2) In passing the Shareholders' Resolutions

125 I next consider the first defendant's intent when it passed the Shareholders' Resolutions on 20 September 2017. All but one of the Shareholders' Resolutions were signed by the second defendant as the "authorised representative" of the first defendant with respect to the first plaintiff, and as the authorised representative of the first plaintiff with respect to the remaining plaintiffs.[136] The Shareholders' Resolutions expressly authorise the Guerra Lawyers to file *concurso* petitions on behalf of each plaintiff without making any reference to Art 115A and without making any provision for the plaintiffs' directors to comply with it.

126 The third defendant's evidence is that, at this time, there was concern that the Bond Trustee would declare an event of default, take control of the first defendant's shares in the first plaintiff and cause the SPVs to terminate Perforadora's charters of the rigs and take possession of them. The third defendant expressly links the Shareholders Resolutions to ensuring that the

136 1st Affidavit of Noel Noel Blair Hunter Cochrane Jr dated 26 January 2018 at pp 1712, 1721 and 1726.

Version No 2: 03 Dec 2025 (20:30 hrs)

Guerra Lawyers would be able to file *concurso* petitions in Mexico "in the event that it became necessary to do so".[137] In context, the necessity for doing so was quite obviously to stop Perforadora losing possession of the rigs. The only way the first defendant could be sure of achieving this was to ensure that the plaintiffs' directors did not comply with Art 115A before the Guerra Lawyers filed the *concurso* petitions.

127 This is not to say that I consider that Mr Cochrane would have withheld a vote of approval for restructuring proceedings if it had been sought from him in August or September 2017. If an objective case had been established in at that time that the plaintiffs were insolvent or in severe financial distress and ought to file restructuring petitions, Mr Cochrane could well have decided not to vote against such proceedings but instead simply to withhold his vote of approval for any proposal to file those petitions anywhere but Singapore. That would have avoided the current standoff in Mexico and allowed the plaintiffs to take possession of the rigs. After all, that is what the bondholders, the first plaintiff, the first defendant and Perforadora all bargained for when the bonds were issued.

Conclusion

128 For these reasons, I accept that it was indeed the first defendant's intention in August and September 2017 to induce the third defendant to breach his implied contract with each plaintiff by carrying into effect the Shareholders' Resolutions and causing the Petitions to be filed without Mr Cochrane's vote of approval.

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137 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 21.

Version No 2: 03 Dec 2025 (20:30 hrs)

The grounds for opposing final relief

129 I have satisfied myself on the merits that the plaintiffs have established a legal basis for granting the final relief that they seek. I have found that the third defendant breached his implied contract with the plaintiffs. I have also found that the first defendant induced the third defendant to breach his implied contract. I now turn to address the procedural and discretionary grounds on which the third defendant submits I should dismiss this originating summons.

130 The third defendant submits that I should dismiss this originating summons on the following six procedural and discretionary grounds:

(a) The plaintiffs' claim is an abuse of the process of the court because:[138]

(i) it relitigates issues that have been decided by the Mexican courts;[139] or

(ii) it is a collateral attack on the decision of the Mexican courts.[140]

(b) The plaintiffs' claim is barred by *res judicata*.[141]

(c) Granting the plaintiffs the relief they seek would result in a breach of judicial comity.[142]

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138 D3WS at para 82.

139 D3WS at paras 85–86.

140 D3WS at paras 83–88 and 97–105.

141 D3WS at para 106.

142 D3WS at para 111–118.

Version No 2: 03 Dec 2025 (20:30 hrs)

(d) I cannot grant any injunctions restraining the Guerra Lawyers from continuing the *Concursos* that can be enforced against them because I have no jurisdiction over them.[143]

(e) I cannot grant a declaration affecting the interests of the Guerra lawyers because none of the Guerra Lawyers is now a party to this originating summons.[144]

131 I deal with each of these grounds in turn.

Abuse of process

132 The third defendant's first submission is that this originating summons as an abuse of the process of the court on one of two grounds. The first ground is that it duplicates the *Concursos* and amounts to an impermissible attempt to relitigate issues that have been decided against the plaintiffs by the Mexican courts (see *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* and another appeal [2013] 4 SLR 1097 and *PT Karya Indo Batam v Wang Zhenwen and others (Wang Zhenwen and others, third parties*) [2021] 5 SLR 1381).[145] The second ground is that this originating summons is, in substance, an attempt to mount a collateral attack on the decisions of the Mexican courts leading to the findings summarised at [69]–[70] above.[146]

133 I do not accept either of these grounds. I take them in turn.

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143 D3WS at paras 119–126.

144 D3WS at paras 127–130.

145 D3WS at paras 85–88.

146 D3WS at paras 83–88 and 97–105.

Version No 2: 03 Dec 2025 (20:30 hrs)

Duplicate proceedings

134 The third defendant submits that this originating summons duplicates the *Concursos* in three respects. First, both proceedings are between the same parties.[147] Second, both proceedings raise the same or similar issues on the same underlying facts.[148] Finally, the plaintiffs seek the same final relief on this originating summons as they seek in the *Concursos*.[149] Determining this originating summons on the merits therefore risks giving rise to the two undesirable consequences of duplicate proceedings. First, it will create the risk of conflicting judgments in Singapore and Mexico on the same issues on the same facts. Second, it will impose upon the third defendant the unfairness or unconscionability of having to fight the same battle twice or on two fronts.[150]

135 I do not accept the third defendant's submission. I accept that there is identity of parties between this originating summons and the *Concursos*. Despite that, it is my view that this originating summons does not duplicate the *Concursos* because it raises issues and seeks relief which are different from the issues that the plaintiffs have raised and the relief the plaintiffs seek in the *Concursos*.

136 I now consider the three respects in which the third defendant submits that this originating summons duplicates the *Concursos*.

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147 D3WS at paras 100–102.

148 D3WS at paras 103–104.

149 D3WS at para 105.

150 D3WS at para 88.

Version No 2: 03 Dec 2025 (20:30 hrs)

(1) Identity of parties

137 I accept that there is identity of parties between the *Concursos* and this originating summons in relation to both the first defendant and the third defendant.

138 For the purposes of this analysis, I accept the third defendant's evidence that the plaintiffs' six *Concursos* were consolidated in December 2021 with Integradora's *concurso* and Perforadora's *concurso*.[151] For this analysis, I therefore treat them as a single proceeding in Mexico, as a matter of Mexican procedural law. I am also prepared to accept that it is immaterial that each plaintiff's *concurso* was a separate proceeding from commencement in September 2017 until consolidation in December 2021. It is during that period that the Mexican courts issued most of the decisions that the third defendant relies on to argue that this originating summons is an abuse of process. The significant point is that, unless and until an appellate court reverses the consolidation, all of those earlier decisions are now to be treated as having been made in a single consolidated *concurso* covering the first defendant, Perforadora and all six plaintiffs.[152]

139 The concept of a party is one that has developed as a matter of civil procedure, in the context of civil proceedings founded on a *lis*. This originating summons is a civil proceeding of this type. It is therefore easy to identify the parties to this originating summons. The parties are simply those legal persons listed in the title to this originating summons, taking into consideration all of the joinders and discontinuances that have taken place since this originating

151 3rd Affidavit of Gonzalo Gil White dated 3 November 2022 at para 17(a).

152 3rd Affidavit of Gonzalo Gil White dated 3 November 2022 at para 17.

Version No 2: 03 Dec 2025 (20:30 hrs)

summons was issued in January 2018. There are therefore now only eight parties to this originating summons: the six plaintiffs, the first defendant and the third defendant.

140 The question which arises is how to identify the parties to the consolidated *concursos*. In most jurisdictions, insolvency and restructuring proceedings are commenced, as a matter of form, like civil proceedings. In this narrow sense, therefore, the parties to proceedings such as a *concurso* will at the very least include the debtor. Where the proceeding is initiated by a creditor, and again in this narrow sense, the petitioning creditor will also be a party. The *Concursos* in this case were all self-initiated. All six plaintiffs, the first defendant and Perforadora are therefore parties to the consolidated c*oncursos*. No creditors are parties to the consolidated *concursos*. Certainly no director of any of the plaintiffs – such as the third defendant – is a party to the consolidated *concursos*.

141 When applying the abuse of process analysis to insolvency and restructuring proceedings, however, the inquiry into identity of parties cannot be applied in this narrow procedural sense. That is because insolvency and restructuring proceedings are fundamentally different in substance from civil proceedings.

142 Civil proceedings are founded either on a *lis* or a statutory right of action and are commenced by one or more claimants against one or more defendants. The claimant commences the proceedings because it is dissatisfied with the *status quo* or fears an imminent change in the *status quo*. Its objective in invoking the coercive powers of the court by commencing the proceedings is to vindicate a personal or proprietary private right which it claims entitles it to a

Version No 2: 03 Dec 2025 (20:30 hrs)

judgment effecting a change in the *status quo* or preventing the imminent change in the *status quo*. On the other side of the *lis* is the defendant, *ie*, the person against whom the claimant is asking the court to exercise its coercive powers and enter a judgment. The parties to the proceedings are simply the two or more legal persons between whom the claimant asserts the *lis* to exist. It is therefore the claimant who defines the parties by choosing to name some but not other legal persons as either a claimant or a defendant upon commencement. The parties are not defined by some legal or factual relationship to the claimant or to the *lis*. That is why the parties to civil proceedings can be identified simply by looking at the title to the proceedings.

143 The utility of the concept of a party in civil proceedings is that it defines exclusively the universe of persons against whom the effects of a judgment are opposable. A judgment in civil proceedings has four fundamental effects. First, it terminates the court's power to alter the parties' substantive rights and obligations in the proceedings, or in a defined phase of the proceedings, leaving the court to exercise only an ancillary or adjectival power relating to the interpretation or implementation of the judgment. Second, the judgment resolves the *lis* by adjudication and with finality, rendering its subject-matter *res judicata*. Third, the judgment binds the parties to comply with its terms. Fourth, the judgment merges the parties' pre-judgment substantive rights and obligations into the judgment. The judgment has these four effects against, and *only* against, the parties to the proceedings.

144 Insolvency proceedings (such as a bankruptcy or winding up application) and restructuring proceedings (such as a scheme of arrangement or a *concurso*) are substantively and substantially different from civil proceedings. The objective in commencing these proceedings is not to get the court to enter

Version No 2: 03 Dec 2025 (20:30 hrs)

a judgment vindicating a private right by changing the *status quo* for the individual benefit of a claimant asserting a *lis*. Instead, the objective is to get the court to enter a judgment effecting a fundamental change in the status of the debtor for the collective benefit of all those who have an interest in its estate. A judgment in these proceedings is therefore quite different from a judgment in civil proceedings. The change of status effected by the judgment binds the whole world; it does not bind only those persons who are parties to the proceedings as a matter of civil procedure.

145 A judgment entered in insolvency or restructuring proceedings does not have any of the four fundamental effects of a judgment entered in civil proceedings. The court effects the desired change in the debtor's status by its judgment upon proof only that the change is warranted by the applicable criteria. The criteria usually include at least proof of the debtor's insolvency or severe financial distress. A judgment does not terminate these proceedings in the same way as a judgment in civil proceedings, *ie*, by bringing an end to the court's jurisdiction to alter the parties' substantive rights and obligations. Instead, the judgment serves merely to initiate the particular collective proceeding in question. Even after judgment, the court continues to have the power to alter substantive rights and obligations. That is in addition to the power to make ancillary or adjectival orders in supervising and rendering assistance to the insolvency professionals and to all those who have an interest in the debtor's estate.

146 A judgment entered in insolvency and restructuring proceedings undoubtedly binds the whole world to recognise the change in the debtor's status that it has effected. But the judgment does not bind anyone in any other respect. Thus, it does not give rise to a *res judicata* and does not effect any

Version No 2: 03 Dec 2025 (20:30 hrs)

merger. For example, the mere fact that a creditor secures a winding up order does not mean that the court has adjudicated in any sense upon the creditor's debt, whether as to liability or quantum. The substantive rights of both the debtor and the creditor and the power of the liquidator, and ultimately the court, to adjudicate upon the debt remain entirely unaffected by the judgment entered in the insolvency or restructuring proceedings.

147 Both before and after judgment is entered, an insolvency court has the power to decide a disputed issue, to make the necessary orders in the course of supervising or rendering its assistance in the collective proceeding. When it does so, it has the power to alter substantive and procedural rights and obligations and to bind persons to those alterations. Those persons need not be parties to the proceeding in the narrow procedural sense. Thus, for example, the very act of commencing insolvency or restructuring proceedings typically subjects all persons with an interest in the debtor's estate to the court's power to bind those persons to a moratorium on individual action in order to protect the collective nature of the proceedings and to advance its purpose. These persons become subject to this aspect of the court's power even before it adjudicates upon whether a change in the debtor's status is warranted and even if no change in status ultimately takes effect, *eg,* if the proceedings are dismissed or withdrawn. Whether before or after judgment, the court possesses and exercises this jurisdiction over persons by reason of the legal or factual relationship to the debtor or to its estate, not (as in civil proceedings) merely because the claimant chose to name the person as a party when commencing the proceedings.

148 The effect of these orders is not confined to the persons who are parties to the insolvency or restructuring proceedings in the narrow procedural sense.

Version No 2: 03 Dec 2025 (20:30 hrs)

These orders will bind those persons over whom the court exercises its personal jurisdiction and against whom it directs its orders, so long as it does so in accordance with the applicable insolvency or restructuring law and the applicable rules of civil procedure. It is in this way that an insolvency court takes jurisdiction over and makes orders binding insolvency professionals it has appointed, creditors, members or shareholders, officers and even former officers.

149 For these reasons, when applying the abuse of process analysis to insolvency proceedings, it is far more meaningful to look for a person over whom the insolvency court exercised jurisdiction in entering judgment or in making an order rather than for a "party" as that concept has developed as a matter of civil procedure.

150 Applying this extended test, I accept that there is identity of parties (for lack of a better term) with regard to the third defendant in the decisions of the Mexican court leading to the findings I have summarised at [69]–[70] above. The effect of these decisions is – at least for the purposes of the consolidated *Concursos* – to restore the third defendant to his status as a director of the plaintiffs. The Mexican courts consider it to be within their jurisdiction – both as to the subject-matter and as to the person – to alter his status in this way as a matter of Mexican insolvency law and as a matter of Mexican civil procedure. I therefore conclude that the third defendant was a party to these decisions for the purposes of the abuse of process analysis.

(2) Same or similar issues

151 The third defendant next submits that this originating summons raises three issues for my decision that the Mexican courts have already adjudicated

Version No 2: 03 Dec 2025 (20:30 hrs)

upon in their decisions leading to the findings summarised at [69]–[70] above. Those three issues are:[153]

(a) whether Art 115A is valid and enforceable;

(b) whether the Guerra lawyers were appointed to act for the plaintiffs in breach of Art 115A; and

(c) whether the Guerra lawyers are entitled to rely on the August 2017 powers of attorney to commence, continue and maintain the *Concursos*.

152 I do not accept that this originating summons raises the same issues that the Mexican courts have already adjudicated upon. In my view, the issues before the Mexican courts in the consolidated *concursos* and the issues before me on this originating summons operate on two separate and parallel planes, in two senses.

153 The first sense in which the issues operate on separate planes is that the issues arise under different bodies of law in different systems of law. The issues before me on this originating summons arise under Singapore contract law, Singapore tort law and Singapore company law. Those issues are: (a) whether the third defendant breached his implied contract with the plaintiffs which incorporates as a term the substance of Art 115A; (b) whether the first defendant induced the third defendant to breach that contract; and (c) whether the corporate acts which the plaintiffs undertook upon and by reason of the event of default are valid. The issues before the Mexican courts in the consolidated

153 D3WS at para 104.

Version No 2: 03 Dec 2025 (20:30 hrs)

concursos, on the other hand, arise under Mexican insolvency law and public policy. Those issues are whether the Mexican courts are entitled or obliged, under Art 87 of the LCM and Mexican public policy: (a) to disapply Art 115A in deciding whether to admit the *Concursos*; and (b) to disregard cl 15.1(g) of the bond agreement in determining the consequences of the event of default. The issues before the Mexican courts in the consolidated *concursos* and the issues before me in this originating summons arise under two different bodies of law within two different systems of law. There is no identity of issues.

154 The second sense in which the issues operate on separate planes is that, in this originating summons, the question in issue is the authority of a director of any of the plaintiffs – such as the second and third defendants in September 2017 – to carry into effect the Shareholders' Resolutions without complying with Art 115A. That too is a question of Singapore law. That too is not the subject matter of any of the decisions in the consolidated *concursos*. The issue decided by the Mexican courts is whether Art 87 of the LCM and Mexican public policy allow the Mexican courts to disapply Art 115A in considering the issue of authority.

155 Despite the third defendant's attempts to frame the issues in the consolidated *concursos* in terms which appear superficially identical to the issues on this originating summons, the two proceedings in my view raise very different issues. I have been asked to and have decided only issues of Singapore contract law, tort law and company law. I have not been asked to decide and I have not decided any issue as to the scope of Art 87 of the LCM or of Mexican public policy. My decision on the issues in this originating summons are not intended to have any bearing – and indeed cannot have any bearing – on the past

Version No 2: 03 Dec 2025 (20:30 hrs)

or future decisions of the Mexican courts on issues of Mexican law and public policy.

(3) Same or similar relief

156 Finally, the third defendant submits that the plaintiffs seek in this originating summons the same relief as they seek in the consolidated *concursos*, *ie*, relief intended to prevent the Guerra Lawyers from continuing the *Concursos*, whether in reliance on the Shareholders' Resolutions or otherwise.[154] I accept there is some similarity between the relief sought in the two proceedings, but only in part and only at a very high level of generality. The similarity disappears when the relief sought by the plaintiffs in this originating summons is examined with more granularity, particularly bearing in mind the points I have already made about the differences between the issues raised in the two proceedings.

157 I have set out the relief sought by the plaintiffs in this originating summons at [77] above. The third defendant submits that two heads of relief that the plaintiffs seek in the consolidated *concursos* is similar to the relief which the plaintiffs seek in this originating summons:[155]

(a) orders for the *Concursos* to be withdrawn or suspended even though the *concurso* court – after this originating summons was commenced in January 2018 – admitted the *Concursos* in December 2021; and

154 D3WS at para 105.

155 D3WS at para 105.

Version No 2: 03 Dec 2025 (20:30 hrs)

(b) declarations that the Guerra Lawyers are not authorised to act for the plaintiffs.

158 The basis on which the plaintiffs seek the first head of relief in the consolidated *concursos* turns on issues relating to the proper scope of Art 87 of the LCM and Mexican public policy. As I have mentioned, those issues are not before me on this originating summons. No relief that I grant can be based, even indirectly, on a Mexican statute or on Mexican public policy. I do not accept that there is any similarity between the first head of relief that the third defendant has identified and the relief which the plaintiffs claim in this originating summons.

159 The basis on which the plaintiffs seek the second head of relief in the consolidated *concursos* turns on the proper scope and validity of the September 2017 powers of attorney under the Mexican law of agency and of civil procedure. But none of the relief that the plaintiffs seek in this originating summons is directed at the Guerra Lawyers or has its basis in any issues of Mexican law. Instead, the relief sought here is directed only to the first and third defendants, as the former shareholder and a former director of six Singapore companies. And the relief that the plaintiffs seek has its basis in Singapore contract law, tort law and company law, not on Mexican law.

160 For these reasons, I do not accept that the relief which the plaintiffs seek in this originating summons is the same as or similar to any relief which the plaintiffs seek in the consolidated *concursos*.

161 The third defendant has established only identity of parties. He has failed to establish identity of issues and identity of relief. I therefore do not accept that

Version No 2: 03 Dec 2025 (20:30 hrs)

this originating summons duplicates the consolidated *concursos*. It is not an abuse of process for persons who are parties to one set of proceedings in one jurisdiction to commence proceedings against the same persons in another jurisdiction raising different issues and seeking different relief. This originating summons is not an abuse of process on the first ground that the third defendant raises.

Collateral attack

162 The third defendant's second ground for submitting that this originating summons is an abuse or process is that it is a collateral attack on the decisions of the Mexican courts.[156] He argues that, by this application, the plaintiffs are seeking rulings from the Singapore court that are inconsistent with the decisions of the Mexican courts leading to the findings summarised at [69]–[70] above.[157]

163 I do not accept this submission. It will be a rare case where litigation between two parties over an issue that *has not previously been litigated* between them will amount to a collateral attack (*Beh Chew Boo v Public Prosecutor* [2021] 2 SLR 180 at [72], citing *In re Norris* [2001] 1 WLR 1388 at [26] *per* Lord Hobhouse of Woodborough). Examples of an impermissible collateral attack are best illustrated by *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 ("*Hunter*") and *Ashmore v British Coal Corporation* [1990] 2 QB 338 ("*Ashmore*").

164 In *Hunter*, the plaintiff attempted to relitigate in a civil court a factual issue which had been decided against him by a criminal court in a trial in which

156 D3WS at paras 89–92 and 106.

157 D3WS at para 106.

Version No 2: 03 Dec 2025 (20:30 hrs)

he was the accused. The plaintiff had had a full opportunity to contest the issue before the criminal court. His attempt to bring a civil claim raising the same issue was struck out as an abuse of the process of the court, being a collateral attack on the decision of one court in another court of coordinate jurisdiction.

165 In *Ashmore*, the plaintiff made a sexual discrimination claim against the British Coal Board. A large number of other women were also interested in pursuing similar claims. As a matter of case management, the employment tribunal selected for trial a number of sample cases on the basis that they raised issues that were common to all the claims, including the plaintiff's claim. The plaintiff did not attempt to put her claim forward for selection as a sample case even though her claim raised an issue that was arguably unique. Her claim was therefore stayed while the sample cases were tried. After the sample cases had been tried and dismissed, the plaintiff attempted to have the stay in her case lifted in order to litigate the issue unique to her case. The English Court of Appeal held that allowing her to litigate her claim in these circumstances would be an abuse of process, being analogous to a collateral attack on the tribunal's decision on the sample cases.

166 For the reasons I have already given, I do not consider the plaintiffs to be relitigating any issues that have been decided by the Mexican courts. The issues before me are issues of Singapore contract law, tort law and company law, not issues of Mexican insolvency law and public policy. I do not accept that the plaintiffs, by commencing this originating summons, are seeking to mount a collateral attack on the decisions of the Mexican courts leading to the findings summarised at [69]–[70] above.

Version No 2: 03 Dec 2025 (20:30 hrs)

Res judicata

167 The third defendant's second submission is that I should dismiss this originating summons as being barred by *res judicata*. For this submission, the third defendant relies on the extended doctrine of *res judicata* (see *Henderson v Henderson* [1843-60] All ER Rep 378) and not on cause of action estoppel or issue estoppel.[158]

168 The third defendant relies on the same points to advance his submission on abuse of process under the extended doctrine of *res judicata* as he relies on to advance his submission on abuse of process on grounds of duplicated proceedings and collateral attack. For the same reasons, I reject the third defendant's submission that this originating summons is an abuse of process under the extended doctrine of *res judicata*.

Breach of judicial comity

169 The third defendant's third submission is that granting the plaintiffs the permanent injunctions they seek will breach judicial comity. The permanent injunctions that the plaintiffs seek will restrain the first and third defendants in perpetuity from causing the plaintiffs to commence or maintain any *concursos*, whether the existing *Concursos* or fresh *concursos*, and whether in reliance on the Shareholders' Resolutions or otherwise.[159] These permanent injunctions are in the same terms, save only as to duration, as the two interim injunctions that the General Division granted *ex parte* at first instance[160] in January 2018 and

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158 D3WS at paras 93 and 107.

159 D3WS at paras 111–118.

160 HC/ORC 724/2018 dated 30 January 2018, extracted 30 January 2018.

Version No 2: 03 Dec 2025 (20:30 hrs)

which the Court of Appeal restored by its judgment in *Oro Negro (CA)* (at [105]) in September 2019.[161]

170 The third defendant's submission proceeds as follows. The injunctions will operate as anti-suit injunctions in so far as they prevent the third defendant from continuing the *Concursos*.[162] They will also operate as anti-enforcement injunctions in so far as they prevent the third defendant from taking the benefit of the decisions of the Mexican courts leading to the findings summarised at [69]–[70] above.[163] The effects of the injunctions will therefore be to nullify these decisions and to strip them of legal effect, thereby breaching judicial comity.[164]

171 For the following reasons, I do not accept that considerations of judicial comity are relevant to the issue of whether to make the interim injunctions permanent. Although the third defendant makes his submissions only on his own behalf, I analyse his submissions as they apply to both the third defendant and to the first defendant.

Anti-suit injunction

172 In my view, the permanent injunctions are not properly classified as anti-suit injunctions. I say that for two reasons. First, the effect of the injunctions is not to restrain *the plaintiffs* from maintaining the *Concursos*. The injunctions merely restrain *a former shareholder* of the first plaintiff and *a former director*

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161 CA/ORC 149/2019 dated 12 September 2019, extracted 24 September 2019.

162 D3WS at para 112(b).

163 D3WS at para 112(a).

164 D3WS at para 117.

Version No 2: 03 Dec 2025 (20:30 hrs)

of the plaintiffs from causing the plaintiffs to maintain the *Concursos*. Second, even if the effect of the injunctions is the same as an anti-suit injunction, that is not their intended effect. I take these two reasons in turn.

(1) Effect of the injunctions

173 The effect of the permanent injunctions is to restrain in perpetuity two persons who have never had any power to exert any control over any of the plaintiffs as a matter of Singapore law to commence or maintain unilaterally any Insolvency Matter from purporting to exert such control to maintain the *Concursos* or to commence fresh *concursos* in any of the plaintiffs' names. The injunction is not a restraint on the plaintiffs from maintaining the *Concursos*.

174 Despite the permanent injunctions, each plaintiff remains entirely at liberty to commence a fresh *concurso* or even to maintain the existing *Concursos* if (but *only* if) that plaintiff: (a) *does not* rely on the Shareholder's Resolutions but instead procures a new ratifying resolution from its current shareholder; and (b) *does* secure Mr Cochrane's vote of approval in compliance with Art 115A to ratify maintaining the *Concursos* or to commence fresh *concursos*.

175 The only effect of the injunctions is to restrain *the first and third defendants* in perpetuity from causing any plaintiff to commence or maintain a *concurso* whether in reliance on the Shareholders' Resolutions or otherwise. Those injunctions are warranted against the first defendant because it ceased to be a shareholder of all of the plaintiffs in October 2017. Those injunctions are warranted against the third defendant: (a) because he did not secure Mr Cochrane's vote of approval before carrying into effect the Shareholders'

Version No 2: 03 Dec 2025 (20:30 hrs)

Resolutions; and (b) because he ceased to be a director of all of the plaintiffs in September 2017.

176 The injunctions are not directed at a litigant in foreign proceedings but only against two persons who, it could be said, continue to be in a position to exercise control over the plaintiffs, either as a shareholder or as a director. Accordingly, I do not accept that making the interim inunctions permanent has the same effect as an anti-suit injunction.

(2) Nature of the injunction

177 In any event, as the Court of Appeal held in *Oro Negro (CA)* at [1]–[2], an injunction granted to enforce a negative covenant in a contract is not to be classified as an anti-suit injunction simply because one of its effects is to restrain a person from commencing or maintaining foreign proceedings.

178 The proper classification of the injunction is not a mere matter of form. The legal principles governing the court's discretion to grant each class of injunction are substantively different. In an application for an anti-suit injunction, considerations of comity take centre stage. That is because the anti-suit injunction is intended to affect a foreign court, albeit indirectly. Therefore, the power to grant an anti-suit injunction must be exercised with caution. That is so, even if the injunction is, in form and substance, directed *in personam* to the defendant and not to the foreign court (see *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at 892C and 892F; approved in *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 ("*Kirkham*") at [25]).

Version No 2: 03 Dec 2025 (20:30 hrs)

179 But where foreign proceedings are commenced or maintained in breach of a negative covenant in a contract, the court will not be diffident in granting an injunction simply because one of its effects will be to restrain the defendant from commencing or maintaining the foreign proceedings (see *Kirkham* at [29]). That is so whether the contract containing the negative covenant is between the parties to the litigation (see, *eg*, *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [67]–[68]) or between a party to the litigation and a person who it could be said is entitled to act as its agent in commencing and maintaining the litigation (see, *eg*, *Oro Negro (CA)* at [101]–[102]). The critical point in both situations is that the court grants the injunction as a remedy for a breach of contract, *ie*, as redress for a substantive civil wrong within its jurisdiction that has been established on the merits in civil proceedings properly brought before it.

180 In *Oro Negro (CA)*, the Court of Appeal restored the interim injunctions which had been granted at first instance. It held that the injunctions were sought, not to restrain the first and third defendants from maintaining the *Concursos*, but to enforce Art 115A (see *Oro Negro* at [100]). In that sense, the intent of the interim injunctions was merely to restrain the first and third defendants from claiming to act on behalf of the plaintiffs, all of whom are Singapore companies, and not to affect the Mexican courts directly or even indirectly. As such, no considerations of comity were engaged at all.

181 The Court of Appeal in *Oro Negro (CA)* was considering whether to restore the interim inunctions on the principles applicable to the grant of *interim* injunctions. I am considering whether to make those interim injunctions *permanent*. Therefore, with respect, the Court of Appeal's analysis in *Oro Negro (CA)* is strictly speaking *obiter* on the issue before me. Nevertheless, I

Version No 2: 03 Dec 2025 (20:30 hrs)

consider that the same analysis must apply to the grant of permanent injunctions. Art 115A is a negative covenant in each plaintiff's constitution. Each of the plaintiff is a Singapore company. As a matter of Singapore law, Art 115A obliges the third defendant not to cause each plaintiff – by purporting to be its director and agent – to carry into effect the Shareholders' Resolution for that company, given that Mr Cochrane had not given his vote of approval. No considerations of comity are engaged as against the third defendant. Art 115A is also the basis of a duty in tort on the first defendant – in relation to a Singapore company and under Singapore law – not to induce the third defendant to breach his implied contract with each plaintiff. No considerations of comity are likewise engaged as against the first defendant.

182 For these reasons, I do not consider that the permanent injunctions are properly classified as anti-suit injunctions even if one of their effects is to restrain the plaintiffs from maintaining the *Concursos* or commencing fresh *concursos*.

Anti-enforcement injunction

183 The third defendant submits, in the alternative, that the permanent injunctions are properly classified as a particular type of anti-suit injunction known as an anti-enforcement injunction.[165] In making this submission, the third defendant relies on the decision of the Court of Appeal in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*") to argue that the plaintiffs must establish exceptional circumstances in order to secure the permanent injunctions because they are anti-enforcement injunctions.

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165 D3WS at paras 114–118.

Version No 2: 03 Dec 2025 (20:30 hrs)

184 I do not accept the third defendant's submission for two reasons. First, the effect of the permanent injunctions is not to restrain the plaintiffs from enforcing the decisions of the Mexican courts leading to the findings summarised at [69]–[70] above. Second, even if that is their effect, the decision in *Sun Travels* is distinguishable. I take these two reasons in turn.

(1) Effect of the injunction

185 The permanent injunctions do not involve any interference with *the plaintiffs'* ability to enforce the decisions of the Mexican courts leading to the findings summarised at [69]–[70] above. The injunctions simply restrain the first and third defendants in perpetuity from causing the plaintiffs to commence or maintain any *concursos*, whether the existing *Concursos* or fresh *concursos*, and whether in reliance on the Shareholders' Resolutions or otherwise.[166]

186 The permanent injunctions, once again, rest only on considerations of Singapore contract law and company law as against the third defendant and on considerations of Singapore tort law and contract law as against the first defendant. The proceedings in Mexico, once again, operate on a separate and parallel plane. The permanent injunctions have nothing to do with *the plaintiffs'* entitlement to enforce the decisions of the Mexican courts on that plane. The injunctions also have nothing to do with the first and third defendant's power to enforce the decisions of the Mexican courts in their own right, *ie*, not through the plaintiffs.

187 The permanent injunctions cannot properly be classified as anti-enforcement injunctions.

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166 D3WS at paras 111–118.

Version No 2: 03 Dec 2025 (20:30 hrs)

(2) *Sun Travels* distinguished

188 In any event, even if the permanent injunctions are properly classified as anti-enforcement injunctions, I consider that this case can be distinguished from *Sun Travels*.

189 In *Sun Travels*, a party (Hilton) secured an arbitral award against another party (Sun) in an arbitration seated in Singapore. In December 2015, Hilton began proceedings to enforce the award in the Maldives, where Sun was incorporated, carried on business and therefore had its assets. While the enforcement proceedings were pending, and in breach of the arbitration agreement between Hilton and Sun, Sun commenced suit against Hilton in the Maldivian civil courts on the same subject matter as the award in Hilton's favour. In March 2017, the Maldivian court entered judgment for Sun and against Hilton in terms opposite to the award. Hilton appealed against the March 2017 judgment. Meanwhile, Hilton had had to terminate the December 2015 enforcement proceedings on technical procedural grounds. In April 2017, Hilton commenced fresh enforcement proceedings against Sun. In June 2017, a Maldivian court dismissed the second enforcement proceedings, holding that the Maldivian civil judgment entered in March 2017 in Sun's favour prevented the award from being enforced in the Maldives. Hilton then applied in Singapore for an anti-suit injunction against Sun. At first instance, a judge of the General Division granted Hilton a permanent injunction restraining Sun from relying on the March 2017 judgment. Sun appealed to the Court of Appeal.

190 The Court of Appeal set aside the injunction because Hilton had failed to seek the assistance of the Singapore court – as the court of the seat of the arbitration – before the Maldivian civil court went into the merits and entered judgment against Hilton in Sun's Maldivian suit. Therefore, considerations of

Version No 2: 03 Dec 2025 (20:30 hrs)

comity had reasserted themselves. Hilton was unable to make out exceptional circumstances justifying the Singapore courts restraining enforcement of the Maldivian judgment. The Court of Appeal therefore set aside the anti-enforcement injunction granted by the General Division (at [125]).

191 In my view, the plaintiffs' application is distinguishable from *Sun Travels* on two grounds.

192 First, the plaintiffs have not been guilty of any delay which results in considerations of comity reasserting themselves and therefore warrants exceptional circumstances to be demonstrated. The Court of Appeal noted in *Sun Travels* that the general rule is that an applicant seeking an anti-suit or anti-enforcement injunction has to do so without delay. Further, a plaintiff's delay is not excused simply because it is making jurisdictional objections in the foreign courts (at [118]). As Leggatt LJ observed in *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace")* [1995] 1 Lloyd's Rep 87 (at [118]), to allow a plaintiff to make jurisdictional objections in a foreign court and then to seek injunctive relief in the forum only if the objections fail would be the "reverse of comity."

193 The Court of Appeal accepted, in *Sun Travels*, that Sun had behaved vexatiously and oppressively by commencing the Maldivian suit. More importantly, the Court of Appeal accepted that Sun had breached a negative covenant in a contract over which the Singapore court had jurisdiction by doing so. But the advanced stage of Sun's Maldivian suit and of Hilton's enforcement proceedings by the time Hilton sought relief in Singapore meant that issues of comity had reasserted themselves. It is not surprising, therefore, that the Court

Version No 2: 03 Dec 2025 (20:30 hrs)

of Appeal required Hilton to establish exceptional circumstances on the usual principles.

194 In our case, the Guerra Lawyers commenced the *Concursos* in September 2017. The plaintiffs approached the Singapore court – as the court having jurisdiction over the plaintiffs and their constitutions as a matter of contract law and company law – in January 2018. The plaintiffs then pursued their claims for interim relief in Singapore in parallel with the Sainz Lawyers' objections to the *Concursos* in Mexico. The first substantive decision of the *concurso* court was the decision to dismiss the Petitions in May 2018. No delay has occurred in this case to allow considerations of comity to reassert themselves.

195 Second, the nature of the permanent injunctions that the plaintiffs seek is completely different from the permanent injunction which the General Division granted in *Sun Travels*. That injunction expressly and directly prevented Sun from relying on the March 2017 judgment. And it did so even though Hilton had participated in Sun's suit leading up to that judgment and even though Sun had filed an appeal against that judgment. The permanent injunctions in this case do no more than restrain the first and third defendants from causing the plaintiffs to commence or maintain any *concursos*. The plaintiffs, remain entirely able to enforce all the decisions of the Mexican courts, so long as they act in accordance with their constitution as interpreted and applied under Singapore law. The injunctions do not purport to restrain *the plaintiffs* – who are the putative litigants in the Mexican proceedings – from enforcing any decisions of the Mexican courts.

Version No 2: 03 Dec 2025 (20:30 hrs)

Interference with or nullification of Mexican judgments

196 The third defendant submits that I should not grant the plaintiffs the final relief they seek because it will interfere with the execution of the Mexican judgments in Mexico or nullify the Mexican decisions. I do not accept that this is the effect of the permanent injunctions.

197 First, granting final relief to the plaintiffs will not interfere with or nullify the Mexican judgments. The relief I have granted, for the reasons I have given, has been granted by a Singapore court as a matter of Singapore law to vindicate causes of action arising and asserted under Singapore law and are directed – not against the plaintiffs or the Mexican courts – but against persons who it could be said continue to have the power to exert control over the plaintiffs as Singapore companies. I have not been asked to decide any issues of Mexican law and have not decided any issues of Mexican law.

198 Likewise, the Mexican courts in the consolidated *concursos* has thus far not been asked to decide any issues of Singapore law and have not decided any issues of Singapore law. In particular, the Mexican courts have not ruled on whether the first and third defendants continue – as a matter of legal reality – to have the power to exert control over the plaintiffs. The decision that the Mexican courts have made is only that – by a legal fiction permitted or mandated by Art 87 of the LCM and Mexican public policy – the Mexican courts are entitled to disapply or disregard Art 115A and cl 15.1(g) of the bond agreement.

199 Nothing in the final judgment I have entered can nullify anything done or to be done by the Mexican courts, unless the Mexican courts now choose to decide issues of Singapore law.

Version No 2: 03 Dec 2025 (20:30 hrs)

200 Second, even if the effect of the final judgment I have entered is to interfere with or nullify the Mexican judgments, this is not a relevant consideration. I have already established that the injunctions are neither anti-suit injunctions nor anti-enforcement injunctions. In view of this, considerations comity fall away.

Relief sought is futile

201 The third defendant next submits that this originating summons should be dismissed because the relief that the plaintiffs seek is futile bearing in mind the purpose for which the plaintiffs seek the relief. The submission proceeds on three grounds.

202 First, the third defendant submits that the Guerra Lawyers are not parties to this originating summons and will not be bound by any final relief which I grant.

203 Second, the third defendant submits that the primary purpose of the plaintiffs in commencing this originating summons is to secure relief which the plaintiffs can use to halt the *Concursos*. None of the declarations and injunctions that the plaintiffs seek will assist them in halting the *Concursos*. That is because the decisions of the Mexican courts have already resulted in the findings summarised at [69]–[70] above. This includes the Mexican court's decision recognising the August 2017 powers of attorney as continuing in force and as sufficient to empower the Guerra Lawyers to maintain the *Concursos* as the plaintiffs' agents. The only way in which any of those findings can be altered and the *Concursos* halted is by a subsequent decision of the Mexican courts, not by this court granting the plaintiffs final relief.

Version No 2: 03 Dec 2025 (20:30 hrs)

204 Third, the third defendant submits that he plays no part in directing the steps that the Guerra Lawyers are taking in the consolidated *concursos* purportedly on the plaintiffs' behalf. He points to Guerra Lawyers' evidence that they are "acting on behalf of the Plaintiff[s] independently and in what they deemed to be in the best interests of the Plaintiffs since the grant of the [August 2017 powers of attorney] to date".[167]

205 I do not accept that the final relief granted is futile for a number of reasons.

206 First, insofar as the Guerra Lawyers are concerned, none of the relief which I have granted in entering final judgment touches on their status as the agents or otherwise of the plaintiffs under the August 2017 powers of attorney when that issue is analysed as a matter of Mexican law and public policy. That also means that the Guerra Lawyers' absence before me on this originating summons is therefore no bar to granting the final declaratory and injunctive relief to the plaintiffs that I have granted.

207 Second, whatever may be the intent of the plaintiffs in seeking the final relief, my intent is simply to grant them redress for causes of action under Singapore law which they have established before me and over which I have subject matter jurisdiction and against defendants over whom I have personal jurisdiction.

208 Third, while it is an open question what the plaintiffs can do with this final judgement in Mexico, it remains the case that the plaintiffs are all companies incorporated in Singapore. The *Concursos* are proceeding on the

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167 1st Affidavit of Gonzalo Gil White dated 14 July 2022 at para 82.

Version No 2: 03 Dec 2025 (20:30 hrs)

basis that the plaintiffs' centre of main interests is in Mexico. It is likely at some point that proceedings will have to be commenced in Singapore to recognise the *Concursos* as a "foreign proceeding" within the meaning of Art 2(*h*) of the Third Schedule (the "Third Schedule") of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed). The Third Schedule sets out the terms on which the Model Law on Cross-Border Insolvency (30 May 1997) (the "Model Law") promulgated by the UNCITRAL has been enacted as part of Singapore law. The extent to which those who are now and then exerting control over the plaintiffs have complied with the interim injunctions restored by the Court of Appeal in *Oro Negro (CA)* and the permanent injunctions that I have now granted will be a relevant factor for the Singapore court in deciding whether extend recognition under the Model Law.

209 Fourth, I simply do not accept that the Guerra Lawyers are conducting the *Concursos* independently of both the first defendant and the third defendant.

Conclusion

210 For all of the foregoing reasons, I have allowed the plaintiffs application for final relief in this originating summons and entered final judgment against the first defendant and the third defendant in the terms set out at [78] above.

211 I have also ordered the first and third defendants to pay to the plaintiffs a single set of the plaintiffs' costs of and incidental to this application, such costs fixed at $25,000 including disbursements.

212 The assessment of the damages payable by the first and third defendants to the plaintiffs has been adjourned pending the third defendant's appeal against

Version No 2: 03 Dec 2025 (20:30 hrs)

my judgment. Subject only to the assessment, Originating Summons 126 of 2018 is now concluded at first instance.

Vinodh Coomaraswamy
Judge of the High Court

Ajaib Hari Dass, Ragini Parasuram and Shawn Tien
(Haridass Ho & Partners) for the plaintiffs;
The first defendant unrepresented;
Paul Seah, Siew Guo Wei, Natalie Ng and Grace Ho
(Tan Kok Quan Partnership) for the third defendant.

Version No 2: 03 Dec 2025 (20:30 hrs)