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ARBITRATION – Appeal – Time trip charterparty – Whether vessel off-hire – Vessel leaving area due to risk of piracy – Clause 81(a) and (b) of BIMCO Piracy Clause expressly deleted – Whether leaving the area within clause 81(c)(i) – Effect of deletion of standard form sub-clauses on remaining clauses of charterparty

Case No: LM-2025-000036

IN THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION
CIRCUIT COMMERCIAL COURT

The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: Friday, 14 August 2026

Before :

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

Between :

Olam International Limited

Claimant

- and -

Pacific Basin Supramax Limited

Defendant

The ‘Grande Island’

Mr Steven Berry KC (instructed by **Hannaford Turner LLP**) for the **Claimant**
Mr Alexander Wright KC (instructed by **Floyd Zadkovich LLP**) for the **Defendant**

Hearing date: Tuesday, 14 July 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 August 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....
HIS HONOUR JUDGE HODGE KC

The following cases are referred to in this judgment:

Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The 'Product Star') (No 2) [1993] 1 Lloyd's Rep 397

Aston Martin MENA Ltd v Aston Martin Lagonda Ltd [2025] EWHC 2531 (Comm)

Cordell v Second Clanfield Properties Ltd [1969] 2 Ch 9

Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The 'Ocean Neptune') [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep 654

Mopani Copper Mines plc v Millennium Underwriting Ltd [2008] EWHC 1331 (Comm), [2008] 1 CLC 992

Narandas-Girdhar v Bradstock [2016] EWCA Civ 88, [2016] 1 WLR 2366

Osmium Shipping Corporation v Cargill International SA (The 'Captain Stefanos') [2012] EWHC 571 (Comm), [2012] 2 Lloyd's Reports 46

Reliance Industries Ltd v The Union of India [2018] EWHC 822 (Comm), [2018] 1 Lloyd's Rep 562

Transocean Drilling UK Ltd v Providence Resources plc (The 'GSF Arctic III') [2016] EWCA Civ 372, [2016] 2 Lloyd's Rep 51

Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] 2 EGLR 14

His Honour Judge Hodge KC:

This judgment is structured as follows:

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Introduction

1. This is the considered judgment of the court on an appeal by the charterer, under s. 69 of the Arbitration Act 1996, on a question of law arising out of an award given in London on 2 January 2025 by experienced maritime arbitrators in favour of the shipowner. The relevant part of the award determined that the owner's decision to leave the approach to the port of Warri in the Gulf of Guinea and return to Lagos due to the risk of piracy fell within clause 81(c)(i) of the BIMCO Piracy Clause, as incorporated within the relevant charterparty, with the consequence that the motor vessel '*Grande Island*' remained on hire. Leave to appeal was granted by His Honour Judge Pelling KC (sitting as a Judge of the High Court) on 9 June 2025.
2. The appeal requires this court to consider the extent to which the deletion of one part of a standard-form clause in a charterparty may affect the true interpretation of the remainder of that clause which was incorporated into the written contract. The appellant charterer (the respondent to the arbitration) is represented by Mr Steven Berry KC. The respondent shipowner (the claimant in the arbitration) is represented by Mr Alexander Wright KC. Both counsel have produced helpful written skeleton arguments, which were served sequentially, with that of Mr Berry KC being the first in point of time. The hearing took place on Tuesday, 14 July 2026, when I reserved my judgment.
3. The question of law upon which the charterer appeals is whether clause 81(c) entitles the owner to refuse to remain in an area due to piracy risk at the same time as the vessel remains on hire, in particular given that: (a) the parties expressly excluded clauses 81

(a) and (b) of the BIMCO Piracy Clause, which (had those sub-clauses remained) would have provided the owner with that same entitlement; and (b) the parties expressly agreed that the vessel could withdraw to or wait at alternative areas, instead of waiting at Port Harcourt or Calabar, but had not agreed the same in relation to Warri.

4. The charterer challenges the award on the basis that the tribunal made an obvious error when construing clause 81(c)(i). The charterer contends that on its proper construction, that sub-clause did not permit the owner to refuse to remain at Warri, or for the vessel to remain on-hire when it left Warri. In its arbitration claim form, the charterer says that the tribunal's conclusion and reasoning are obviously wrong since they are inconsistent with: (a) the deletion of clauses 81(a) and (b) (which would have provided for the alleged entitlement on the part of the owner, but which the parties had expressly deleted); (b) express provisions providing that entitlement for ports other than Warri; and (c) the language of clause 81(c)(i) "*which is a general clause concerning measures other than leaving an area (which would have been governed by clauses 81(a) and (b) had they been incorporated, or by specific agreement which did not extend to Warri)*".
5. The shipowner argues that the tribunal's decision on the disputed issue of construction was correct. By a Respondent's Notice, it further contends that the tribunal's decision may be upheld on other grounds that were identified, but not discussed, in the award. Specifically, the tribunal's disposal of the arbitration (granting the owner's claim and dismissing the charterer's defence and counterclaim) was correct pursuant to clause 79 (the BIMCO War Risks Clause for Time Chartering 2013 (CONWARTIME 2013)) and/or clause 17 (Off Hire) of the New York Produce Exchange Form Time Charter .

The charterparty

6. The contract is contained in and evidenced by a recapitulation email dated 26 October 2021 for a time trip charterparty on an amended New York Produce Exchange form by which the owner chartered the '*Grande Island*' for a time charter trip from Ghent to Nigeria with a cargo of bulk wheat. The dispute between the parties centred primarily on whether the vessel was on-hire or off-hire during a period of approximately three days (between 14.00 on 13 December and 15.00 on 16 December 2021) when the vessel had sailed away from the roads at the discharge port of Warri. Essentially, the owner's case was that the decision to sail away was the result of a sensible decision by the master to avoid the dangers of piracy. The charterer did not accept that this decision was reasonable; but its primary case was that it did not matter whether or not the master had reasonable fears about piracy. The charterer's case was that the agreed terms of the charterparty meant that the vessel was off-hire during the entire period between her departure from, and her return to, Warri.
7. In paragraph 7 of the award the tribunal set out the relevant provisions of the recapitulation email and a number of standard clauses from the incorporated charterparty. Under the heading '*Nigerian trading clause*', the recapitulation email provides (so far as material):

latest bimco piracy clause 2013 for charter parties to apply, delete a + b

owners confirm that the vessel has a citadel, and that the vessel can be controlled from within the citadel, with an independent means of communication when in lockdown.

charterers to appoint at their time and cost vessel's protective agent in Nigeria who will provide latest security updates to the master.

...

the vessel to remain at the n.p.a. Lagos anchorage until she is ordered to berth with 7 Nigerian military guards onboard.

prior to sailing from Lagos for the subsequent discharge port(s), a minimum of 7 armed naval marines shall be placed on board the vessel. they shall remain until the last discharge port and shall then be disembarked.

in the event that the naval marines are not timeously available when the vessel has to vacate the discharge berth, the vessel shall proceed to the n.p.a. Lagos anchorage, and wait there, for them to board, prior to proceeding to the subsequent discharge port(s) at charterers time and cost. when sailing to Port Harcourt or Calabar the master has the right to sail keeping 200 nm from the delta coast.

in the event of congestion at Port Harcourt the ship will wait at bonny town anchorage with the naval armed guards on board. if there is a delay in arranging the pilot the ship has the right to sail out until such arrangements are in place. likewise if the berth at Calabar is not free on arrival the ship has the right to proceed to see more than 250nm from land to wait. (Calabar may be reconsidered depending on the anchorage – we suggest buoy 17 or parrot island or beecrfot crossing to be considered as suitable)

the ship is to sail from the discharge port with 7 Nigerian navy armed guards for disembarkation at Lagos anchorage at charterers time and expense with the ship remaining on hire until the guards are disembarked.

....

it is expressly understood that all arrangements costs & time for the naval marines and security escort vessel, as outlined above, shall be for charterers account.

8. Clause 17 (headed 'Off Hire') provides in part:

... Should the Vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers, for any reason other than accident to the cargo or where permitted in lines 257 to 258 hereunder, the hire is to be suspended from the time of her deviating or putting back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom. All bunkers used by the Vessel while off hire shall be for the Owners' account ...

Clause 22 (headed 'Liberties', and set out in lines 257 to 258) provides in full:

The Vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life and property.

9. The incorporated charterparty also contained a number of standard clauses as additional clauses. These include:

Clause 79. BIMCO War Risks Clause for Time Chartering 2013 (CONWARTIME 2013)

(a) For the purpose of this Clause, the words:

...

(ii) 'War Risks' shall include any actual, threatened or reported:

... acts of piracy and/or violent robbery and/or capture/seizure (hereinafter 'Piracy');

...

(b) The Vessel shall not be obliged to proceed or required to continue to or through, any port, place, area or zone, or any waterway or canal (hereinafter 'Area'), where it appears that the Vessel, cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be exposed to War Risks whether such risk existed at the time of entering into this Charter Party or occurred thereafter. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or may become dangerous, after entry into it, the Vessel shall be at liberty to leave it.

...

(j) When acting in accordance with any of the provisions of Sub-clauses (b) to (h) of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party

10. Although the recapitulation email provides that clauses (a) and (b) of the BIMCO piracy clause should be deleted, for reasons that were explained later in the award, the tribunal considered it to be relevant to quote the whole clause, as follows:

Clause 81 BIMCO Piracy Clause for Time Charter Parties 2013

(a) The Vessel shall not be obliged to proceed or required to continue to or through, any port, place, area or zone, or any waterway or canal (hereinafter 'Area') which, in the reasonable judgement of the Master and/or the Owners, is dangerous to the Vessel, cargo, crew or other persons on board the Vessel due to any actual, threatened or reported acts of piracy and/or violent robbery and/or capture/seizure (hereinafter 'Piracy'), whether such risk existed at the time of entering into this Charter Party or occurred thereafter. Should the Vessel be within any such place as aforesaid which only becomes dangerous, or may become dangerous, after entry into it, the Vessel shall be at liberty to leave it.

(b) If in accordance with sub-clause (a) the Owners decide that the Vessel shall not proceed or continue to or through the Area they must immediately inform the Charterers. The Charterers shall be obliged to issue alternative voyage orders and shall indemnify the Owners for any claims from holders of the Bills of Lading or third parties caused by waiting for such orders and/or the performance of an alternative voyage. Any time lost as a result of complying with such orders shall not be considered off-hire.

(c) If the Owners consent or if the Vessel proceeds to or through an Area exposed to the risk of Piracy the Owners shall have the liberty:

(i) To take reasonable preventative measures to protect the Vessel, crew and cargo including but not limited to re-routeing within the Area, proceeding in convoy, using escorts, avoiding day or night navigation, adjusting speed or course, or engaging security personnel and/or deploying equipment on or about the Vessel (including embarkation/disembarkation).

(ii) To comply with the requirements of the Owners' insurers under the terms of the Vessel's Insurance(s);

(iii) To comply with all orders, directions, recommendations or advice given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Government, body or group (including military authorities) whatsoever acting with the power to compel compliance with their orders or directions; and

(iv) To comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement; and the Charterers shall indemnify the Owners for any claims from holders of Bills of Lading or third parties caused by the Vessel proceeding as aforesaid, save to the extent that such claims are covered by additional insurance as provided in sub-clause (d)(iii).

(d) Costs

(i) If the Vessel proceeds to or through an Area where due to risk of Piracy additional costs will be incurred including but not limited to additional personnel and preventative measures to avoid Piracy, such reasonable costs shall be for the Charterers' account. Any time lost waiting for convoys, following recommended routeing, timing, or reducing speed or taking measures to minimize risk, shall be for the Charterers' account and the Vessel shall remain on hire;

(ii) If the Owners become liable under the terms of employment to pay to the crew any bonus or additional wages in respect of sailing into an area which is dangerous in the manner defined by the said terms, then the actual bonus or additional wages paid shall be reimbursed to the Owners by the Charterers;

(iii) If the Vessel proceeds to or through an Area exposed to the risk of Piracy, the Charterers shall reimburse to the Owners any additional premiums required by the Owners' insurers and the costs of any additional insurances that the Owners reasonably require in connection with Piracy risks which may include but not be limited to War Loss of Hire and/or maritime K & R.

(iv) All payments arising under Sub-clause (d) shall be settled within fifteen (15) days of receipt of Owners' supported invoices or on redelivery, whichever occurs first.

(e) If the Vessel is attacked by pirates any time lost shall be for the account of the Charterers and the Vessel shall remain on hire.

(f) If the Vessel is seized by pirates the Owners shall keep the Charterers closely informed of the efforts made to have the Vessel released. The Vessel shall remain on hire throughout the seizure and the Charterers' obligations shall remain unaffected, except that hire payments shall cease as of the ninety-first (91st) day after the seizure until release. The Charterers shall pay hire, or if the Vessel has been redelivered, the equivalent of Charter Party hire, for any time lost in making good any damage and deterioration resulting from the seizure. The Charterers shall not be liable for late redelivery under this Charter Party resulting from the seizure of the Vessel.

(g) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any implied or express provision of the Charter Party, this Clause shall prevail.

11. I pause to note that, as Mr Wright KC pointed out, the opening words of 81(c) - "*If the Owners consent ...*" - obviously refer back to the situation addressed in 81(a) where the owners had the right not to proceed to or through the Area but have elected to do so anyway. In that context, these opening words really only make sense where (a) and (b) are not deleted but remain.

The award

12. In his skeleton argument for the shipowner opposing this appeal, Mr Wright KC emphasises that the relevant facts fall within a narrow compass; and that as this is an appeal under s. 69, they must be taken from the award. He points out that, by agreement, the matter proceeded to an award on the basis of the documents alone. The two party-appointed arbitrators had originally differed in their views, so a third arbitrator was appointed under the terms of the arbitration agreement (as varied). Following further discussion, the tribunal reached a unanimous decision, as rendered in the award.
13. Mr Wright KC notes that the tribunal expressly recognised that although the recapitulation email provided that clauses (a) and (b) of the BIMCO piracy clause should be deleted, for reasons that would be explained later it was relevant to quote the whole of clause 81. He comments that the tribunal was thus acutely conscious of the charterer's case on the alleged effect of the deletion of sub-clauses 81 (a) and (b). He also references paragraph 21 of the award. This reads:

In the submissions served on behalf of the Charterers, although criticisms were made of the expert report adduced by the Owners, it was not alleged that the risks were so modest that they could be ignored and it was unreasonable of anyone to take measures intended to avoid or at least reduce the risks. The Charterers' case was that with clauses 81(a) and (b) deleted, under clause 17 of the charterparty, hire would be suspended when a vessel 'put back during a voyage' unless she was assisting vessels in distress or deviating 'for the purpose of saving life and property'. The Charterers' case was that since the vessel was not putting back 'for the purpose of saving life and property', she was off hire for the entire period between her departure from and return to Warri.

14. Mr Wright KC observes that the tribunal stated its conclusions concisely, commensurate with the fact that this was a modest claim, determined on the documents alone. Mr Wright KC summarises the tribunal's essential reasoning as follows:
- (1) The tribunal started by acknowledging that the parties had deleted sub-clauses (a) and (b) from clause 81; and that, by doing so, the parties had removed the owner's entitlement (that would otherwise have arisen in the circumstances specified in clause 81(a)) to refuse to call, or to remain, at an area exposed to the risk of piracy, and to call for alternative orders. Those '*circumstances*' were whenever the master or owner determined, in their reasonable judgment, that the area was dangerous due to any risk of piracy [Paragraphs 24 and 26 of the award].
 - (2) The tribunal also acknowledged that "*the remaining provisions of clause 81 were incorporated without amendment*". Those included the '*broad*' wording in clause 81(c) (i) that allowed the taking of "*reasonable preventative measures to protect the Vessel, crew and cargo*", such liberty arising "*if the Vessel proceeds to or through an Area exposed to the risk of Piracy*" [Paragraph 25].
 - (3) That left two questions to be determined:
 - (a) First, whether or not there was in fact the risk of piracy at Warri. The tribunal held that there was [Paragraph 26].
 - (b) Second, whether the decision to depart from Warri and temporarily return to Lagos was a "*reasonable preventative measure*". Again, the tribunal held that it was [Paragraph 27]. The tribunal went on to observe (at paragraph 28) that that reflected "... *commercial good sense. There would be no reason for rational commercial parties to exclude putting back from the scope of clause 81, not least because it may well have been a matter of chance whether the 'reasonable preventative measure' was putting back, as opposed to putting out to sea or sailing elsewhere*".
 - (4) It followed that the vessel was on-hire under clause 81(d)(i) [Paragraphs 28 and 29]. It was therefore unnecessary to consider the owner's alternative cases under clauses 17 and/or 79 [Paragraphs 30 and 31]. The tribunal went on to determine two discrete disputes (against which there is no appeal) before ruling on the final accounting issues.
15. In his commendably brief skeleton argument, submitted in support of the charterer's appeal, Mr Berry KC summarises the essential facts (on a '*benevolent*' reading of the award) as follows: The vessel arrived at Warri but could not berth [Paragraphs 8-9]. The shipowner did not wish to wait at the Warri anchorage (in the Gulf of Guinea) due to the alleged piracy risk [Paragraphs 12 and 18]. The owner therefore ordered the vessel to leave Warri and return to Lagos [Paragraphs 13 and 19]. This would have been a deviation unless clause 81(c) applied, entitling the owner to leave Warri (and return to Lagos) [Paragraph 28]. The arbitrators held that returning to Lagos was a "*reasonable preventative measure*" within clause 81(c) [Paragraph 27], with the result that it was not a deviation, and the vessel remained on hire under clause 81(g) [Paragraphs 28-29].
16. Mr Berry KC submits that the arbitrators thereby erred in law because clause 81, as agreed by the parties (with the express deletion of sub-clauses (a) and (b)), did not

permit the owner to refuse to remain at Warri or for the vessel to remain on hire upon leaving Warri. As HHJ Pelling KC summarised the charterer's argument, when giving his reasons for granting permission to appeal, the charterer's case is that when the arbitral tribunal concluded that the vessel nevertheless remained on hire during the disputed period between the date and time when notice of readiness was tendered at Warri and the date and time when the vessel was returned there, the arbitral tribunal obviously erred in its construction of the modified version of clause 81 used in the charterparty. That is because, on the proper construction of that provision, the owner was not entitled to refuse to remain at Warri, even if the conditions for the applicability of the clause were otherwise satisfied.

Permission to appeal

17. At paragraph 3 of his ruling on the charterer's application for permission to appeal, HHJ Pelling KC said that the tribunal's conclusion was that departing from Warri, and temporarily returning to Lagos, was conduct that fell within the scope and purpose of what it characterised as "*the wide wording*" of the phrase "... *reasonable preventative measure*..." in clause 81(c)(i); and that, in consequence, leaving Warri for Lagos was not a deviation (that would have resulted in the suspension of hire) but was to be considered as the due fulfilment of the charterparty, applying clause 81(g). The Judge noted the claimant's submission that this was obviously wrong because the version of clause 81 included within the charterparty had expressly deleted clause 81(a), which expressly provided the owner of the vessel with an entitlement to refuse to remain in an area exposed to piracy risk, and because express liberty to leave other places on the Nigerian coast had been included within the charterparty. The charterer maintained that by deleting clause 81(a), the parties had "...*manifested an objective intention that the Vessel would not be at liberty to leave an area exposed to the risk of piracy*". If the vessel left (as in fact it did) then it was off hire until the date and time she returned.
18. In granting permission for the appeal to proceed, HHJ Pelling KC said this:
 5. *The issue that arises is one of construction. The principles that apply when construing contracts governed by English law have been summarised in various judgments at all levels over the last decade or so and were authoritatively re-stated by the Supreme Court in Wood v Capita Insurance Services Ltd [2017] AC 1173 ('Wood v Capita') in the judgment of Lord Hodge JSC at [10] and following. In summary, all contracts must be interpreted objectively by asking what a reasonable person, with all the background knowledge that would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. In arriving at a conclusion '... the court must consider the quality of drafting of the clause ... and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest ... Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. ...' Whilst the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense, commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party.*
 6. *The Award does not refer to or purport to apply these principles even though the issue that arise was one of construction. The defendant accepts that had clause 81(a)*

been included in the charterparty it would have entitled the owner of the vessel to remove her from an area which was dangerous due to piracy. Whilst caution needs to be exercised when arriving at conclusions concerning the true construction of a contract by reference to a deletion, the deletion of clause 81(a) is part of the factual matrix that would need to be taken into account in construing the charterparty. It is not suggested by the Tribunal that it regarded the deleted clauses as deleted because the parties thought they added nothing to or were inconsistent with, what was already contained in the charterparty, nor that the deletion was carelessly carried out or otherwise should be ignored. Given that the clauses that were deleted appeared in a standard form agreement it is improbable that the clauses were because the parties thought they added nothing and if that was the conclusion reached it would need to be identified and explained. In fact that does not appear to have been the Tribunal's conclusion because it concluded at [24] of the Award, that the '... effect ... was, in broad terms, to remove entitlement (that would otherwise arise in the circumstances specified in clause 81(a)) to refuse to call at, or remain at, an area exposed to the risk of piracy, and to call for alternative orders.' What the Tribunal appears not to have considered however is how this mutually manifested intention works with the conclusion that clause 81(c)(i) nevertheless permitted the removal of the vessel, particularly when removal from expressly identified ports and places (not including Warri) was preserved.

7. In my judgment the failure to identify or expressly apply the applicable tests relevant to construction, to take account of the effect of the deletions on the parties' intentions concerning the scope and effect of clause 81(c)(i) and/or the inclusion of some ports and places where removal was permitted taken together are sufficient to persuade me that the decision of the Tribunal was obviously wrong. In particular the failure to identify the principles of construction being applied and the failure to explain how the mutual intention implicit in the deletion of clause 18(a) was consistent with the conclusion that there was nevertheless an entitlement to remove available by operation of clause 81(c)(i) of itself suggests a 'false leap in logic or reaching for a result which has no reasonable explanation' – see HMV UK Ltd v Propinvest Friar LP [2012] 1 Lloyd's Rep 416 per Arden LJ as she then was at [34].

The proper approach to a s.69 appeal

19. At paragraphs 24 and 25 of his skeleton argument, Mr Wright KC identifies (with relevant case law authority) the principles to be applied on an arbitration appeal under s. 69 of the Arbitration Act 1996. I did not understand Mr Berry KC to dispute any of them. I consider that the applicable principles can be summarised in the following propositions:

(1) As a matter of general approach, the court should strive to uphold arbitration awards. The court does not approach them with a meticulous legal eye, endeavouring to pick holes, inconsistencies and faults in awards, and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it: see *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at 14F per Bingham J. The policy that underlies the Arbitration Act 1996 as a whole is in favour of upholding the arbitration process.

(2) The court should read the award in a fair and reasonable way, without engaging in minute textual analysis. It should not be pre-disposed to find any errors in the legal reasoning in the award but should start with the benevolent assumption that there is no error of law on a fair reading of the award.

(3) In approaching an award, where the arbitral tribunal has not expressly stated the legal principles in terms which are obviously erroneous, it will be difficult for an appellant to identify an error of law. If the arbitrators have stated the correct legal principle, the court will start from the assumption that that is the principle which has been applied. If the law is not stated, or not fully stated, the court will nevertheless start from the assumption that the law has been correctly understood and applied. Arbitral tribunals are not treated as falling into error if they do not spell out the law; and to require them to do so would be contrary to the desideratum of speedy finality which underpins the Arbitration Act. It is occasionally possible to infer an error of law which is not explicit on the face of the award, but only where a correct application of the law would inevitably lead to one answer, whereas the arbitrator has arrived at another: see *Reliance Industries Ltd v The Union of India* [2018] EWHC 822 (Comm), [2018] 1 Lloyd's Rep 562 at [56] per Popplewell J.

(4) Where a tribunal's experience assists it in determining a question of law, such as the interpretation of contractual documents, the court will accord some deference to the tribunal's decision on that question. It will reverse the decision only if satisfied that, despite the benefit of that experience, the tribunal has still come to the wrong answer.

(5) On the substantive hearing of an arbitration appeal, the court's determination, at the permission stage, that the appellant has satisfied the threshold condition that the tribunal's decision on the question of law arising out of the award was '*obviously wrong*' will clearly fall for reconsideration. The test at the substantive hearing is whether the award was wrong; and the court hearing the substantive appeal may refuse to find that the award was wrong even though permission to appeal was granted on the basis that the '*obviously wrong*' test was satisfied: compare *Aston Martin MENA Ltd v Aston Martin Lagonda Ltd* [2025] EWHC 2531 (Comm).

The proper approach to construction

20. The general approach to the construction of a charterparty is not contentious. Mr Wright KC referred the court to the useful summary set out by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The 'Ocean Neptune')* [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep 654, at [8]:

The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between

the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

21. One of the issues raised on this appeal is what, if any, regard should be had to deletions when construing a commercial contract. Both counsel referred me to the decision of Christopher Clarke J in *Mopani Copper Mines plc v Millennium Underwriting Ltd* [2008] EWHC 1331 (Comm), [2008] 1 CLC 992. Following a comprehensive review of the authorities, the judge said this:

120. The diversity of authority ... renders it difficult for a judge of first instance to recognise what recourse to deleted words may properly be made. The tenor of the authorities appears to be that in general such recourse is illegitimate, save that (a) deleted words in a printed form may resolve the ambiguity of a neighbouring paragraph that remains; and (b) the deletion of words in a contractual document may be taken into account, for what (if anything) it is worth, if the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain. This is classically the case in relation to printed forms ..., or clauses derived from printed forms ... , but can also apply where no printed form is involved

121. Support for that view may be found in the latest edition of Keating on Building Contracts which contains the following passage:

‘... Where parties have made a contract in a document that contains deletions, to look at the deletions does not offend the principle discussed above which prevents reference to preliminary negotiations. The deletion is physically contained in the concluded contract. It is submitted that the court should first construe the retained words. If they are unambiguous, reference to the deletion is unnecessary. If they are ambiguous, reference to deletions from printed documents should be permitted to see whether objectively they throw light on the meaning of the retained words.’

122. Even if recourse is had to the deleted words, care must be taken as to what inferences, if any, can properly be drawn from them. The parties may have deleted the words because they thought they added nothing to, or were inconsistent with, what was already contained in the document; or because the words that were left were the only common denominator of agreement, or for unfathomable reasons or by mistake. They may have had different ideas as to what the words meant and whether or not the words that remain achieved their respective purposes.

123. Further, as Morgan J pointed out in Berkeley Community Villages Ltd v Pullen [2007] EWHC 1330:

‘Even in the cases where the fact of deletion is admissible as an aid to interpretation, there is a great difference between a case where a self-contained provision is simply deleted and another case where the draft is amended and effectively re-cast. It is one thing to say that the deletion of a term which provides for ‘X’ is suggestive that the parties were agreeing on ‘not X’; it is altogether a different thing where the structure of the draft is changed so that one provision is replaced by another provision. Further, where the first provision contains a number of ingredients, some assisting one party and some assisting the other, and that provision is removed, it by no means follows that the parties intended to agree the converse of each of the ingredients in the earlier provision.’

22. That summary of the law was cited by the Court of Appeal as representing the ‘true position’ in *Narandas-Girdhar v Bradstock* [2016] EWCA Civ 88, [2016] 1 WLR 2366 at [19]. There a debtor’s proposed individual voluntary arrangement had been approved in modified form. The issue was whether it was legitimate to have regard to words deleted from the original proposal when construing the terms of the approved arrangement. At [20], Briggs LJ (with whom Black and Ryder LJ agreed) added:

For present purposes, the relevant principle is that if the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain, then the deleted provision may be an aid to construction, albeit one that must be used with care.

23. From these authorities, I derive the following propositions of law concerning the extent to which a court of construction may properly have regard to the deletion of words as an aid to contractual interpretation:

(1) In general, reliance upon deleted words is impermissible as an aid to the true interpretation of a contract; but this general prohibition admits of exceptions.

(2) The court should first construe the words that have been retained, without reference to the deletion. If they are unambiguous, reference to the deletion is unnecessary, and therefore impermissible.

(3) If the words that remain are ambiguous, reference to the deleted words is admissible in order to see whether, viewed objectively, they may throw any light on the meaning of the retained words. This may be the case in either of two situations.

(4) The first is where the deleted words assist in resolving the ambiguity in the words that remain.

(5) The second is where the fact of deletion shows what it is that the parties agreed that they did not agree about.

(6) Even if it is permissible to have recourse to the deleted words, care must be taken as to the inferences, if any, that can properly be drawn from them. The parties may have deleted words: (a) because they thought they added nothing to, or were inconsistent with, what was already contained in the document; or (b) because the words that were left were the only common denominator of their agreement; or (c) for unfathomable reasons; or (d) by mistake. The parties may also have had different ideas about what

the words mean, and whether or not the words that remain achieve their respective purposes.

(7) Even in the cases where the fact of deletion is admissible as an aid to interpretation, there is a great difference between the case where a self-contained provision is simply deleted, and one where a draft is amended and effectively re-cast. It is one thing to say that the deletion of a term which provides for one thing tends to suggest that the parties were agreeing on its opposite. It is altogether a different thing where the structure of the draft is changed, so that one provision is replaced by an entirely different provision. Further, where the provision that is removed contained a number of ingredients, some of which assisted one party whilst some assisted the other, it by no means follows that the parties intended to agree the converse of each of the ingredients in the earlier provision.

(8) These principles apply particularly in relation to printed forms, or to clauses derived from such forms; but they may also apply where no printed form is involved .

The charterer's submissions

24. For the charterer, Mr Berry KC submits that the arbitrators erred in law because clause 81 in its agreed form (with the express deletion of sub-clauses 81(a) and (b)) did not permit the owner to refuse to remain at Warri or to remain on hire on leaving there. In reliance upon *Mopani*, Mr Berry KC says that the express deletion of sub-clauses (a) and (b) is admissible and, with due care, is material in construing clause 81, as agreed between the parties. Mr Berry KC emphasises that the drafting technique adopted by the parties is to attach additional clauses to the recap email, including the entire clause 81, and then to say the clause is “to apply” but “delete a+b”. The parties are thereby drawing attention to the complete clause, and also to its partial deletion. Applying all due care, the objective reason for the deletion was to remove what would otherwise, on the standard BIMCO clause, have been the owner’s right, under clause 81(a), to leave the ‘Area’ (i.e. Warri) on grounds of piracy risk (and the consequences thereof in clause 81(b)).
25. In particular, and tracking the wording in *Mopani* at [122], the deletion of those sub-clauses was not, and neither the arbitrators nor the owner positively assert, (and nor was there any evidence) that it was, because:
 - (1) “*they thought they added nothing*”. The deleted clauses were part of a standard form, obviously carefully drafted, giving additional and cumulative rights; or
 - (2) “*they were inconsistent with what was already contained in the document*”. There is no suggestion of this, nor is there any inconsistency within what is a standard BIMCO clause for time charters, or between 81(a) and 81(b) and other parts of what was a standard time charterparty; or
 - (3) the words left were “*a common denominator*”; or
 - (4) the reasons for deletion are “*unfathomable*”. The reason is eminently “*fathomable*”: It was to remove the additional right to leave the Area in 81(a); or

(5) the deletion was a “*mistake*”. There is no evidence of, or reason to suppose, any mistake; or

(6) there is room for “*different ideas as to what the words meant*”. There was, and is, no difference of ideas about what 81(a) and 81(b) meant; or

(7) the words that remained (namely 81(c)) “*achieved their respective purpose*” (including the right to leave the Area). There is no evidence, or reason to think, that both parties’ “*respective purposes*” were to permit the owner to leave the Area, that 81(c) achieved that purpose, and, therefore, that they agreed to delete 81(a) to avoid surplusage. Even if they had that purpose, and thought 81(c) achieved it, the obvious reaction would nevertheless have been to leave 81(a) intact. Parties are not astute to identify surplusage in standard form clauses; and, if they do, they are not astute to remove it. The idea that they removed 81(a) because they thought the BIMCO drafting committee was guilty of surplusage is not credible.

26. In the course of his oral submissions, Mr Berry KC emphasised that: (1) the only right to leave an area which is expressly conferred by the BIMCO piracy clause is that contained in the second sentence of clause 81(a); and (2) the objective intention of the parties in deleting (a) was clearly to remove that right to leave. This is said to make entire commercial good sense in the context of a voyage involving discharge at a list of ports where the parties are not likely to have welcomed the vessel entering, and then leaving, an area, putting back on herself. Mr Berry KC points to: (a) the limited right to leave an area contained within the second sentence of clause 81(a), which is restricted to an area only becoming actually or potentially dangerous after the vessel has already entered it; and (b) the fact that clause 81(b) only applies where the owner decides that the vessel shall not proceed or continue to or through the area, and not where the vessel leaves it. In the context of that extremely limited right to leave an area, Mr Berry KC says that it is impossible to construe the right in 81(c) “*to take reasonable preventative measures to protect the Vessel, crew and cargo*”, on its own, as conferring a generalised right to leave the area. Thus, there is no such right contained within the contract. But Mr Berry KC goes further and contends that the deletion of clause 81(a) and (b) shows a positive intent to remove the only right, and therefore all rights, to leave the area. So, even proceeding with all due care, the court can draw a positive conclusion from the deletion; there can be no other explanation for it; and the court can conclude that there was good reason for the deletion of 81(a) and (b). The parties did not want the vessel to be putting back and leaving an area once it had entered it.

27. In summary, Mr Berry KC submits that this was a deliberate deletion from a standard industry clause in several parts, granting separate cumulative rights, with the objective intention of removing the 81(a) right to leave the area on grounds of piracy risk. This was, indeed, what the arbitrators found. Paragraph 24 of their award reads:

The parties amended clause 81 by deleting sub-clauses (a) and (b). The effect of this was, in broad terms, to remove owner’s entitlement (that would otherwise arise in the circumstances specified in clause 81(a)) to refuse to call at, or remain at, an area exposed to the risk of piracy, and to call for alternative orders.

28. Mr Berry KC complains that, in error, the arbitrators did not apply this correct, and dispositive, finding to the ultimate result. They fell into error, both because the right to leave the area was never there in the contract in the first place; and, secondly, and

independently, because the positive inference from the deletion of 81(a) and (b) is that 81(c) does not permit the vessel to leave the area by way of “*reasonable preventative measures*”.

29. In this context (or legal or factual ‘*matrix*’), Mr Berry KC contends that the objective construction is that clause 81, as agreed (without (a) or (b), but with (c)), did not permit the vessel to leave the Area, or for the vessel to remain on hire if it did.
30. Mr Berry KC says that this is confirmed, and would be the case even without the deletion of (a) and (b), by the list of examples of preventative measures in 81(c)(i), all of which are measures “*within the Area*”. Whilst these are prefaced by “*including but not limited to*”, that does not exclude the principle of construction ‘*ejusdem generis*’. Mr Berry KC originally claimed that the genus is preventative measures **within** the Area. This excludes leaving the area of Warri. Even if one just looks at 81(c)(i) on its own, divorced from its context, it is clearly about taking reasonable preventative measures to protect the vessel short of, and not including, leaving the area. Even if the ejusdem generis doctrine strictly so-called does not apply (because it requires the general words, such as ‘*or in any other way*’, to follow a specific list), Mr Berry KC submits that it follows from the requirement to construe the contract in context, with the benefit of all the information known to the parties, that what follows the general words must be capable of informing what they mean, and what they are limited to. Here the general words are “*reasonable preventative measures to protect the Vessel, crew and cargo ...*”. They are followed by specific examples of such measures. But Mr Berry KC submits that it would be astonishing if by the expression “*reasonable protective measures*”, followed by a list of specific examples, the parties had provided a general right to leave the area, to be contrasted with the specific right to leave the area contained within the deleted clause 81(a).
31. Mr Berry KC acknowledges that Mr Wright KC is right to correct his formulation of the genus, in the sense of the characteristic which unifies all the specified instances. The genus is not confined to reasonable preventative measures to be taken **within** an area exposed to the risk of piracy, but would also extend to such measures taken when **proceeding to** such an area. Mr Berry KC submits that what Mr Wright KC has done is simply to perfect his submission, and to make it more elegant and beautiful. This is all about protective measures when the vessel is proceeding to or continuing through the area. Read as a whole, even on its own, because of that list of things, but particularly in the context of the deleted 81(a), 81(c)(i) cannot possibly include a generalised right for the vessel to sail wherever the shipowner thinks is reasonable.
32. Mr Berry KC prays in aid observations from the authorities cited at paragraphs 7.131 and 7.132 of *Lewison: The Interpretation of Contracts* (8th edn.), as follows:
 - (1) The rule or maxim of ejusdem generis may be summarised as follows: The meaning of general words, even ‘*whatsoever*’, may be limited by the context in which they appear. They may be used to refer to a class or category, a genus, of which some of, but not necessarily all, the members are identified in the clause. Mr Berry KC says that this also applies to ‘*including but not limited to*’.
 - (2) The ejusdem generis principle is a flexible aid to construction which reflects the twin requirements of commercial common sense and the need to construe contractual provisions as a whole and in their context. Mr Berry KC says that this is ‘*the killer*

point'. One has to construe the clause as a whole, including the words that follow, in their context, including what was in 81(a), and what was removed from the contract.

(3) The main argument of construction which justifies the application of the principle is the presumption against surplusage; for if the general words have unrestricted meaning, the enumerated items are surplusage. Mr Berry KC says that if one has a perfectly general, '*you can do anything you want*' clause, why then bother to have several examples, all of which are covered by one genus; it is a waste of ink. If Mr Wright KC is right that the owner can do anything it wants by way of '*reasonable preventative measures*', then the specific words that follow are irrelevant; and the presumption against surplusage in drafting here justifies an application of the ejusdem generis rule whether the general words come first or last.

33. Mr Berry KC summarised this part of his argument as follows:

(1) The ejusdem generis principle applies whether the general words appear first, before a list, or second, after the list, provided that there is a genus within the specific words.

(2) But even if the technical, classical statement of the doctrine does not apply where, as in this case, the general words come first, with "*reasonable preventative measures*" followed by a list, which is covered by a genus, even so, the principle that the court must construe the contract as a whole, and with all the background knowledge available to the parties, dictates, or alternatively permits, the court, to say: "*I know what this clause is about; it is about reasonable preventative measures taken whilst going to or passing through or within the area.*" That is the genus.

34. Mr Berry KC addresses the authority of *Transocean Drilling UK Ltd v Providence Resources plc (The 'GSF Arctic III')* [2016] EWCA Civ 372, [2016] 2 Lloyd's Rep 51, cited by Mr Wright KC. Mr Berry KC identifies the critical words of the contract in that case at [16]: "... *loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or sub-contractors of every tier or by third parties), loss of business and business interruption ...* " At [17], Moore-Bick LJ recognised that:

'Loss of use' naturally refers to the loss of the ability to make use of some kind of property or equipment owned or under the control of the contractor or the company, as the case may be, but in this case the parties have made it clear by the words in brackets that follow that its scope is intended to be wider than that.

35. Mr Berry KC makes the point that this was a case where the parties had applied an expansive definition to the expression '*loss of use*'. The case is one of narrow general words expanded by the addition of words of wider scope. The case is therefore no authority, and is of no assistance, in the converse case where the court is required to construe general words followed by a list of narrower instances. Moore-Bick LJ was making the point that the ejusdem generis principle has no application where the parties have expanded the words that follow the expression '*without limitation*'. Strictly speaking, the ejusdem generis principle was of no relevance to this case because it is a limiting principle, and this was an expanding clause, so Mr Berry KC finds it hard to understand the argument which is advanced in reliance upon it.

36. Further, and independently of the deletion of 81(a) and 81(b), the express rights in the Nigerian trading clause to leave Port Harcourt and Calabar, but not Warri, objectively exclude the right to leave Warri. In this context, clause 81(c) itself must be construed so as exclude any right to leave Warri. In the course of his oral submissions, Mr Berry KC contrasted the express, and highly specific, provisions about what is to happen if there is congestion at any of Lagos, Port Harcourt, and Calabar which prevents the vessel from berthing so as to avoid any risk of piracy that might be caused by waiting outside these discharge ports with the complete absence of any specific provision to address the piracy risks outside Warri.
37. The effect of all of this is that the charterer is able to rely upon clause 17 (at lines 219-236) of the New York Produce Exchange Form of Time Charter since the exclusion in lines 257-8 (conferring liberty “*to deviate for the purpose of saving life and property*”) was not engaged. The vessel deviated for the purpose of averting or managing risk, and not for the purpose of saving life or property. Hire for the vessel was therefore “*suspended from the time of her deviating or putting back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom*”.
38. Mr Berry KC makes one final submission on the appeal generally. He points to the fact that whilst this is a decision of experienced maritime arbitrators, initially the first two of them to be appointed could not agree. Further, HHJ Pelling KC, with his considerable experience of presiding in the London Circuit Commercial Court, and sitting in the Commercial Court, was of the view that the ultimate decision of the arbitrators was ‘*obviously wrong*’. So, the deference usually accorded to a unanimous decision of experienced maritime arbitrators is of little weight in the present case.
39. Mr Berry KC then turns to address the Respondent’s Notice. By this, the owner argues that the tribunal’s decision that the vessel remained on hire was “*correct pursuant to clause 79 and or 17*”. There are said to be two elements to this. First, that clause 79 applied. Second, that its effect was to keep the vessel on hire during the deviation from Warri.
40. As to the first, Mr Berry KC points out that the arbitrators did not find that clause 79 (relating to ‘*War Risks*’) was triggered, or gave the owner the right to leave the Area. He references paragraph 30 of the award. This reads:
- Given our decision on clause 81, it is not strictly necessary to determine the effect of clause 79. In summary, clause 79 would be engaged if there were actual, threatened or reported acts of piracy which, in the reasonable judgment of the master and/or owners, may be or may become dangerous. The clause (which was unamended) confers a liberty to leave a port or place which becomes dangerous after entry. Unlike clause 81, however, clause 79 does not include any express provision for the vessel to remain on hire (or to go off hire). The operation of clause 79 does not, therefore, affect our conclusion in relation to clause 81.*
41. Mr Berry KC submits that, in the context of the inclusion of clause 81, dealing specifically with piracy, and the fact that this was a case of piracy risk, clause 81 applies to the exclusion of clause 79. Further Mr Berry KC submits that no factual basis has been found for the application of clause 79. That would require factual findings (which were not made) of ‘*actual, threatened or reported*’ acts of war (clause 79(a)(ii)); a “*reasonable judgment*” of exposure to “*war risks*” (clause 79(b)); and that the place

(Warri) “only became dangerous ... after entry into it” (the last sentence of clause 79(b)). He points out that paragraph 30 of the award expressly notes the requirement that the area only “becomes dangerous after entry”. Conspicuously there is no finding that this was the case here. Nor is there any basis for such a finding. The piracy danger appears to have been long-standing as at the date of the charterparty: see paragraph 20 of the award. This reads:

The dangers from attacks by pirates in the Gulf of Guinea are well known to everyone involved in the shipping industry. That is why the charterparty contained provisions relating to the provision of armed guards, the existence of a ‘citadel’ which should provide protection for the crew while allowing them to control the vessel, razor wire and additional premium(s) which all reflect the danger of attack by pirates. Increased patrolling by the Nigerian navy and the warships of other naval powers and the coordinated sharing of information about where attacks are taking place have helped reduce the number of attacks, but the risk of attacks is not insubstantial. On 13th December a container ship was attacked while underway off Bonny. The pirates escaped with the six kidnapped crew. However, it has to be noted that that occurred 250 miles away from Warri.

42. As to the second element, clause 79 does not expressly deal with hire. The arbitrators noted this at paragraph 30 of the award. In particular, the clause does not say that the vessel remains on hire if (which Mr Berry KC says is not the case) it is otherwise applicable. Clause 79 does not displace clause 17, according to which (by lines 226-228), the vessel is off hire if it should “deviate or put back ...”. Even if applicable, therefore, clause 79 did not prevent the vessel from going off hire under clause 17 during the disputed period. Mr Berry KC cites the decision of Cooke J on an analogous clause (the CONWARTIME) in *Osmium Shipping Corporation v Cargill International SA (The ‘Captain Stefanos’)* [2012] EWHC 571 (Comm), [2012] 2 Lloyd’s Reports 46, especially at [27]-[30]. This passage includes the following about the analogous clause:

It is a clause relating to the performance of the charterparty and to breach, and not to off-hire. Whilst it specifically deals with war risks and piracy in that connection, it is not directed at off-hire at all, which is distinct from breach ... Although compliance is deemed not to be a deviation but to be a fulfilment of the charter, it is another thing entirely to say that this means that the charterer is deemed to have had the service he requires for the purpose of the off-hire clause. The owner is not in breach, but there is still a loss of time and, if there is an event which falls within the off-hire clause, it would need much more than this to provide that it was not to constitute such an off-hire event ... [The clause] is not apt to negate or derogate from the operation of the off-hire clause, when the off-hire clause specifically provides for the events in question.

43. Mr Berry KC would accept that if there is any factual issue in doubt, remission is the appropriate course. But there is no factual issue here raised by the alternative case advanced in the respondent’s notice. Even if there were a factual issue, the owner’s case is legally unsound because of *The Captain Stefanos*. In those circumstances, remission would be a waste of time and costs. This is not a particularly valuable case; and what the parties do not need is remission to another hearing, before a three-person arbitral tribunal, in circumstances where there is really nothing for them to decide.

44. In conclusion, Mr Berry KC submits that clause 81 did not permit the vessel to leave Warri. The award should be varied so as to dismiss the owner's claim for hire; determine that the owner is liable on the charterer's counterclaim for overpaid hire and interest; and order the owner to pay the charterer's costs of the arbitration. Alternatively there should be a remission to the arbitrators.

The owner's submissions

45. Key to Mr Wright KC's oral submissions for the shipowner, in response to the charterer's appeal, is the recognition that, contrary to the way the charterers put their case, clause 81, and also the recap Nigerian trading clause, contain a series of overlapping rights which are exercisable upon the satisfaction of different triggers and can be exercised in different circumstances. Whilst the owner accepts that the deletion of clauses 81(a) and (b) was plainly intended to remove those rights, the owner does not accept, and the court should reject, the suggestion, that that deletion bears on the proper construction and operation of clause 81(c)(i), which is concerned with a different suite of rights and, in particular, a right to take reasonable preventative measures in very broad terms which, in the owner's submission, is capable of including a right to leave an area exposed to the risk of piracy, provided that is a reasonable preventative measure in all the circumstances. The short point is there is an entire suite of rights contained in 81(a) and (b) that are independent of, and additional to, those rights which are conferred on the owner under 81(c). The fact that those separate, and additional, rights are deleted does not impinge upon what the parties can be taken to have objectively intended as the meaning of 81(c)(i). Mr Wright KC also points to clause 81(g), which has the effect of overriding any other provision of the charterparty (including clause 17) if the owner can bring itself within clause 81.
46. Mr Wright KC also makes the preliminary observation that if it were in fact the case that there was a pre-existing risk of piracy across the approaches to all four of the named Nigerian ports of discharge, then had the printed 81(a) applied, there would at least be an argument by which the shipowners could have turned round and said: "*Actually, having agreed to trade to Nigeria, we can immediately refuse to proceed there under 81(a).*" That would be an absolute right; and no doubt that may afford one explanation as to why those provisions were deleted from the charterparty, rather than because the parties were seeking in some way to water down what was intended by 81(c)(i).
47. Mr Wright KC begins his skeleton argument in opposition to this appeal by submitting that the charterer's thesis wrongly conflates different clauses, with different triggers under clause 81, with an assumption that different remedies must follow. In particular:
- (1) Sub-clauses (a) and (b) of the printed Piracy Clause confer certain rights on owners, and, if these are exercised, consequent obligations on charterers. The owner's rights include an absolute right to refuse to proceed to or through a particular area, or to leave a particular area which becomes dangerous after entry into it, whenever the master and/or the owners perceive, in their "*reasonable judgement*" that there is the danger of piracy. It was those important liberties which were deleted in the charterparty.
- (2) By a bespoke clause, the charterparty also entitled the vessel to wait at some distance from two named ports, Port Harcourt and Calabar, should they be congested. Those liberties were absolute, and are cumulative with the owner's rights under clause 81.

48. In contrast, clause 81(c)(i) confers additional, and different, rights on the shipowner; but these are fettered in two important respects:

(1) First, the owner must prove that there is in fact exposure to the risk of piracy. Reasonable judgment is not enough. The tribunal was astute to that difference but, on the evidence, they concluded that Warri was within “*an Area exposed to the risk of Piracy*”. Reference is made to paragraph 26 of the award, which reads:

On the evidence, we have concluded that Warri was within ‘an Area exposed to the risk of Piracy’. (Given the deletion of sub-clause (a), it is not strictly necessary for the purposes of clause 81 to determine whether in the ‘reasonable judgment’ of the master and/or owners, Warri was ‘dangerous’ due to the risk of piracy (as defined). Had that been a relevant issue, we would have decided, on the basis of the evidence of the risk of piracy in the Gulf of Guinea, including Warri, that the master/owners did exercise reasonable judgment in this regard.)

(2) Second, the owner must prove that the proposed preventative measures were ‘reasonable’. What constitutes a ‘reasonable’ measure is a matter for factual evaluation by the tribunal. The tribunal considered that the owner had acted reasonably. Reliance is placed upon paragraph 27 of the award. This reads:

Further, we consider that departing Warri and temporarily returning to Lagos was a ‘reasonable preventative measure’ falling within the scope of clause 81(c)(i). Even if one assumes in Charterers’ favour that returning to Lagos was not, strictly, ‘re-routing within the Area’ or ‘adjusting course’, it was nevertheless a similar preventative measure which, in our view, fell within the scope and purpose of the wide wording of clause 81(c)(i).

49. In short, Mr Wright KC contends that at the heart of the charterer’s case is the non sequitur that the deletion, or non-application, of other rights detracts from the rights exercisable under clause 81(c)(i) in different circumstances. The tribunal acknowledged the points made by the charterers at, for example, paragraph 24 of the award (previously cited); but the tribunal was right to conclude (at paragraph 25) that where “*the remaining provisions of clause 81 were incorporated without amendment*”, including clause 81(c)(i), the parties did not intend it to be cut down by the deletion of other rights. Having cited that sub-clause, paragraph 25 of the award continues:

We note that the wording of this clause is broad: while it sets out a number of potential ‘reasonable preventative measures’, it also expressly provides that such measures are not limited to the specified matters.

50. Mr Wright KC therefore submits that this appeal should be dismissed. Alternatively, even if the charterer is right on clause 81, the matter should be remitted to the tribunal so that it can consider the owner’s alternative cases that did not, in the event, require determination. The owner does not maintain that those issues should be determined by this court afresh (or de novo) so as actually to uphold the award on either of those two alternative bases.
51. Mr Wright KC contends that the tribunal was right in its conclusions about the applicability of clause 81(c)(i) for the reasons stated in its award, and developed at paragraphs 30 and following of his skeleton argument.

52. Mr Wright KC begins by addressing the proper construction of the piracy clause. He notes that the charterer's case rests heavily upon the deletion of clauses 81(a) and (b). In particular, it says that the tribunal's construction of clause 81(c)(i) is inconsistent with the parties' own deletion of those sub-clauses because, had they intended the owners to be at liberty to leave an area exposed to the risk of piracy, they would not have made those deletions. But to begin to make that argument good, the charterer would need to demonstrate that "*the fact of deletion shows what it is the parties agreed that they did not agree*"; and that it could not be said that the parties "*had different ideas as to what the [deleted] words meant*" or "*whether or not the words that remain achieved their respective purposes*". In fact, the charterer's analysis of clauses 81(a) and (b) is said to be misconceived. A right to deviate under clauses 81(a) and (b) differs from clause 81(c)(i), as construed by the tribunal, in three important respects.
53. **First**, an owner seeking to rely upon sub-clause (a) of the printed piracy clause would not have to demonstrate that the vessel would in fact be exposed to the risk of piracy. It would be sufficient if danger was apprehended "*in the reasonable judgement of the Master and/or the Owners*". That is an important qualification. An owner faced with an order to proceed to a particular area will have to make a prompt decision as to whether or not they are obliged to comply with it. Information about piracy risks may be incomplete. However, provided a decision is made in good faith, and is objectively reasonable, printed sub-clause (a) allows the owners to act on the basis of their own "*reasonable judgment*", without exposing themselves to a claim by the charterer. Conversely, from a charterer's perspective, sub-clauses (a) and (b) are undesirable because they allow owners to refuse deployment orders solely by reference to the exercise of a "*reasonable judgment*". A charterer may find it difficult to challenge such a judgment in the event of an arbitration. All of that can be contrasted with sub-clause (c), where (as the tribunal observed, at paragraph 26 of the award), there must, as a matter of fact, be a '*risk of piracy*'. A reasonable, but incorrect, judgment as to the risk of piracy would be insufficient to engage sub-clause (c), and would put the owners in breach of the charterparty if they sought to rely upon that sub-clause to decline the charterer's orders. In short, there are different triggers for the different rights that follow from clauses 81(a) and (c).
54. **Second**, where sub-clause (a) applies, the owner has an absolute right not to proceed or to continue through the affected area, or to leave it. In a case where the owner decides not to proceed or to continue to or through the area, the charterer "*shall be obliged to issue alternative voyage orders*". It is not open to the charterer to complain that the owner, even with a reasonable apprehension of piracy, could have sufficiently mitigated that danger by taking alternative steps. Nor is it open to the charterer to say that the owner should '*wait and see*' if the security situation improves and, if it does, to comply with its original voyage orders. To the contrary, as the charterer rightly acknowledges (at paragraph 5 of their reply permission skeleton), a failure to issue alternative voyage orders would amount to a breach of contract, entitling the owner to damages. A sufficiently persistent failure may even amount to a repudiation of the charterparty. That can again be contrasted with sub-clause 81(c)(i), where the preventative measures must be "*reasonable*". A necessary corollary of that is that even where the risk of piracy exists, an owner might not be entitled to take steps which are later found to be unreasonable. Thus, in *London Arbitration 13/18* (noted, in abbreviated form, in the 11 May 2018 issue of the *Lloyd's Maritime Law Newsletter*), owners were found liable for a failure to comply with the charterer's orders to proceed through a high risk area. That

was so even though the tribunal had found a risk of piracy because a further issue arose as to “*whether it was reasonable ... for the vessel to have taken the route that she did on the fourth voyage given the anti-piracy measures that had been taken*”. The tribunal held that it was unreasonable, even though “*the route favoured by the charterers would have taken the vessel through an area where there was a risk of interference by pirates*”. That was because the vessel’s security measures, and the owners’ conduct on previous voyages, made their decision to skirt the border of the high risk area an unreasonable one. Mr Wright KC cites this case as a good example of a case where a particular measure has been taken, and has been found not to be ‘reasonable’. It identifies the kind of arguments that charterers can raise in relation to these sorts of questions: the availability of other measures, such as armed guards and protective material, and the fact that owners may have transited these routes before. All of these are matters that are open to charterers, on the facts, to push back on any suggestion that the preventative measures are reasonable; but that is an argument that only arises in relation to clause 81(c)(i), and not 81(a).

55. In oral submissions, Mr Wright KC also took me to the decision of the Court of Appeal in *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The ‘Product Star’)* (No 2) [1993] 1 Lloyd’s Rep 397 as authority for the proposition that where there has been no material change in risk, it may very well be held that it is not reasonable to refuse to proceed to an area, and even more so to leave it. 81(a) addresses this situation by making it clear that the sub-clause is engaged whether the risk existed at the time of entering into the charterparty or occurred thereafter. 81(c) contains no similar elaboration. Mr Wright KC suggests that where there has been no change in the risk profile, it may be difficult for an owner to establish the reasonableness of preventative measures.
56. **Third**, where sub-clauses (a) and (b) apply, the charterer is obliged not only “*to issue alternative voyage orders*” but also to “*indemnify the Owners for any claims for holders of the Bills of Lading or third parties caused by waiting for such orders and/or the performance of an alternative voyage*”. No equivalent indemnity appears in sub-clause (c)(i) of the charterparty (although it does in sub-clause (c)(iv)). That is a further important distinction between the two regimes.
57. It follows, so Mr Wright KC submits, that much of this appeal is built upon sand. The deletion of clauses 81(a) and (b) is not consistent only with an intention that the owner is not to be entitled to leave the affected area where clause 81(c)(i) applies. On the contrary, it might be thought that the better inference is that the parties intended to delete the owner’s absolute rights under sub-clauses 81(a) and (b) in circumstances where they were unable to establish a risk of piracy, but only that they had exercised a reasonable judgement. As Mr Wright KC put it in his oral submissions, if the court accepts the proposition that 81(a) and (b) confer a different package of rights to those in 81(c), then **the**, or at least **a**, logical answer as to why the parties agreed to delete (a) and (b) is because they simply wanted to get rid of those particular rights. Mr Wright KC emphasises that this is **a** logical answer because the authorities make clear that one should be cautious about drawing conclusions as to what the parties objectively intended by reference to a deletion.
58. Mr Wright KC also notes that whilst, understandably, the parties have focused upon clause 81(c)(i), the structure of 81(c) is that the if opening words “*If the Owners consent or if the Vessel proceeds to or through an Area exposed to the risk of Piracy*” are

engaged, the owner shall have the various liberties referred to in (ii) to (iv). What is not clear to Mr Wright KC is whether the charterer is seeking to read the deletion of clauses (a) and (b) across into those subclauses also. He submits that 81(c)(ii), (iii) and (iv) must contemplate circumstances where the owner is complying with third party orders, and may have to leave the area in consequence.

59. In the context of this particular case, Mr Wright KC agrees that some, but not all, of the reasons ventured by Christopher Clarke J in *Mopani* as to why the court should be cautious when using deletions as an aid to construction have no application. Mr Wright KC agrees that it is unlikely that the parties thought that the deletion added nothing, which is why he is at pains to explain the differences between the rights conferred under 81 (a), (b) and (c). Nor does he suggest that (a) and (b) are inconsistent with what is already contained in the charterparty, subject to the ‘*wrinkle*’ of the potential inconsistency between a trip charter where all the discharge ports are in Nigeria, where there is a known risk of piracy, set alongside a clause which, on the face of it, entitles an owner to refuse to go to any place with a known risk of piracy, even if that risk is a pre-existing one. The factor whether the words left were ‘*a common denominator*’ is probably neutral for both parties. Mr Wright KC does not seek to suggest that the reasons for the deletion are unfathomable, or were mistaken. The logical inference is that the parties were looking to take out the rights in 81(a) and (b).
60. Where Mr Wright KC does part company with Mr Berry KC is that he (Mr Wright KC) does submit both that there is room for different ideas as to what 81(a) and (b) mean, and also that the remaining words in 81(c) achieve the parties’ respective purposes. First of all, it is apparent that there is a difference of ideas as to what 81(a) and (b) mean (although the court does not have to determine that issue). The point that Christopher Clarke J was making in *Mopani* is that if there is any room for argument as to what the deleted words mean, then that is precisely why the court should be cautious about using those deletions to infer what the parties intended by the words that remain. If there is any room for disagreement about what the deleted words mean, then that clearly renders the intention behind that deletion ambiguous. Perhaps most importantly of all is the question whether the words that remain ‘*achieved their respective purpose*’, including any right to leave the area. Mr. Berry KC says that there is no evidence to think that the parties’ respective purposes were any different. But that is an objective question of construction; it would not be a matter of evidence in the true sense of that word. In any event, there is every reason to think that the parties considered that the words that remain achieved their respective purposes.
61. From the owner’s perspective, it may well objectively have considered that 81(c)(i) would permit the vessel to leave the area provided always that that was a reasonable preventative measure to protect the vessel against the actual risk of piracy. From the charterer’s perspective, it may have been sufficiently comforted by the deletion of the absolute rights in 81(a) and (b) and prepared to accept by way of compromise a formulation that referred to ‘*reasonable preventative measures*’. The difficulty, to some extent, in all of this is that one is having to speculate as to the logic behind a deletion. That is precisely why the authorities urge caution against too ready a resort to deleted words because one is drawn into speculating as to the motivation behind the deletion rather than simply construing the words that remain. Ultimately, all one knows is that the rights conferred on the owners under clause 81(a) and (b) were deleted, but those in clause (c)(i) were not touched or qualified. So, if clause 81(c)(i), read in context and so

on, would otherwise entitle the owner to leave the area provided that was a reasonable preventative measure, in Mr Wright KC's submission, the deletion of 81(a) and (b) does not meaningfully bear upon that question.

62. Mr Wright KC then turns to the content of clause 81(c)(i). He emphasises that the owner does not say that '*reasonable preventative measures*' will **always** entitle an owner temporarily to depart from a certain anchorage and proceed to another anchorage. The owner may or may not do so on the facts of the particular case. It is the charterer who must say that doing so will **never**, as a matter of law, fall within the scope of the sub-clause. It is driven to do so because as soon as the question becomes one of evaluation, it is not an appeal on a question of law, and the tribunal's decision cannot be impugned. Mr Wright KC contends that that ambitious case must be rejected for seven reasons.
63. **First**, as a matter of ordinary and natural language, there is no reason why leaving an area cannot be a '*reasonable preventative measure*'. All will depend upon the particular facts and circumstances of the case. The charterer has the protection that where leaving the area is not '*reasonable*', then (unlike the absolute right to refuse orders, or to leave the area under sub-clauses (a) and (b)) the owner cannot rely upon clause 81(c)(i). The fact that an owner has agreed to proceed to a particular area may be a powerful reason why departing from it should be regarded as '*unreasonable*'. However, whether or not that is so in any particular case will turn upon the facts.
64. **Second**, as the Tribunal notes at paragraph 25 of the award, "*the wording of this clause is broad: while it sets out a number of potential 'reasonable preventative measures', it also expressly provides that such measures are not limited to the specified matters*". Mr Wright KC notes that the charterer gives no other examples of matters not enumerated within sub-clause 81(c)(i) falling short of leaving the area. He says that the objective intention of the parties is that this broad clause should be left open.
65. **Third**, the commercial purpose of clause 81(c)(i) is to allow an owner to take steps to avoid, or to mitigate, the risk of piracy. If other measures would not be effective to avoid or to mitigate that risk, it would be odd if the owner was not entitled to take measures that were.
66. **Fourth**, clause 81(c)(i) is only one of a number of sub-clauses under clause 81(c). The other sub-clauses ((ii), (iii) and (iv)) entitle the owner to comply with the requirements of their insurers and the directions of governmental or supra-national bodies. Those requirements or directions might involve leaving the area affected by piracy risks.
67. **Fifth**, and contrary to the position adopted by the charterer (at, for example, paragraph 7(b) of its reply permission skeleton), whether or not an owner is entitled to take reasonable preventative measures may not be limited to the question of who has to bear a modest amount of hire. A refusal to comply with the charterer's employment orders is a breach of the charterparty, and may be repudiatory. It may also constitute a deviation under any separate, but related, contract of carriage, with potentially profound legal consequences for the owner.
68. **Sixth**, as the tribunal pointed out at paragraph 28 of its award, its construction reflects '*commercial good sense*'. The charterer's construction would not prevent the vessel from '*putting out to sea or sailing elsewhere*', provided that those steps were taken within the '*Area*'. Nor would it prevent the vessel from waiting at a safe place within

the ‘Area’. But all of those measures would involve a deviation from the chartered voyage. It is not clear why sensible commercial parties should agree to a regime whereby a deviation **within** the ‘Area’ would leave the vessel on-hire, but as soon as the vessel crossed to a point just outside the ‘Area’ as part of a ‘*reasonable preventative measure*’ against the risk of piracy, she would be off-hire. That is particularly so where the ‘Area’ is undefined, and might be very large.

69. **Finally**, if the court is left in any uncertainty over the proper construction of the clause, it may wish to accord some deference to the tribunal’s decision on that question. This is precisely the sort of issue where the tribunal’s expertise in this field should assist in reaching a conclusion as to what the parties objectively would have intended. Put another way, the court should not allow this appeal unless it is persuaded that this experienced specialist tribunal was wrong.
70. Mr Wright KC recognises that the charterer also relies upon the ejusdem generis principle, on the basis that all of the measures enumerated in clause 81(c) are ones that can be taken within the area ‘*at risk*’. Mr Wright KC finds the prominence of the ejusdem generis principle in the charterer’s argument to be a little surprising. Normally if there is a question of construction, one undertakes the usual process of ascertaining the meaning of the words, looking at them in the context of the contract as a whole, weighing questions of commercial common sense, and the like. Although the ejusdem generis principle may be a guide to the meaning of the contract, it should be no more than that. Mr Wright KC derives support for this approach from *Lewison on The Interpretation of Contracts* (8th edn, 2023) (at paragraph 7.46), warning “*against a too ready application of the principle*”, and reminding “*the reader that no principle of interpretation is ever more than a guide to the true meaning of the contract*”. So, whilst the ejusdem generis (or any analogous) principle is of assistance, it should not be the first port of call.
71. Mr Wright KC contends:
- (1) The only common genus to the enumerated steps is that they are preventative measures to avoid, or to mitigate, the risk of piracy. There is otherwise no linkage between “*re-routeing within the Area, proceeding in convoy, using escorts, avoiding day or night navigation, adjusting speed or course, or engaging security personnel and/or deploying equipment on or about the Vessel*”. In those circumstances, Mr Wright KC submits that either the ejusdem generis principle cannot apply at all, or that the genus is wide enough to include temporary departures from the area. He points to the fact that the genus has ‘*morphed*’ even since the service of the charterer’s skeleton argument such that Mr Berry KC now accepts that the genus can extend to measures taken outside the area. So, the owner can take measures within the area and it can take measures outside the area. One therefore arrives at a situation where the genus appears to be defined in terms of a facility to do anything except leave the area. Mr Wright KC says that this is rather revealing as to the way that the charterer has to pitch its case. There are simply no clear words of limitation that are relevant here.
- (2) In particular, and contrary to paragraph 10 of the charterer’s appeal skeleton, it is not correct to say that these are all steps within a common genus of ‘*preventative measures within the Area*’. Such measures are also exercisable where the vessel is proceeding **to** (as well as **through**) that area. There was no suggestion in *London Arbitration 13/18* that skirting around a high-risk area fell outside the equivalent to

clause 81(c)(i); merely that it was not a ‘*reasonable preventative measure*’ on the particular facts of that case.

(3) In any event, the drafting leaves little, or no, room for any application of the ejusdem generis principle because it states in terms that ‘*reasonable preventative measures*’ shall be “*including but not limited to*” the specifically enumerated matters. This is something to which the arbitral tribunal expressly drew attention at paragraph 25 of their award. The use of this sort of language is a well-known mechanism for seeking to draft away from the ejusdem generis principle. In *Transocean Drilling UK Ltd v Providence Resources plc (The ‘GSF Arctic III’)* [2016] EWCA Civ 372, [2016] 2 Lloyd’s Rep 51, the Court of Appeal made it very clear that a draftsman who employs words such as ‘*without limitation*’ (in that case) or ‘*including but not limited to*’ (in the instant case) is intending what follows simply to be examples of what are covered by the use of very wide words. Certainly the draftsman is not intending to limit the wide words used in opening to any particular genus, even if one can be identified. Moore-Bick LJ observes (at [17 and 18]) that the words ‘*without limitation*’ are words that emphasise “*the width of the clause*”; and at [24] that the case is not a “*proper case for the application of the ejusdem generis principle of construction, by which general words may be given a limited meaning when they follow a list of specific matters (often causes or events) which can be seen to be of a similar kind.*” At [17], Moore-Bick LJ says:

Moreover, it is interesting to note the lengths to which the parties have gone

to emphasise the width of the clause: twice within the same passage in brackets they have used the expression ‘without limitation’ to make the point.

At [18] he adds:

In my view, the purpose of those words is to explain and expand the simple phrase ‘loss of use’ by examples expressed in the widest possible way (‘without limitation’).

Mr Wright KC also refers to the statement at paragraph 7-139 of *Lewison on The Interpretation of Contracts* (8th edn, 2023) that: “*In some cases the language of the contract itself signals that the principle is not to apply..*”

(4) As *Lewison* observes (at paragraph 7-140), the ejusdem generis principle may not apply where the general words precede specific examples. That is consistent with the formulation of the principle at the beginning of section 13 of chapter 7: “*If it is found that things described by particular words have some common characteristic which constitutes them a genus, the general words which follow them ought to be limited to things of that genus.*”

(5) The inclusion of specific examples in 82(c)(i) is explicable on the basis that the parties, or the BIMCO drafting committee, may well have thought it sensible to enumerate those specific examples precisely in order to avoid any debate as to whether those particular examples, such as proceeding in convoy, etc, should fall within the scope of ‘*reasonable preventative measures*’.

72. Thus, Mr Wright KC submits that there is no error of law in the tribunal’s approach. Its decision was right. There was no inconsistency with the wording of clause 82(1)(i).

73. The shipowner addresses the other points made by the charterer rather more briefly.
74. Mr Wright KC submits that the alleged significance of the deletion of clauses 81(a) and (b) is misconceived in three respects:
75. **First**, it wrongly assumes that by deleting sub-clauses (a) and (b), the parties agreed that the owner would not be entitled to leave the area in the different circumstances that might apply in sub-clause (c)(i). The charterer's error is encapsulated in the submission that if the parties had intended that the effect of the deletion of sub-clauses 81(a) and (b) should be to remove the owner's right to refuse to call at, or to remain in, an area exposed to the risk of piracy, the parties cannot also have intended that the effect of the remaining (printed) sub-clause 81(c)(i) should be to preserve that same right. However, the two rights are different. Nor is it correct that the tribunal's analysis had the consequence that the parties achieved nothing by the deletion of sub-clauses 81(a) and (b).
76. **Second**, deleted words are only a weak guide to construction. The authorities have repeatedly underscored that they should be used "*with care*", and even then only where it can be said with certainty what the parties agreed that they did not agree. That is not the case here.
77. **Third**, recourse to deleted words is only legitimate where the words that remain are ambiguous after a conventional process of construction. Had 81(c)(i) stood alone, there could be no doubt as to its meaning. It is therefore unnecessary to speculate as to why the parties might have wished to delete sub-clauses (a) and (b).
78. Mr Wright KC finds Mr Berry KC's alleged inconsistency with the entitlement in respect of ports other than Warri to be a slightly puzzling argument. The gist of it is that because the Nigerian trading clause conferred an absolute right on the owner to depart from Port Harcourt and Calabar in the event of congestion, clause 81(c)(i) should be read down so that there is no such right at Warri. However, the owner does not contend for any such absolute right. Any right to depart from an area at risk under clause 81(c)(i) is conditional upon establishing both (1) an actual risk of piracy; and (2) that such departure constitutes a '*reasonable preventative measure*'. Neither of these two requirements had to be satisfied before the owner could exercise its rights under the Nigerian trading clause. Indeed, provided that there was "*congestion at Port Harcourt*" or "*the berth at Calabar is not free on arrival*", those rights were exercisable, even without the need for a "*reasonable judgment*" that the vessel was in danger for the purposes of the deleted sub-clauses (a) and (b). The charterer is therefore wrong to suggest that the Nigerian trading clause operates as a '*write back*' of clauses 81(a) and (b) for these ports. Rather, it established a completely different suite of rights, which were not conditional upon the existence of a risk of piracy, or involved the exercise of reasonable judgment, or the taking of reasonable preventative measures. So the addition of that suite of rights in the recap cannot be taken as detracting from the very different suite of rights conferred on the owner by the printed clause 81(c). Mr Wright KC's central submission on the Nigerian trading clause is that the rights it confers do not detract from the separate rights that the owners have under clause 81(c). Rather it confers additional rights that deal with the specific scenarios identified in that clause. In any event, it is not uncommon for charterparties to provide for multiple, and overlapping, rights. That is particularly true where they are a composite of rights arising

under bespoke contracts and printed forms. This is why the presumption against surplusage is so weak in the context of commercial contracts.

79. On the text of the contract, Mr Wright KC's point ultimately is this. There are a series of different rights, some of which have been deleted in this particular charterparty, and some of which, such as those in relation to Port Harcourt and Calabar, have been superadded in. But 81(c)(i), as the tribunal rightly said, has been left untouched; and one simply cannot infer from the deletion of 81(a) and (b) that is to be read down.
80. Mr Wright KC next turns to address the three possible grounds upon which HHJ Pelling KC considered that the tribunal's decision was '*obviously wrong*'. He points out that that ruling was made on the papers, and without the benefit of oral argument. The owner disagrees with it:
81. **First**, it is said that the tribunal had not identified the principles of construction that it had applied. However, the starting point is that an arbitral tribunal is not to be treated as falling into error if they do not spell out the law. That is particularly so on issues of contractual interpretation, which Mr Wright KC portrays as "*bread and butter*" to this experienced maritime tribunal.
82. **Second**, HHJ Pelling KC appears to have been persuaded by the charterer's submissions that, on the tribunal's construction, the deletion of sub-clauses (a) and (b) added nothing. But that is not the case, as explained above. The parties deleted the rights under sub-clauses (a) and (b). But they retained the different, and more limited, right in sub-clause (c)(i).
83. **Third**, HHJ Pelling KC placed some weight upon what was said to be the '*preservation*' of the right to remove the vessel "*from expressly identified ports and places (not including Warri)*". However, as explained above, there was no such '*preservation*'. The Nigerian trading clause provided for a different suite of rights. It was not a partial writing-back of sub-clauses (a) and (b); and, in any event, that would not bear on the proper construction of clause 81(c)(i).
84. Finally, even if the court were to accept the charterer's submissions on clause 81, the award will need to be remitted back to the tribunal under s. 69(7) so that it can consider the owner's alternative cases under clauses 17 and 79.
85. The owner's case under clause 17 is that by leaving Warri, the vessel was putting back "*for the purpose of saving life and property*" within the liberty contained in clause 22. The case therefore falls within the exception to clause 17, whereby a vessel is to be treated as off-hire if it should deviate or put back during a voyage.
86. The owner's case under clause 79 is that the owner had an express liberty (at 79(b)) to leave an area in which the vessel is exposed to '*War Risks*', which is defined in clause 79(a)(ii) as including '*Piracy*'. By a deeming provision (at clause 79(j)), any exercise of that liberty "*shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party*". As such, the vessel did not deviate or put back so as to engage the off-hire clause 17.
87. The owner says that the tribunal's decision disposing of the arbitration in favour of the owner can be justified by the proper application of either clause 17, or alternatively

clause 79, of the charterparty. There has been no decision on these alternative cases; and, at least in the case of clause 17, whether or not any deviation to Lagos was “*for the purpose of saving life and property*” will raise further factual matters for determination that are the exclusive province of the arbitral tribunal. Clause 79 may also raise factual issues.

88. Although this issue will need to be remitted, Mr Wright invites the court to note that the decision in *The ‘Captain Stefanos’*, relating to the issue of ‘*due fulfilment*’, which is relied upon by the charterer, is controversial. The editors of *Time Charters* (8th edn.) consider the case to have been wrongly decided. At paragraph 5.45, they write:

It is respectfully suggested ... that treating the ship as off hire during a period in which the ship is operating in compliance with orders as envisaged by sub-clause (f) would be inconsistent with the agreement that such compliance is to constitute ‘due fulfilment’ of the charter’. To say that compliance with an order from a specified third party is ‘due fulfilment’ of a time charter is to say that the order is to be treated as if it came from the charterers and superseded any inconsistent prior orders. By complying, the ship will be undertaking, in proper time, the charterers’ (deemed) employment orders and there will be no interruption to, or delay in performance of, the service immediately required. It should be neither here nor there that whilst doing so she will not be fulfilling, or will be causing delay to the ultimate fulfilment of, prior orders that have been (deemed to be) superseded.

Mr Wright KC respectfully agrees. But he also takes the point that *The ‘Captain Stefanos’* is distinguishable on the basis that Cooke J was not considering, and his decision is therefore not determinative of, the interaction between the off-hire clause 17 and clause 79(g), which falls to be addressed in the present case.

89. The principal point in dispute in *The ‘Captain Stefanos’* turned on the construction of the words ‘*capture/seizure*’ in clause 56, which was the relevant off-hire provision in the charterparty. The owners submitted that those words were qualified by the further words ‘*by any authority*’, and that pirates did not constitute such an authority, whereas the charterers said that the words were unqualified and that a seizure by pirates was an off-hire event. Upholding the decision of the arbitrators, Cooke J held that the seizure did not need to be carried out by any authority. The charterers had clearly brought themselves within the clause, and had discharged the onus of showing that there was an off-hire event. That part of the decision on which the charter now relies is not even mentioned in the headnote to the report of the case. Reliance on a clause in terms equivalent to 79(g) in the instant case was very much a fall-back position on the part of the owner in that case; and Cooke J’s observations on the effect of that sub-clause were very much influenced by the specific terms and scope of the off-hire clause, and the other clauses of that particular charterparty, and should not be applied more widely. As Cooke J observes at [29]:

The CONWARTIME clause, upon which owners rely, cannot bear the weight which the owners wish to give it. It is a clause relating to the performance of the charterparty and to breach, and not to off-hire. Whilst it specifically deals with war risks and piracy in that connection, it is not directed at off-hire at all, which is distinct from breach.

90. Mr Wright KC submits that remission will also be necessary for the tribunal to consider:

(1) whether the vessel's departure from Warri, and temporarily returning to Lagos, could be said to fall within the scope of "*re-routeing within the Area*", or "*adjusting course*", something which (at paragraph 27 of the award) the tribunal was prepared to assume in the charterer's favour, but did not finally decide;

(2) the quantification of any off-hire amounts, including in the light of any un-appealed findings of fact; and

(3) the incidence of costs, in circumstances where the owner succeeded before the arbitrators on two issues which have not been the subject of any appeal.

91. Mr Wright KC submits that remission is consistent with the general approach in s.69(7) that the court should not exercise its powers to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration. That provision, which applies similarly to other sections dealing with challenges to arbitration awards under the Arbitration Act, recognises the importance of arbitration in respect of party autonomy, and the respect which is to be given to the parties' agreement, and the processes which they have implemented for arbitration.
92. For all of these reasons, Mr Wright KC invites the court to dismiss the appeal with costs. Alternatively, should the court accept the charterer's submissions on clause 81, the award should be remitted to the tribunal, with the costs reserved pending the tribunal's determination on the remitted issues.

The charterer's reply

93. Mr Berry KC began his reply by addressing Mr Wright KC's submission that clause 81(c) confers a different package of rights from 81(a) and (b) so that when they deleted 81(a) and (b), the parties were not also deleting the different package of rights in 81(c). Mr Berry KC's short submission is that this begs the question, which is what is in the 81(c) package? The owner displays an unsound tendency to consider this out of its true context. The context is that 81(c) does not expressly mention leaving an area, but the last sentence of 81(a) does; and yet the parties have elected to delete the one right to leave the area that the standard-form charterparty had contained. When one construes 81(c)(i) in conjunction with 81(a) in the unamended clause as a whole, it is entirely wrong to treat 81(c)(i) as including any right to leave an area, either from its general words, or by implication, since leaving has been explicitly addressed elsewhere. The problem with the owner's submission is that it assumes what it seeks to achieve, which is that the content of the 81(c)(i) package includes leaving an area, whereas the liberty to leave had been addressed elsewhere and had then been removed from the contract.
94. Mr Berry KC suggests that whilst the triggers in 81(a) and (c) may be worded differently, they are materially identical in substance. The trigger in 81(a) is a '*reasonable judgment*' that the area is dangerous to the vessel whilst the trigger for the owner's supposed package of rights in 81(c)(i) is that it is a '*reasonable preventative measure*' to protect the vessel for it to leave the area. Mr Berry KC submits that these are materially identical concepts. He ventures to suggest that there will never be a case where one is true but the other is not. At paragraph 26 of their award the arbitrators held that both were satisfied in the instant case. So, the difference between the two suggested packages of rights is either non-existent or minuscule. It does not lead to the conclusion

that the 81(c) right to take reasonable preventative measures includes the specific right to leave the area which had been conferred by, but was taken out of, clause 81(a), which had preceded 81(c)(i).

95. Mr Wright KC had submitted that the charterer's obligation to issue alternative voyage orders, and to indemnify the owner, under 81(b) arises when liberty to leave the area is exercised under the second sentence of 81(a) but not under 81(c). Mr Berry KC submits that no such obligation arises under the second sentence of 81(a). On its wording, clause 81(b) requires the owner immediately to inform the charterer only if, in accordance with 81(a), the owner decides that the vessel shall not proceed or continue to or through the area. It is not triggered by the vessel leaving the area. The obligation to issue alternative orders is confined to the case where the information is given, which, in its turn, is confined to the case of not proceeding or continuing to or through the area; and it does not extend to the case of leaving the area. That is the only sense that can be made of 81(b). But if Mr Wright KC is right, and the obligation to issue alternative voyage orders and of indemnity do apply if the vessel leaves the area under 81(a) but not under 81(c), then Mr Berry KC says that that is a point in his favour. It makes no sense for the parties to have established an elaborate structure in 81(a) and (b) governing the liberty to leave the area, and then to have conferred a general right to leave the area in 81(c), with different triggers and different rights and obligations.
96. During the course of oral argument, a lacuna seemed to emerge in the drafting of clause 81(a) and (b). Mr Berry KC submits that the obligation on the charterer to issue alternative voyage orders under 81(b) in terms only arises if the owner decides that the vessel shall not proceed or continue to or through the 'Area' (as defined), and not if the owner elects that the vessel shall leave an area that has become, or may become, dangerous after the vessel has entered into it. Mr Wright KC disputes this, on the basis that the parties could never have intended that, once it has left the area, the vessel should simply wait outside the area for an indeterminate amount of time waiting for orders. What the parties would objectively have contemplated in those circumstances, Mr Wright KC says, is that there would then be an obligation on the charterer to issue alternative orders once it became aware that the vessel had left the area. However, Mr Wright KC was prepared to acknowledge that the charterer could not be expected to issue such alternative orders unless and until it knew that the vessel had left the area. He faces the difficulty that there is no express obligation on the owner to inform the charterer of this, unlike the express obligation in the first sentence of 81(b) immediately to inform the charterer if the owner decides that the vessel shall not proceed or continue to or through the area. Mr Wright KC's response was to observe that, as with any professionally drafted clause, there are often gaps that can be exposed when tested in '*the crucible of litigation*'. Mr Berry KC submitted that it will be in the charterer's own interests to give alternative orders, and not to have the vessel wait outside the area for ever. He says that although there is no obligation on the charterer to issue alternative orders when a vessel leaves the area in accordance with the second sentence of 81(a), as there is in the case where the ship does not proceed or continue to or through the area, there is no gap because the drafting committee has clearly made a deliberate decision to leave it to the charterer to choose to issue alternative orders, as distinct from imposing any obligation upon the charterer to do so. This should not be treated as any gap, as opposed to a deliberate decision on the part of the drafting committee. However, it seems to me that this does not meet the point that there is no express obligation on the shipowner to inform the charterer that the vessel has left the area and is without

orders to proceed. Fortunately, for the purposes of the present appeal, I do not have to decide whether there is any lacuna and, if so, how this is to be filled.

97. Mr Berry KC submits that the difference between what may be done within the area and leaving the area is ‘*hard-baked*’ into all the various clauses of the charterparty. Although there may be hard cases close to the borderline, there is a fundamental conceptual difference to the parties’ rights when the vessel is sailing within the area as opposed to when the vessel is proceeding to the area. Mr Berry KC refers in this context to clause 79(b). He recognises that there will be tricky factual cases at the borderline; but Mr Berry KC argues that that is a point in his favour because in the rest of this charterparty the parties have clearly demarcated between, and provided different regimes for, conduct within, and outside, the area. The owner’s submissions cut across this fundamental demarcation line.
98. Mr Berry KC draws attention to the fact that the right to leave the area is in fact a right to disobey orders, whereas the specific rights mentioned within 81(c) are methods of obeying orders. The right to disobey orders is one not lightly to be inferred. It should require clear words. There are clear words in the last sentence of clause 81(a), but not in 81(c)(i).
99. Mr Berry KC submits that *The ‘Product Star’* and *London Arbitration 13/18* are of no assistance. They are cases where the issue was whether certain conduct was reasonable or not. That is of no assistance in determining, in the context of the rest of the charterparty, what the rights within 81(c)(i) are. In both of those cases, there was a clear clause permitting certain conduct, if reasonable, and the question was a simple factual one. The fact that simple factual questions can arise under clause 81(c)(i) says nothing about the content of the package of rights it confers. In *Arbitration 13/18*, the clause was different. It explicitly permitted “*taking a reasonable alternative route*”; so it is hardly surprising that the parties did not seek to argue that this was confined to taking a route within the area because the clause expressly provided that the vessel might take a reasonable alternative route. Those were Mr Berry KC’s submissions on the main appeal.
100. In relation to the respondent’s notice, Mr Berry KC’s basic submission is that remission to the arbitrators would be a waste of money because this is one of those cases where there is no nettle to be grasped. The owner relies on the off-hire clause 17, and also upon clause 79. Where a vessel is already within the area, the latter clause is only triggered when the area becomes dangerous after the vessel has already entered into it. Mr Berry KC says that it is clear from paragraph 20 of the award that it was known at the time of entry into the charterparty that the area of the Gulf of Guinea outside Warri is an area at risk of piracy. Mr Berry KC submits that there is therefore literally no chance of clause 79 being satisfied. Even if it were satisfied, the owner has the problem of *The ‘Captain Stefanos’*. That case is binding authority for the proposition that where there is an off-hire event under clause 17 (in that case clause 56), then the vessel remains off-hire notwithstanding the CONWARTIME clause, which deems there to be ‘*due fulfilment*’. Mr Wright KC is said to have diverted attention away from that point of law to the different, and irrelevant, issue of whether the off-hire event was triggered. In that case, there was a question whether or not ‘*seizure*’ included seizure by pirates; but this is irrelevant to the point at issue here. That point is whether, if the off-hire clause is triggered, that is overridden by the CONWARTIME clause. The very clear answer

provided by *The 'Captain Stefanos'* is no. Mr Berry KC cites the summary of the decision at page 148 of *Time Charters* as follows:

The owners then contended that, whilst captured, the ship was exercising the liberty under sub-Clause (f)(i) of the Conwartime clause to comply with the orders of a 'body or group . . . acting with the power to compel compliance with their orders', and that the 'due fulfilment' provision of sub-Clause (h) overrode the off-hire provision in Clause 56. Cooke J doubted the premise and in any event rejected the argument that sub-Clause (h) would override Clause 56.

It is that '*in any event*' finding in the decision of Cooke J that is part of the ratio of the case. It decides that a clause identical, or materially identical, to that in the instant charterparty does not override an off-hire clause. It does not matter which particular off-hire event triggered the off-hire clause in the first place. So, there is no nettle to be grasped at all under clause 79, when read with clause 17.

101. Mr Wright KC also seeks to rely on clause 22, or would wish the arbitrators to do so. He says that clause 17 creates an exception to off-hire when clause 22 is engaged. Mr Berry KC submits that there is no nettle to grasp here either. Deviation for the purpose of '*saving life and property*' requires an immediate prospect of loss or damage to life or property. It is to be distinguished from taking precautions. These are different concepts; and there is no prospect of the arbitrators finding that the taking of precautions by leaving an area is the same as saving life or property. Certainly no further facts are required for that determination. It is a pure point of law: the meaning of saving life or property.
102. For all of these reasons, Mr Berry KC submits that if the court is with him on the main point on this appeal, there really would be nothing but an infliction of unnecessary delay and costs for this court to remit the matter back to the arbitrators rather than deciding that the vessel was off-hire, with the financial consequences that follow from this.

Analysis and conclusions

103. I am greatly indebted to both counsel for their detailed submissions, both written and oral. I record that I have fully taken account of all that both counsel have urged upon me. Following my foregoing detailed recital of the parties' respective submissions, I can dispose of this appeal quite shortly. In doing so, this section of my judgment should clearly be read in conjunction with my earlier observations concerning the proper approach both to appeals under s. 69 of the Arbitration Act 1996 (at paragraph 19 above) and to issues of construction (at paragraphs 20-23 above).
104. I prefer the submissions of Mr Wright KC to those advanced by Mr Berry KC. In my judgment, the arbitral tribunal arrived at the right result, and this appeal therefore falls to be dismissed. I arrive at this conclusion by two alternative routes.
105. The first is that in my judgment, this is not a case where reliance upon the deletion of clauses 81(a) and (b) is permissible as an aid to the true interpretation of this charterparty. I have set out the principles to be derived from the leading authority of *Mopani Copper Mines plc v Millennium Underwriting Ltd* [2008] EWHC 1331 (Comm), [2008] 1 CLC 992 at paragraph 23 above. Before the court may resort to

deleted words as an aid to the true construction of a written contract, the court should first construe the words that have been retained, without reference to the deletion. If they are unambiguous, reference to the deletion is unnecessary, and therefore impermissible. In my judgment, ignoring the deleted words of sub-clauses 81(a) and (b), sub-clause 81(c) admits of no ambiguity. Therefore the court should ignore sub-clauses 81(a) and (b) when construing sub-clause 81(c). My reasons for regarding sub-clause 81(c) as unambiguous are as follows:

106. In my judgment, there is nothing in clause 81(c) to indicate that the ‘*reasonable preventative measures*’ that may be taken by the owner to protect a vessel, its crew and its cargo when it is proceeding to or through an area exposed to the risk of piracy are limited to measures **within** that area, apart from the express reference to ‘*re-routeing within the Area*’. However, this is merely one express instance of the type of measures that may be taken by the shipowner to protect the vessel; and it is expressly introduced by the words ‘*including but not limited to*’, which are words of inclusion and not limitation. I agree with Mr Wright KC’s submission that had sub-clause 81(c)(i) stood alone, there could be no doubt as to its meaning. Recourse to the deleted words is therefore illegitimate since the words of 81(c)(i) are unambiguous once they have been subjected to a conventional process of construction. It is therefore unnecessary to speculate as to why the parties might have wished to delete sub-clauses 81(a) and (b).
107. The parties have expressly included, within the incorporated clause 79(b), a provision whereby the vessel “*shall not be obliged to proceed or required **to continue to or through** any area*” when, in the reasonable judgement of the master and/or the owner, it appears that the vessel may be exposed to ‘*War Risks*’ (which are defined as including the risk of ‘*Piracy*’), whether such risk existed at the time of entering into the charterparty or occurred thereafter. Admittedly the only express liberty to leave the area conferred by that sub-clause is if the area becomes, or may become, dangerous **after** the vessel has already entered into it. But the right not “*to continue ... through*” the area must, in my judgment, import a right to leave the area because it cannot have been intended that the vessel should remain subject to the risk of piracy by simply putting to within the area and waiting to be attacked or seized. I recognise that sub-clause 79(b) requires an exercise of ‘*reasonable judgment*’ by the master or owner. But one of the arguments advanced by Mr Berry KC in his reply (as recorded at paragraph 94 above) is that the two packages of rights conferred by sub-clause 81(a) (which is in similar terms to sub-clause 79(b)) and sub-clause 81(c) are materially identical in substance. If that is so, then since, in my judgment, sub-clause 79(b) clearly contemplates the vessel leaving the area, there is no reason to conclude that sub-clause 81(c) does not similarly allow the vessel to leave the area if that would constitute a reasonable preventative measure to protect the vessel from the risk of piracy. If, however, Mr Berry KC’s argument is wrong, then that would support Mr Wright KC’s submission that different suites of rights are conferred by sub-clauses 81(a) and (c). Effectively, in this part of his submission, Mr Berry KC is caught between Scylla and Charybdis.
108. Although these sub-clauses did not feature significantly in the submissions of either counsel, in my judgment it is also important to bear in mind the provisions of sub-clauses 81(e) and (f) whereby: (1) if the vessel is attacked by pirates, any time lost shall be for the account of the charterers, and the vessel shall remain on hire; and (2) if the vessel is seized by pirates, the vessel shall remain on hire for the first 90 days after the seizure. Since the charterer clearly has a substantial financial interest in avoiding any

attack or seizure by pirates, commercial good sense suggests that the court should not favour any construction of sub-clause 81(c) of the charterparty that would involve taking a restrictive approach to the range of reasonable preventative measures available to the master and owner to protect the vessel from the risk of piracy.

109. The fallacy, as it seems to me, of the charterer's espousal of a narrow interpretation of sub-clause 81(c) was exposed during the early part of Mr Berry KC's reply (summarised at paragraph 93 above) when he submitted that, by construing sub-clause 81(c)(i) **in conjunction with** 81(a) in the unamended clause as a whole, it can be seen to be entirely wrong to treat 81(c)(i) as including any right to leave the area since leaving had been explicitly addressed elsewhere but had then been removed from the charterparty. In my judgment, it is only permissible to look to 81(a) if the court has already concluded that 81(c)(i) is ambiguous. In my judgment, that is not the case. As Mr Wright KC submits, as a matter of ordinary and natural language, there is no reason why leaving an area cannot be a '*reasonable preventative measure*'. All will depend upon the particular facts and circumstances of the case. Since the commercial purpose of sub-clause 81(c)(i) is to allow an owner to take steps to avoid, or to mitigate, the risk of piracy, if other measures would not be effective to avoid or to mitigate that risk, it would be odd, and not in the charterer's own best interests, if the owner were not entitled to take measures that were. I agree with Mr Wright KC that it is difficult to discern why sensible commercial parties should have agreed to a regime whereby a deviation within the '*Area*' should leave the vessel on-hire, but as soon as the vessel crosses to a point just outside the '*Area*', as part of a '*reasonable preventative measure*' against the risk of piracy, she should be placed off-hire. That is particularly the case where the '*Area*' may be difficult to identify precisely or to define, and may be very large.
110. The second route to my conclusion that the arbitral tribunal arrived at the right result, so this appeal falls to be dismissed, proceeds on the assumption (contrary to the view I have already expressed) that it is permissible to have regard to the deleted sub-clauses 81(a) and (b) in construing 81(c)(i). On this footing, I agree with the submissions of Mr Wright KC that the deletion of the rights conferred by 81(a) and (b) should not lead the court to conclude that the range of reasonable preventative measures to protect the vessel from the risk of piracy is limited to measures to be taken within the area of risk. Even assuming that Mr Berry KC is right when he submits that the difference between the triggers for the two suggested packages of rights is either non-existent or minuscule, it is clear that they operate in different ways. 81(b), for example, imposes obligations upon the charterer that are not replicated in 81(c)(i).
111. Sub-clauses 81 (a) and (b) of the printed Piracy Clause confer certain rights on the owner; and, if these are exercised, consequent obligations on the charterer. These rights are independent of, additional to, and more extensive than, the rights which are conferred on the owner under 81(c). The right to deviate conferred by sub-clauses 81(a) and (b) differs from the right to take reasonable preventative measures under sub-clause 81(c)(i). In my judgment, applying the principles I have outlined at paragraph 23 above, the fact that the former discrete, and additional, rights are deleted does not impinge upon what the parties are to be taken to have objectively intended as the meaning of 81(c)(i). In my judgment, there is no reason to infer that the parties intended this sub-clause to be cut down by the deletion of those earlier rights. I agree with the views expressed about sub-clause 81(c)(i) at paragraph 25 of the award:

We note that the wording of this clause is broad: while it sets out a number of potential 'reasonable preventative measures', it also expressly provides that such measures are not limited to the specified matters.

I do not consider that the deletion of sub-clauses 81(a) and (b) is consistent only with an intention that the owner should not be entitled to leave the affected area by way of reasonable preventative measures under sub-clause 81(c)(i).

112. Turning to Mr Berry KC's reliance upon the ejusdem generis principle (or a related principle of construction), I agree with Mr Wright KC that this principle is simply not engaged in the instant case for the reasons he supplies. First, in my judgment, there is no relevant genus which can operate to exclude temporary departures from the area from the scope of 'reasonable preventative measures'. Acknowledging the force of the point made in Mr Wright KC's skeleton argument that the scope of reasonable preventative measures must extend to measures taken when proceeding **to** an area exposed to the risk of piracy, as well as when proceeding **through** such an area, Mr Berry KC has been constrained to redefine the genus, effectively in terms of a facility to do anything **apart** from leaving the area of risk. As thus redefined, I find that there are simply no clear words of limitation defining any relevant genus. Mr Berry KC has effectively rewritten the genus so as to fit his argument. In any event, I consider that the wording of sub-clause 81(c)(i) leaves no room for any application of the ejusdem generis principle. That is because it states in terms that the 'reasonable preventative measures' are to be 'including but not limited to' the specifically enumerated matters. I agree with Mr Wright KC's submissions on the ejusdem generis aspect of the charterer's case, as summarised at paragraphs 70 and 71 above.
113. Nor do I consider that the charterer can derive any assistance from the inclusion within the charterparty of the bespoke provisions of the Nigerian trading clause. These address any problems that may arise if there is congestion on arrival at Port Harcourt, or the berth is not free upon arrival at Calabar. These provisions establish a completely different suite of rights from those conferred by sub-clause 81(c)(i) (or the deleted 81(a) and (b)). These are not conditional upon the existence of any risk of piracy, or the taking of reasonable preventative measures; nor do they involve the exercise of any reasonable judgment. So the addition of that suite of rights in the recap cannot be taken as detracting from, or affecting, the very different suite of rights conferred on the owner by the printed sub-clause 81(c)(i). I accept Mr Wright KC's central submission concerning the Nigerian trading clause that the rights it confers do not detract from the separate rights that the owners have under sub-clause 81(c)(i), or would have had under 81(a) and (b) had those clauses not been removed from the charterparty. Rather, the Nigerian trading clause confers additional rights that address the specific scenarios identified in that clause. In any event, as Mr Wright KC points out, it is not uncommon for charterparties to provide for multiple, and overlapping, rights. That is particularly true where they are a composite of rights arising under a combination of various bespoke contracts and printed forms. This is why the presumption against surplusage is so weak in the context of commercial contracts in general, and charterparties in particular.
114. At this point, it is appropriate for me to say a little about HHJ Pelling KC's reasons for, and observations upon, the grant of permission to appeal. As I explained when setting out the proper approach to an appeal under s. 69 at paragraph 19 of this judgment, on the substantive hearing of an arbitration appeal, the court's determination, at the

permission stage, that the appellant has satisfied the threshold condition that the tribunal's decision on the question of law arising out of the award was '*obviously wrong*' will clearly fall for reconsideration. The test at the substantive hearing is whether the award was wrong; and the court hearing the substantive appeal may refuse to find that the award was wrong even though permission to appeal was granted on the basis that the '*obviously wrong*' test was satisfied. It follows from all that I have said in this section of my judgment that I disagree with HHJ Pelling KC's assessment that the arbitrators' award was '*obviously wrong*'. On the contrary, in my view it was correct.

115. As recorded at paragraphs 80-83 above, Mr Wright KC ventures three observations upon HHJ Pelling KC's ruling on the charterer's application for permission to appeal.
116. The first relates to the criticism that the tribunal had failed to identify the principles of construction that it had applied. However, the starting point is that an arbitral tribunal is not to be treated as falling into error if they do not spell out the law. That is particularly so on issues of contractual interpretation, which Mr Wright KC correctly portrays as "*bread and butter*" to this experienced maritime tribunal. I agree with Mr Wright KC that there was no obligation upon the arbitral tribunal to revisit, or to re-articulate, the well-established, and equally well known, principles of contractual interpretation. As I explained, at paragraph 19 (3) above, citing the authority of Popplewell J in *Reliance Industries Ltd v The Union of India* [2018] EWHC 822 (Comm), [2018] 1 Lloyd's Rep 562 at [56]:

If the law is not stated, or not fully stated, the court will nevertheless start from the assumption that the law has been correctly understood and applied; tribunals are not to be treated as in error if they do not spell out the law, and to require them to do so would be contrary to the desideratum of speedy finality which underpins the Act.

Those observations have a particular resonance in the context of a relatively low-value arbitration, such as the present.

117. Second, Mr Wright KC points out that HHJ Pelling KC appears to have been persuaded by the charterer's submissions that, on the tribunal's construction, the deletion of sub-clauses 81(a) and (b) add nothing. But that is not the case, for the reasons explained above. The parties deleted the rights under sub-clauses 81(a) and (b). But they retained the different, and more limited, rights in sub-clause 81(c)(i).
118. Third, Mr Wright KC refers to the weight that HHJ Pelling KC placed upon what was said to be the '*preservation*' of the right to remove the vessel "*from expressly identified ports and places (not including Warri)*". However, I accept that there was no such '*preservation*'. This aspect of the Nigerian trading clause provided for a different suite of rights, which applied in very different circumstances from sub-clause 81(c)(i). It did not bear on the proper construction of clause 81(c)(i).
119. In addition, it seems to me that HHJ Pelling KC did not ask himself the prior question of whether, without recourse to the deleted sub-clauses 81(a) and (b), sub-clause 81(c)(i) was ambiguous on conventional principles of contractual interpretation. Unless it was, reference to the deleted sub-clauses was unnecessary, and therefore impermissible. In my judgment, that is the case here.

120. I recognise that the arguments that have been advanced before this court on the substantive hearing of this appeal are essentially the same as those that were deployed by different (and junior) counsel at the permission stage, albeit that they have since been subject to considerable development, elaboration and refinement. I also acknowledge that HHJ Pelling KC found that the decision of the tribunal was “*obviously wrong*”. I have come to a different conclusion. But in doing so, I bear in mind the observations of Megarry J in *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9 at 16F-17B, albeit they were made in the rather different context of the weight to be accorded to the words of a legal textbook written or subscribed to by an author who then becomes a judge. Having proclaimed that “*argued law is tough law*”, Megarry J concludes his judgment by referring to “*the testing and refining process of argument. Today, as of old, by good disputing shall the law be well known.*” As Mr Wright KC points out, HHJ Pelling KC arrived at his ruling on the papers, and without the benefit of any oral adversary argument.
121. So, for all these reasons, I am satisfied that the arbitrators arrived at the correct result. This appeal therefore falls to be dismissed. I invite counsel to agree a draft order to give effect to my decision. If necessary, I will formally adjourn any consequential matters to a remote hearing on a convenient date to be fixed and extend the time for appealing until 21 days after that consequentials hearing.
122. It follows that it is strictly unnecessary for me to consider what I would have done had I been minded to allow the appeal from the arbitrators’ decision. In that event, I would **not** have ordered remission of the award to the arbitrators. I agree with Mr Berry KC’s submission that had I agreed with him on the main point of this appeal, there really would be nothing but an infliction of unnecessary delay and costs should this court be minded to remit the matter back to the arbitrators, rather than deciding that the vessel had been off-hire during the entire period of some three days between her departure from, and her return to, Warri., with the financial consequences that follow from this.
123. Under the second sentence of sub-clause 79(b), the right to leave an area which the vessel is already within is only triggered when the area becomes dangerous, or may become so, after the vessel has already entered into it. I agree with Mr Berry KC that it is clear from paragraph 20 of the award that it was known at the time the parties entered into this charterparty that the area of the Gulf of Guinea outside Warri was an area at risk of piracy. It follows that there is no real prospect of the arbitrators finding that the requirements of sub-clause 79(b) were satisfied on the facts of the present case. Even if there were, I consider that *The ‘Captain Stefanos’* is authority, binding on the arbitrators, for the proposition that where there is an off-hire event under clause 17, then the vessel remains off-hire notwithstanding sub-clause 79(j), which deems there to be ‘*due fulfilment of the Charter Party*’. Whilst I tend to agree with the criticisms that have been levelled at that part of Cooke J’s decision, I would not have regarded this as an appropriate matter for remission to the arbitrators in light of the decision of Cooke J that a clause identical, or materially identical, to that in the instant charterparty does not operate to override an off-hire clause.
124. Mr Wright KC also seeks to rely on clause 22, or would wish the arbitrators to do so. He says that clause 17 includes an exception to the off-hire provisions when clause 22 is engaged. I agree with Mr Berry KC’s submission that there is no nettle to grasp here either. I consider that deviation for the purpose of ‘*saving life and property*’ requires an immediate prospect of loss or damage to life or property. It is to be distinguished from

the taking of precautions, or ‘*reasonable preventative measures*’. I agree with Mr Berry KC that these are different concepts; and that there is no real prospect of the arbitrators finding that the taking of precautions by leaving an area is the same as deviating “*for the purpose of saving life and property*”. Certainly no further findings of fact are required for that determination. It is a pure point of law: the meaning of “*saving life and property*”.

125. In the event, however, the question of remission does not arise. The charterer’s appeal is dismissed.