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Claim No. CL-2023-000451

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

10 July 2026

Before:

MR JUSTICE WAKSMAN

BETWEEN:

BRIETY SHIPPING INC

Claimant

- and -

TRAFIGURA MARITIME LOGISTICS PTE LTD

Defendant

JUDGMENT

Hearing dates: 23-26 and 31 March and 1 April 2026

David Lewis KC and Michal Hain (instructed by Clyde & Co. LLP, Solicitors) for the Claimant
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for the Defendant

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INTRODUCTION

1. The Claimant, Briety Shipping Inc. (“Briety”), a Marshall Islands company, is the owner of a liquefied natural gas (“LNG”) carrier vessel, hull number 3157, with the name TENERGY (“the Vessel”), built by Hyundai Heavy Industries in Ulsan, South Korea. The Defendant, Trafigura Maritime Logistics Pte Ltd (“Trafigura”), a Singapore company, was and remains the charterer of the Vessel from Briety pursuant to a 5-year time charterparty, with options to extend, signed on 21 July 2020 (“the TCP”). The charter actually commenced in January 2022 following delivery of the Vessel on 12 January 2022. The initial period therefore ends in January 2027, so the Vessel remains under charter to Trafigura at present.
2. The principal issue in this case concerns the proper interpretation of Clause 10 of the TCP, which provides a formula for the calculation of the hire payable by Trafigura to Briety. It is common ground that the reference point for the hire is the freight payable for LNG per MMBtu (Metric Million British Thermal Unit). The latter is a traditional unit of heat or energy value, which is widely associated with measurement of natural gas in energy markets worldwide. There are two relevant prices. The first is JKM, being the Platts LNG Japan-Korea Marker, a spot price in Far East markets for LNG. The second is TTF, being the Netherlands’ Title Transfer Facility, a spot price for LNG in European markets.
3. The basic minimum rate payable under the TCP by Trafigura to Briety, or “Floor”, is US\$50,000 per day. However, it ratchets up once “JKM-TTF” is \$1.3 or more, with a maximum amount payable, or “Ceiling”, of US\$145,000 per day.
4. The history of pricing in the LNG markets as at the time of the making of the TCP showed that usually, though not inevitably, JKM exceeded TTF.
5. The key difference between the parties’ claimed interpretations of Clause 10 is this: Briety contends that JKM-TTF involves subtracting the latter price from the former but the end result, whether a positive or negative number, results in a difference or spread which is applied to the trigger of US\$1.3 either way. Thus, if the JKM minus TTF was US\$1.5, the trigger is activated. However if (because TTF exceeds JKM by US\$1.5) JKM minus TTF is -US\$1.5, that is still a value which would activate the trigger. In other words, whether JKM exceeds, or is less than TTF by more than US\$1.3, an increased rate of hire will be payable by Trafigura to Briety. I shall refer to this interpretation of Clause 10 as “the Briety Basis”.

6. By contrast, while Trafigura agrees that the calculation to perform is to deduct TTF from JKM, should that deduction result in a minus figure, that does not lead to an increase in price above the Floor because a minus figure, cannot, by definition be US\$1.3 or indeed any figure at or above zero. I refer to this position as “the Trafigura Basis”.
7. The difference between the parties’ positions is acute because, as it so happens, for a part of the period of the charter so far, TTF has exceeded JKM. According to the Briety Basis, this resulted in an increased hire payable to Briety. On the other hand, according to the Trafigura Basis, the hire in such cases remained at the Floor.
8. The period of the alleged shortfall is from January 2022 to February 2023, and also for a short time in late 2023, when, according to the Briety Basis but not the Trafigura Basis, hire at a rate considerably in excess of the Floor should have been paid. Over that period, Trafigura paid the Floor rate. In fact, for much of that period, the invoices sent to Trafigura on behalf of Briety (“the Invoices”) only claimed hire at the Floor rate. Why, and with what effect, is a matter discussed below.
9. Proceedings were issued by Briety on 9 August 2023 and the Particulars of Claim were served on 24 January 2024, claiming the shortfall and declaratory relief as to the claimed correct hire rate calculation basis. In the alternative, if Briety is wrong about its interpretation of Clause 10, it seeks rectification on the basis of common, alternatively unilateral, mistake.
10. Trafigura’s Defence and Counterclaim dated 21 February 2024 denies the Briety Basis of hire calculation and relies on the Trafigura Basis. If it is wrong about that interpretation of Clause 10, it seeks rectification for common mistake, alternatively a declaration that Briety is estopped by convention from bringing this claim, relying here in particular on the Invoices. Trafigura also contends that the contractual claim for unpaid hire is time-barred as from September 2022 and insofar as Briety would have been entitled to rectification, this remedy is barred by the doctrine of *laches*. Those contentions are in turn denied by Briety in its Reply and Defence to Counterclaim dated 13 March 2024.
11. Although this was a relatively short trial, the issues and arguments arising on each of the different claims were numerous and detailed. I have considered all of them, although I have concentrated in this judgment on dealing with what I consider to be the key points made by each side in their oral and written submissions.

THE EVIDENCE

12. For Briety, I heard from the following witnesses of fact:
 - (1) Nikolaos Tsakos, the founder and Chief Executive Officer of Tsakos Energy Navigation Limited (“TEN”) which is Briety’s parent company; his witness statement (“WS”) is dated 19 June 2025 (“NT1”); TEN is itself part of the Tsakos group of companies;
 - (2) Michael Jolliffe, Co-Founder, Vice Chairman and Director of TEN, as well as being the Chairman of TEN’s Capital Markets and Projects Committee; he is also a shipping broker; his WS is also dated 19 June 2025 (“MJ1”); and
 - (3) Ioannis Sapis, a Manager in the Chartering Department of Tsakos Shipping and Trading S.A. (“TST”) which is the commercial manager of TEN; his WS is dated 20 June 2025 (“IS1”).
13. For Trafigura, I heard from Oliver Murley, employed within the Trafigura Group since May 2015; at the material time, he was a charterer at Trafigura with responsibility for negotiating and concluding the TCP on behalf of Trafigura. His WS is dated 20 June 2025 (“OM1”).
14. Each side also called one expert witness to deal with various aspects of LNG market operations and practice.
15. For Briety, I heard from Dr Anita Odedra, who is an executive director at Amphitrite Limited, a shipping consultancy, whose work includes advising on LNG contracts and shipping operations. Between 2022 and 2025 she was also an Executive Vice-President of Tellurian Inc, a US-based LNG exporter. Prior to that, the bulk of her career was spent at BG Group, a British multinational oil and gas company. Between 2013 and 2016 at that company, she was responsible for a fleet of around 38 LNG ships, managing over 200 cargoes per year from numerous global sources, as well as a smaller fleet of crude oil and LPG vessels. Her experience in the energy industry as a whole spans 29 years with a significant focus on LNG and shipping.
16. She has produced three reports, the third being a corrective to the first, dated 22 October 2025, 20 January and 13 March 2026 (respectively “AO1”, “AO2” and “AO1A”).

17. For Trafigura, I heard from Mark Terzopoulos, Founder & Managing Director since 2023 of Longview Shipping, a specialized boutique ship brokerage focused exclusively on commercial LNG shipping. For 3 years prior to that, he was Commercial Director at Maran Gas Maritime (“Maran”), being responsible for the shipping strategy of a 56-vessel LNG carrier fleet, dealing with spot and term chartering, new building projects, and sale and purchase, reporting directly to the CEO. Prior to that he held other shipping and LNG chartering roles since 2014. His two reports are dated 22 October 2025 and 20 January 2026 (“MT1” and “MT2” respectively).
18. In addition, there is a helpful joint statement (“the JS”) dated 28 November 2025.
19. In this judgment, references to oral evidence contained in the daily transcripts are to day number e.g. T2, T3 etc., and page number e.g. T2/45.

CLAUSE 10 OF THE TCP

20. The TCP was signed on 21 July 2020 by Georgios Skopelitis on behalf of Briety, and Mr Murley on behalf of Trafigura.
21. I set out the material parts of Clause 10 below, followed by a summary of how they work and where the parties disagree about how they work.
22. It is common ground that the section headed with a second “B” (“JKM-TTF Spread”) should have been headed (“D”), and the section following, headed with a “D” should have been headed “F”. There is an obvious typographical error here, which I have corrected, but placing square brackets around the original numbering.

“10. Rate of Hire

A. Payment of Hire

Charterers shall pay for the use and hire of the Vessel at a daily hire rate, and pro rata for any part of a day, commencing from the time and date of delivery of the Vessel (UTC) (the "Hire Payment Commencement Date") until the time and date of redelivery (UTC) to Owners.

The daily rate of hire of the Vessel, per day pro rata ("Hire Rate") shall be as set out in this Clause. Owners shall invoice Charterers monthly, and latest by the 15th day of the month in advance, for the payment of hire and Charterers shall pay the invoice in immediately available funds by the last Business Day prior to the start of the initial hire period or each subsequent month. In the event of any disagreement on the applicable Hire Rate for any month, Charterers shall pay the base Hire Rate of US\$

50,000 (US\$ fifty thousand) per day/pro-rata ("the Floor") while any such dispute as to Hire Rate is resolved.

B) Firm Period Hire Rate

- a) In the event Delivery occurs before 23:59 (UTC) on 31st Jan 2022 (always in line with Delivery Clause)

From Delivery of the Vessel on day zero of the Charter Period until the earlier of 23:59 hours (UTC) on the date ten (10) days after delivery or until completion of first loading (to be defined as hoses disconnected), the Hire Rate shall be US\$1 per day pro rata.

Thereafter and until the expiry of the Firm Period (as per applicable clause), the Hire Rate shall be calculated in accordance with Clause C "JKM minus TTF".

- b) In the event delivery occurs between 00:01 (UTC) 1st February 2022 and 23:59 (UTC) 31st June 2022 (always in line with Delivery Clause)

From Delivery of the Vessel on day zero of the Charter Period until the earlier of 23:59 hours (UTC) on the date ten (10) days after delivery or until completion of first loading (to be defined as hoses disconnected), the Hire Rate shall be US\$1 per day pro rata.

Thereafter and until expiry of the Firm Period (as per applicable clause), the Hire Rate shall be calculated using either (a) or (b) below in Charterers Option to be declared within ten (10) days of delivery

- a) Pricing from 00:01 (UTC) of the 11th day Delivery till end of Firm Period as per Clause C)
- b) Pricing from 00:01 (UTC) of the 11th day after Delivery until 23:59 on 101st after Delivery shall be calculated for the applicable month (M) at the average of all published BLNG1, BLNG2 and BLNG3 assessments for of M -2; thereafter pricing shall be as per Clause C)

C) JKM minus TTF Rate

The Hire Rate shall always be subject to a minimum Floor of US\$ 50,000 (US\$ fifty thousand) ("the Floor") and a maximum Ceiling of US\$ 145,000 (US\$ one hundred and forty five thousand) ("the Ceiling"),

The Hire Rate for month M shall be calculated in accordance with this clause and as set out in the table below, always subject to the Floor and Ceiling as applicable (inclusive). It is based on the monthly average of the daily differences in the spread between JKM and TTF as defined in Clause D below ("the JKM-TTF Spread"):

- i. If the JKM-TTF Spread is equal to or less than \$1.300 per mmBTU then the Hire Rate shall be US\$ the Floor.

- ii. For every full 0.010 increase in the JKM-TTF Spread above \$1.300 per mmBtu and up to \$5.300 per mmBTU, the Hire Rate shall be increased by US\$ 242.5 (US\$ two hundred forty two and fifty cents),. The full table of applicable hire rates can be found in Appendix J.
- iii. If the JKM-TTF Spread is equal to or more than \$5.300 per mmBTU then hire Rate shall be the Ceiling.

D) [B] JKM — TTF Spread

The JKM — TTF Spread for any calendar month M, where M is the month for which hire is due shall be calculated as follows:

- (1) Calculate JKM as per Step 1 below for each applicable Pricing Day;
- (2) Calculate TTF as per Step 2 below for each applicable Pricing Day;
- (3) Calculate the difference between JKM and TTF values as per Step 3 below for each applicable Pricing Day;
- (4) Calculate the arithmetic average of all the values in (3) above as per Step 4 below

All intermediate calculations shall not be rounded and the final daily JKM-TTF Spread calculation shall be rounded to four (4) decimal places.

Pricing Day; is every day during the Assessment Period on which both the quotations of Month M are published by the Intercontinental Exchange at <http://data.theice.com> and JKM is published in Platts LNG Daily.

Step 1: Calculation of JKM

"JKM" is the arithmetic average of all the JKM (M) frontline quotations published in the JKM Market Price Table for a Commodity Business Day, as published in Platts LNG Daily in the JKM Marker Price Table entitled AAOVQ00, during the Assessment Period;

"Assessment Period" means the period covering the second half (16th — month end (unless the 16th is not a Pricing Day, in which case the next Pricing Day until month end) of M-2 month and the first half (1st — 15th, unless the 15th of that month is not a Pricing Day, in which case the first half will end of the day immediately before the next Pricing Day) of M-1 month;

"Commodity Business Day" shall mean a day in respect of which Platts LNG Daily published prices for "DES Japan/Korea Marker (JKM)";

"JKM Marker Price Table" means the section headed "DES Japan/Korea Marker (JKM)" of the table "Platts daily LNG markers (US\$/MMBtu)" published in Platts LNG Daily;

"Platts Business Day" means a day on which both TTF is settled and JKM is published

"Platts LNG Daily" means the publication of that same name published by McGraw Hill Financial;

Step 2: Calculation of TTF

TTF for any day shall be = TTFA x FX1 where:

TTFA for any day is the arithmetic average of the quotations within the Calculation Period, of the futures contract Dutch TTF Gas Futures (Monthly) for delivery in Month M, published as settlement price, such average converted to EUR per MMBtu by multiplying by 0.293071 and rounding to the third decimal place;

FXI = the arithmetic average of the daily conversion rate US\$ against EUR for the same Pricing Day as published by European Central Bank on the website <https://www.ecb.europa.eu> in the section Statistics, Exchange rates, Euro foreign exchange reference rates - under the heading "Euro foreign exchange reference rates", subheading "Currency", column "Spot", line "US\$" for each day in which TTFA is priced; and

Calculation Period; is each pricing day between and including 16th calendar day of Month M-2 and the 15th calendar day of month m-1 for which month M is published by the Intercontinental Exchange at <http://data.theice.com>

Step 3: Calculate the difference between JKM and TTF

For Each day where both JKM and TTF have a quote/publication the TTF quote shall be deducted from the JKM publication creating a spread "daily spread"

Step 4: Calculate the arithmetic average

All the daily spread numbers in part 3 shall be averaged by the number of days on which there is a quote/publication of TTF and JKM therefore creating a monthly averaged spread which shall be used as the input for "TTF JKM Spread" in the Table of Hire Rates as per appendix J. The monthly average spread shall be rounded to two (2) decimal places.

E) Adjustment to Hire Rate Calculation: alternative index

If on or after the One Thousand and Ninety Fifth (1095) day of the Charter both parties deem the forward Baltic LNG freight indices (1, 2 and 3), or any other LNG Freight Index, to be mature and suitable for use in this Charter, then Owners and Charterers shall work together to explore the possibility to find a suitable structure to adjust the calculation of the Hire Rate pricing mechanism from the JKM-TTF Spread-linked to Baltic (or other) linked.

If mutual agreement as to the maturity or suitability of an alternative index cannot be reached, then the existing pricing in accordance with this clause shall continue on rolling 6-month basis until such agreement can be reached or the charter ends.

A mutually agreed third party may be consulted to assist in determining if the indices are mature and suitable for purpose. The Parties shall then continue discussions independently of the third-party consultant.

Owners and Charterers shall enter into discussions not later than 90 days prior to the 1095th day of the charter, in order to discuss whether an alternative index is mature

and suitable for use in this Charter, so that in the event of any agreement, a suitable structure can be implemented from the 1,096th day onwards. Owners shall initiate the process by communicating with the charterers in this respect".

Any adjustment to the Hire Rate Calculation or switch to an alternative index shall only be effective once agreed by both Parties in a signed addendum to this Charter party.

F) [D] Optional Period Hire Rate:

If Charterers exercises any of the Optional Periods, the Hire Rate in United States Dollars for any Optional Period ("Optional Period Hire Rate") shall be as set out in the table below:..."

23. It will be seen that the payment stipulation (subject to an initial grace period following delivery) is contained in the last part of Clause B, namely pricing "as per Clause C".
24. Clause C, itself headed "JKM minus TTF Rate", then states the Floor and Ceiling hire rates and then provides that the hire rate for any given month is based on "the monthly average of the daily differences in the spread between JKM and TTF as defined in Clause D below ("the JKM-TTF Spread")." Sub-paragraphs (i) to (iii) then deal with the different hire rates applicable. The key threshold for present purposes here is where the JKM-TTF Spread of prices is more than \$1.300 per MMBtu because that is the trigger for the increased rate.
25. There is a critical dispute between the parties as to what the term "the JKM-TTF Spread" means, but Briety accepts that the symbol "-" within that expression is a minus sign, not a hyphen or dash (notwithstanding one suggestion to the contrary by Mr Saparis at paragraph 42 of IS1 in respect to a reference to "JKM-TTF" in the course of negotiations). That is plainly correct. Step 3 of Clause D expressly refers to "deducting" TTF from JKM. It is in fact fortified by the express reference to a "minus" in the heading (I deal with the permissibility of considering the headings within the TCP below), but it is unnecessary to rely on that feature as well. Indeed, paragraph 16.2 of the POC expressly refers to the process of the subtraction of TTF from JKM.
26. One then turns to Clause D itself. There is no issue over the method of calculating the particular prices or their averages, as set out in Steps 1 and 2. Step 3 is headed "Calculate the difference between JKM and TTF" and then there is the reference to the TTF being "deducted" from the JKM price to create a "daily spread". The final part then refers to

averaging the daily spread numbers to create a single monthly averaged spread to be used as the input for the “TTF JKM Spread” in the Table of Hire Rates at Appendix J.

27. It is not necessary to reproduce the entirety of Appendix J here. It is sufficient to show an extract of the table, thus:

Appendix J – Table of Hire Rate

JKM – TTF Spread			JKM – TTF Spread		
(\$)	(US\$ per mmBTU)	Hire Rate (US\$)	(\$)	(US\$ per mmBTU)	Hire Rate (US\$)
0,00	2,00	66975,00	3,00	91225,00	
0,00	2,01	67217,50	3,01	91467,50	
0,00	2,02	67460,00	3,02	91710,00	
0,00	2,03	67702,50	3,03	91952,50	
0,00	2,04	67945,00	3,04	92195,00	
0,00	2,05	68187,50	3,05	92437,50	
0,00	2,06	68430,00	3,06	92680,00	

28. It can be seen that there are two columns, repeated across the table. The first is headed “JKM-TTF Spread” and the second is headed “Hire Rate (US\$)”. The gradually increasing hire rate can be seen as the spread figure increases.
29. Since Briety accepts that the calculation process starts from deducting the TTF price from the JKM price, it then has to explain what happens if TTF should exceed JKM. It does not agree that the outcome of such a deduction is simply that there is a negative number without more, though it does agree that this is the first stage of the calculation process (again, see paragraph 16.2 of the POC). If the process stopped there, then it is plain that any negative number (along with zero and indeed any positive number less than US\$1.3) could not trigger an increased rate because all are, by definition, not at least US\$1.3.
30. However, Briety contends that there is what I consider to be a further stage to the calculation which is then to view the negative number reached (where TTF is > JKM, yet still has to be deducted from it) as an “absolute value”. In other words, the “-” part of the negative number reached is now disregarded and what one is left with is an absolute value, which is no different conceptually from the absolute value to be derived where JKM > TTF so that the deduction process will yield a positive figure, i.e. one larger than zero. In this regard considerable emphasis is placed on the use of the word “spread” in Clause 10. What follows from this is that the calculation of the average “spread” over the relevant month is an average of all the absolute values, whether they derive from positive or negative numbers. So if, for example, on one day JKM-TTF was 1.5 (leaving out the dollar signs) and then the next day it was -1.5, the relevant average value is 1.5. That is because on both days, the absolute value was 1.5.

31. By way of contrast, according to the Trafigura Basis, the average in that example would be 0 (because each figure would cancel the other out). This is how the Invoices were in fact calculated. By way of example, the February 2022 invoice was for US\$1,400,000. That is 28 days at the Floor rate of US\$50,000. The underlying calculation for that invoice has added up the daily spread figures (mainly negative numbers because TTF mainly exceeded JKM), and divided the total by 28 so as to reach a daily average of US\$-2.53. Since that figure is plainly below US\$1.3, only the Floor rate is payable.
32. However, if the Briety Basis was applied there, one averages the absolute value of the spread each day, regardless whether the actual number was positive or negative and on that basis the true amount due was US\$3,124,660 so that there was a shortfall in payment of US\$1,724,660. See the table annexed to the POC and the detailed “rework” by Briety of the tables used by Fearnleys to calculate the invoices; the rework adds a further column headed “Absolute Value” which shows every spread in the previous column now as a positive number.

SUMMARY OF THE FACTUAL BACKGROUND TO THE TCP

33. Even when addressing simply the language and effect of Clause 10, it is necessary to set out the broad background to its making, not least with regard to key aspects of the business of trading on the LNG market and transporting and moving cargoes of LNG. Unless otherwise indicated, the facts and documents I set out below are either uncontroversial or cannot seriously be doubted. I have taken much of the material set out below from a draft Agreed Statement of Facts prepared by Trafigura which has been marked up by Briety, although it is not in a final agreed form, which itself makes references to agreed parts of documents such as the JS. I have also taken note of Section C2 of Briety’s Written Closing which itself makes reference to the Agreed Chronology and an almost agreed earlier factual narrative. Briety says that I should ignore the draft Agreed Statement of Facts. There is no reason to do that, where it is a helpful document and where the parts I have used are not, or cannot, be disputed.

The Parties

34. TEN, along with the other companies in its group, is a diversified energy transporter, listed on the New York Stock Exchange. It says that it is the largest Greek owner of oil tankers. Trafigura is the chartering entity within the Trafigura group of companies and at the time of the making of the TCP, Trafigura’s core business was the physical trading of oil and petroleum products, and metals and materials, and their transportation across the globe. The chartering

department of TST, also a member of the TEN group, exclusively manages the chartering of TEN's ships. TEN's preference is to fix its tankers (including LNG carriers) on long-term time charters on the basis of a floating hire mechanism where the amount payable depends upon a freight index or other variable measure. By way of example only, the Baltic freight indices for different kinds of ship are published by the Baltic Exchange by reference to various types of ship and route. The indices are the function of submissions by a panel of international shipbrokers of their assessment of the current freight cost for the relevant ship and route. TEN has not and does not (or at least typically does not) trade any of its LNG carriers on the spot hire market.

35. The market for LNG has developed and changed in the last 20 years. In particular, by 2019/2020, the US went from being an importer of LNG to being one of the largest exporters and the number of importers and other exporters of LNG had grown. This is reflected in the fact that the Baltic Exchange published its first LNG index in 2019.
36. In 2007, TEN took delivery of its first LNG carrier, the NEO ENERGY. It took delivery of its second LNG carrier, the MARIA ENERGY, in 2016. By late 2019, it had commissioned the construction of the Vessel.

Fearnleys

37. Fearnleys is a shipbroking firm based in London. Mr Tristan Jones is a broker working there and he features prominently in this case, although he has not been called as a witness. His evidence would have been very helpful, but I am not drawing any adverse inferences from the fact that he was not called. Fearnley's client was TEN for the purpose of obtaining a charter for the Vessel, and according to Mr Jolliffe, Fearnleys would be entitled to a 2.25% commission from TEN on completion of the charter. The commission would be levied on the hire payments. As already noted, Mr Jolliffe himself, as well as being a co-founder of TEN, also operates as a broker and he arranged with Fearnleys (to the knowledge of TEN) to take as commission for himself, 1% out of the 2.25% commission due to Fearnleys. In an email to Mr Tsakos and others dated 7 January 2020 about the floating rate structure proposed for the hire of the Vessel he said that:

“It has taken a lot of work and Tristan and I met frequently over the Christmas and New Year holidays to develop it. I have to say that this is Tristan's invention with what I hope was useful input from me.”

38. Then, on the day when the TCP finally agreed (though not yet signed), 14 July 2020, Mr Jolliffe wrote to Mr Jones' colleagues at Fearnleys, to say, among other things, that:

“I set Tristan the task of finding a new and inventive formula which would encourage charterers to negotiate with us on a bilateral basis and this has been the result.”

39. Mr Jolliffe also referred to Mr Jones as “the super broker” in an email to him dated 3 September 2020.

Use of time charters of LNG carriers by traders

40. LNG traders would often, though not exclusively, transport the LNG which they had purchased on time-chartered LNG carriers, as opposed to using voyage charters for a particular transaction at a particular destination. This meant that they had considerable flexibility as to where they would ultimately sell their cargo of LNG and when. This flexibility is important because of the varying spot price of LNG at any given time, at certain locations.
41. A key index of spot LNG prices prevailing in Asia is JKM. It is a benchmark for the price of LNG delivered to Japan, South Korea, Taiwan and China. Furthermore, Asia (in particular the Far East) was the largest import centre in the Pacific Basin and was by far the largest LNG demand/import centre globally, representing approximately 70% of global imports in 2019.
42. TTF is a key benchmark for spot prices of LNG delivered to Europe which was the largest import centre in the Atlantic Basin.
43. Other LNG benchmarks include “Henry Hub” (“HH”) (an FOB price for US LNG exports) and the NBP (National Balancing Point, a virtual trading location for the sale and purchase and exchange of LNG in the UK) as an alternative European benchmark price.
44. When LNG is transported from the US, the relevant carriers will travel towards Europe across the Atlantic and traders may offload their cargoes of LNG in Europe, depending on the price and customer, and then return their carriers in ballast to the US to collect another load. However, if the spot price of LNG in Asia is higher to the extent that it is worth transporting the cargo over a greater distance beyond Europe to offload in Asia, they have the flexibility to do that instead. In that way, they can arbitrage their trading.

The Arb

45. There is one feature of the LNG market which (as I find for the reasons given below) was well-known to traders at the time colloquially as “the Arb”. This phenomenon occurs when owners of flexible Atlantic Basin LNG cargoes, that is to say cargoes of LNG from the USA not earmarked for one particular destination only, would be incentivised to divert their trading from the closest available major import market (namely Europe), to a major import market much further away in the Pacific Basin (Asia, and predominantly Far East destinations), when JKM sufficiently exceeded TTF to outweigh the additional freight costs of the much longer (round) trip to Asia. The Arb tends to operate (i.e. is “open”) in the winter months when Asian demand for LNG rises significantly, causing prices payable in that region for the LNG to rise.
46. It was known by traders that when the Arb was open, it typically caused upwards pressure on spot freight rates. This is because there would be a reduced supply of LNG carriers available to hire, because more of them would be tied up on longer voyages, both to discharge their cargoes and then to return in ballast to the US to collect the next cargo. In this way, there would be a correlation between an increased price margin as between JKM and TTF on the one hand, and increased freight rates on the other.
47. For the reasons given below when I assess the relevant lay and expert evidence, I am quite satisfied that at all material times Briety was well aware of the existence and effect of the Arb, and that would be so for any reasonable owner or charterer which operated in the LNG market. Further, prior to the Russian invasion of Ukraine in February 2022, any reasonable owner and charterer would also know that typically JKM prices would exceed TTF prices when the Arb was open, and even when it was not, TTF prices did not exceed JKM prices for sustained periods of time.

Initial Discussions

48. The broker on this fixture, ultimately reflected in the TCP, was Mr Jones, who worked in the division of Fearnleys which specialised in LNG. He was effectively acting as the “middleman” between Briety and Trafigura in relation to the negotiation of the charterparty between the two in respect of the hire of the Vessel, although as already noted, his client was Briety.
49. It is common ground that, as one might expect, the initiative for the charterparty here came from Briety because it had commissioned the construction of a third LNG carrier which it

needed to have on hire once it had been built. To that end, Mr Jolliffe approached Mr Jones to assist Briety in finding a suitable charterer for the Vessel. Through Mr Jones, Mr Jolliffe first met Mr Murley and his then-boss, Ben Martin, in early 2019. This allowed Briety and Trafigura to get to know each other but there were no negotiations commenced at that time.

50. Later in 2019, Mr Jones pitched to Mr Jolliffe the idea of a charterparty based not on a fixed rate of hire, but a floating rate pegged to broker reports “or the commodity price and arb between USGC, TTF and JKM. Can work with a floor and a ceiling”, to quote from his email dated 26 November 2019, albeit that the suggested charterer at that stage was a company called Gunvor. On the following day, however, Mr Jolliffe emailed Mr Murley to suggest that they meet up in Geneva where Mr Jolliffe had to be on 9 December 2019. At the lunch, where Mr Jones was also present, floating hire rates were discussed and it was agreed that discussions should be taken further.

51. Thus, on 9 December following the lunch, Mr Jolliffe emailed Mr Murley saying, (among other things) that:

“Tristan will send you our draft formula for fixing our newbuilding to you on a "trader minded" profit sharing deal with a base and a cap rate where in the middle the rate is calculated against the traders own profit on the cargo!”

52. There were then the following communications, among others:

(1) On 10 December 2019, Mr Jones sent Mr Murley the following worked example:

“TTF: 4.5 \$/MMBtu
JKM: 7 \$/MMBtu
Floor: \$60,000
Ceiling \$130,000
Arb = 2.5 (7-4.5)
Monthly Rate: = \$60,000 * \$2.5 = \$150,000 but the ceiling kicks in and the rate is adjusted to \$130,000.”

(2) The email also attached a spreadsheet with filename “*Trafi Tsakos Floating*” and explained:

“Find attached a sheet that takes TTF going forward and JKM. The Historical tab uses NBP a little further back as we do not have the TTF data. The formula is as follows: =IF(ARB<1\$/MM Btu, Floor, Floor*ARB). ... As you can see for the historical prices recently and forward view the arb isn’t expected to open.”

(3) On the same day Mr Jones sent an email to Mr Jolliffe, in which he said he had:

“... shared a file with Trafigura this morning but they have an interest in the mechanism you described yesterday would be happy to share a tiered mechanism as described Please correct me but from what I heard it would look a little like this in a worked example:
Floor: \$60,000

Arb: JKM – TTF
 Profit sharing mechanism:
 $<1 = \$60,000 \cdot 1 - 1.5 = \$60,000 \cdot \text{Arb} \cdot 100\%$
 $1.51 - 2.0 = \$60,000 \cdot \text{Arb} \cdot 50\%$
 $>2.01 = \$60,000 \cdot \text{Arb} \cdot 25\%$

- (4) In response, again on the same day, Mr Jolliffe said that this

“... is how we discussed it but can you give a couple of monetised examples I can send to Nicos. In other words take different arbs between JKM and TTF in actual dollar terms and explain what TCE this gives us. Give three or four examples. Use a base of \$60,000 and a cap of \$85,000 at this time.”

- (5) Mr Jones also emailed Mr Murley to say that:

“What we attached is what we have presented to Nicos, I’ve sent an email to Michael this morning if we can also put the following which I think is close to the example discussed at lunch yesterday and used in tankers...”

Floor: \$50,000
 Arb: JKM — TTF
 Profit sharing mechanism:
 $<1 = \$50,000$
 $1 - 1.5 = \$50,000 \cdot \text{Arb} \cdot 100\%$
 $1.51 - 2.0 = \$50,000 \cdot \text{Arb} \cdot 50\%$
 $>2.01 = \$50,000 \cdot \text{Arb} \cdot 25\%$

- (6) On 11 December 2019, Mr Jones sent to Mr Jolliffe and Mr Murley a table of examples setting out four illustrations, in each of which JKM exceeded TTF, with an “ARB” column showing figures of 0.80, 2.00, 3.00 and 4.00.

- (7) Later that day, Mr Jones emailed Mr Murley saying “1.3 \$/MMBtu” and headed “Voyage Calculator – TTF-JKM.pdf” (the “Voyage Calculator”). The voyage in the calculator was from Zeebrugge in Belgium (close to Rotterdam) to Tobata in Japan and included the costs of reloading a cargo in Europe to be shipped to Japan. The same calculation was subsequently sent to tankers@tsakoshellas.gr (an account used and accessed by Mr Saparis, amongst others at TEN), copied to Mr Jolliffe; the Voyage Calculator calculated the cost of that voyage per MMBtu as US\$1.20 exclusive of LNG consumed or lost in the voyage and US\$1.32 on an inclusive basis and with an assumed freight cost of US\$55,000 per day. On any objective basis, the purpose of this calculation, consistent with the operation of the Arb, was to ascertain the additional cost of shipping a cargo of LNG to Asia for sale there, rather than in Europe; unless that extra cost could be covered by the increased revenue received from sales in Asia at a higher price than in Europe it would not make commercial sense to undertake that further voyage.

- (8) On 11 December, Mr Jones emailed Manolis Nerantzis; he was a specialist in freight derivatives and worked in TEN’s London office in 2019, for TST, and in fact adjacent

to Mr Jolliffe who was in the same building; he had previously asked for information showing historic spreads between JKM and TTF where they exceeded US\$1; attached to this email was Mr Jones' answer to that question in the form of a spreadsheet; column I showed "JKM-TTF" and how this would have (or have not) affected the basic rate of hire (i.e. Floor) assuming it was US\$40,000, US\$50,000 or US\$60,000; in some cases the figure in column I was a negative which is when TTF on a particular day exceeded JKM; as Mr Nerantzis observed the following day:

"... On your excel sheet the JKM vs TTF spread is depicted vertically on column I. From top that is 18 Nov 2019 (line 4) to 21 Jan 2019 (line 47) the spread fluctuates from -1.14 to + 1.74. ...".

- (9) Also on 12 December, after Mr Jones had passed on to Mr Jolliffe Trafigura's proposals for the floor, ceiling, trigger and hire increase increments, and after a meeting between them at TEN's offices, Mr Jones emailed Mr Jolliffe with "a 2 page pdf containing the information on the floating rate structure", which contained a chart headed "JKM-TTF Arb", and which labelled a line plotting "JKM-TTF", along with hypothetical illustrations premised on a trigger of US\$1.3; the email explained the rationale behind the structure chosen as follows:

"1. Two DES destinations have been selected, TTF and JKM, to align the interests of both parties. When the arb opens the cargo will be enjoying more profits and due to the locations and laden passage distances, vessel availability will decrease and market rates will rise, this mechanism captures this

2. 1.3 \$/MMBtu is based on the voyage costs of a 174,000m³ XDF HHI built vessel at the charter rate equal to the floor between Rotterdam (TTF) and Japan (JKM)"

- (10) Mr Jolliffe then forwarded this email and attachment to one of Mr Tsakos' PAs. The forwarding email said:

"As you are aware Tristan Jones and myself went to Geneva on Monday and met with Trafigura. All of you know, Trafigura are one of the world's largest trading houses and this year they will have traded some 15 million tonnes of LNG. As a rule of thumb each 1 million tonnes of LNG requires a ship and currently Trafigura only have 3 ships on period time charter. Patently they need more coverage!

Being traders, their trading desk prefer a rate that is attached somehow to the profit they make on their trading desk and we believe that after much discussion we have come up with a formula which actually equates the shipping market to the LNG gas market. Thus with a floor and a cap we are attaching our charter hire to the arbitrage between TTF (The European Hub) and JKM (Far Eastern Hub). As the arbitrage between the two hubs opens, patently it becomes more profitable to send LNG cargoes to the Far East rather than to Europe. Of course, if more cargoes go to the Far East rather than Europe, obviously the time charter rates increase, because there is more cargo going over longer distances thereby reducing the supply of ships. Thus the interests of the trader and the shipowner are aligned.

\$1.3 / MMBtu is based on the voyage costs of a 174,000 m³ XDF HHI built vessel at the charter rate equal to the floor between Rotterdam (TTF) and Japan (JKM). The base rate below which our charter hire cannot go and as proposed by Trafigura, is \$50,000 a day which equates

to an arbitrage of \$1.22 between JKM and TTF. You will note that in the attachments Tristan is showing a floor rate of \$55,000, above which he believes Trafigura will not go. As concerns a cap, that is proposed by Trafigura at \$125,000 a day which is equal to an arbitrage between JKM and TTF of \$3.40.

As concerns a \$55,000 floor that is equal to an arbitrage of \$1.3 and the \$125,000 cap proposed is equal to an arbitrage of \$3.40.

Attached are firstly, a graph showing how many times the JKM —TTF arbitrage has been above the proposed floor rate of \$1.22 between January 2010 to date. As you can see there were considerable periods. Also attached, is a PDF spreadsheet that shows the arbitrage that is required to reach certain charter rates.

Tristan has had several conversations with Trafigura Shipping in Geneva, and they in turn have had detailed discussions with their LNG trading floor. Tristan truly believes that a floor of \$55,000 and a cap of \$125,000 for 5 years is fixable. He doubts that we can achieve more than \$55,000 floor but perhaps we try \$60,000 floor and \$135,000 cap to reach \$55,000 / \$125,000.

There is also a small and by no means certain possibility that Trafigura could take the optional ship using exactly the same structure.

We can fix this vessel before the end of the year if we are prepared to follow this profit-sharing formula.

They have asked for reply by COB Geneva time tomorrow 13th December 2019.”

- (11) On 15 December, Mr Jolliffe sent another message to be printed out for Mr Tsakos; this read:

“Nicos –

Tristan Jones is preparing for you the statistical figures you have requested.

As you know the time charter rate proposed is based on the arbitrage between the TTF which is the price of LNG in Europe and the JKM which is the price in the Far East.

The price in Europe is always lower because it is nearer to the U.S. but as the price in the Far East goes up proportionally to Europe it suddenly becomes more profitable to sell cargoes in the Far East rather than Europe.

This means the traders have to ship the cargoes further, which of course also increases the charter rate as longer distances take ships out of the market for more extensive periods - a large increase in ton miles!

Thus, although the TTF and JKM are cargo indices they are also a benchmark for the freight as well, as since when the price in the Far East is much higher than in Europe the freight is bound to increase too. ...”

- (12) On 7 January 2020, Mr Jolliffe sent to Mr Tsakos and Mr Sapis, among others, a presentation prepared by Fearnleys concerning the proposed mechanism by then being discussed, stating:

“Please find attached hereto a presentation from Fearnleys regarding the floating rate structure we have been discussing with a number of potential time charterers. All of Trafigura, Gunvor and BP have shown substantial interest and have indicated willingness to time charter ships from us on a bilateral basis using this formula. Please appreciate that this is completely new and therefore no doubt some tweaking will be required using the expertise of our chartering department.

It has taken a lot of work and Tristan and I met frequently over the Christmas and New Year holidays to develop it. I have to say that this is Tristan’s invention with what I hope was useful input from me. Because a substantial amount of time work and effort has been expended, please study this carefully and please do not hesitate to contact Tristan if you would like to discuss any aspect of it. I would like to emphasise the following: ...

1) ... This TTF / JKM floating rate structure enables us to negotiate bilateral time charter deals with charterers as it is currently an exclusive product.

2) LNG traders like this formula as we make money when they make money. Unlike the chartering of oil tankers ... in the LNG market the final decision is taken by the actual physical trader of the LNG cargoes themselves. They therefore much prefer a cargo index to a Baltic shipping index. Also, if they wanted to do a deal based on a profit share linked to a Baltic shipping index they would put it out to tender.

3) This formula uses two indices – the European hub (TTF) and the Far Eastern hub (JKM). As the arbitrage between the two hubs widens it becomes more profitable to send more cargoes to the Far East than to Europe as they fetch a higher price in the Far East. The traders make more money per cargo and our time charter rate increases.

However, because the ton miles also increase when more cargoes are shipped to the the [sic] Far East rather than Europe so do the shipping rates in general. Therefore, this is an arbitrage between two cargo hubs but ALSO it simultaneously pushes the shipping index up too. It is a cargo hub based index but a shipping [sic] index too.

4) Page 6 of the presentation shows the comparison of what we would have earned in all of the years 2012 – 2019 taking the Fearnleys weekly average assessed spot rates against the TTF/JKM arbitrage floating rate. The red numbers are when our TTF/JKM arbitrage would under perform the spot market and the green numbers are when the TTF/JKM would have outperformed the spot. Nicos is in London next week and we can discuss this face to face with Tristan then. However, in the meantime please feel free to comment and/or to discuss this with Tristan. The quicker we can finesse this the quicker we can charter our new building and hopefully other ships too.”

- (13) On 13 January, Mr Jones sent an email to Mr Sapis and Mr Jolliffe to which was attached a spreadsheet containing various calculations of JKM-TTF and their effect on the hire rate; the JKM minus TTF figure was shown in a column headed “ARB”. It read thus:

“Morning George and Yannis,

Hope you both had a good weekend. As discussed last week see attached the profit sharing mechanism for your review in conjunction with looking through slide 5 of the presentation. Some points to note:

1. Column U is the sum of columns 0 through to T
2. Columns 0 through to T are derived by multiplying the % in row 12 * Floor (C5) * the applicable range number in Columns E, G, J or M”

Negotiations between January and May 2020 and the HOA

53. Between 30 January and May 2020, there were negotiations between the parties as to the substantive terms of the intended TCP, including the proposed Floor and Ceiling, the trigger for the increased hire rate and how it was to operate, in particular the increments by which the rate would increase where the monthly average of JKM – TTF exceeded the trigger. Briefly as such was not yet proffered as the chosen contracting entity by TEN.
54. At one point in the negotiations, TEN wanted to have the floating hire rate aligned to the newly introduced Baltic LNG index, but Trafigura was not prepared to agree this, although, as noted above, the ultimate TCP did include a non-binding clause to enable the parties to consider using this index after 3 years – see Clause 10 (E) set out at paragraph 21 above.

55. Ahead of completing the TCP itself, Briety produced a draft Heads of Agreement (the “HOA”) on 17 February. This was worked on as part of the negotiations, and on 15 May, the HOA was signed by Mr Saroglou, TEN’s Chief Operating Officer on behalf of a subsidiary whose identity would be notified by TEN. On 19 May, Mr Murley added the words “*TRAFIGURA MARITIME LOGISTICS PTE LTD*” under “*Agreed and signed by Charterers*” and added his name, title and date, and signature in manuscript.
56. The HOA anticipated the making of the TCP. It provided for a 5-year fixed hire with various options to extend. There were then the following terms:

“12 Rate of Hire....

During the applicable 5 (five) years firm period, the rate of hire shall be united states dollars ("firm period hire rate"): minimum US\$ 50,000 (US\$ fifty thousand) per day/pro-rata plus profit sharing as per below description and a maximum US\$ 145,000 (US\$ one hundred forty five thousand).

PRICING MECHANISM

To be inserted into the TCP based on the daily assessment of the Platts JKM (M-2 with further definition as per further terms) and the ice TTF 'M.; gas price (M-2 with further definition as per further terms) indices of which the difference in the spread between the two indices shall form the basis of the profit sharing as follows:

If the monthly average spread is equal or less than \$1.300 per mmBTU then the min hire of US\$ 50,000 is payable as monthly hire pdpr.

Thereafter every 0,1 upwards difference of the monthly average spread, shall amount to US\$ 2,425 (two thousand four hundred and twenty-five) up to maximum US\$ 5,3 (US\$ 145,000) as per below table, which shall be payable to owners as the monthly hire pdpr in question.

If the monthly average spread is equal to or more than \$5.300 then charterers shall only pay the max US\$ 145,000 as hire pdpr...

Spread and representative hire rate

Spread	
JKM - TTF	Rate (\$)
0.10	50000
0.20	50000
0.30	50000
0.40	50000
0.50	50000
0.60	50000

4.50	127600
4.60	130025
4.70	132450
4.80	134875
4.90	137300
5.00	139725
5.10	142150
5.30	145000

If on One Thousandth and Ninety Fifth (1095) day of the charter the forward Baltic LNG freight indices (1, 2 and 3), or any other LNG Freight Index, are mutually deemed mature then owners and charterers shall work together to find a suitable structure inclusive of a minimum US\$ 50,000 (US\$ Hy thousand) per day/pro-rata floor to transfer the pricing from JKM-TTF linked to Baltic linked. If a mutual decision cannot be reached, then the existing pricing shall continue rolling on 6-month basis on the existing 3Km-rn, structure until such agreement can be reached or the period ends.”

21 Governing Law

This HOA and the Charter and any non-contractual obligations arising out of or in connection with either of them shall be governed by and construed in accordance with the laws of England and Wales.

Any dispute arising out of or in connection with this HoA, including any question regarding its existence, validity or termination, shall be referred to the High Court of London - English Law to apply.

22 Charterers Management Subject Fee:

In the event that Charterers do not lift Charterers Management subject within six months of lifting subject I, Charterers shall pay Owners US\$1,000,000 (US\$ One Million). In the event that subjects 1 and/or 3 listed in item 23 of this HOA not be successfully lifted this clause shall not apply.

23 Subjects

The Charter is subject to:

1. Mutual agreement on all terms of Time Charter Party, to be confirmed by both parties no later than 15:00 London on 15th May 2020 basis this H.O.A.
2. Charterers' Management Approval, to be confirmed no later than six months from agreeing subject I.
3. Charterers detailed review of Vessels specification, to be lifted to later than 15:00 London 15th May 2020

Extensions of subjects not to be unreasonably withheld..”

Further Negotiations and the TCP

57. Following the making of the HOA, the parties continued to negotiate until 14 July 2020, although the TCP was not signed until 21 July 2020. It is not necessary to go into the detail of those negotiations at this stage.

58. I should point out, however, that Clause 46 of the TCP provided for the application of English Law in relation to any dispute, together with an exclusive jurisdiction clause in favour of the High Court in London, and Clause 47 provided as follows:

- “(b) The Clause, sub-clause and side headings have been included in this charter for convenience of reference and shall in no way affect the construction hereof.
- (i) This Charter constitutes the entire agreement between the Parties bound hereby and supersedes and replaces all other written or oral negotiations, representations, warranties, agreements, and undertakings made or entered into by or between Owners and Charterers with respect to the subject matter herein prior to the date of this charter.”

Post-Contractual Events

59. From December 2020 and through 2021, Briety received information from the technical managers of their existing LNG carriers and also from Fearnleys, showing how the Clause 10 hire rate mechanism would perform had the Vessel been delivered by then, based on past and projected future JKM and TTF prices. Briety also developed with Fearnleys an excel spreadsheet containing a formula to calculate JKM minus TTF (“the Spreadsheet”). This was ultimately used by Fearnleys, with checking by TEN personnel, to prepare ‘trial’ hire calculations in advance of the Vessel’s delivery, and thereafter actual calculations of hire due, on the basis of which Briety’s hire invoices to Trafigura were issued.
60. On 1 December 2021 Mr Jones and Mr Murley exchanged WhatsApp messages, commencing with Mr Jones saying:
- “Tsakos - Nicos has asked to amend the contract so that should JKM - TTF arb open (reverse to current) then Owners should also benefit. Premise of the thought is that it is a profit share and with an arb you will still be in the money.”
61. On 17 December 2021, Mr Jones sent Mr Tsakos a WhatsApp message containing a Fearnleys Daily Spread update showing the JKM-TTF spread was at “-7.346 MMBtu / US\$” and on 20 December 2021, Mr Jolliffe emailed Mr Jones saying:
- “Tristan - I know that it is an awkward subject but Nicos does want you to take the matter of the reverse arbitrage up with Olly. ...”
62. On 18 December, Mr Jolliffe and Mr Tsakos exchanged WhatsApp messages concerning Mr Jolliffe speaking to Mr Jones about the “*reverse TTF/JKM arbitrage*”.
63. The last two of these exchanges, and others, may well reflect the fact that at this time, the TTF price had just risen above JKM on certain days (see paragraphs 65 and 194 below).
64. Trafigura was not prepared to change the TCP to allow increased hire rates where TTF exceeded JKM without additional benefits for it. There were negotiations about this, but they did not result in any agreement by which the TCP would be varied.

65. On 30 December 2021, Briety issued the first hire invoice to TML for the January 2022 contract month, based on Fearnleys' calculations in the Spreadsheet, which showed that the daily spread was a negative number for Pricing Days 10, 14 and 15 December 2021. Overall, however, it resulted in a daily hire rate of US\$99,955.00 (i.e. substantially in excess of the Floor of US\$50,000) because the monthly average of JKM-TTF was a positive figure which exceeded US\$1.3, and Trafigura paid it.

Delivery of the Vessel and Later Invoices

66. The Vessel was delivered on 12 January 2022. It is common ground that in the months to which Briety's claim relates (January 2022 to February 2023 and October 2023) it issued invoices, having approved calculations of hire prepared by Fearnleys, which calculated hire in accordance with Trafigura's construction of clause 10, such that whenever TTF exceeded JKM the daily spread was shown as a negative figure, and that negative value was included in the calculation of the average monthly spread. Further, no matter how large a negative average monthly spread was, this was treated as being below the US\$1.3/MMBtu trigger.
67. In the months after January 2022, there were further discussions about changing the TCP in the light of periods of a negative JKM-TTF spread. However, no agreement was reached. Following a telephone call between Mr Murley and Mr Stanczyk of Trafigura, and Mr Tsakos with Mr Jolliffe listening in, on 7 October 2022, Mr Stanczyk emailed Mr Holtum also of Trafigura as follows:

"Hi Richard,
Olly and I had a VC with Nikos Tsakos.
The premise of the call was for Nikos to re-iterate TEN's position, which is that Trafigura has a moral responsibility to amend the Hire Rate structure of the Tenergy TCP even if this falls outside of the agreement of the Charter Party. Nikos re-iterated that TEN believes that the Tenergy should be profiting from the reverse arb or should be linked to the Baltic and not on what we have agreed in the contract. We re-iterated our position that the mutual intention of the Charter Party, right from the start of the discussion stage, was for the Hire Rate to be product related and based on the spread between the TTF Price and the JKM Price i.e. a West - East arb. It was not intended to be linked to (1) an arb that does not trade (the reverse arb) or (2) The Baltic Index (which is freight liquidity driven rather than product pricing).
We advised that we had already sent over proposals but are yet to receive feedback or counter proposals in writing. Do note, our last proposal was sent on the 16th September 2022.
We requested once again, that TEN send us in writing an email stating where they believe the TCP has been breached as we still have not received this, despite being told we would do so. Nikos has said that they intend to send us such an email so I will update you when and if we receive it."

68. On 14 October 2022, Mr Jolliffe sent an email to Mr Murley and Mr Holtum following a meeting where Trafigura had asked Briety to set out its position on Clause 10. The email stated as follows:

“Thank you for your time on Friday. As discussed, we set out below, in overview, the basis on which we believe that the charterparty does not operate in the way that Trafigura contends, and why it is our view that on a proper interpretation of clause 10, the applicable hire rate, in the present circumstances, should not be "the Floor", and should be calculated by subtracting the lower quotation (i.e. currently the JKM) from the higher quotation (i.e. currently the TTF), and then inputting that spread into Appendix J.

- First of all, it is mathematically impossible for there to be a negative spread between JKM and TTF — a "spread" is obviously not a number, it is the difference between two numbers, and the difference between two points cannot be negative. Clause 10 refers throughout to the difference between JKM and TTF as being a "spread", and it would defeat the purpose of clause 10 if it were applied in a way that ignores the intention that the calculation produce a "spread". In short — as the agreement specifically records, it was agreed between us that the hire rate would be based on the spread between two indices, not on whether a number is, in the abstract, mathematically bigger or smaller than another number.
- Even if that is not the case, a negative spread is clearly not provided for in the charter and the Hire Rate calculation does not work when the spread is negative. This is because (i) Step 4 requires us to use the spread which results from Steps 1 to 3 as the input in the table at Appendix J, and (ii) clause 10 C) provides that the table in Appendix J is a "full table of applicable hire rates". However, Appendix J contains no negative numbers (not surprising since a spread cannot be negative) and therefore starts at 0 — which means that it is not possible to input a "negative spread" (even if such a concept could exist, which we believe it cannot), and it is clear that there was no expectation that a spread (in the true sense of the word) could ever be negative if the table starting at 0 is described as a "full table".
- This must also be read in the context of the reference to "TTF JKM Spread" in Step 4, since it was clearly never the intention that the TTF must always be deducted from the JKM if the TTF exceeds the JKM — and Step 4 shows that there was no uniform approach to the order of the TTF and JKM and that the agreement refers sometimes to the TTF-JKM Spread and sometimes to the JKM-TTF Spread. Clearly, both are equally correct when "spread" is understood to be the difference between two numbers. As we mentioned when we spoke, especially given that we are a publicly listed company, we have a responsibility to properly and fully protect our shareholders' interests. If, therefore, this cannot be satisfactorily resolved in sensible commercial discussions, then we feel that we will unfortunately have very little choice but to start proceedings. If proceedings prove necessary, we are confident that the court will decide in our favour, resulting in a substantial liability for Trafigura (i.e. the missed hire, plus interest). It would, of course, be undesirable for both us and Trafigura to throw away money on legal costs, and so we are hopeful that we can come to a commercial agreement to the satisfaction of both parties.”

69. On 17 October 2022 Mr Murley sent Trafigura’s formal response, rejecting Briety’s claimed interpretation of Clause 10.
70. On 15 February 2023, Briety wrote to Trafigura, asking the latter to pay what it had calculated by then was the shortfall in hire. This was for the period January 2022 to February 2023. In other words, there were days in every month in that period where $TTF > JKM$. Trafigura refused to pay, and on 21 April 2023, Briety issued its letter before action. Trafigura responded on 19 May, denying any liability. As the dispute was not resolved, proceedings were issued, as already noted, on 9 August 2023. The total sum claimed by Briety is US\$29,309,539.46 plus interest (this was now inclusive of a further claimed under payment for the month of October 2023) and further sums if there are further underpayments (which there have not been, to date). Quantum is agreed if Briety succeeds on its construction or its rectification plea. If Trafigura’s time-bar argument succeeds, it is further agreed that this reduces the money claim to US\$14,766,830.00.

THE FACTUAL WITNESSES

Introduction

71. The factual witnesses' evidence was adduced primarily in respect of the following matters:
- (1) Factual matrix points and in particular the parties' knowledge (or not) of the Arb, its application and relationship to the Clause 10 calculation;
 - (2) Briety's rectification claim;
 - (3) Trafigura's rectification claim; and
 - (4) Trafigura's estoppel by convention claim.
72. I will deal with the various witnesses' evidence in context below, but first make some general observations about them as witnesses.

Mr Jolliffe

73. There is no suggestion that Mr Jolliffe's knowledge was not the knowledge of Briety in respect of the matters set out in paragraph 71 above. In other words, even if Mr Tsakos' knowledge was not as extensive as Mr Jolliffe's, this does not matter.
74. In general, I did not think that Mr Jolliffe was a satisfactory witness. For example, he (like Mr Tsakos) often used the mantra of "clarify" when dealing with the documents from or on behalf of Briety which were plainly seeking to amend the already-made TCP. The word "clarify" was plainly used as an afterthought, designed to avoid the conclusion that if Briety was seeking to amend the TCP so that it covered a "reverse arbitrage", Briety subjectively knew that this was not otherwise covered in the existing TCP. Such knowledge would, apart from anything else, be fatal to Briety's rectification claims. In this regard, the furthest that Mr Jolliffe was prepared to go was that "clarifying" the TCP might amount to "amending the charter" and that the two expressions were "a little bit interlinked". In reality, in my view, Mr Jolliffe knew that what was being sought was an amendment - see, for example, Mr Jones' message to him 1 December 2021 cited at paragraph 60 above, and Mr Jolliffe's email to Mr Jones dated 20 December 2021, cited at paragraph 61 above, which was plainly about the request for an amendment which is why the subject was "awkward".

75. Equally, Mr Jolliffe was reluctant to accept that he had described the Arb mechanism at the lunch with Mr Jones in Geneva on 9 December 2019 which Mr Jones then asked him to confirm in his email of 10 December - see paragraph 52.(3) - 52.(4) above, but in my view, he did describe it.
76. Finally, I refer to Mr Jolliffe's message to Mr Jones of 11 March 2021 asking:
"Tristan what does it mean when TTF is higher than JKM apart from disaster?"
77. Here, Mr Jolliffe unrealistically refused to accept that it would be a "disaster" for Briety because only the Floor rate would be payable; instead, he said that this remark was just a joke. I do not accept that.
78. What Mr Jolliffe did accept is that he has a personal financial interest in the outcome of this case, because of the commission he earns as a broker which is calculated by reference to the hire payable.
79. I do not agree that I should accept all of Mr Jolliffe's evidence as suggested by Briety. Nor do I agree that his own understanding was "relatively limited", for the reasons already given. Insofar as he accepted that the focus in December 2019 was on tonne miles where JKM was higher than TTF, but that this changed later, I do not see such evidence as being significant. Mr Jolliffe accepted that the materials put before him only dealt with the situation (as per the Arb) of the higher JKM prices creating a "pull" of ships from the US to the Far East and thereby increasing tonne miles; however, he did not give a real answer to the point that none of the materials showed a putative interest in tonne miles (and hence less availability of vessels) where TTF exceeded JKM. All he said was that if you drag ships one way you create a shortage another way, the market was "an evolving thing", and every action promotes a reaction. I did not think that this added very much.

Mr Tsakos

80. Mr Tsakos is a very experienced ship-owner, operating through various corporate vehicles. He has a degree in economics from Columbia University, a Master's degree in shipping, trade and finance from London University and an honorary Doctorate for his pioneering work in the equity finance market for shipping.
81. Like Mr Jolliffe, I found that he was an unsatisfactory witness. At times, he portrayed himself as lacking knowledge or understanding of arbitrage matters which I found implausible.

82. Also, when confronted with Mr Jolliffe's email to him dated 12 December 2019 (see paragraph 52.(10) above), which correctly summed up the Arb, Mr Tsakos said that he did not recall seeing it although he was not saying that he did not, however even if he did see it, it did not make much sense to him at the time. I did not find that plausible. I am quite sure that (a) he would have read it fully, as it was an important communication on a large and important deal he was making, and (b) he clearly understood its import.
83. By way of a further example, Mr Tsakos refused to accept that he had required certain figures in December 2019, even though two emails from Mr Jolliffe (including one directly to him) clearly state that Mr Tsakos had indeed required the figures. In addition, in response to the second email, when Mr Jolliffe said to Mr Tsakos that Mr Tsakos knew that the proposed hire rate was based on the Arb (as described by Mr Jolliffe) (see paragraph 52.(11) above), he said in evidence that he did not know this. That was not credible in my view.
84. Nor is his suggestion that he understood the expression JKM-TTF to be neutral because the “-“ was a dash, not a minus sign, which is not even Briety's own case now.
85. Finally, in relation to the graph attached to Mr Jolliffe's email to him dated 12 December 2019, he said that it would have taken him some time to understand it. Yet it clearly showed, under the heading “JKM-TTF Arb”, periods where, sometimes, this was a negative figure. I am sure that Mr Tsakos could and did see and understand this at the time.
86. When Mr Tsakos said that he did not want this dispute to end up in court, I am sure that he meant it. In his mind, it was only morally fair for Trafigura to alter the TCP so that the “one-way bet” became a “two-way bet”, without Briety having to give anything extra to Trafigura. As he saw it, Trafigura could afford to do this because it would also profit if any negative spread exceeded US\$1.3. The problem here is that led him to take an implausible approach in evidence to some of the questions put to him. As already noted, he, like Mr Jolliffe, adopted the mantra of “clarification” rather than amendment, even though it was the latter which Mr Jolliffe said he was seeking - see paragraph 60 above.
87. I do not accept, therefore, that Mr Tsakos set out always to assist the court properly or that his evidence should be accepted without more, as Briety has submitted.

Mr Saporis

88. Mr Saporis was a more straightforward witness than either Mr Jolliffe or Mr Tsakos, in that he made some realistic concessions. Thus, he accepted that the graph referred to at paragraph 85 above did show positive and negative numbers. He also accepted that he, too, saw Mr Jolliffe's email of 12 December 2019 and how the arbitrage referred to would produce an increased hire rate. He added that he probably did not pay as much attention to it at the time as he should have done. Also, in relation to the spreadsheet attached to the email from Mr Jolliffe to Mr Nerantzis dated 11 December 2019 (see paragraph 52.(8) above), he accepted that where $TTF > JKM$, it resulted in a negative number.
89. On the other hand, in relation to the spreadsheet attached to Mr Jones' email to him dated 13 January 2020 (see paragraph 52.(13) above), he said that although the calculation shown was JKM minus TTF , it could have been TTF minus JKM ; but there was no basis for suggesting that.
90. In relation to another spreadsheet sent to him on 26 May 2020, about 2 months before the TCP was signed, he accepted that as framed, if TTF was deducted from JKM as required, where $TTF > JKM$, a negative number would be shown. However, he said that he had raised with Mr Jones many times that they were not deductions, but rather a spread. Later, he said that a minus figure would not cause any issues for him, but also that he had spoken with Mr Jones and told him that this was not how he understood the position. That evidence is itself not very clear but in any event there is no document suggesting that Mr Saporis was pushing back, as it were, on the formula as described in those spreadsheets.
91. Later, Mr Saporis was shown a message from him, saying that Mr Tsakos was screaming at him and was "pist off" because they were getting "the min" (i.e. the Floor). Mr Saporis said that Mr Tsakos was trying to get "clarification" which, again, I think he was using as a mantra, like Mr Tsakos himself and Mr Jolliffe.
92. Finally, when shown the message from Mr Jolliffe to Mr Jones from June 2020 referring to the HOA as non-binding, Mr Saporis (like Mr Jolliffe now) said he regarded it as binding because of its governing law and exclusive jurisdiction clauses. However that evidence sounded to me like an afterthought, rather than a view he actually held at the time.

93. I therefore do not accept that Mr Saparis was a consistently direct and careful witness whose evidence (where it was adverse to Trafigura) should be accepted, as submitted by Briety.

Mr Murley

94. Briety contends that Mr Murley was an unsatisfactory witness on whom I should place no reliance at all. It goes further and invites me to conclude that he positively sought to misrepresent his recollections in both his written and oral evidence. In support of those submissions Briety set out at paragraph 124 of its Closing Submissions a total of 13 specific examples.
95. I deal with those examples first, before expressing my own view about his reliability as a witness. I do so by reference to their appearance as numbered subparagraphs of paragraph 124.
96. As to (1), I do not think that his oral evidence was inconsistent with his WS on the question of proxies. He did consider that the Arb did produce a good proxy for freight rates because of how it worked. As he put it in evidence (T3/9-10):
- “My aim was, sir, as I have just repeated, which was to look at a concept that we were familiar with and that we have been trading as long as we have been trading LNG, which was the Atlantic to Asia arb, and ensuring that the events when we are paying more hire under, ie when tonne–miles increase, we were earning more money and therefore can give owners more money. So, yes, we anticipated from our side it would have a link to the value of the ship.”
97. As to (2) and (3) taken together, much was made of what Mr Murley said in paragraphs 146 and 147 of OM1, as compared with the content of the email from Mr Stanczyk (also at Trafigura) to Mr Holtum dated 7 October 2022, relating to the video call he and Mr Stanczyk had with Mr Tsakos on that day, and which has already been recited at paragraph 67 above. The substance of what is in paragraph 146 of OM1 does, in my view, reflect that of the email.
98. It is true that in OM1, Mr Murley said that Mr Tsakos had never previously alleged breach, while the email recounted that TEN had previously been requested to send an email explaining how they said that the TCP had been broken, but no email had yet been received. Mr Murley said that in correspondence, Briety had threatened legal action but had still not yet said what Trafigura had done wrong. Indeed, of course, at this stage, Fearnleys were still issuing invoices to Trafigura on behalf of Briety on the basis of calculations as contended for by Trafigura. Reference is made by Briety to the words “even if” in the email, as if Briety was in

fact asserting that Clause 10 was not limited to the one-way Arb. However, we know what Briety's position was by virtue of the original emails on the question of amendment (and see my comments on the evidence of Mr Tsakos and Mr Jolliffe above). I do not think that there is anything of significance in Briety's criticism of Mr Murley's evidence here.

99. As to (4), at paragraph 139 of OM1, Mr Murley refers to the conversation with Mr Jolliffe and Mr Jones during which they were all agreed about the meaning of Clause 10 i.e. that it dealt only with the Arb. There is ample documentation to show that this was indeed the belief of Mr Jolliffe and Mr Jones, even if Mr Jolliffe shied away from this in evidence (see my comments on him above); Briety makes reference to the WhatsApp messages between Mr Jolliffe and Mr Tsakos on 11 May 2022, and in particular Mr Jolliffe's recounting that, having spoken to Mr Murley,

"...They feel not only the clause itself but the intention of the clause is very well agreed and if we feel the wording also covers a both ways arbitrage then why are we asking to change it and offering incentives to do so. They appreciate none of us saw the possibility of the War in Ukraine which has reversed the arbitrage but geopolitical events often play a role in shipping just as they have now pushed tanker rates up. All of this is a summary of Olly's comments..."

100. This was said to show (if Mr Jolliffe's recollection was correct) that Mr Murley knew that Briety thought at the time that the calculation went both ways. However, the fact is that at this stage and indeed before and after, there were various discussions about amending the TCP to achieve this. Briety had not yet articulated a case as to why the TCP already did so and as Mr Murley said, that did not arise until later. In any event, what Mr Jolliffe said in his WhatsApp messages to Mr Tsakos was only a summary of Mr Murley's position; indeed, when asked about this, Mr Murley said:

"Q. You knew that on 10 May 2022, owners felt the wording covered a both ways arbitrage but were trying to reach an amicable resolution, didn't you?

A. No, sir, I didn't and, again, I was not involved in these WhatsApps so I can't comment on Mr Jolliffe's recollection. But, again, I would repeat my point that, as you can see, throughout 2022, Mr Tsakos got more and more frustrated with the deal and with the fact that we wouldn't just change the TCP as he wanted. And I think the way I would read this is he wanted us to include the reverse arbitrage because if the reverse arbitrage had been in play at this point, he would have earned a lot of money, despite the tonne-mileage being very small.

Q. Just to test this. You say it is about Mr Jolliffe's 7 recollection, but actually we have a document here from 11 May where he is updating Mr Tsakos. Are you now suggesting that because your recollection of May 2022 is so clear as to the clear words that were used by Mr Jolliffe and Mr Tsakos on the 11th, that you did not say "if owners feel the wording also covers a both ways arbitrage, why are owners asking to change it and offering incentives to do so?" Is it your evidence that you did not say that?

A. My memory from this call, sir, is it was not a categorical point to say it is included. It was a request to change—to change it. And I believe, at this point, the owners were still invoicing us the floor without any dispute."

101. That seemed credible evidence to me.

102. As to (5), Briety refers to Mr Murley's email of 4 January 2022. This stated as follows:

"Hey Nikos,

Whilst we appreciate your concern on the recent product market dynamics with regards to our deal together it is difficult for us to grant Tsakos a share on the TTF over JKM arb without changing the existing deal.

As discussed this is due to

- In a market where TTF is above JKM, shipping becomes weak as a result (due to the reduction in tonne mile) and actually the vessel will have value significantly below the floor (right now we are employing ships at \$0k per day) and therefore there is no 'profit' to share unlike what we have with the existing arrangement in which as the Arb opens shipping benefits from increased tonne miles and therefore higher implied rates.

- Even if the above wasn't the case, the existing JKM over TTF pricing fits against the hedges of our long term Cheniere FOB contract and therefore the increase in TTF flat price does not lead to any profit for Trafigura as what we make on the physical we lose on the hedges.

- Giving Tsakos profit share on the inverse TTF over JKM therefore is an absolute cost and exposure to Trafigura without any corresponding gain.

After our back and forth and internal discussion here we realise this is important to you and we want to start this long term partnership in the right way so can therefore propose the following.

Existing TCP is to be changed as follows

- The deal will be changed whereby TTF over JKM and JKM over TTF have the same 'profit share' parameters. Practically speaking no profit share shall be paid where the JKM over TTF arb between 1.3 and -1.3 and the below will apply in all other cases.

- o Floor of 42,000

- o Ceiling of 145,000 (unchanged)

- o Profit Share above \$1.3 mmbtu (unchanged)

- o Hire Increments to be paid of \$2,425 per 0.1 mmbtu move in arb. (unchanged)

- <!--[if !supportLists]--><![endif]-->This will then give Tsakos the mirrored earning potential on TTF over JKM that you have on the existing JKM over TTF structure

If this is something that could be of interest please let us know and we can elaborate further with you and your team.

As discussed I'm happy to come and meet you in Zurich this week to discuss further if that works for you..."

103. Mr Murley was asked why no detailed calculation had been done in relation to the new proposed Floor of US\$42,000 (instead of US\$50,000) as the price for changing the TCP; he said that this was because at the time, it would result in free money to Trafigura (by reason of the drop in the Floor) since they did not see a way for TTF to go above JKM at that point; although not put to him at the time, Briety says that this explanation could not be correct because TTF was already higher than JKM at that point. In fact, TTF had exceeded JKM on 5 pricing days in December 2021, although this did not affect the average for the month which was positive and exceeded US\$1.3. Reference was also made to January and February 2022. However, in January 2022 (prior to the Russian invasion of Ukraine) the (Daily) Spread was positive each day save for 3 cases, which were towards the end of the month. In February, the position changed very substantially, but I fail to see why Mr Murley was simply making up the explanation he gave in oral evidence as to why there was no detailed calculation of the new proposed Floor as at 4 January. Indeed, whether Trafigura did or did not run a detailed calculation at that point is hardly a key matter in dispute. In fact, certainly as at 1 December 2021, Mr Jones' view was that it was very unlikely for the so-called reverse arbitrage to

operate so there would indeed be a “freebie” for Trafigura; see the WhatsApp exchange quoted at paragraph 118 of OM1.

104. As to (6), at paragraph 119 of OM1, Mr Murley used 3 phrases in italics which he said had been used in the telephone discussions with Mr Jolliffe and which had earlier been in a WhatsApp exchange; this was said to be implausible, but I can see no reason why Mr Murley could not have used those 3 particular phrases later on as they were the key points in what by now Briety wanted, i.e. an amended profit share and coverage of reverse arbitrage. As it happens, sub-paragraph (6) here misquotes the question which was asked of Mr Murley which was about the use of those particular 3 phrases, not all the phrases from the WhatsApp messages - see T3/47.
105. As to (7), it is said that Mr Murley stated that Mr Jolliffe had agreed Trafigura’s interpretation of Clause 10 since 2019 and yet that clause was not in existence in 2019; when this was put to him, Mr Murley said that the concept (behind the clause) had been agreed since then; in my judgment there is nothing in this criticism.
106. As to (8), this deals with Mr Murley’s account of his telephone call with Mr Tsakos while driving his car in New York, including that Mr Tsakos had not said that he thought the arbitrage coverage was two-way and that he was only asking Mr Murley to change the TCP; Mr Murley accepted in evidence that he would have reported on this back to Mr Jones. However, in a subsequent WhatsApp message between Mr Jones and Mr Saporis, Mr Jones said that he had spoken to Mr Tsakos, who had spoken to Mr Murley; Mr Jones suggested that in the conversation between Mr Tsakos and Mr Murley there had been two views expressed in the sense of there being two different interpretations of Clause 10; Mr Murley did not accept this and suggested that Mr Jones, when speaking to Mr Saporis, may have been acting diplomatically as the broker not wishing to express the real position which was that Briety was simply wrong in its interpretation; that suggestion is plausible, but in any event it all depends on what “two views” means here. After all there were certainly two views, in the sense that Mr Tsakos was insisting that the TCP be changed, effectively without charge, while Mr Murley was prepared to engage in considering a change, but as explained in the call, it would come at a price; I do not think there is much in this point.
107. As to (9), at paragraph 114 of OM1, Mr Murley referred to an email from Mr Jones to him dated 14 June 2021 which enclosed a spreadsheet showing JKM-TTF figures; this paragraph

clearly suggested that the email and spreadsheet related to the TCP, but on being shown them during cross-examination, Mr Murley fairly accepted that these materials did not appear to relate to this deal at all, in particular there was no reference to a trigger and the floor and ceiling figures were also different. That said, this email and attachment were clearly sent to him and they appear to relate to an Arb-type calculation. It was suggested that the minus figure at Row 87 could not have stood out to him at the time if these documents did not refer to the TCP. His reply was that in any event this negative figure was a feature of Arb-type calculations; I see that, even though Mr Murley was clearly wrong to have suggested that these documents referred specifically to the TCP deal and it is not apparent how the suggestion to the contrary emerged in paragraph 114 to begin with.

108. As to (10), Briety also takes issue with Mr Murley's very definite recollection of the lunch on 9 December 2019 with Mr Jones and Mr Jolliffe; in particular it was suggested that his specific recollection that there was agreement on the concept of a one-way Arb, presented by Mr Jones and Mr Jolliffe to him, was wrong and implausible; this was said to be because they all consumed 2 bottles of wine and no notes were taken at the time, with his WS only being written around 5 years later in 2025. I see the force of the point that such a clear recollection may seem unlikely, and of course, I bear in mind the well-known observations of Leggatt J (as he then was) in *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm); on the other hand it is supported by the contemporaneous documents - see in particular the interchanges between Mr Jones and Mr Jolliffe referred to at paragraphs 50, 51, and 52.(1) - 52.(4) above; also this was an important conversation for Mr Murley, because it involved a substantial new deal to take a new-build LNG carrier, where Mr Jones and Mr Jolliffe were plainly proposing the idea of linking a floating hire rate to an open Arb, to a prospective new customer for the Vessel. Even if Mr Murley's recollection was not quite as detailed as he has said, I reject the suggestion (which he denied) that he was in effect making it all up. In this regard, and by way of contrast, I refer back to the difficulties I had over Mr Jolliffe's evidence on these points.
109. As to (11), a further suggestion put to Mr Murley concerned his recollection of the draft HOA submitted to him by Mr Jones on behalf of TEN on 18 February 2020, while the terms of the TCP itself were being negotiated; his evidence was that he did not see anything in how the hire formula was described in the HOA which was different from his existing understanding of the operation of the one-way Arb with JKM minus TTF (see for example the email from Mr Jones of 10 February 2020 discussed at paragraph 55 (a) of OM1); however, in evidence, he added that his own counter-offer to the draft HOA profit on 18 February 2020 did feature

a “deduction” or “minus” expression in it, or something similar, and that one draft of the HOA implied a deduction of TTF from JKM; however he could not recall exactly the wording. In fact this was not correct - the counter-offer retained the previous wording on the calculation in the draft that had been sent by Mr Jones on 18 February 2020, which in fact Mr Murley accepted in paragraph 57 (e) of OM1; in the light of this error (at least in his oral evidence) Briety questions Mr Murley’s general ability to recollect; I agree that there was this error but in the overall scheme of things, I do not consider it to be of any great significance.

110. As to (12), at paragraph 59 of OM1, Mr Murley said that when he ran the calculations back in February 2020, the cost difference between the two journeys, from the US to Europe, on the one hand, and from the US to the Far East on the other, was around US\$1.3; this was a recollection from back then because he did not save the calculation which he did at the time based, as it was, on a template; in evidence he said the difference was around US\$1.2. I see the difference in the figures, but again I do not consider this point to be very significant.
111. As to (13), at paragraph 91 of OM1, dealing with his addition of Steps 3 and 4 to the draft Clause 10 of the TCP, Mr Murley said that while the discussions and understandings to date had always been based on JKM minus TTF,

“I wanted to make each step of the calculation crystal clear so that there could be no possible basis for future disagreement.”

112. It was suggested to him in cross-examination that the only possible disagreement he could have had in mind was Briety thinking that the spread also worked if $TTF > JKM$; he denied this, and said that there could have been a disagreement over other things as well, like the exact output of TTF or JKM. I agree that Step 3 would not actually deal itself with any potential dispute over the actual output, although Step 4 did explain the monthly averaging process very clearly; I accept that Mr Murley’s answer here was not logical. I think that the sense of his paragraph 91 was actually that he wanted to make the Step 3 process extremely clear so that there could be no ambiguity about it later, or any disagreement as to how the process was to operate; however, the real point is whether this means that he positively understood and believed that (a) Briety’s own understanding up to that point had been that the price mechanism works both ways and (b) he was somehow “slipping in” what he claimed was an uncontroversial change to the wording to make things absolutely clear, when in reality he was hoping to change the substance of the wording without TEN; as for that suggestion, and for the reasons I give below, I consider this to be a wrong suggestion.

113. I have dealt above with the numerous criticisms made of Mr Murley's evidence at some length, not merely because they were set out in the Closing Submissions but also because they are by way of example the foundation of Briety's contention that I should not place any reliance on his evidence at all. I disagree with this. There were some inaccuracies in his evidence, of course, and on occasion, his recollection was not as good as he said or thought it was. In general, however, I thought he was doing his best to assist the Court, he gave plausible explanations why his recall was detailed, for example about his knowledge of how long a particular car journey would take or a meeting where he recalled correctly that Mr Jolliffe's son was also present, and also, his recollection generally was supported by the contemporaneous documents.

THE EXPERTS

Dr Odedra

114. I have referred to Dr Odedra's core experience at paragraph 15 above. In addition, she has had extensive experience in the negotiation and performance of LNG sale and purchase agreements ("SPAs") and shipping portfolios. She dealt with SPAs and time charterparties during her time at BG Group as well as in subsequent roles in the LNG industry. She has extensive knowledge of wider industry practices and was an active participant in the wider LNG industry. Between 2010 and 2015, she was a board member of the Society of International Gas Tanker and Terminal Operators (SIGTTO), a major industry body and technical forum in the LNG industry as well as Chair of the Commercial Study Group of the International Group of Liquefied Natural Gas Importers (GIIGNL) which is a non-profit organisation comprising around 70 global LNG importers.
115. However, notwithstanding this extensive experience, her written and oral evidence contained a number of unsatisfactory features.
116. First, although she denied it, parts of her report amounted to legal argument. The fact that she may in some cases have been asked or instructed to engage in it by the lawyers does not make any difference. Thus, for example, at paragraph 8.1.12 of AO1, she says that she agreed with paragraph 8.2 (e) of the Reply whose last sentence was that the material referred to therein "supports Owner's construction". Further, at paragraph 8.2.1, she recounts that she was asked to assume that Clause 10's express purpose was a general profit-sharing agreement (as pleaded in connection with the HOA at paragraph 8 of the Particulars of Claim), and on that basis, she

opined at paragraph 8.2.2 that Briety's construction served that purpose but Trafigura's did not. Finally, at paragraph 8.7 she considers that from a commercial perspective Trafigura's interpretation of the operation of clause 10 would depart from the economic function of a "profit share" mechanism which in her understanding was typically intended to reflect freight market strength. It is said that this is legitimate expert opinion. I do not agree, but even if it was, it hardly adds anything since once the assumption of a general profit share is made, the outcome she refers to almost follows automatically, at least if it is assumed (in fact it is contested) that charterers would make profits not only from the Arb but the supposed "reverse arbitrage". In fact there is a further problem because she says that one of the problems is that there is a cap on the owner's earnings, but there is no dispute about that - the question is what is the subject of the cap.

117. It is correct that at paragraph 1.3 of AO1, she states that she does not express any view on legal interpretation or contractual construction. The difficulty is that this is what she does in the examples cited. As an objective expert, even if asked to express such views, she should have refused to do so.
118. In addition to proceeding on the assumption that the underlying purpose was a general profit share, she says that in her experience profit shares are about sharing upsides deriving from many factors, but that simply begs the ultimate question of whether Clause 10 amounts to a general profit share agreement at all. I simply do not see how this can be used as the basis for a meaningful expert opinion.
119. Also, as it seemed to me, there were times when Dr Odedra found it difficult to accept that parts of her evidence were founded on an assumption about such a profit share agreement. At T2/24-25, she initially denied that she was making an assumption but ultimately accepted that she was, when asked by me.
120. On the question of Australian cargo going to Europe, she said this at paragraph 4.3.5:

"On the other hand, despite Australia's geographical proximity to Asia, Australian LNG cargoes have previously been delivered to the U.S. between 1997 and 2005, and more recently to Europe following the Russia/Ukraine war, whenever price signals make such trade routes more economically advantageous. The key point here is that while Australian LNG traditionally follows trade routes within the Pacific Basin, it will shift to Atlantic Basin trade routes if there is a compelling economic incentive to do so."
121. That gives the impression that sometimes, Australian cargoes went to Europe. In fact, as far as her report was concerned, there had only been one Australian cargo (out of 1,000 LNG

cargoes) that went to Europe as opposed to Asia at the time of the JS, and that was in November 2022 in the unusual circumstances of the invasion of Ukraine, and after the relevant factual matrix period which was 2019 and 2020, when there was no such cargo. It is true that Dr Odedra added that she had been told recently by some European importers that in fact there had been 5 such cargoes from Australia and some cargoes to Turkey, but none of this was in her reports.

122. Accordingly, the impression given in paragraph 4.3.5 of AO1 is overstated. Dr Odedra sought to explain this by saying that a cargo can go to a different destination from the usual if there was an economic incentive to do so. As a matter of theory, that is unobjectionable but it does not assist where the question is what actual trading movements there were always likely to be, in the minds of reasonable owners and charterers prior to the making of the TCP.

123. Finally, I agree with Trafigura that sometimes, Dr Odedra's answers, while given confidently, did not amount to much by way of specifics as opposed to general theorising. This is shown in the lengthy explanation she gave as to why it was that there would inevitably be a vessel scarcity problem (which would lead to an increase in freight rates) whenever there was an LNG price increase in whatever location. Ultimately, she said it was all about scheduling (T2/82):

"I think we have to separate out what is a base case. The base case is you schedule your cargoes on an annual basis . If you are going to Asia, you will need more ships. Now, ultimately, you put that into your base schedule. That is your annual delivery schedule. So, you have factored that in already. You have already taken those ships into your portfolio and you are delivering happily to Asia. That is not ships you are talking out of the spot market. That is your base position . Every portfolio trading company —Trafigura included and the companies I have worked for —we have a buffer . We have ships that can go to almost all the locations we ever want them to go to, depending on where we want to go to and when the market goes up or down, we can spot charter in or out. The spot charter market is very, very thin, it is very, very thin. For example, in the report I show, it is less than vessels , which is less than 4% of the overall shipping market of about 600 vessels. So, if you are merrily going along to Asia and suddenly Europe has become your market, that one ship you are taking to Asia, you now need to take to Europe and you are doing your round trips. All of a sudden freight rates have gone up because prices have gone up. That is just a natural reaction. So the spot market, which already thin and illiquid, people start chartering in those ships to be able to pick up cargoes from anywhere they can to take them into Europe or take them into Asia, whichever the premium market is, and that is what drives up the spot market rate. It is the thin illiquid spot market that we are talking about, not the base shipping position. The base shipping position is what everybody already has."

124. This was the culmination of her explanation that started at T2/77. I followed what she was saying, but ultimately it struck me as "waffle" and speculation, especially as it was unsupported by any significant reference to existing materials. The same is true, in my judgment, of Dr Odedra's "reallocation pressure" theory but I will deal with that in context, below.

Mr Terzopoulos

125. In general, I thought that Mr Terzopoulos was a reliable witness, doing his best to assist the court. It is correct that he spent many less years working in the LNG market itself than Dr Odedra. His experience effectively started in 2014 when he moved to the very substantial ship-owner TMS, which in 2019/20 was the largest LNG shipowner in the world, to charter LNG vessels for it, and he accepted that it was a steep learning curve. During his time there he was involved in 11 new-build charters and 120 other time charters secured on the spot market. He then moved to the chartering department at Maran. Neither of these two employers themselves traded in LNG. In his present consultancy he works for shipowners and charterers, traders and portfolio players. In his time since 2014, he said that he had chartered more ships for an owner than almost anyone else in the LNG market. So at the critical time for factual matrix purposes, namely 2019 and 2020 he had been active in the LNG chartering market for some 5-6 years.
126. Mr Terzopoulos was willing to make realistic concessions; so, for example, he accepted that the LNG carrier spot freight market was thin and illiquid, compared to other shipping segments in 2019 but added that it had become much more liquid by 2019-2020. He also agreed that LNG spot freight rates were driven by many factors and that as at 2018, the surge in US LNG exports was anticipated, and further that as at 2019/2020, there was no real history of TTF exceeding JKM.
127. He also accepted that the rescheduling of vessels could have an impact on their availability (a large impact according to Dr Odedra) but said that the open Arb would have a much bigger impact. Equally, with more ships in the Atlantic Basin because there was so much more availability of vessels and any question of rescheduling would not be on even the same level as that factor.
128. As against that, Briety made a number of criticisms of Mr Terzopoulos at paragraph 126 of its Written Closing. I address those below using the same sub-paragraph numbering.
129. As to (1), the first point was that at one stage in his oral evidence, Mr Terzopoulos forgot that moments earlier, he had seen figures showing that Japan did some reloads - it had 4% of the total LNG re-export market in 2018, according to the GIIGNL Annual Report on LNG published in 2019. That is strictly correct, but the focus of the previous questions had been on Singapore (with 15% of the re-load market) because Singapore had been suggested as a

reflection of the reload facilities in Asia, referred to by Dr Odedra; also this was in the context of shipping costs of a voyage from Japan to Europe; while it would be wrong to suggest that Japan did no reloads at all, Mr Terzopoulos was right to say that this was something of a hypothetical because Japan's reloads were confined to the Pacific Basin, namely China and South Korea.

130. In fact, Mr Terzopoulos had already made these points in paragraphs 24-26 of MT1; I agree that although he had initially questioned if the cost of a Japan-Europe voyage would be the same as a Europe-Japan voyage, he was eventually prepared to assume that the relevant calculation excluded reload costs in which case they would be the same; I did not think there was much in the further point that his view that there could be many “moving parts” between Fearnleys’ figures and Dr Odedra’s calculations;
131. As to (2), the next point concerned his evidence about whether there would be fewer vessels in the Pacific Basin because the relevant US vessels would have stopped their voyages in Europe and discharged there, because of the high TTF price in 2022; see T4/156-162; he explained that it was because of the invasion of Ukraine and the consequential market uncertainty about LNG and the reduced supply of it into Europe by Russia, that LNG prices in Europe went up; this incentivised cargo owners to sell their LNG there, rather than in the Pacific Basin where JKM prices were not much more than TTF. Although this meant that there would be fewer voyages by US vessels to the Pacific Basin, this did not affect the spot market because those vessels would have simply returned to the US had they discharged in Asia, in order to pick up the next load; so, from the spot market point of view, the fact that now a number of those vessels would not be coming into the Pacific Basin at all would not affect spot availability of LNG carriers and hence freight rates.
132. I thought that this was a clear and sensible explanation and of course, in part, it is based on the notion that high TTF prices in Europe did not “pull in” vessels that would otherwise have been trading in the Pacific Basin (i.e. vessels based there), it is just that more of the US vessels stayed in the Atlantic Basin. In this context, Mr Terzopoulos did refer back to illiquid spot markets but questioned the extent of this (see T4/160).
133. As to (3) and the correlation, if any, between high TTF prices and rising freight rates (they did not in fact rise initially in 2022 anyway), it is necessary to set out paragraphs 41-43 of MT1:

“41. Accordingly, it is clear that TTF exceeding JKM did not lead to any significant change in LNG trading patterns in 2022 (other than the “arb” remaining firmly “closed” with more US Gulf cargoes remaining in the Atlantic) and did not result in any increase in “tonne-miles” with a consequential knock-on effect of causing freight rates to rise.

ii. Freight rates increase in late 2022 was unconnected to TTF exceeding JKM, but instead due to other factors

42. Instead, freight rates rose for a different reason altogether. LNG ships operate as the “pipeline” for the LNG trade. Following the Russian-Ukraine conflict, Russia limited its gas supply to Europe. As the months passed by following the initial invasion, this created great market uncertainty and a concern over perceived shortage of LNG supply into Europe in the future, leading to charterers being willing to out-bid each other to secure available tonnage. Furthermore, in these volatile circumstances charterers would naturally wish to maintain commercial control of their vessels, i.e. they would restrict subletting to other charterers on the market, unless it was for a suitably higher price. This meant that in the second half of 2022, owners and charterers started 'hoarding' their vessels in a rising freight market, leading to a reduction in the supply of tonnage. The combination of the above factors is widely understood to have led to freight rates rising rapidly.

43. Accordingly, whilst it can be said that both the rising TTF price, and the rising LNG freight market, were caused in some way by the Russian-Ukraine conflict, they each increased for different reasons, and were not inter-dependent/inter-related. There was no similar connection between TTF exceeding JKM and the freight market increasing as one sees in an “open arb” scenario when JKM exceeds TTF that leads to a change in trade flows and an increase in “tonne-miles”. To the extent the freight market was high during the same period when TTF exceeded JKM, this was coincidence, rather than due to an increase in “tonne-miles”.

134. What Mr Terzopoulos is saying here is that when the freight rates did rise, this was not because of some scarcity of vessels due to a Pacific-Europe arbitrage that was the equal and opposite of the Arb; rather, because of uncertainties over supply of LNG in Europe and the rise of imports thereof (to replace lost supplies through the pipeline from Russia) there was increased demand for charters and some element of hoarding, and it was these factors which led to the eventual rise in freight rates; that is what he was referring to at T4/162-163, where he said that because of the war, everything “goes out of the window”; owners and charterers were now acting in response to the LNG shortage caused by it. He expressly referred to hoarding here just as he had done in paragraph 42 of MT1. He did not in fact disagree with Fearnleys’ assessment about a connection between high TTF prices and later increased freight demand and rates; in this regard, it is worth setting out part of the Fearnleys LNG Shipping report of October 2022 at pages 16-18:

“With significantly reduced pipeline flows from Russia now even more drastic following the recent damage to the Nord Stream 1 pipeline, Europe's need for LNG cargoes is clear and the importance of diversifying supply has never been more apparent. Europe has imported 14 MT LNG more than last year. of which half is from the US, All other importing regions have imported less in 03 this year vs last year. Interestingly, the Northern Sea Route has been used less than last year, and Europe's LNG imports from Yamal are increased year-on-year...

Looking at the countries which have increased their 03 exports year-on-year, the top five are all in Europe. If Europe were a country, it would be the largest importer in 2022, which it has been several times before, but stands in contrast to 2021 where both China and Japan imported more than all of Europe combined.

Tonne-miles have remained below last year's levels this quarter, driven mainly by the lower distances of US volumes, but also the lower distances of Russian volumes. Interestingly, tonne-time has been well above last year's levels despite the low distances. It is thus the voyage durations, and not the

distances, that have been driving shipping demand. This is partly due to reduced speed as portfolio players optimise their 'long' shipping portfolios, as well as floating cargoes as a result of both import terminal congestion and vessels waiting to get a better price for their cargo in subsequent months. Floating cargoes has not really been a topic since 2020, but current levels are well above the highs seen in 2020, mainly driven by floaters in the Atlantic.

With reduced flows from the US to Asia, pressure on the Panama Canal is reduced: there were only 18 LNG transits completed in 03, versus 33 last year.”

135. Like Mr Terzopoulos, Fearnleys make a clear link between high LNG prices and the invasion of Ukraine; so I disagree that there is anything in this point materially adverse to Mr Terzopoulos’ reliability as a witness.
136. I should add that I did not consider there was anything inappropriate in Mr Terzopoulos’ various references to “common ground” with Dr Odedra; it is a logical term to use in the context of expert agreement or disagreement. Perhaps it was suggested as a term by the lawyers, but if Mr Terzopoulos found it useful, then there is nothing objectionable in that, provided it does not suggest that the substance of his report was in truth dictated by the lawyers. I saw no evidence that it was.

THE EXTENT AND SUFFICIENCY OF TRAFIGURA’S DISCLOSURE

137. I should at this point refer to a submission made by Briety that Trafigura’s disclosure was inadequate and that I should draw an adverse inference on the basis that the reason for that inadequacy was because there were disclosable documents which were adverse to Trafigura’s case, and even if that is not correct, I should take into account the fact that not all relevant documents may have been disclosed. I do not intend to take either course. The whole question of disclosure was well-ventilated (and answered by Trafigura) in correspondence, and if Briety was seriously concerned, it could and should have made an application to the Court.
138. By way of example, it was said that it was implausible that there was no disclosure of WhatsApp messages between Mr Murley and his colleagues at Trafigura in relation to the TCP, especially as messages between Mr Jones or Mr Jolliffe and Mr Murley had been disclosed. Indeed the messages between Mr Jones and Mr Murley had actually been disclosed by Trafigura. It was suggested in argument that there was nothing surprising in that, because Trafigura would have known that Briety could have obtained such messages from Fearnleys anyway. It did not mean that Trafigura was not withholding other, internal WhatsApp messages. There is nothing in that, and indeed, if the suggestion was (as it seemed to me at one point) that Mr Murley or others at Trafigura were deliberately withholding documents or

were simply not taking their disclosure duties seriously, that should have been put to him, but it was not.

139. Other points were made about Trafigura's document retention system but I did not think there was anything in that, either.

CONTRACTUAL INTERPRETATION: THE LAW

140. In terms of a statement of the general principles of contractual interpretation, I need do no more than cite the helpful summary given by Popplewell J (as he then was) in *The Ocean Neptune* [2018] EWHC 163 (Comm):

“[8] There is an abundance of recent high authority on the principles applicable to the construction of commercial documents, including *Investors' Compensation Scheme Ltd v West Bromwich Building Society*, *Investors' Compensation* [2018] 2 All ER (Comm).. *Scheme Ltd v Hopkin & Sons* (a firm), *Alford v West Bromwich Building Society*, *Armitage v West Bromwich Building Society* [1998] 1 All ER 98,...; *Chartbrook Ltd v Persimmon Homes Ltd* (*Chartbrook Ltd and anor, Pt 20 defendants*) [2009] UKHL 38,...; *Re Sigma Finance Corp*n [2009] UKSC 2,... *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50,...; *Arnold v Britton* [2015] UKSC 36,...; and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24,... 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.”

141. Admissible factual matrix matters are of course captured by the well-known reference in the above summary to “background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”
142. In relation to *Arnold v Britton* [2015] UKSC 36 in particular, I found the following observations made by Leggatt LJ (as he then was) in paragraph 27 of his judgment in the Court of Appeal case of *Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526 to be apposite:

“The decision of the Supreme Court in *Arnold v Britton* ...signalled a need for caution in relying on considerations of commercial common sense in interpreting contracts. In particular, Lord Neuberger emphasised that this criterion should not be invoked to undervalue the importance of the language used. It is salutary to recall that the persons best placed to judge what is a commercially sensible agreement to make are the parties who have chosen to make it, and courts should be correspondingly wary of rejecting a natural interpretation of contractual language because it appears to produce a commercially unreasonable result. But just as there are degrees of naturalness of linguistic usage, so too there are degrees of unreasonableness of result, ranging from the merely imprudent or surprising to the obviously irrational or absurd.”

143. So far as pre-contractual negotiations in general are concerned, the position is well-summarised in *Lewison’s The Interpretation of Contracts* 8th Edition at paragraph 3.43:

“Evidence of pre-contractual negotiations is not generally admissible to interpret the concluded written agreement. But evidence of pre-contractual negotiations is admissible to establish that a fact was known to both parties; to decide (in a consumer contract) whether a term has been individually negotiated; to determine which party put forward a particular term; and to elucidate the general object of the contract. Evidence that parties negotiated on the basis of an agreed meaning is only admissible in support of a claim of estoppel or rectification.”

144. Further guidance here can be found in the following later paragraphs of the judgment of Leggatt LJ in the *Merthyr* case:

“52. It is established law that, as stated by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384-5, previous documents may be looked at to show the surrounding circumstances and, by that means, to explain the commercial or business object of a contract...It is an approach which, as Lord Wilberforce noted, can be traced back at least to Lord Blackburn’s judgment in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763, which emphasised the importance in construing written instruments of “seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view ...”

53. The phrase “genesis and aim of the transaction” is a composite phrase taken by Lord Wilberforce from the judgment of Cardozo J in *Utica City National Bank v Gunn*, 222 NY 204 (1918), a decision of the New York Court of Appeals, which Lord Wilberforce described as following “precisely the English line” and as a judgment which “combines classicism with intelligent realism”: see *Prenn v Simmonds* [1971] 1 WLR 1381, 1384F. The approach followed by Cardozo J was, by considering the circumstances which led to the execution of the contract, to identify the purpose of the transaction and to construe the language used in the light of that purpose. Cardozo J concluded (at 208): “To take the primary or strict meaning is to make the whole transaction futile. To take the secondary or loose meaning, is to give it efficacy and purpose. In such a situation, the genesis and aim of the transaction may rightly guide our choice.”

54. Lord Wilberforce clearly saw no conflict between this approach and the rule, reaffirmed in *Prenn v Simmonds*, that evidence of negotiations, or of the parties’ intentions, ought not to be received. (It is equally clear that Lord Blackburn had seen no such conflict, as Lord Hope observed in the *Chartbrook* case at para 4.) What is not permissible, as the decision of the House of Lords in the *Chartbrook* case confirms, is to seek to rely on evidence of what was said during the course of pre-contractual negotiations for the purpose of drawing inferences about what the contract should be understood to mean. It is also clear from the *Chartbrook* case that it is not only statements reflecting one party’s intentions or aspirations which are excluded for this purpose but also communications which are capable of showing that the parties reached a consensus on a particular point or used words in an agreed sense. The exclusion of such evidence was justified in the *Chartbrook* case, not on the ground that it will always or necessarily be irrelevant, but because of the costs and other practical disadvantages that would result from relaxing the rule and because the “safety devices” of rectification and estoppel will generally prevent the exclusionary rule from causing injustice.

55. I would accept that there may be borderline cases in which the line between referring to previous communications to identify the “genesis and aim of the transaction” and relying on such evidence to show what the parties intended a particular provision in a contract to mean may be hard to draw. The present case, however, is not one of them. In my view, it very well illustrates this distinction.”

145. These observations are of assistance here because of both parties’ submissions made in relation to what each of them say was the “genesis” of or underlying objective behind the TCP.
146. It is also of course the case that in general, the parties’ post-contractual conduct cannot be used as an aid to interpretation.
147. A question arises in this case as to the use of headings as an aid to construction. As already noted at paragraph 58 above, Clause 47 (b) of the TCP provides that headings are included for convenience of reference and should in no way affect its construction. Briety submits that in these circumstances, a heading cannot be used for the purposes of construction at all. Trafigura contends that it is permissible to have regard to headings for the limited purpose of corroborating the meaning apparent from the body text where the consistency between the heading and body text is mutually reinforcing. It relies here on the judgment of Burton J in *Citicorp International Ltd v Castex Technologies Ltd* [2016] EWHC 349 (Comm) at paragraph 3, and the judgment of Bell J in *SBJ Stephenson Ltd v Mandy* [2000] FSR 286 at paragraph 297 which Burton J specifically followed. In the latter case, Bell J refused to ignore a heading which said “CONFIDENTIAL INFORMATION” despite there being a clause in the same terms as Clause 47 (b). He said at page 297 that:

“Although interpretation clause 21(B) of the agreement provides that clause headings are inserted for convenience only and shall not affect the construction of the agreement, it seems to me that the convenience which they provide is to tell the reader at a glance what the clause is about.”

148. At paragraph 18 of its Written Closing, Briety emphasises that the view expressed in *Lewison* at paragraph 5.108 is that despite those cases, where there is a relevant term, headings should not be taken into account. It points to other first instance decisions which take a stronger line against the use of headings. A more nuanced approach can be detected in some cases like *CMG v CGI* [2022] EWHC 2130 where Leech J observed that:

“...it is clear...that the Court may not rely on a heading to contradict the plain meaning of the relevant clause where it is expressed to be for convenience only.”

149. I think that there is force in the point made by Trafigura, notwithstanding the views expressed in *Lewison*, that a heading could be used simply to corroborate the interpretation of the provision to which it relates. As we shall see, it seeks to do no more than that here. As it

happens, however, my conclusion on interpretation of Clause 10 here is not ultimately reliant on making any use of headings at all.

150. Finally, I should add that in relation to its “Change of Circumstance” argument, Briety also relies upon *W Nagel v Pluczenik* [2018] EWCA Civ 2640, *Bromarin v IMD* [1999] STC 301 and *Standard Chartered v Guaranty* [2024] EWHC 2605 (Comm). I will deal with that case-law in context, below.

151. In my analysis below, I have taken account of all of these principles.

PROPER CONSTRUCTION OF CLAUSE 10

Introduction

152. In this case, it is convenient to commence the iterative process of contractual interpretation by considering the language in its immediate context, i.e. the TCP. I shall then consider, to the extent necessary, the wider context, namely the purpose of the TCP, and then the various factual matrix arguments which have been advanced by both parties.

Language

153. Clause 10 (C) stipulates that the hire rate is based on the monthly average of the daily differences in the spread between JKM and TTF as defined in Clause D with the defined term “the JKM-TTF Spread”. Clause 10 (D) then states that the JKM-TTF Spread for any given month is calculated in the four steps then described and set out in detail. There is no issue about Steps 1 and 2 which simply require the calculation of the spot JKM and TTF prices.

154. Step 3, however, is in my view is important. It states expressly that the TTF quote must be deducted from the JKM quote. That exercise reflects Clause 10 (C) and the use of the word “minus” in its heading. Although the parties debated the extent to which this heading could be used to assist on the question of construction (see paragraphs 147 - 149 above), in fact, Briety accepts that the word “deducted” means what it says, so that the first part of the exercise is indeed a deduction of TTF from JKM. On that basis, should the TTF price happen to be greater than JKM, the result of the deduction is a negative number. Given that concession, it is difficult on the facts of this case not to see the heading to Clause 10 (C) as at least accurately reflecting the process of deduction which Briety agrees must be carried out, as explained in

paragraphs 24 (1) and (2) of its Written Closing. However, for present purposes, I am content not to place any weight on the “minus” part of the heading at all.

155. According to Trafigura, the deduction is where the matter effectively rests so far as Step 3 is concerned. Step 4 then requires the average of all the daily calculations for the relevant monthly period. In creating that average any negative numbers are averaged *qua* negative numbers. This is how the relevant invoices were calculated by Fearnleys.
156. Briety however says that any negative number must be treated as an “absolute value”. In other words it effectively becomes a positive number; thus if the calculation JKM-TTF produced +5 on one day and -5 on the next, both numbers are treated as 5 and so the average is 5, instead of (as Trafigura contends) 0.
157. There is nothing in the language which entails this conversion to absolute value in my judgment. Moreover, the effect of the language is clear and workable on the basis of a simple deduction, even where the result is a negative number.
158. However, Briety advances a number of arguments why the absolute value conversion must be correct as a matter of interpretation even if not so at first glance because of the language of deduction.
159. First, Briety focuses on the use of the word “spread”. Briety says that a “spread” necessarily means a “difference” between two figures and it does not matter whether that difference has a + or - in front of it. In some cases, that may be true, but I do not accept that it must always be true. Although the word “spread” appears in numerous places in Clause 10, “the JKM-TTF Spread” is a defined term, as set out above, and it is expressly linked to the deduction exercise in Step 3, and no more. In other words, the use of the word “spread” here is highly context-specific. There is no basis for saying that it must be looked at in isolation, or that it connotes a particular term of art with only one meaning. Understood in context, there is nothing *per se* odd or inapposite in using the word “spread” or “difference” as a convenient way of describing the result of the deduction exercise. Nor does the use of the word “spread”, therefore, mean that there has to be some additional step to be performed once the supposed positive or negative number is reached. That is so even though the last few words of Step 3 refer to “the TTF quote shall be deducted from the JKM publication creating a “daily spread”.

Quite the opposite, it is expressly using the word “spread” to define the result of the required deduction.

160. Both parties have referred me to materials where the word “spread” has been used in a sense favourable to their own interpretation here. I consider some examples below, but all they do, in reality, is demonstrate that context is everything.
161. Considering Briety’s position first, one document it refers to is Trafigura’s own “*Commodities Demystified: a Guide to Trading and the Global Supply Chain*”. This makes reference to the monitoring of relative prices for different grades of a commodity, or the same commodity but with different delivery locations, and where there is a mismatch traders can lock in a profit by buying in the cheaper market and selling in the more expensive market. There is an arbitrage opportunity when the value of the transformation - the difference between the prices of the transformed and untransformed commodity - is more than the cost of making that transformation. I follow all of that, but this is in a context where there is an arbitrage caused by the ability of the trader to purchase the commodity at location A and sell it for more at location B. I can well understand the simple use of the word “spread” there. In our case, the position is somewhat different because the traders have already purchased the LNG and loaded it onto the carriers which they use and the question is the market into which they sell it. None of this means that it is impossible to have a “spread” which consists of a positive or negative number.
162. For its part, Trafigura relies upon a number of different references to spreads which are on their face positive or negative. One is the Affinity Shipping’s LNG Floating Storage Update for week 24 of 2020. At page 6 there is a chart of “JKM-TTF Spread” which clearly shows, by reference to blue, alternatively red highlighting what are either positive (above zero) or negative (below zero) spreads. It is correct that there are quite complex calculations involved here but it is at least true that we see here references to positive and negative spreads in the context of LNG trading. If this is to be regarded as a factual matrix matter it would, on the face of it, be something which was reasonably available to owners and charterers but even if not, the point being made by Trafigura here is that this is simply an illustration of the fact that the word spread can be used in a positive or negative sense.
163. Trafigura also points to the email from Mr Nerantzis which is cited at paragraph 52.(8) above, where he refers expressly to the negative as well as positive numbers in the spreadsheet

describing the “JKM-TTF Spread”. This was something which Mr Saparis also saw (see paragraph 88 above), where he accepted that five of the spread values were negative. Briety objects that this is no more than a reference to inadmissible pre-contractual negotiations or an appeal to the “private dictionary” concept outlawed by the *Chartbrook* decision, referred to by Leggatt LJ in *Merthyr*, cited at paragraph 144 above; again, however, I think that strictly this is not a valid objection because it is simply another example of how spreads can be described as both positive and negative. For the same reason there is some value in Trafigura’s references to the Howe-Robinson LNG market reports referring to a JKM-TTF differential in minus and plus figures and similar references in Fearnley’s “Spread Scenario 1 Results” document, its comment on TEN’s seeing negative spreads, their own “Arb-o-meter” dial running from minus to positive figures and Mr Jolliffe’s own reference to positive and negative spreads, all as set out in paragraph 73 (6) of Trafigura’s Closing Submissions.

164. Finally, here, Trafigura relies upon a new document, one not submitted prior to the trial, which is an NBER Working Paper 26429, in which a positive spread, being a number above zero is used to describe a situation where one set of interest rates exceeds another and negative spread where the reverse was true. Briety makes the fair point that in fact this is concerned with interest rate swaps, with almost all the “negative” references being to negative swap spreads, so I do not place any weight on this particular document.
165. Overall, I consider that the materials referred to by Trafigura and which are admissible just to obtain a general understanding of how the word “spread” may be used, albeit not inevitably, constitute some support for its opposition to Briety’s reliance on the word “spread” to give effect to its notion of “absolute value”. However, I should make it clear that I would have reached this conclusion without regard to these particular materials for the simple reason set out in paragraph 159 above.
166. Second, Briety suggests that the averaging exercise required by Step 4 would be meaningless or unworkable if absolute values were not its starting point. I do not accept this. It really assumes the answer to the question posed, being whether the Step 3 exercise requires the conversion of the negative number into the absolute value. It does not follow, as submitted by Briety, that a reasonable commercial person in the position of these parties would inevitably say that the average must be that of the absolute values. As Trafigura points out, if there is a particularly volatile month where on one day $JKM > TTF$ and on another $TTF > JKM$, it actually makes sense to average out the positive and negative numbers to see whether there is in fact

an overall positive number which exceeds US\$1.3 because from a commercial point of view, what one is looking for is a sustained upward trend. In my judgment, what Briety is really contending is that a calculation exercise which does not involve the use of absolute values is commercially absurd or something that could not reflect the real underlying purpose of the TCP. That is a separate matter which I will consider below. For present purposes, I do not accept that the existence of the required averaging exercise is itself a reason to suppose that absolute values are required.

167. Next, Briety argues that Appendix J, being the Table of Hire Rate makes no sense if Trafigura's construction of Clause 10 is correct. That is because the figures in that table start from zero and not, as might be the case, from some negative number which is below zero. It here relies upon Step 4 requiring that the "monthly averaged spread... shall be used as the input for the "TTF-JKM Spread" in the Table. If the spread figures were, on average, negative for a particular month, they could not be used in the table because it only starts at zero.
168. I do not accept this point either. Albeit this Table is described in Clause 10 (C) (ii) as a "full" table, its obvious purpose is to show that which is implicit from that sub-paragraph itself, namely what happens when the spread exceeds US\$1.3 and how the incremental increase in the hire rate works, along with showing the Floor and the Ceiling. Strictly, since we know that the trigger itself is US\$1.3, there is no real need to start at zero, as opposed to US\$1.3. So it is important not to over-emphasise the significance of this illustrative table. The fact that it starts at zero does not mean that there cannot be results from a monthly averaging exercise which would yield a negative number. Obviously, on the basis that a negative number is less than zero (and less than US\$1.3) there would be no point in stating it. All of this is in the context, of course, of working out whether for any given month the hire rate will be more than the Floor because the table is only concerned with the monthly average not the underlying calculation for that average.
169. I should add, that some reliance was placed by Briety here on the fact that there is the (single) reference to TTF-JKM rather than the other way round. This is said to be fatal to Trafigura's argument. There are two answers to this. First, given the fact that all the other references are to JKM-TTF, there is no difficulty with seeing this isolated reference as the subject of an obvious error. Second, and more fundamentally, it is irrelevant because of Briety's acceptance that there should be a deduction exercise, and I have already explained why the use of the

word “spread” does not then entail the additional step of converting positive and negative numbers into absolute values.

170. Briety then submits that if the exercise is ultimately a “one-way bet” for Briety, in the sense that it will benefit from increased hire rates only when $JKM > TTF$ (above US\$1.3) and not when $TTF > JKM$ by the same amount, the TCP would surely have said so. Again, I disagree. In contractual interpretation the argument that if the parties had really intended X, they would have said so in some other or express way, is of limited value where in any event it is clear that they did intend X with the language they did use. Second, it assumes that there would have been something commercially odd or implausible or inconsistent with the contract’s underlying purpose for the putative benefit to Briety to be confined to this “one-way bet”. Again, this is really an appeal to commercial realities. At this stage, and without recourse to anything more, it simply does not follow that the “one-way bet” makes no objective commercial sense. The fact that, in the event, and because of the unusual movement in JKM and TTF prices in certain periods, it would have been advantageous for Briety to have had a “two-way bet”, as it were, does not mean that Trafigura’s interpretation is wrong. Further, and as we shall see when considering factual matrix and in particular the whole question of what “the Arb” means and meant to the parties at the time, there is nothing implausible or commercially improbable in their agreement, objectively, to the “one-way bet”.
171. For all those reasons, and even confining the iterative process to the language of Clause 10 itself, I would accept the interpretation proffered by Trafigura, as opposed to Briety. In fact, it will be seen that a wider analysis which takes into account factual matrix simply adds weight to that conclusion.

Contractual Purpose

172. In this particular case, reference to the general contractual purpose underlying the TCP does not really assist, it being a charterparty which, for the most part, contains standard industry terms. Beyond that, it has a formula for determining the hire-rate payable at any given time, and which enables the owners to receive more than a minimum rate up to a maximum rate depending on the application of the formula by reference to monthly averages. In a broad sense, that is the contractual purpose here. However, the real question here is how the formula is to be applied and in this regard, the parties have competing contractual purposes, i.e. for Trafigura, the specific application (and application only) of the Arb, and for Briety, the wider

purpose of enabling it to benefit from a “reverse arbitrage” as well as where, as a result of TTF>JKM, it can be inferred that there would also be an increase in the price of LNG which would have an impact on spot freight hire rates, and where the same trigger of US\$1.3 would be applied. Consideration of those putative contractual purposes is not something which can be divined by reference purely to the language of the contract, and I will therefore consider them within the context of factual matrix, to which I now turn.

The Arb

173. The critical question, in my view, is the significance, both generally and to the parties, of the Arb. Before considering Briety’s knowledge (or not) of the Arb and whether its existence and operation constituted something which was reasonably available to Briety, irrespective of its subjective knowledge or not, it is necessary to say something about its existence as a particular arbitrage phenomenon in any event.
174. I introduced the subject of the Arb at paragraphs 45 - 46 above. In reality, there was no dispute between the experts that the phenomenon there described existed. The dispute between them, as at the time of the JS, was that Dr Odedra qualified her acceptance of its existence by saying that while it was an arbitrage relating to differential LNG pricing in different locations which ultimately affected spot freight rates, it was not the only one. For that reason, she did not initially accept that this phenomenon could be captured by the expression “the Arb”, or that it was one recognisable to reasonable owners or charterers operating in the LNG market in 2019/2020. See, for example, the JS at paragraphs 26, 30, 34 and 51.
175. However, her position changed when she gave oral evidence. At the end of it I asked her a question and her answer is important:-
- “Q. Just on this question of arb, I just want to be quite clear what your evidence is. So you are saying as the reasonable owner or charterer in this market –that is LNG and where the two basins operate in the way that we have described —if someone said to you "the arb is open", you are saying you would not understand that usually to mean the east/west arb that we are talking about?
- A. I believe that I would understand it, but I would say "Do you mean the arb to Asia is open?" So I would just make sure I clarified it.
- Q: Right. But subject to that clarification, your first reaction would be, if they are saying "the arb is open" or "the arb is closed", you would know, subject to your absolutely checking, that that would be referring to the East/West arb?
- A. Yes.”
176. Even here, I consider that Dr Odedra has over-qualified her position by reference to her apparent need to do at least some checking to confirm her first reaction. I think she knows perfectly well what the expression “the Arb” denotes and what is meant by when it is open or closed. I have already expressed above why, in general terms, the evidence of Mr Terzopoulos

should be preferred to hers where there is a difference between them, and I think that any residual reluctance to agree what the expression “the Arb” connoted was, as Trafigura submits, simply a reflection of her not wishing to give ground completely on this issue, for no good reason.

177. In any event, if it came to it, and Dr Odedra had still denied the existence of the expression “the Arb” in an unqualified fashion, I would have found it to exist and be known at all material times to reasonable owners and charterers in the LNG market. This is for the reasons given by Mr Terzopoulos, both in his written and oral evidence. In relation to the former, see paragraphs 15 (iv), 18, 21 (iv) – (v) and 22 of MT1 and paragraphs 13-22 of Annex 1 thereto, and paragraphs 7-10 and 17 (b)-(d) of MT2. As to the latter, he gave clear evidence to the same effect:

“When we refer to the arb in LNG shipping, as far as I know it, and I'm pretty sure that most of my colleagues would say it means that JKM is greater than TTF and from a shipping perspective of what that means on freight rates. Now, from a cargo trader's perspective, will they find other arbs in the market? Yes, I'm sure they will. But the general concept that I understand the arb to be is Atlantic volumes, moving to the east when JKM is greater than TTF by a greater amount than the shipping cost.” (T4/109-110)

“...Like I said in my report here to the part that you are talking , I talk about a sample of publicly-available articles and sources which discuss the existence of the "arb" and "open arb" and so when it is referring to the "arb" here, from a shipping perspective, I 'm understanding it to mean, and what you have just read out as well , the cargoes not going to the Pacific .

Q. So you bring this to this, your pre conception that as soon as anyone says "the arb", that is what they are talking about. Is that a fair summary of the position?

A. In LNG shipping when someone refers to the "arb", they are talking about Atlantic cargoes moving to the Pacific Basin instead of staying within the Atlantic. That was what happened when I was working in LNG shipping in TMS Cardiff Gas, so up to 2023. That was happening when I worked for Angelicoussis and Maran Gas and that would still be the case today when I'm working for Longview Shipping when somebody refers to the "arb". Now maybe my preconception has to do with the fact that during this time I have chartered more ships working for an owner than almost anybody else in the market so maybe that is why my preconception comes from that is what the "arb" means but, in my experience, that is what it means.” (T4/182-183)

Knowledge of the Arb by the parties

178. The first time the parties met in relation to a possible deal involving the Vessel was in Geneva on 9 December 2019. At this stage, of course (i.e. construing the TCP), the only purpose of referring to what happened prior to the TCP is in connection with ascertaining the familiarity (or not) of the parties with the Arb as a phenomenon.
179. Trafigura’s position is that it was aware of the Arb and understood its relevance to any proposed deal, because of the pitch made to Mr Murley by Mr Jones and/or Mr Jolliffe at that meeting. Mr Murley’s own recollection of the meeting, as set out at paragraphs 23-30 of OM1

is extremely detailed and I have discussed and essentially rejected Briety's contention that it is an implausible account, at paragraph 108 above. I do not accept, as Briety contends, that Mr Murley had no real recollection of the lunch at all and that he was simply reconstructing events.

180. Although it does not matter which party "pitched" the idea of using the Arb as a mechanism for setting the hire rate above the minimum, it plainly did not start with Mr Murley (or Mr Murley in conjunction with Mr Jones) as suggested to him in cross-examination, or that the discussion was all above Mr Jolliffe's head. That is demonstrated by the sequence of contemporaneous documents both before and after the lunch and the fact that Mr Jolliffe was the one who set up the lunch in the first place.
181. By then, Mr Jones had suggested to Mr Jolliffe the idea of using the Arb and explained it in detail in his email of 26 November 2019. See paragraph 50 above. There is then the series of post-lunch emails dated 9, 10 and 11 December 2019, set out at paragraphs 51, and 52.(1)-52.(4) above. There then followed some emails to both sides from Mr Jones, but this was all in the context of his having proposed the idea to Mr Jolliffe in the first place.
182. What the communications from Mr Jones to both parties show is the detail as to how the Arb-based calculation would work. See the further documents at paragraph 52.(5) - 52.(9) above. The internal communications cited at paragraphs 52.(10) - 52.(12) above show the level of specificity as to how the Arb calculation would work here.
183. Because of those documents, any dispute as to what was said or understood at the lunch in Geneva (for the purpose of factual matrix) is very much of secondary importance even though I happen to prefer Mr Murley's account to that of Mr Jolliffe.
184. Accordingly, and for factual matrix purposes, I find that both sides actually knew of the Arb as a phenomenon and how it worked and understood the notion that particular parameters would have to be set. These were the Floor, the Ceiling, the incremental effect on the floating hire rate of the JKM-TTF price differential and the required "trigger". All of that emerges from the contemporaneous documents and their objective meaning.
185. Given that mutual knowledge of the Arb as a means of determining a floating hire rate - because of the correlation between a certain level of increased LNG prices and spot freight

rates - it is obvious that Clause 10, as agreed, was designed to give effect to it. Nor, if there could have been any doubt about it (and I found that there was not) could the use of the word “spread” have meant anything other than the figure produced by deducting TTF from JKM. Nor could there be any basis for importing the notion of an “absolute value” so as to translate any negative figure into one which also had the effect of uplifting the hire rate where the trigger of US\$1.3 was reached.

186. Had that been the end of the matter on factual matrix, it would follow that the genesis and purpose of Clause 10 was to give effect, with particular chosen variables, to the use of the Arb as the hire price-fixing mechanism. If that is the conclusion, it is itself powerful support for Trafigura’s construction of Clause 10, if it were needed, in addition to the analysis of the language itself.

Briety’s claimed other purposes

187. However, it is not the end of the matter on factual matrix, because Briety contends that the purpose of Clause 10 was wider than simply to give effect to additional hire for it when the Arb was open and the trigger of US\$1.3 was reached; it was the wider one of enabling Briety to benefit from increased hire when there was in effect a reverse arbitrage said to be created when TTF exceeded JKM by the same trigger amount of US\$1.3 i.e. a wide geographic spread. This, it is said, would itself reflect the two elements of this wider purpose: first, a profit share to Briety not just in relation to the Arb but also the reverse arbitrage (“the profit share”), and second, the creation of at least a rough proxy for what was occurring on spot freight rates (“the freight rates proxy”). That Briety contends for both of these is made clear in paragraph 34 and 35 of its Written Closing.

188. This raises a number of questions:-

- (1) The extent to which there is admissible evidence that the parties objectively had these two purposes;
- (2) Whether the reverse arbitrage in fact existed;
- (3) If it did, whether there was a correlation with spot freight rates;
- (4) If so, whether, as at 2019 and 2020 these phenomena would have been known to the reasonable owner and charterer;

(5) If so, is Clause 10 capable of giving effect to these purposes.

Did the parties objectively have these purposes in mind?

189. As to profit share, it is obvious that the Arb-based formula did enable Briety to profit (by reason of the increased hire payable by Trafigura) when the Arb was (sufficiently) open, so as to cause the trigger to operate. In that way, it was a “profit-sharing deal”. See Mr Jolliffe’s email to Mr Murley of 9 December 2019 quoted at paragraph 51 above, Mr Jolliffe’s email to Mr Tsakos of 12 December quoted at paragraph 52.(9) above, and finally the reference to Briety making money when Trafigura makes money in Mr Jolliffe’s internal email of 7 January 2020, cited at paragraph 52.(12) above.
190. However, such references (especially when they occurred internally at Briety) cannot possibly form the basis for saying that there was to be a more general profit share as the purpose of the TCP. There is nothing in the wording of Clause 10 to support this. Moreover, since, on any view, the only formula available was JKM-TTF (even with the modification, in this scenario, that the “absolute value” concept applies) it assumes that there would inevitably be an increase in spot freight rates whenever TTF exceeded JKM, otherwise Briety would be taking a share of Trafigura’s notional profits even where spot freight rates were low. As we shall see, that is what Briety contends. If that contention is wrong (and I find below that it is) then the profit share concept cannot work, even in its own terms.
191. As for the freight rate proxy, there is nothing to indicate that the parties had the general purpose of linking the floating hire rate to spot freight rates and indeed Briety’s suggested use of the Baltic LNG freight indices was rejected at all times by Trafigura - with the only concession being that they could be considered as a mechanism after 3 years - but without any binding commitment for either party. See Clause 10 (E).
192. On one view, that would be the end of the matter, irrespective of whether there was in fact a reverse arbitrage with a freight rate proxy. However, I deal with the further issues since Briety suggests that if there were, and if they would have been known by reasonable owners and charterers, then, regardless of the lack of reference to them as purposes by the parties, it must be assumed objectively that they intended Clause 10 to give effect to them and its wording should be interpreted accordingly, as part of the overall iterative process.

The Existence of the Reverse Arbitrage

193. On this issue, it is necessary first to say something about TTF and JKM prices and freight rates. The critical period is 2019 and 2020, but I deal with what the track record, so to speak, had been for some years earlier; I also cover 2021 and 2022 because of submissions made by Briety in connection with those periods. Whether, on the question of interpretation, they are relevant at all, given that the TCP was made in 2020, I deal with below. In any event, they may have some relevance for the rectification claim made by Briety and it is convenient to deal with them all in one place.
194. The first document is a spreadsheet created by Fearnleys and sent to Briety on 23 December 2021. The date is irrelevant as this document simply records what had happened up to that point. It shows that over the period 2015-2021, the number of pricing days was 1,734, i.e. days when JKM-TTF was calculated. Of those days, the result was a negative (because TTF exceeded JKM) on only 65 days i.e. 3.7% of the time. It follows that for the vast majority of that period, TTF did not exceed JKM. That reflects Mr Terzopoulos's evidence that TTF historically had rarely exceeded JKM, and there was no serious challenge to that by Dr Odedra, nor could there be as it is a matter of record. According to these figures, TTF never exceeded JKM at all in 2017 or 2018, although it did so on 18 price days in 2019 and 21 such days in 2020, with 8 such days in 2021.
195. The above is also reflected in the Fearnleys document "Review and Explanation of Clause 10" produced for the parties on 9 September 2021 - see in particular page 8 which shows that on a monthly average basis (which is what Clause 10 requires) there was always a positive spread i.e. overall, JKM exceeded TTF over the month even if (as we know) there were certain days of that month when TTF exceeded JKM. This document also contained a forecast for the period October 2021 - February 2022. This showed an increasingly positive spread producing a significant increase in the hire rate which would be entailed by the operation of Clause 10, reaching an estimated US\$105,000 by February 2022.
196. The invoice and supporting figures for the January 2022 hire, based on the preceding months' average spread was US\$99,995, based on a monthly average positive spread of US\$3.36. However, the February hire was at the Floor, i.e. US\$50,000, because there was there an average negative spread of US\$-2.53.

197. The later invoices of course show the figures for the rest of 2022 but the overall picture is also shown by Dr Odedra's Figure 20, under paragraph 8.2.2 of AO1.

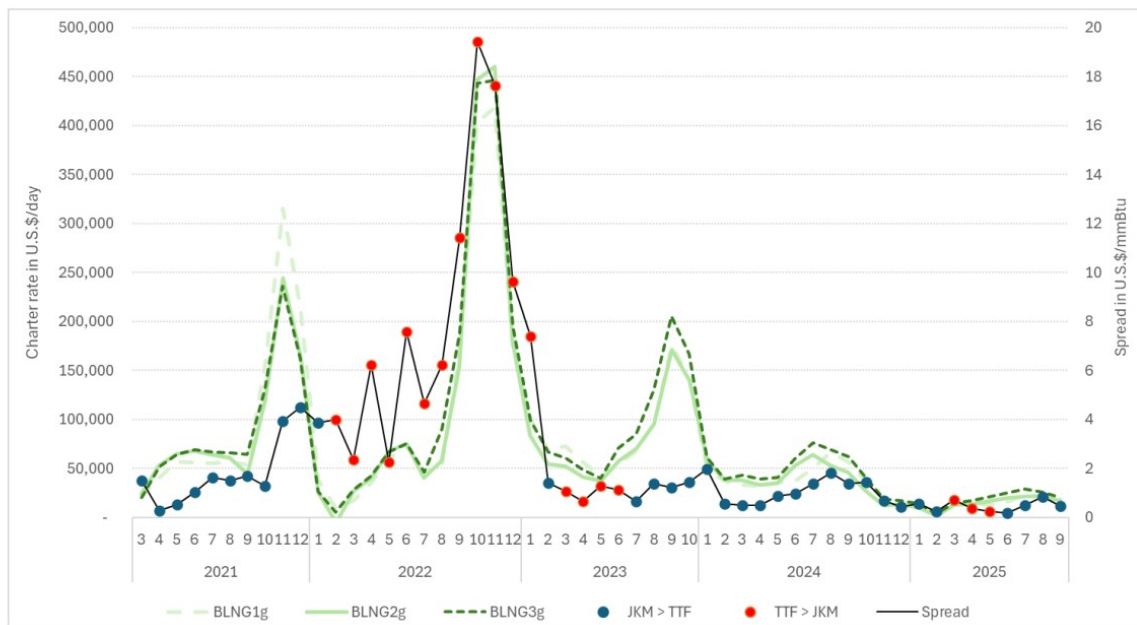


Figure 20 – spread between JKM and TTF price indices and correlation with Baltic LNG freight indices. Chart produced by Lansdowne Moritz, (2025).

198. This shows that the substantial period when TTF exceeded JKM began in February 2022, with a very large spike starting in August 2022, dropping back down by February 2023, with a further 4 months when the spread was negative again (but at much lower prices). A positive spread returned in July 2023 and remained until February 2025, after which there was again a negative spread for 3 months before it turned positive once more.
199. So far as freight rates are concerned, the focus of debate was 2022. I will come to the arguments about that later, but what one can see from Figure 20 (and regardless of which of the three Baltic LNG indices are used, recalling that Trafigura did not in 2020 accept they were sufficiently reliable anyway) is as follows: between January and May 2022 the rates were very low and well below the US\$50,000 Floor. After that, they increased somewhat in June but dropped again in July. They then rose to a very high level of over US\$450,000 by November, but then fell back down to US\$50,000 by March 2023. There was then a more modest spike later in that year. For most of 2024 they were below US\$50,000 although there were positive spreads for all of that year, and they remained well below the Floor for 2025.

200. The first incarnation of the Reverse Arbitrage thesis is that pleaded in the Reply. This postulates a reverse arbitrage where TTF exceeded JKM, due to LNG cargoes being shipped from the Middle East or the Pacific Basin and in particular Australia, to Europe, by reason of changing or diverting such voyages originally bound for Japan, to ones bound for Europe. In such cases, an increase in freight rates due to an increase in tonne miles would be expected to follow (as it would with the Arb). Briety adds that a trigger of US\$1.3 would work equally well for the Arb or the Reverse Arbitrage. See paragraphs 8.2 (c) and (d), 25, 26.2 and 46.2 (b) of the Reply. A final point was that there were such voyages from the Pacific basin to Europe (i.e. the Atlantic basin) as a result of the Russian invasion of Ukraine.
201. The principal difficulty with this thesis is that there is no evidence of the existence of any such phenomenon in 2022, let alone as at 2019-2020. Mr Terzopoulos has demonstrated this thoroughly at paragraph 14 of and Annex 2 to MT1. Paragraph 14 states:
- “Annex 2 (sections A and B) contains further market analysis regarding the above. In particular, and to illustrate the relative simplicity of the LNG market and the defined nature of the export/import markets, in 2020:
- (i) 99.8 per cent of exports from Australia (the largest exporter in the Pacific Basin) were delivered to other countries in the Pacific Basin (predominantly the Far East), equating to approximately 1,000 full LNG cargoes. No cargoes were delivered from Australia to Europe;
 - (ii) 84.6 per cent of exports from the US Gulf (the largest exporter in the Atlantic Basin) were delivered to Europe or the Pacific Basin
 - (iii) The Far East was an import market and did not export to Europe. Despite the Pacific Basin (predominantly the Far East) receiving well over 3,000 full LNG cargoes, the Far East did not re-export/reload any LNG cargoes for delivery to Europe.”
202. As for 2022, this remained the position, notwithstanding the invasion of Ukraine. As summarised by Mr Terzopoulos at paragraph 29 of MT1:
- “TTF exceeding JKM did not lead to any significant change in LNG vessels’ trading patterns. In particular in 2022, despite TTF reaching record high levels:
- (i) Australia continued to deliver roughly 1,000 cargoes to Asia in the Pacific Basin, and only delivered 1.5 cargoes to Europe;
 - (ii) All Pacific Basin exporting countries continued to deliver the equivalent of roughly 1,900 LNG cargoes to Asia, and only delivered approximately 31 full cargoes to Europe (of which 25 were from Peru – see Figure 2 below);
 - (iii) The Pacific Basin continued to receive roughly 3,300 cargoes per year, and only exported 31 cargoes to Europe;
 - (iv) The US Gulf continued to deliver a baseline of 24 per cent of its cargoes to Asia, albeit this was fewer cargoes than in previous years because the “arb” was “closed””.
203. This is then explained in detail at paragraphs 30-36 of MT1. See also paragraphs 22-24 of MT2, which point out the decline in tonne miles where TTF exceeded JKM.
204. In this context, I would also here refer back to paragraphs 129 and 130 above, where I rejected Briety’s first point as to why I should not accept Mr Terzopoulos’ evidence generally.

205. In the light of all of those matters, there is, in my judgment, no basis for this first incarnation of the reverse arbitrage thesis.
206. In the event, although Dr Odedra did not abandon that thesis altogether (see my comments on her evidence about that at paragraphs 120-122 above), the primary focus of her written and oral evidence was different, being the second incarnation of the reverse arbitrage thesis. This was her “reallocation pressure” theory. According to this theory, when TTF exceeded JKM there was an increase in tonne time not because of an increase in tonne miles (as postulated in the Reply, being the only pleaded case on reverse arbitrage), but because LNG carriers were simply tied up for longer periods. This would be as a result of congestion at European ports, rescheduling of voyages, charterers “hoarding” their vessels so as to take advantage of predicted higher prices later, and vessels “idling”. Further, all of that would lead to an increase in spot rate rates because fewer vessels would be available than otherwise.
207. Given that this thesis had never been pleaded and that the pleaded thesis was very different, it might be said that this is not a promising start for a submission that the reallocation pressure theory was something known by a reasonable owner and charterer back in 2019-2020.
208. In fact, there are numerous difficulties with it in any event. First, I found Dr Odedra’s oral evidence on the point unsatisfactory for the reasons which I gave at paragraphs 123 and 124 above. This is in a context where, as she accepted, the expression “reallocation pressure” was not one that appears in the literature or industry practice; it was a term she coined herself.
209. In contrast, I thought that the reasons given by Mr Terzopoulos in paragraphs 25-43 of MT2 (in MT1 he was simply addressing the pleaded case in the Reply) were compelling, for the rejection of the reallocation pressure theory. I summarise these and other points below.
210. First, if Europe pulled in more cargoes as it did in 2022, in particular, it simply meant that some US vessels remained in the Atlantic Basin and did not deliver to Asia (though there were still many such voyages). The reason for the increased demand in Europe is obvious. Russia had cut off a significant proportion of LNG which was otherwise supplied to Europe by pipeline, not LNG carriers from elsewhere. That shortfall would exist even if TTF had not exceeded JKM. In other words, there was a shortage of LNG supply in Europe which had to be filled by ship-bound cargoes.

211. Next, the fact that a larger proportion of US vessels stayed in the Atlantic Basin rather than travelled to Asia (because the Arb was not open in the circumstances) did not mean that there was a scarcity of vessels now in Asia which would lead to an increase in spot freight rates. As Mr Terzopoulos put it in paragraph 27 of MT2:

“(g) Prior to 2022, generally speaking there were two trading patterns: (i) vessels trading within the Pacific Basin (loading Pacific cargoes for delivery into Asia and returning to a Pacific load port) and (ii) vessels trading within the Atlantic Basin (loading Atlantic cargoes for delivery into Europe and returning to an Atlantic load port). When the “arb” was “open”, some Atlantic vessels shipped cargoes from the Atlantic to Asia instead of Europe, and typically returned in ballast to the Atlantic before performing another “open arb” voyage or resuming intra-Atlantic trading. In 2022, more vessels trading in the Atlantic Basin remained in-basin, performing Atlantic-to-Europe voyages instead of Atlantic-Asia-Atlantic voyages. Those were not ships that were “available into the Pacific Basin” in the sense of being available to load from Pacific Basin ports such as Australia. The Pacific Basin already had sufficient vessels performing Pacific-Asia-Pacific voyages. As such, the increased number of vessels remaining in the Atlantic would not cause any “scarcity” of vessels available for loading in the Pacific Basin. The CER provides no evidence that there were fewer ships available for loading in the Pacific Basin in 2022. On the contrary, Australia continued to export approximately the same volume of cargoes to Asia in 2022 as it had done in previous years (DER §33/ Figure 3), which would suggest that there was no shortage of available tonnage in the Pacific...

(i) More generally, in neither the CER nor JM have I seen any data supporting an imbalance of fleet supply in 2022. If anything, I would assume there was an over-supply (globally) of vessels since far fewer Atlantic basin vessels were engaged on longer voyages to Asia, reducing overall tonne-miles for the global fleet and thereby increasing global LNG vessel supply. There was no basin-specific “scarcity” that resulted in “freight tension” between the basins. Therefore, I do not agree with CER §7.3.4(b)(iii), that traders seeking to load in Asia (I assume this mainly refers to loading in Australia or other Pacific Basin export countries, since not many cargoes are loaded in “Asia”) would face scarcity, pushing up freight rates “there”, i.e. in Asia (or the Pacific Basin).

(j) On the contrary, freight rates in both the Atlantic and Pacific Basins and intra-basin (i.e. BLNG routes 1-3) all increased in 2022 at roughly the same time, so I see no evidence of “freight tension”. Furthermore, as appears from DER Figure 6, BLNG2 (US-to-Europe) increased first in Q1-Q3 of 2022, with BLNG1 (Australia-to-Japan) lagging slightly behind...

(n) In addition, although there was an increase in US export volumes from 2021 to 2022 of an additional 8.4 mmt (see DER Figure 4(b)), the proportion of such cargoes being delivered on shorter voyages (requiring less ships) to Europe increased over that period, meaning that this increased volume of cargo could be delivered by less ships, without “pulling” in ships trading in the Pacific Basin. In other words, whilst I agree that more of the vessels trading in the Atlantic Basin remained in the Atlantic in 2022, there is no evidence of an equivalent shift of vessels already trading in the Pacific Basin away from that basin.

(o) Furthermore, at CER §7.3.4(b), it is stated that shorter Europe-bound voyages shortens tonne-miles (with which I agree), but intensifies competition for Atlantic tonnage (with which I disagree). On the contrary, if there is a reduction in tonne-miles, there should be an over-supply of vessels in the Atlantic, which will reduce competition for Atlantic tonnage.”

212. So far as hoarding is concerned, reallocation pressure would not cause charterers to hoard, simply because there were more LNG carriers in one geographical area than another, nor is there any evidence to show that hoarding occurred whenever there were price differences, and it had not occurred in the past when the Arb was open. Rather, as Mr Terzopoulos put it in MT2:

“35. Vessel ‘hoarding’ tends to occur after unexpected events such as Fukushima and the Ukraine war, because those extreme events create market panic and a strong incentive for charterers to retain control of their vessels amid heightened market uncertainty. It is not caused by whether one cargo index exceeds the other.

36. For example, and as explained at DER §§42-43, such vessel ‘hoarding’ was a response to the market turmoil and uncertainty created by the Ukraine war (an unexpected one “black swan” geopolitical event), which caused charterers to hoard vessels in order to ensure that they retained control over tonnage. It was not the result of TTF>JKM by a particular amount. The events would have led to vessels being hoarded even if TTF and JKM had been equal, or even if JKM>TTF. In other words, unlike an “open arb” scenario where JKM>TTF by a sufficient amount has an observable and consistent cause and effect relationship with freight rates (due to vessels proceeding on longer voyages leading to vessel scarcity), there is no equivalent correlation between TTF>JKM by any particular amount and charterers ‘hoarding’ vessels.”

213. Nor would idling or congestion be caused by reallocation pressure. While there could be congestion because of the number of cargoes discharging in Europe, that, again, is a function of increased demand, not any particular TTF-JKM price differential. In particular, as Mr Terzopoulos also said in MT2:

“39. In any event, in my opinion, to the extent an increase in ‘idling’ time could be predicted if imports into Europe increased, and that in fact occurred after Russia invaded Ukraine, its impact on freight rates would be relatively limited. Particularly since its impact on LNG carrier availability would be offset by the increased availability of LNG carriers resulting from the substantial decrease in tonne-miles as a result of more vessels remaining in the Atlantic basin, as explained above.

40. I would draw a comparison with the impact of JKM>TTF, which leads to a very substantial change in voyage length for each LNG vessel of about an additional 25-58 days that each ship is out of the market. That significantly increases tonne-miles. By contrast, a ship performing a US-to-Europe 28 day roundtrip voyage which spends, for instance, 5-10 extra days ‘idling’ has far more limited impact. I have not seen any supporting data in the CER or JM to show what impact owners/charterers would reasonably have expected in 2019/20 for increased European discharges to have on ‘idling’, or what impact ‘idling’ in fact had in 2022.”

214. Yet further, it is wholly unclear how the supposed effect of reallocation pressure on freight rates would be measured. Unlike the Arb, and the first incarnation of the reverse arbitrage thesis, there is no question of additional tonne miles being calculated to arrive at a trigger. Dr Odedra provides no detailed explanation as to how one would set the trigger in such circumstances. In addition, and as explained below, Briety’s points on the US\$1.3 trigger in this context do not work.
215. As it happens, and referring to Dr Odedra’s Figure 20, it is plain that for much of 2022 there was no correlation between high TTF prices and freight rates. See paragraphs 197- 199 above. The SSY chart used by Dr Odedra at paragraph 10.6 of AO2 does not give any additional support for the correlation. It uses an unexplained spot rate, and while it is true, broadly, that in 2022 there were spikes in both freight rates and TTF prices, to the extent they were aligned this was not because of a direct correlation but because both were caused by the particular and unusual position that had arisen in Europe as a result of the invasion of Ukraine. I do not accept the submission made by Briety at paragraph 48 of its Written Closing that the “coincidence” point made by Mr Terzopoulos here does not work and that he needed to go further and show that the increases in TTF prices and freight rates had to be independent of

each other; however, he was saying that they were independent. He rejected the notion that TTF prices had some sort of causal effect on freight rates, and explained why. I have also dealt with his evidence in this respect at paragraphs 133 - 135 above.

216. In this context, I think there is force in his observation about the reallocation pressure theory generally, at paragraph 29 of MT2:

"If the theory were correct, it would mean that, all else being equal, $JKM > TTF$ will lead to an increase in tonne-miles (which it is common ground does apply upward pressure on freight rates), or alternatively $TTF > JKM$ will lead to "reallocation pressure", which according to the CER also applies upward pressure on freight rates. In my view, this theory could therefore imply a never-ending upward pressure on freight rates, irrespective of whether $JKM > TTF$ or $TTF > JKM$."

217. While Mr Terzopoulos fairly accepted that there could be examples of rescheduling, this was effectively immaterial; see above in this section and also paragraph 127 above. I found his answers in cross-examination on this point convincing. See at paragraphs 131 and 133 above his rejection of the correlation between high TTF prices and increased freight rates.
218. I also do not think that there was anything in the (unpleaded) "tonne time" point developed in the cross-examination of Mr Murley in particular by reference to the graphs at page 18 of the Fearnleys LNG Shipping document which I have quoted from at paragraph 134 above. In fact, that document was not even addressed by Dr Odedra in her reports. It can also be seen that there was a large spike in tonne time at the beginning of 2022, while freight rates were very low. While Briety says that it is not suggesting there is a perfect correlation, but rather a trend, the question remains whether what was said to be the causes of additional tonne time in 2022, for example, hoarding, idling or other manifestations of reallocation pressure, have themselves led to a lack of available vessels such as to cause freight rates to rise. I do not accept that this was the case, for the reasons identified by Mr Terzopoulos.
219. At this stage, I need to deal specifically with the debate concerning the US\$1.3 trigger. There can be no doubt as to where, objectively, the US\$1.3 trigger used in Clause 10 came from. It appeared in Fearnleys' "voyage calculator" document referred to at paragraph 52.(7) above, sent to the parties on 11 December 2019. As part of the underlying Clause 10 formula, its derivation is plainly admissible and indeed it is not suggested that it arose from anything else.
220. The calculation is based on the shipping cost of Europe to Japan which cost could also have been calculated by comparing the cost of a US-Europe voyage, with a Europe-Japan voyage,

as both experts agree; but the method actually used was also acceptable. It is also how the Affinity Update for Week 24 of 2020, dated 10 June 2020, calculated the additional cost for the purpose of when the Arb would open; see page 6 thereof.

221. Moreover, it has to be assumed for these purposes that both parties objectively agreed that US\$1.3 was an appropriate figure to use as the trigger. It forms no part of Briety's case that, for example, the figure was so wrong or mistaken that it should be changed, either as a result of the application of the "corrective principle" in the interpretation of contracts or that the TCP should be rectified in that respect. Rather, Briety's point is that the US\$1.3 would be a suitable trigger to cover the reverse arbitrage.

222. Thus far, it was unclear to me initially why the US\$1.3 figure should have become a bone of contention at trial. In cross-examination, it was put to Mr Terzopoulos that a trigger of US\$1.3 based on the comparative price differential was not one he would ever see. He did not accept this, not least because the size of the trigger would also depend on the particular increase in hire which would apply once the trigger was activated. I myself enquired as to where the issue about the correctness or otherwise of the US\$1.3 trigger came from. At that stage, Mr Lewis KC responded:

"Both parties have relied upon factual matrix, it may or may not be permissible, as to the source of the \$1.30 in the time charter. We have relied on the voyage charter figure. Trafigura have said, no, Mr Murley showed the comparative exercise on his screen to Mr Jolliffe in a meeting on 25 February 2020, and that is how we got to the figure doing this approach. So, Dr Odedra has also here done the approach. Gets nowhere near \$1.30 on that and that is where it goes to."

223. However, that still left unanswered the question: if the voyage calculator outcome should have been much less than US\$1.3 why does it matter? After all, there is evidence that both parties looked at how often the Arb would be open above US\$1.3. See, for example, Mr Jolliffe's email to Mr Tsakos referred to at paragraph 52.(10) above, and on the Trafigura side, Mr Murley said that he also checked and discussed with Mr Jolliffe the US\$1.3 figure. This was challenged by Briety in-cross examination but I see no reason not to accept Mr Murley's evidence on this. On the basis that the trigger of US\$1.3 was being put forward by Fearnleys, it is obvious that both sides would want to check that it would work and be suitable for their purposes.

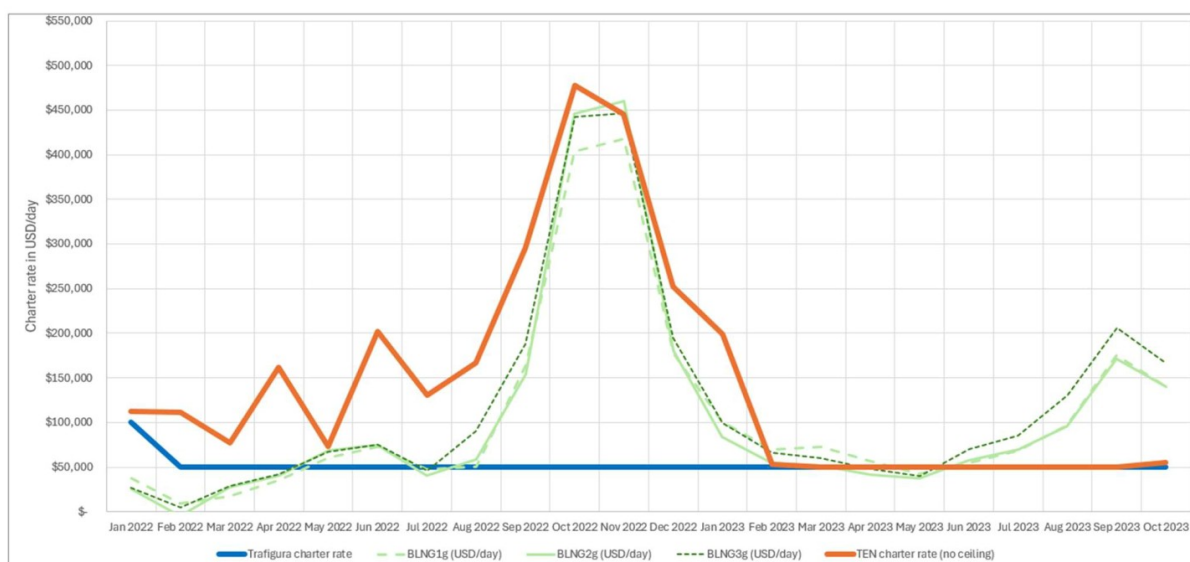
224. The supposed relevance of the US\$1.3 issue is in fact to be found in paragraphs 49-56 of Briety's Written Closing. It says that the appropriate figure for the Arb should have been much lower, something around US\$0.50. Pausing there, if that is right, Briety scored something of an own goal by agreeing a US\$1.3 figure for when the hire rate would start to increase. That

is because it means that Trafigura would be paying the Floor for much longer including when the differential was more than US\$0.50 but less than US\$1.3. That seems unlikely.

225. Briety also contended that the figure of US\$1.3 is sufficiently large to cater for the reverse arbitrage as well as the Arb, because the reverse arbitrage contemplated the same voyage as the Arb but only in reverse so the costs would be the same. However, that logic could only apply to the first iteration of the reverse arbitrage which is not now its primary case (which form of reverse arbitrage did not in fact exist as I have found).
226. Rather, Briety now contends that the US\$1.3 figure would allow for a trader to purchase by a reload, for example, somewhere in Europe and sell elsewhere in Europe, and it would cover necessary congestion, hoarding costs etc. It could also include the position of a US carrier bound for Asia but which turns round at the last minute, not discharging their load and going back to Europe instead. However, there is no evidence of such things happening, not least because, TTF did not usually exceed JKM. Indeed, if in truth the reverse arbitrage arises through reallocation pressure there is no evidence as to how the precise effect of that pressure would be measured so as to arrive at a trigger of US\$1.3.
227. More generally, and as we know, the US\$1.3 trigger was founded on a calculation which involved the cost of the extra tonne miles entailed by the Arb. Regardless of whether that was a correct calculation, the point is that it is very hard to see why the same US\$1.3 trigger should apply in relation to a thesis which argues that factors other than increased tonne miles lead to increased hire rates.
228. For all the above reasons, I conclude that neither iteration of the reverse arbitrage thesis is correct, whether as applied to the events of 2022 or any earlier period.

Correlation of the reverse arbitrage with spot freight rates

229. This is somewhat academic in the light of my last conclusion, but I should say something more about it, since one part of Briety's claimed wider purpose was use of the Clause 10 formula as a proxy for freight rates. I have already introduced this topic at paragraphs 199 and 215 above. I now refer to Dr Odedra's revised Figure 19 which is as follows, based on a chart prepared for her by Lansdowne Moritz:



230. As Trafigura has pointed out at paragraph 34 of its Written Closing, for the period up to mid-May 2022, the putative Briety hire rate, on the basis of its claimed interpretation of Clause 10, well exceeded the index rates and the same is true for the period after May 2022 until around September 2022. Afterwards, there was a broad correlation between around April – June 2023, in fact around the Floor rate, but then the index rates started to exceed the putative Briety hire rate quite considerably.
231. Accordingly, there is no clear and reliable correlation simply between a TTF minus JKM spread above US\$1.3, and spot freight rates.
232. In other words, while there was thought to be a correlation between the JKM minus TTF figure above US\$1.3 and freight rates (and see here my comment on Mr Murley’s evidence at paragraph 96 above), the same did not apply where TTF exceeded JKM.

Knowledge on the part of the reasonable owner or charterer

233. In the light of the above conclusions, knowledge on the part of a reasonable charter or owner of this reverse arbitrage and its supposed effects as at 2019-2020 does not arise.
234. However, even if in theory it could arise, there is no basis at all for suggesting that it would have been known by the reasonable charter or owner. For one thing, as already noted, the term “reallocation pressure” is not to be found in any of the relevant materials. Nor had Mr Terzopoulos come across this phenomenon (whether described as “reallocation pressure” or

something else) at the time which is when he was actively working in the LNG market. See paragraphs 42 and 43 of MT2.

235. Nor do I accept that a reasonable owner or charterer should have cause to imagine particular sets of circumstances or phenomena which had not occurred as at 2019-2020 but which conceivably might occur in the future. I also agree with paragraph 51 of Trafigura's Written Closing that that it cannot be said that such owners or charterers would have had in mind in 2019/2020 that any and all trading arbitrages from which traders could potentially profit would also inevitably cause freight rates to increase.

Conclusion on Briety's claimed wider purpose

236. For all those reasons, I conclude that there was no further, wider purpose underlying clause 10 than the implementation of an Arb-based calculation in order to derive increased hire rates under the contract. That being so, and if needed, the existence of the latter purpose itself supports Trafigura's case on construction.

Change of Circumstance

237. In the light of my conclusions above, the facts that there was (in my analysis) an unexpected and unforeseen position arising in 2022 were for some of that year, TTF exceeded JKM (so that the hire payable under Clause 10 remained at the Floor) and yet spot rates were higher than the Floor, are irrelevant. That is because the formula was limited to giving effect of the Arb and the Arb alone. Mr Tsakos was (as the documents show) plainly irritated and frustrated at this outcome. However this was simply a vicissitude of commercial life in my view.
238. Nevertheless, in this context, Briety makes a point about "change of circumstance" – see paragraphs 62- 69 of its Written Closing. Here, it refers to *Nagel, Bromarin and Standard Chartered*.
239. In *Nagel* Leggatt LJ (as he then was) stated that:
- "It is ... common place for circumstances to rise which the parties to a contract did not foresee when the contract was made. When this happens, it does not follow that the contract ceases to be binding or ceases to apply. On the contrary, unless the change of circumstances is so radical or fundamental as to frustrate the contract by making it impossible to perform, the parties are held to their bargain".
240. As he went on to explain, "[w]hat the contract requires in the changed circumstances depends on its proper construction" (ibid) citing Chadwick LJ in *Bromarin v IMD* [1999] STC 301 at 310. There, Chadwick LJ held that:

“It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event 'A', and they did not contemplate event 'B', their agreement must be taken as applying only in event 'A' and cannot apply in event 'B'. The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event 'B', which they did not contemplate. That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction. It is an exercise which requires the court to look at the whole agreement which the parties made, the words which they used and the circumstances in which they used them; and to ask what should reasonable parties be taken to have intended by the use of those words in that agreement, made in those circumstances, in relation to this event which they did not in fact foresee.”

241. As summarised by Flaux C and Foxton J in *Standard Chartered* at paragraphs 51 and 52, the authorities,

“... support an approach which, when a contract is required to be performed in (non-frustrating) circumstances which the parties did not foresee and for which they did not provide, seeks to ascertain the purpose or structure of the relevant aspects of the parties’ bargain, and to adopt an interpretation which best serves or is most consistent with that purpose in the changed circumstances: in effect, a form of contractual cy-près..

[This]... approach, as well as cohering with the intentions of reasonable parties to long-term contracts, also gives effect to an important policy of English contract law which is reluctant to contemplate the failure of partly executed contracts merely because they do not address a particular circumstance or eventuality which has come to pass ...”.

242. The issue in *Bromarin* arose in a context very different from our own. In that case, there was a formula for the payment of consideration by the defendant to the plaintiffs for the purchase of the company which had accrued capital losses which would be available thereafter to be set off against chargeable gains, so as to eliminate or reduce the CGT otherwise payable. As a result of a change in the law, the defendant’s ability to use such losses was restricted but the contractual formula still required consideration to be paid.
243. The change in the law was not such as to frustrate the contract. Nor was there any basis for saying that the consideration provision, on its true construction, was inapplicable in the circumstances that happened. The fact that the change in the law meant that the contract was less advantageous than had been supposed by the defendant, was not a ground for frustration and it was not for the court to mend one party’s bad bargain at the expense of the other.
244. The decision in that case in fact supports *Trafigura*’s position here. The fact that TTF had an unforeseen spike for a sustained period in 2022 was not a reason for giving Clause 10 an interpretation it otherwise would not bear, just because, for that period (out of a 5-year charter) the contract had not proved as advantageous as *Briety* had expected.

245. Nor does the decision in *Standard Chartered* assist Briety. That was also a very different case where certain preferential shares were tied to LIBOR, which was itself subsequently abolished. That meant that there had to be some form of implied term in order to address the problem because without it, it was common ground that the preference shares would have no commercial or practical coherence. The question then was what term should be implied. None of that has any bearing on the present case.
246. To be clear, this is not a case where the contract fails to provide for a certain event happening (where a contractual *cy-pres* might be appropriate). In our case the eventuality of TTF exceeding JKM is provided for – just not in a way which favours Briety. Where TTF exceeds JKM, the same calculation is performed, it is just that it ends up being a negative.
247. Yet further, the Change of Circumstance argument is in fact expressly premised on the basis that the parties’ purposes for Clause 10 included the profit share and the freight rate proxy - but I have already rejected these.
248. Accordingly, in my judgment, there is nothing in the “Change of Circumstance” point.

The HOA

249. The HOA is relied upon by Briety principally in relation to its common mistake rectification claim. However, at paragraph 36 of its Written Closing, it submits that the claimed purpose of a profit share was “memorialised” in the HOA.
250. It is correct that two parts of Clause 12 of the HOA (see paragraph 56 above) refer to profit-sharing. However, this takes Briety’s case no further, because a mere reference to profit sharing is hardly evidence of the particular profit share alleged by Briety. There is no dispute that there was a profit share when the Arb opened at or above the US\$1.3 figure. A mere reference to profit share in the HOA cannot establish Briety’s claimed “both ways” profit share purpose, if otherwise (and as I have found above) that cannot be shown.
251. Briety does not appear here to argue also that these references to profit share could inform the actual construction of Clause 10. But if it does, that would be impermissible – see paragraphs 135-137 of the judgment of Bright J in *Moloney v Falcon* [2025] EWHC 240 (Comm).

Conclusion on the correct interpretation of Clause 10

252. For all the reasons given above, I conclude that Clause 10 must be interpreted as contended for by Trafigura and not Briety. That being the case, Trafigura's alternative case based on rectification or estoppel by convention does not arise. However, Briety's alternative case on rectification does, and I now turn to that claim.

INTRODUCTION TO BRIETY'S RECTIFICATION CLAIMS

253. Briety claims that the TCP should be rectified to include additional wording in Clause 10 as set out in bold below:

“Step 3: Calculate the difference between JKM and TTF

For Each day where both JKM and TTF have a quote/publication the TTF quote shall be deducted from the JKM publication creating a spread **that is the absolute value of the difference "daily spread"**”.

254. It claims that it is entitled to this relief by reason of common, alternatively unilateral, mistake.
255. The common mistake claim has two variants. The first is that the necessary common intention can be found objectively, in the HOA, for which purpose it must be shown that the HOA itself was binding. The second relies again on the HOA, on the basis that even if not binding, it represents both parties' common, subjective intentions. No other document is relied upon for this second variant.
256. The unilateral mistake claim is based on the alleged facts that (a) while Trafigura's own intention was that Clause 10 would operate to increase the hire rate only if JKM exceeded TTF by the required amount (i.e. US\$1.3 or more), (b) Mr Murley knew that Briety intended Clause 10 to operate also where TTF exceeded JKM by the trigger amount, or was reckless as to Briety having such an intention and (c) he did not draw this mistake to Briety's intention.
257. I consider these claims, including the law relating to each of them, separately below.

THE COMMON MISTAKE RECTIFICATION CLAIM

Introduction

258. Briety's principal claim here is based on the HOA as a prior binding agreement and thus as an expression of the parties' prior objective common intention (“the HOA Claim”). Its alternative

common mistake that is that the HOA is the best evidence of the subjective common intention of both parties (“the Subjective Intentions Claim”).

The Law

259. For the most part, the parties agree on the relevant principles here. As set out in Briety’s Written Closing, the four basic elements of rectification for common mistake are:

- (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
- (2) there was an outward expression of that accord;
- (3) the intention continued at the time of the execution of the instrument sought to be rectified; and
- (4) by mistake, the instrument did not reflect that common intention.

260. In terms of the degree of proof of these matters (and indeed for matters going to unilateral mistake rectification as well), *Snell’s Equity* (35th Ed) puts it thus as paragraph 16-022:

“The standard of proof remains the civil standard of the balance of probabilities. However, since the alleged intention contradicts the written instrument, “convincing proof” is required to contradict the inherent probability that the written instrument truly represents the parties’ intention because it is a document signed by them. Equally, “certainty and ready enforceability would be hindered by constant attempts to cloud the issue by reference to pre-contractual negotiations”. It is for these reasons that a person seeking rectification must be able to rely upon “strong irrefragable evidence”. The burden of proof is on the party seeking rectification, and this burden is particularly “formidable” if the formal written instrument is detailed and recorded with the benefit of expert legal advice.”

261. Further, where (as here) the prior agreement is a contract, it can constitute the parties’ objective common intention, provide that the prior agreement is itself binding. Thus, in *Porter v Stokes* [2023] UKSC 11, a deed was rectified on the basis that the claimant had “an enforceable right to a conveyance of the strip” of the relevant land by reason of the prior binding contract, which the deed, by mistake, subsequently failed to reflect. The “enforceable right” reflected the binding nature of the earlier agreement. As Lord Briggs explained at paragraph 39 of his judgment:

“39. There was a time, before *Joscelyne v Nissen* [1970] 2 QB 86, when it was thought by some that the first type of case was the only type for which rectification was an available remedy. Absent an earlier binding contract there was nothing upon which an equity of rectification could be based: see per Lord Hoffmann in *Chartbrook* at para 59, referring to *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 88 per Cozens-Hardy MR. Rectification of a mistaken document (eg a deed of conveyance) made pursuant to an existing contractual obligation would be granted almost as a kind of specific performance. If the claimant could show that the later document failed to implement the earlier contract, objectively construed, then it would be rectified so that it did. It would be irrelevant, in Lord Hoffmann’s

view, that the subjective intentions of one or more of the parties differed from its meaning objectively construed.”

262. I do not read that passage as meaning that the prior agreement relied upon not only had to be binding, it had also to be capable of specific performance of its substantive terms. Rather, the notional specific performance referred to by Lord Briggs was of the obligation to make the further contractual document in accordance with, or so as to give effect to, the earlier one.
263. In *Porter* itself, it was clear that it was intended that the later deed should embody the earlier agreement. The circumstances were that the parties had made a binding contract of sale of a plot of land which itself was inaccessible from the main road. In order to deal with that, it was also agreed that the claimant would purchase from the defendant a strip of land adjacent to the road which would afford such access. That contract was made on 15 May 1982. Of course, in order to give effect to that contract so that title could pass to the claimant, there needed to be a deed of conveyance which was duly executed on 18 August 1982. The problem was that the sale of the strip of land had been omitted from the deed. The claimant was therefore left with no access to the main plot of land. There were in fact various features of the deed, from which it could be inferred that the omission of the strip of land was indeed a mistake. This is perhaps a classic case of where the earlier agreement obliged the parties to enter into the later one, because in conveyancing terms, the earlier contract gave rise only to personal rights and it was necessary for a later deed (or in the modern terminology for registered land a transfer) so that the relevant title could be conveyed. In such a case, it is very easy to see that the parties did not intend any alteration to the land to be sold as between the earlier and the later agreement.
264. Equally, in *FSHC v Glas* [2020] Ch 365, the problem was relatively simple to identify. The underlying contract had required the claimant to provide particular security which would be in the form of later agreements, but this was not furnished at the time of the underlying contract as it should have been. When this was realised, the claimant’s solicitors procured the claimant to enter into what was thought to be the necessary security agreement with the relevant counterparty, so as to “plug the gap” as it were. In fact, as matters turned out, and due to insufficient care being taken with the mechanism for the provision of the security, the later agreements in fact imposed additional obligations upon the claimant which neither party had intended. In those circumstances the trial judge held that the security agreement should be rectified to remove the offending additional obligations and the Court of Appeal agreed.

265. In both *Porter* and *FSHC*, therefore, it was easy to discern the parties' intention to create a further agreement and that the further agreement as drafted contained an obvious error.
266. What neither that dealt with was the situation where there was an earlier binding agreement, followed by a later more detailed binding agreement, the creation of which the parties had contemplated but where there was no obligation in the first agreement to enter into the second one.
267. This is what occurred in *The Aktor* [2008] 2 Lloyd's Law Reports 246, where the earlier agreement was a binding "recap" for the sale of a ship and the later one (to be rectified) was a formal MOA (memorandum of understanding). The argument was that the provision for the payment of the 10% deposit differed between the two, and when the buyer insisted on paying the deposit in the manner set out in the recap, the seller purported to terminate the MOA on the grounds that the buyer had repudiated it. In the proceedings which followed, the buyer sought to rectify the MOA so that its deposit term reflected what was set out in the recap.
268. The matter came before Christopher Clarke J (as he then was) on an appeal from the arbitrator's award. He made the following observations about the law:

"Supersession"

49. The buyers are not entitled to rectification unless they establish that the MOA was intended by the parties to embody the provisions of the recap as to payment of the price without alteration...

59. In the present case it was for the buyers to establish their entitlement to rectification and to do so convincingly. They were, however, at least halfway there in that it was common ground that the recap was a contract. Moreover, the meaning of the recap "is not a matter of proof. It is a question of construction": per Hoffmann LJ in *Britoil*. The MOA does not bear the same meaning as the recap. Accordingly the buyers would be entitled to rectification if there was no intention on the part of the parties to vary the agreement. Since the onus of proof lies on the buyers I am prepared to accept that it was for them to establish that there was no intention to change. In practical terms that may be a light burden if, on the facts, no one suggested that there was any change involved.

60. But the arbitrators have held that, although there was a concluded agreement when the recap was sent out, that agreement was superseded by the final signed contract, ie the MOA, which was intended to record their final agreement: para 41 of the award. By that I take them to mean that the MOA was intended to be a complete replacement for the recap, to the exclusion of whatever had gone before, and so that the agreement between the parties was to be found within, and only within, the MOA. That that is what they meant is apparent from their reference in para 31 of the award to their experience that, where a formal MOA is drawn up after terms have been agreed, the parties' intention is generally to record "exclusively and comprehensively" the agreement between the parties, and in para 41 to the fact that that assumption was not rebutted in this case. As Rix LJ put it in *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] Lloyd's Rep IR 596, page 619: Where . . . one contract has been intended to supersede an earlier contract, it must follow that the parties' contract must be found exclusively in the later contract. Thus the earlier contract cannot be used to add to, or modify the later contract."

269. The two points made here (in paragraphs 49 and 59 on the one hand, and paragraph 60 on the other) really amount to the same thing. If the parties intend the later contract to supersede the earlier one, they obviously do not intend simply to record the earlier contract in the later document without alteration, and in such a case their objective common intention can be found only in the document sought to be rectified i.e. the later contract. The intention to supersede is clearly more likely to be found where the first agreement is less formal and less detailed than the second agreement which follows it after further negotiations.

270. That view of the matter is further supported by the footnote reference by Christopher Clarke J to the decision of Gross J (as he then was) in *Electrosteel Castings Ltd v Scan-Trans Shipping and Chartering Sdn Bhd* [2003] 1 Lloyd's Rep 190, where he observed (at page 201 col 2) that:

“It is true that there were no further negotiations between the recap telex (28th October) and signature of the Booking Note (30th October); but neither the documents nor the context lend support to the notion that the later Booking Note contract is to be incorporated in, or must give way to, the prior contract evidenced by the recap telex. It follows that, in all the circumstances, the correct inference to draw is that the Booking Note contract was intended to govern”

271. Finally, I consider the effect of an “entire agreement clause” (“EAC”) in the contractual document sought to be rectified, as there was here. Does that, without more, rule out reliance on the prior agreement as an objective manifestation of the parties’ common intention?

272. In *Snamprogetti v Phillips Petroleum* [2001] EWCA Civ 889, the Court of Appeal found that there was no basis for the rectification claim because the alleged prior common intention did not reflect the rectification actually sought. However, it also dealt with other arguments against the claim. The contract sought to be rectified contained an EAC. In that regard, Tuckey LJ said this at paragraph 32 of his judgment:

“...Furthermore, where there is an entire agreement clause this may tend to show in fact no inconsistent governing intention has subsisted and that hence no basis for rectification has arisen because the parties have intended to be bound by the document in the material respects regardless of prior or other intentions (Spry on Equitable Remedies 5th Edition at p.612.)”

273. The Court of Appeal went on to find overall that the parties intended to be bound, and bound only, by the final formal and carefully drafted document which could not be affected by the succession of earlier, less formal and less considered documents. One can infer, because of the earlier reference to it, that the EAC in that case played some part in this reasoning.

274. However, in *Bin Obaid v Al-Hezaimi* [2022] EWHC 2460 (Ch), Joanne Wicks QC, sitting as a Deputy High Court Judge, said as follows at paragraph 82 of her judgment:

“I mention briefly an argument of Mr Ho, namely that clause 11.1, the entire agreement clause in the Settlement Deed, would tend to show that no basis for rectification could have arisen because the parties intended to be bound by the document in the material respects regardless of prior or other intentions: see *Phillips Petroleum Co UK Ltd v Snamprogetti Ltd* [2001] EWCA Civ 889 at [32]. It was not Mr Ho’s submission that the mere inclusion of an entire agreement clause in a contract or deed would prevent a claim to rectification arising: such an argument was rightly rejected by Christopher Pymont QC, sitting as a Deputy High Court Judge, in *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWCA 1291 at [70]-[74]. His was the more limited argument that the inclusion of the entire agreement clause should be given evidential weight in considering the parties’ intentions. On my findings, this issue does not arise but for completeness I should record that the presence of the entire agreement clause in this case throws no light on the parties’ actual intentions and I have no evidence to suggest that its inclusion was given any particular thought in the drafting process.”

275. Similarly, see the decision of Picken J in *Cindat v Hunter Holdings* [2024] EWHC 1202 (Comm), where at paragraph 16, he quoted with approval the same passage from *Surgicraft*, observing that the existence of an entire agreement clause is not necessarily a bar to rectification.
276. I agree that an EAC does not necessarily act as a bar to rectification. In particular, it cannot act as a bar, simply because it purports to exclude reliance on any earlier agreement, without more. That is because what is sought to be rectified is a substantive part of that written contract which contains the EAC. The purpose of the EAC is to exclude reliance on any other materials to supplement the written contract or (if covered by the EAC) earlier representations or statements so as, for example, otherwise to constitute a collateral contract. It is not barring a rectification claim as such. However, as is recognised, the EAC could be relied upon as a piece of evidence to show the parties’ intention that the document in question was meant to be the first and last word, as it were, in terms of their contractual obligations, and in that sense superseded earlier agreements, even if themselves binding. One would consider that piece of evidence in the context of the evidence surrounding the formation of the written contract as a whole.
277. I confess that I have some difficulty with the notion that whether or not the EAC constitutes such evidence depends on the thought given to it at the time of making the written contract. The fact that it is agreed in a bespoke full written contract (as opposed to a set of standard terms, for example) without much or any discussion or particular thought given to it would be unsurprising. When commercial lawyers are involved in the drafting of a written contract the inclusion of such a clause will usually be uncontroversial; after all, it protects both sides from arguments about other materials said to form part of or supplement the contract. I fail to see why that means it should not be capable of constituting some evidence of the parties’ intention to give complete primacy (for all purposes) to the ultimate written contract now sought to be

rectified. As it happens in this case, whether that is a correct analysis does not matter, in the light of my findings below.

The HOA claim

Was the HOA binding?

278. The HOA claim cannot succeed at all unless the HOA was itself binding. In my judgment it was not (save possibly in one immaterial respect) for the reasons given below.
279. The wording of the HOA (set out at paragraph 56 above) clearly contemplated that there would be agreed thereafter a time charter. See item 4, and the references to “the Charter”. What one then has at item 23 is a provision making “the Charter” subject to 3 conditions:
- (1) Mutual agreement by the parties of all the terms thereof by 15 May 2020;
 - (2) Approval by Trafigura’s management of a charterparty on those terms within 6 months of the agreement referred to in (1) above; and
 - (3) Trafigura’s definitive review of the specification of the Vessel by 15 May 2020.
280. Those time limits could then be extended, with consent to such extension is not to be unreasonably withheld.
281. The drafting is not perfect here (perhaps itself an indication that the HOA was not generally binding) but it is plain from those 3 conditions that a formal charterparty had to be agreed and approved before there could be any binding charter. Of course, the ultimate charterparty (here the TCP) could change those conditions, but at least this is what the HOA provided for as at the date when it was made.
282. In this context, item 22 is important. It provides that if the only condition not fulfilled was condition (2), then Trafigura must pay the “Owner” US\$1 million. The object of that was clearly to compensate the Owner for the time and cost expended on negotiating the charter party if, in the event, it was not executed by Trafigura because its management did not approve it; all in circumstances where there had been fulfilment of Conditions (1) and (3), i.e. all the substantive terms had been agreed and there had been the required (satisfactory) review. All of this makes commercial sense, and it is understandable that if there was no charterparty

because its terms could not in the event be agreed or there was a problem about the specification of the Vessel, Trafigura should not have to bear any of the Owner's costs.

283. It should also be noted that item 12 itself expressly left some matters for further negotiation. See the reference under "Pricing Mechanism" to "M-2 with further definition as per further terms" and also the expression "to be inserted into the TCP based on". In addition, there were a number of matters that were not defined at all, and which were necessary for the floating hire mechanism to operate, including complete definitions for the pricing sources for JKM and TTF, which pricing days and quotations thereon would be used to calculate the respective figures for the purpose of calculating the monthly hire, the method for converting TTF figures to a US dollars per MMBtu and how the monthly average spread was to be calculated. To remedy that omission in the absence of a further definitive agreement would be a difficult if not impossible exercise of either construction or the implication of terms. In fact, item 4 contemplated that there would be "further terms" to be agreed.
284. In addition, although not a critical point, and not one I need for my conclusions here, I do observe that strictly, there was no actual party identified as the Owner. While there was a signature from a representative of TEN, it was said to be given not on behalf of TEN, but a company TBN (I assume "to be notified"). Of course, it might be said that in the absence of some other company being advised to Trafigura, the signature should be taken to be on behalf of TEN itself; that is not what the signature wording says, however. On any view the ambiguity here is another reason why the parties could not objectively be regarded as seeing the HOA as being an effective and binding charterparty.
285. In those circumstances, where the making of a full charterparty was expressly contemplated and provision was made for what should happen if it was not made, it is extremely difficult to see how, absent a charter party, the HOA was itself objectively intended to be such. If one asked oneself the question at the time whether, if negotiations for a charter party failed and no vessel was supplied by the owner, Trafigura could sue the Owner for repudiatory breach, the answer would surely be in the negative.
286. Briety makes the point that there is an indication that the HOA was binding because of item 21, providing for English governing law and the exclusive jurisdiction of the High Court in here in respect of "Any dispute arising out of or in connection with this HoA...".

287. I see the force of that, but, looking at the HOA as a whole, I do not consider that this element of it displaces the other features of the HOA which clearly point to it not being binding. Further, and subject to my earlier point about the non-identity of the Owner contracting party made in paragraph 284 above, item 21 would still have a purpose when it came to enforcing the payment obligation set out in item 22, should it arise. Also, in this regard, I agree with Trafigura that item 21 would at least prevent a foreign court from taking jurisdiction and deciding for some reason that the HOA was binding in the event that either of the parties tried to litigate where there was no following charterparty. Accordingly, I do not consider that the presence of item 21 means that I must regard the HOA as generally binding.

288. In addition, there is evidence that the parties themselves did not, subjectively, think that the HOA was generally binding at the time. This is evidence which is admissible on the factual question as to whether there was an intention to create legal relations. As for Briety, on 4 June 2020 Mr Jolliffe sent a WhatsApp message to Mr Jones saying:

“No signed HOA. This is not funny. Why won't he sign it (a non binding document)? Is there something wrong ?”

and in an email to Mr Jones the following day Mr Jolliffe said:

“Despite the fact that it is 11.30am in Geneva I still have no signed HOA. It is non binding so shouldn't be a problem for Olly and Nicos wants it. Why is it such a problem? I promised it to Nicos early this morning based on your call with Olly”

289. Mr Jolliffe was asked about these exchanges in cross-examination. He took some time to answer the precise question put to him, and ended up saying that while this is what he had said at the time, he realised later on that he must have been wrong because he looked at the governing law and jurisdiction clause and thought they would not be there unless the HOA was binding (see T2/118-119). I did not find that answer persuasive at all. Given that he was anxious that the HOA should at least be signed, he must have been familiar with all of its terms at the outset. I am quite sure that this evidence about discovering later that, contrary to his first impression, the HOA was binding, is an incorrect afterthought, and with knowledge of the emphasis now placed on item 21 as part of Briety's case. I should add that when Mr Saporis was shown the WhatsApp message, he said that he did not regard the HOA as non-binding, again because of item 21. I did not find that evidence plausible either. I say that even though Mr Saporis made the point that Briety had originally wanted an arbitration rather than an exclusive jurisdiction clause.

290. No one suggests that the HOA was wholly insignificant as a document, in terms of recognising where the parties' negotiations had got to at that stage and as an albeit non-binding expression of their commitment to do the deal and enter into a charterparty. The question is not that, however, but rather whether the HOA amounted to a generally binding contract in its own right. I am satisfied that those at Briety (correctly) did not regard it as such.
291. For his part, Mr Murley did not see it as binding either; see his evidence at T3/94 and 115. I should add that when he said here that he did not need management approval for the HOA, because it was non-binding so he could sign it himself, as he did, that seemed perfectly plausible to me. The correctness of that view is emphasised by the fact that when Trafigura's management approval was contemplated as being necessary, this was in relation to the making of the charterparty itself - see Condition (2) of item 23 of the HOA.
292. For all those reasons, I consider that the HOA was not binding and by reason of that conclusion alone, the common mistake rectification plea based on the HOA must fail.

What does item 12 mean in any event?

293. However, even if it was binding, there are further objections to the rectification plea based upon it. First, I do not accept that the meaning of item 12 itself imports Briety's claimed "absolute value" of the spread. It does not say so, and it still makes reference to "JKM-TTF" with the dash meaning "minus". Indeed, Briety itself does not contend that item 12 clearly expresses the "true" common intention, because the wording sought to be added to Clause 10 by the rectification plea is not that contained in clause 12, but rather the addition of a reference to absolute value - see paragraph 253 above. While Briety can propose whatever wording it considers is most appropriate for the rectification plea, it is relevant that the claimed expression of the parties through common intention is itself apparently not clear enough to be introduced into Clause 10.
294. Moreover, all of the factual matrix points made above in relation to the interpretation of Clause 10 would, in my judgment apply to item 12 as well. In other words, it is not the case that item 12, properly interpreted, provides for a 2-way mechanism for the increase in hire rate, as distinct from Clause 10.
295. On that basis, there is no relevant mistake, because both the HOA and the TCP provide for a one-way hire rate increase where the Arb was sufficiently open. Again, if this point is reached,

it must be at the end of the HOA Claim (and indeed the alternative Subjective Intentions Claim).

Did the parties intend that the TCP should entirely supersede the HOA?

296. However, even if the HOA was binding and did or might provide for the two-way increase in hire as a matter of construction, Briety would still have to show that the parties intended that the TCP was meant to reproduce the HOA without alteration. Or, to put it another way, there was no intention that the TCP should supersede the HOA in all respects.
297. In my judgment, Briety cannot show this. First, there is no obligation within the HOA to execute the TCP. Quite the reverse, because item 22 expressly contemplates that the TCP might not be made at all and only provides fixed compensation for Briety in that event, where the only outstanding matter is the approval of Trafigura's management where all the terms had themselves been agreed and where there had been a satisfactory review of the Vessel. The very fact that all the terms had to be agreed shows that there was to be a detailed negotiation for the subsequent charterparty. This conclusion is reinforced by the reference to the need for further terms in items 4 and 12.
298. As it happens, and for the reasons set out below, it is my view that both parties did in fact subjectively know that the hire rate mechanism was only "one-way" as at the time of the HOA and the TCP and did not intend to change that mechanism. Objectively, however, it seems to me that both parties did regard the TCP as the exclusive record of their agreement so that it did in any event supersede the HOA. The facts of this case are very far from those in either *Porter* or *FSHC*.
299. We know that there were in fact considerable negotiations leading to the TCP, which had in fact started prior to the making of the HOA, and which were described as a "marathon". Annex 2 to Trafigura's Written Closing on the drafting of the TCP demonstrates this and the number of further or more detailed, or different terms that went into the TCP, as compared with the earlier HOA. None of the factual matters referred to in Annex 2 seem to me to be controversial and this document was not challenged in terms of what it said in Briety's Oral Closing.
300. In summary, there were many differences between the TCP and the HOA and the content of the TCP itself, as it was being drafted, changed in the course of negotiations. There was no suggestion at any stage that either party was prevented from proposing whatever amendments

it wished. Lawyers were instructed on both sides and for Briety, there were also at least at some stages, external lawyers in the form of Clyde & Co.

301. Thus:

- (1) The HOA was a 7-page document, whereas the TCP consisted of 122 pages;
- (2) There was a widening of the laycan period;
- (3) The increments changed (to Briety's financial advantage at \$1,212.50 per day) from US\$0.10 to US\$0.01;
- (4) There were changes and additions to the wording of Clause 10 when compared with item 12 of the HOA.

302. It is true that on 20 May 2020, Mr Jones emailed Mr Saparis as follows:

"Good afternoon Yannis,

Pleased to attach Charterers comments to the TCP.

Please note that Clauses 10 are still under review to ensure that we have the required details to transfer the HOA into a fully operational TCP clause. No intention here to change form [from] the agreed but for completeness sake as we have discussed before. Clause 19 still to be checked by Trafigura credit. Once you have had time to review be good to talk through the TCP and comments made..."

303. As already noted, I do not believe that either party thought that Clause 10 had materially changed the formula from item 12, and for the reasons given above, I have already found that on the proper interpretation of item 12 it was no different anyway; however, the point here is that the nature and length of the negotiations and the changes which were made all support the notion that whatever the HOA had said, the parties were now exclusively focusing on the TCP as the definitive contract and it would supersede as such, the earlier HOA in any event.

304. Further, in this regard, I take the view that some weight can be attached to the TCP's EAC at Clause 47 (i):

"47. Confidentiality and Construction

(i) This charter constitutes the entire agreement between the Parties bound hereby and supersedes and replaces all other written or oral negotiations, representations, warranties, agreements, and undertakings made or entered into by or between owners and Charterers with respect to the subject matter herein prior to the date of this charter."

305. I have no doubt that it would have been considered by the lawyers even if both sides agreed that it would be uncontroversial, because it is a sensible and necessary provision for the protection of the parties.
306. Accordingly, in my judgment, and for the reasons given above, rectification on the basis of the HOA claim is not available even if (contrary to my earlier findings) the HOA was binding and item 12 should be construed as Briety submits.

Conclusion on the HOA Claim

307. This iteration of the rectification plea must therefore be rejected.

The Subjective Intentions Claim

Generally

308. On the basis that the HOA was not binding, Briety relies in the alternative on the HOA (and nothing else) as the best evidence of what, on the facts, both sides' subjective common intentions actually were.
309. The first point here is that even if this was the correct approach to ascertaining the parties' subjective common intentions (which, in my view, it is not - see below) this variant of the rectification plea cannot succeed because in my judgment, item 12 is not to be interpreted as providing for a two-way hire rate, as explained above. If that is the expression of the parties' common intentions, then plainly, the claim here cannot work.
310. However, even if the position were otherwise, I reject the notion that one should take such a "blinkered" approach to the parties' subjective intentions. I understand why Briety invites the Court to consider the HOA alone, because otherwise there would be a plethora of material to examine which was or might be relevant to the parties' subjective intentions, and Briety's approach here has the merit of simplicity. However, it is unrealistic. There is no basis for restricting the materials that the court should consider when deciding what the prior subjective intentions of each of the parties were. When a wider exercise is conducted, it shows that it is quite impossible for Briety to demonstrate with "convincing proof" that both parties had the same subjective intention, namely to create an increased hire mechanism which operated both ways.

Trafigura's Subjective Intentions

311. In this context, it is sufficient to conclude that Briety has not established that Trafigura had the subjective intention overall for which it contends. It clearly did not.
312. In my view, there can be no doubt that at all material times, Trafigura understood and believed that the purpose and effect of the floating hire clause, based on JKM-TTF, was to increase the hire when the Arb was sufficiently open and in no other circumstances. That is the thrust of Mr Murley's evidence which is consistent with the contemporaneous documents and here, of course, one is not limited to documents which would only be admissible as factual matrix evidence. I accept Mr Murley's evidence here.
313. Indeed, it was not put to Mr Murley in cross-examination that Trafigura subjectively intended or believed otherwise, and Mr Murley's evidence on Trafigura's intentions was not itself challenged. Instead, and in support of Briety's unilateral mistake rectification claim, the cross-examination of Mr Murley proceeded on the basis that while Mr Murley did subjectively intend Clause 10 to operate only in respect of the open Arb, he knew that Briety intended otherwise or was reckless as to the existence of Briety's contrary understanding.
314. Accordingly, it cannot be shown that Trafigura's subjective intentions here aligned with Briety's claimed subjective intentions. That is sufficient to dispose of the Subjective Intentions Claim, being the second variant of the common mistake rectification claim.

Briety's own Subjective Intentions

315. As it happens, I also consider that Briety's own subjective intentions were the same as Trafigura's. I deal with this below in the context of the unilateral mistake claim, but it also supports my conclusion, here if such support was necessary.

Conclusion on the Common Mistake Rectification Claim

316. It therefore follows that this claim must fail.

THE UNILATERAL MISTAKE RECTIFICATION CLAIM

The Law

317. As far as I can see, this is common ground between the parties.

318. There is a four-fold test for unilateral mistake, as set out in the judgment of Buckley LJ in *Thomas Bates v Wyndhams* [1981] 1 WLR 505 at 515 as follows:

“it must be shown: first, that one party A erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party B was aware of the omission or the inclusion and that it was due to a mistake on the part of A; thirdly, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element involved, namely, that the mistake must be one calculated to benefit B. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake.”

319. That analysis was accepted in *George Wimpey v VIC* [2005] EWCA Civ 77, by Peter Gibson LJ at paragraph 38 of the judgment as an “authoritative statement of the requirements of rectification for unilateral mistake.

320. In *Thomas Bates*, it was also noted by Sedley LJ at paragraphs 58-61 that the court should be most cautious and wary about concepts of ‘honour’ in relation to arm’s length commercial negotiations – a reasonable negotiator’s first duty is to his own principal. Further, paragraph 5-79 of *Chitty* states that:

“If...it is reasonable to expect the other party to check the draft, and A does not know that B mistakenly thinks that it reflects what B hoped would be agreed, there will be no relief”.

321. Further, while the knowledge referred to in the second requirement set out in *Thomas Bates* must be actual knowledge, as *Chitty* puts it at paragraph 5-078:

“but if a party wilfully shuts its eyes to the above, or wilfully and recklessly fails to make such inquiries as an honest and reasonable man would make, that will count as actual knowledge”.

322. As explained by Jacobs J in *Global Display Solutions Ltd v. NCR* [2021] EWHC 1119 (Comm) after a careful review of the authorities, where this “recklessness” limb is invoked i.e. in the absence of actual knowledge, in so acting, the relevant parties must be shown to be dishonest. As he put it at paragraph 458 of his judgment:

“I therefore conclude that unless actual knowledge of the mistake can be shown, dishonesty is on current authority a necessary requirement for a case of rectification for unilateral mistake. Whilst this dichotomy may appear anomalous, in practice (as Blackburne J indicated in paragraph [79] of his judgment in *Wimpey*), a case where one party knows that the other is labouring under a mistake as to the contract terms, but does nothing to alert him, will usually be a case of dishonesty anyway.”

The Detail of the Unilateral Mistake Claim

323. The way in which this claim is made, in terms of the actions of Trafigura is highly specific, as indeed, it should be. Of course, it is premised on the basis that, as I have found, Trafigura is correct about the interpretation of Clause 10. The claim runs thus:

- (1) At all material times in the negotiations up to and including the signing of the TCP, Briety understood and intended that the Clause 10 mechanism would lead to an increased hire rate “both ways” i.e. whether JKM exceeded TTF, or TTF exceeded JKM at or above the trigger of US\$1.3;
- (2) Mr Murley knew that this was Briety’s intention or at least was reckless as to that being the case;
- (3) On Friday, 10 July 2020, prior to the negotiations concluding, and at 10:19 AM he sent to Mr Jones a revised draft of Clause 10 which, for the first time, included Steps 3 and 4; he did not present this as a substantive change and in fact sent the email attaching the draft without any subject heading or comment at all;
- (4) Shortly afterwards, Mr Jones sent to Mr Murley a number of changes that have been proposed separately by Mr Paul O’Sullivan who was another broker at Fearnleys;
- (5) In the afternoon of 10 July, Mr Jones then sent to Mr Murley composite draft amendments to Clause 10 including both Mr Murley’s and Mr O’Sullivan’s changes;
- (6) At 8:13 PM, Mr Jones sent those proposed changes to Mr Jolliffe, Mr Saparis and others at TEN, which said as follows:

“Good evening Yannis,

Pleased to attached the TCP with Charterers comments to your last. Going through it in the knowledge that it is the last review and rather than negotiating but reading to capture the sense of the Clauses to ensure all makes sense a few items have been altered but we here believe for the greater good.

1. Through the discussions of Clause 7 the delivery notices got removed, they have been inserted as per HOA
 2. Clause 10 wording has been refined to ensure correct capture of the incremental changes, see attached excel that has been created to improve the understanding
- I'll give you a call to discuss but Charterers wanted to pass on their thanks to your last counter and also to continue to show progress. Charterers reserve the right to a final review to the document on Monday morning but again we do not expect any further changes.”

- (7) The changes were duly accepted by Briety and they all formed part of Clause 10 (and some other clauses) of the concluded TCP;
- (8) The addition of Steps 3 and 4 were what made all the difference in terms of the interpretation of Clause 10, or at least contributed to it, and Mr Murley knew that;
- (9) By this exercise, Mr Murley “slipped in” these important changes to Clause 10 without drawing to Briety’s attention that they were important changes; moreover (although

this is not pleaded) it should be inferred that, in order to mask these changes he himself had instructed Mr O’Sullivan to go through the document and suggest amendments of his own and when added to Mr Murley’s changes, were likely to give less prominence to the Clause 10 changes when they had all been merged by Mr Jones;

- (10) Mr Murley achieved his purpose so that when the TCP was signed, Briety had not realised that Clause 10 now had the effect that I have found that it did.

324. Added to this, there is the general plea that Trafigura did not draw to Briety’s attention that Clause 10 was not to the same effect as the HOA, this being on the basis that (contrary to my finding above) item 12 of the HOA did allow for the increase in hire both ways, in circumstances where Trafigura knew that Briety was labouring under the mistake that Clause 10 also operated to increase the hire both ways, or was reckless as to whether Briety was so mistaken. The focus in the cross-examination of Mr Murley was on the detailed version of the plea set out in paragraph 323 above. I deal with what that cross-examination did or did not reveal, below.

Briety’s Subjective Intentions

325. First, however, I deal with the question of what Briety’s subjective intentions actually were at the material times. For these purposes I shall refer to Briety’s intentions, but whether they were those of Briety (once it had been nominated as the owner for the purpose of the charter party) or those of TEN, makes no difference for present purposes.
326. The relevant intention alleged is that the difference between JKM and TTF (whichever was the greater) is to be seen as an absolute value so that the hire would increase “both ways”. As already noted, Briety contends that this is the effect of item 12 of the HOA and was so understood by Briety. However, even if item 12 was not to that effect (as I have found) the contention remains that Briety’s subjective intention at all stages was to have the concept of absolute value. Briety was thus mistaken in thinking that Clause 10 was to that effect. I agree with Trafigura that the relevant subjective intention alleged is this positive intention as to what would happen if TTF exceeded JKM. One could not get to the question of absolute value unless this was the case. Such an intention is therefore not consistent with a position whereby Briety simply never considered what might happen if TTF had exceeded JKM.

327. As to whether there was such a subjective intention, the first point is that there is not a single document which contains or makes reference to a positive intention based on absolute value on the part of Briety. I do not consider that references to profit shares or “we make money when you make money” establish such an intention for the reasons I gave when discussing such phrases in the context of factual matrix. See paragraphs 187 to 192 above, which apply equally here.
328. Second, I refer again to what was explained to Briety about the workings of the floating hire mechanisms and the numerous documents explaining this. See paragraphs 178-186 above, and all the documents cited at paragraphs 51-52 above.
329. As for Mr Jolliffe, he plainly knew what the effect of all of these documents was and what he was himself telling Mr Tsakos. To the extent that he said in cross-examination that all of this was over his head or “a foreign language” I do not accept that evidence. I have already said that I found him to be an unsatisfactory witness generally, for the reasons given in paragraphs 74-79 above. He is plainly an intelligent and experienced businessman who was excited to obtain and financially interested in obtaining, a charter for the Vessel on the basis initially pitched to him by Mr Jones. It is unrealistic to suggest that he did not understand precisely what the formula on offer was and any of his evidence to the contrary is implausible. It should also be recalled here that it is not enough, in any event, for Mr Jolliffe to say that he did not understand the formula being proffered (by him among others). It has to be shown that he did in fact understand and intended to operate on the absolute value basis. There is no basis for the existence of that intention on his part, however.
330. In addition to explanations as to how the formula worked on the basis of the Arb, there were, of course, the references to negative spreads. In that context, Mr Jolliffe’s observation later that if TTF exceeded JKM it would be a “disaster” (referred to at paragraph 76 above) is pertinent. This was a post-contract communication but it is relevant where it can assist on determining what Briety’s belief and intentions had been previously, up to the conclusion of the TCP.
331. Further, on 4 January 2022 he messaged Mr Jones as follows:

“F..k - bloody thing has gone negative again! What a bummer! Expect calls from Nicos”

332. It is true that by then, Mr Tsakos had raised (through Mr Jones) the question of amendment, but Mr Jolliffe's message as an immediate reaction to a negative spread surely indicates that he knew that this was bad for Briety and that is because of his knowledge as to how Clause 10 worked.
333. Further, it is difficult to see why Briety positively intended, prior to the making of the TCP, that increased hire would be payable if TTF exceeded JKM anyway. That is because TTF had hardly ever exceeded JKM and never on a monthly average basis. I have set out the figures at paragraphs 193 and 194 above. On that basis, they would not have given any thought to that possibility and the documents do not indicate that they did. In other words, the only realistic and established scenario whereby, as a result of the price differential, there would be a resulting effect on freight rates so as to justify an increased hire rate, was the Arb.
334. In my judgment, it is impossible to attribute to Mr Jolliffe a positive subjective intention that the absolute value concept would be in play. He was the principal actor for Briety, negotiating with Mr Murley and on that basis his knowledge (or lack of it) must be attributed to Briety. That being so, the evidence given by Mr Tsakos does not really matter. However, I did not think that he was a satisfactory witness either. See paragraphs 80 - 87 above. I am quite sure that, prior to the making of the TCP he did not personally have the relevant subjective intention.
335. Insofar as it matters, I do not accept that the evidence of Mr Saparis adds anything here. He was not as unsatisfactory a witness as Mr Jolliffe or Mr Tsakos, although there were still some problems with his evidence (as noted at paragraphs 88 - 93 above), but I do not consider that his evidence convincingly shows that prior to the making of the TCP, he had a positive subjective intention to the effect of absolute value.
336. In regard to all of this, what is of particular significance is that it is not alleged that Mr Jones was labouring under a mistake at any point. Given that he initiated the formula based on the Arb in the first place, that would not be very likely. However, if he was not labouring under such a mistake, it would be very odd if his client, Briety, was, and yet he did not notice it or, if he did notice, negligently failed to do anything about it. Nor is it suggested (nor could it be, realistically), that he did notice but was now conspiring with Mr Murley to pull the wool over Briety's eyes.

337. On the basis of what I have said so far, Mr Murley's own evidence on the question of Briety's subjective intentions is not necessary. However, I thought he was a generally reliable witness (see paragraphs 94-113 above), and I accept the thrust of his evidence to the effect that from his perspective, Mr Jolliffe and Mr Tsakos did correctly understand how Clause 10 was to operate.
338. I should here revert to the question of the HOA. To the extent suggested, I do not accept that Briety subjectively thought that the HOA did include the absolute value concept. I have already found that, objectively speaking it did not. However, on a subjective basis, given all the reasons why I have said that Briety cannot show that it had the relevant intention, I do not accept that the emergence of the HOA somehow changed the position, so that Briety now did have the relevant intention, whereas it did not before. I say that, notwithstanding Mr Jolliffe's reliance in evidence on the HOA, which I do not accept.
339. One then comes to the evidence about Mr Tsakos wanting to amend the TCP. See in particular paragraphs 60-64 above. I do not accept that Mr Tsakos's request was for clarification rather than a change. That is not what was said in the initial WhatsApp sent by Mr Jones on the subject of 1 December 2021 (see paragraph 60 above). I have already observed that all three of Briety's witnesses have adopted the mantra of "clarification" as opposed to "amendment" (see my comments at paragraphs 74, 86 and 91 above). In my view, they did so, disingenuously, because they thought that this word does not have the same connotation as "amendment". That is illustrated by Mr Tsakos's evidence that in fact he had asked Mr Jolliffe to have the matter clarified but Mr Jolliffe instead used the word "amend" "because that's a broker's expression". I regard the latter suggestion not only as implausible, but difficult to understand since it is unclear why a broker acting on instructions would take that course.
340. One might ask what caused Mr Tsakos to raise the amendment point when he did. As at 1 December 2021, there had not been any days of negative spreads since March 2021. What Mr Tsakos says in NT1 is that he raised the matter with Mr Jones on the basis that he felt that the profit sharing concept had not been sufficiently translated into Clause 10. If that was the case, it is not how Mr Jones put it to Mr Murley, and Mr Tsakos does not say in NT1 what Mr Jones' reaction was when Mr Tsakos first raised it.

341. However, the reason for Mr Tsakos' intervention, is not important save that it cannot be said (as it might be in some cases) that the point is raised only when some step adverse to the party seeking rectification has been taken by the other party.
342. Nonetheless, the fact remains that in my judgment, this was not put as a request for clarification. It was required as a change because, one way or another, Mr Tsakos appreciated that if there was some form of reverse arbitrage, Briety could not take advantage of it. That view was obviously highlighted once the rise in TTF prices had become known at the end of 2021 and the beginning of 2022. I am quite sure that Mr Tsakos did consider that it was unfair, on the simplistic view that it should follow that if Trafigura was making increased profits from the higher TTF prices, why should Briety not share in them, just as it would when the Arb was open? I do not think that the reasoning was any more sophisticated than that. It was not even linked to freight rates increasing because, as demonstrated above, for the first part of 2022 the rates remained low, sometimes even below the Floor.
343. The whole episode of seeking the amendment is a significant factor when considering what Briety's true subjective intentions had been.
344. I then turned to the question of the hire invoices. These have been calculated on the basis of the operation of Clause 10 as interpreted by Trafigura. If Briety really thought that it was entitled to increased hire, it is difficult to understand why that additional claim was not made. It could easily have instructed Fearnleys to calculate the hire due on that basis.
345. In fact, Briety went so far as to ask Fearnleys to correct some of the calculations which had led to negative numbers, where there was an error.
346. Mr Tsakos gave an explanation as to why Briety did not claim the full rate of hire (on its case), at paragraph 57 of NT1. He said it was in order to maintain the steady payment of hire to Briety. However, I fail to see why raising an invoice for the higher amount would not achieve that. Trafigura would be bound to pay at least the amount which on its case was due in any event, namely the Floor. Further, while, as Mr Tsakos says, there was a discussion about changing Clause 10 in early 2022, that is not relevant because if the discussions were about a change (as I find they were) that is consistent rather than inconsistent with the hire invoices being sent out as they were. Briety, at that point had not clearly asserted that it was in fact entitled to the additional hire on the proper interpretation of the TCP as it stood. That only

came later. So I do consider that the rendering of these invoices at the lower amounts is of some evidential value on the question of subjective intention. I should add that in evidence, Mr Tsakos said that he in fact had prepared parallel invoices which did show the true amount, according to Briety, but they have not been disclosed and there is no reference to them in the contemporaneous documents.

347. As a final point here, there is the fact that what Mr Tsakos said he wanted was the “minus concept” put into Clause 10. In fact, that is different from the absolute value concept. The former means that there would still be positive and negative spreads but if the ultimate spread was negative and exceeded the trigger, now assumed to be *minus* US\$1.3, then the increased rate would apply, although on a monthly average basis if Clause 10 was followed. That is actually less generous than the absolute value concept, because here, every day there would be a spread and on an absolute value basis, this would yield a higher rate. I therefore agree with what is said at paragraph 97 of Trafigura’s Written Closing. Asked about the minus concept, Mr Tsakos said that it was Trafigura who referred to it first “in their lingo”. I doubt that, because I have not seen it thus referred to by Trafigura in the negotiations for a possible change and Mr Tsakos clearly used it himself in his message to Mr Jolliffe of 27 December 2021. In the end, the minus concept may not add very much, but one does note that in this message, again, it is referred to as being “added” to Clause 10, suggesting a change.
348. For all of those reasons, I am not satisfied at all that Briety has provided convincing proof or cogent evidence that it had the required subjective intention which is the starting point for the unilateral rectification plea. That would be the end of the matter, but I will go on to consider, in any event, the further elements of the plea that must be proved.

Belief as to Briety’s subjective intention on the part of Trafigura

349. Here, what has to be posited is that Briety did have the subjective intention it claims, and mistakenly thought that Clause 10 gave effect to it, and that Mr Murley knew of this mistake or was always reckless as to its making.
350. I have already referred to the emails at paragraph 323 323.(3) - 323.(6) above. However, it is necessary to start the analysis somewhat earlier stage. I set out below the relevant paragraphs from OM1 to show what Mr Murley said about this episode:

- “81. On 8 June 2020:
- a. Mr Jones sent me an email attaching a further draft of the TCP wording and asking me to provide and insert Clause 10. As noted above, this reflected the fact that Mr Jolliffe, Mr Jones and I were all aware that TML was to revert to Owners with a proposed new clause 10 for consideration.
 - b. Mr Jolliffe sent me a further direct email asking me to send him the amended Clause 10 wording, noting that "it is THE clause" without which all others have little relevance". In my view, this reflected the fact that, notwithstanding that the parties had signed the HOA, Mr Jolliffe/Owners and I both understood that the precise wording of Clause 10 was still under consideration and would need further drafting and agreement. I knew Owners were very focused on the wording of Clause 10.
82. On 12 June 2020 Mr Jones sent an email attaching the current draft of the TCP wording and noting that Clauses 7, 10 and 19 required further work.
83. Following the weekend, on Monday 15 June 2020:
- a. I sent Mr Jolliffe a direct email noting that our Clause 10 proposed wording would follow. This was in response to an email Mr Jolliffe had sent to me expressing concern about Clause 10 and the fact that it was taking "such an inexplicable amount of time to draft" which he thought indicated "major changes". Whilst this accorded with my view that the parties were free to propose changes (even major ones), I had no intention to make any major changes to the fundamental agreement, and I replied that drafting Clause 10 was not a simple task.
 - b. Later on 15 June 2020, I sent Mr Jones an email attaching a Word document setting out proposed wording for the Clause 10 hire rate calculation. That wording made clear that hire would be calculated in accordance with Sub-clause C) "JKM minus TTF". The express reference to "JKM minus TTF" (which was also the wording used in the original draft heads of terms on 10 February 2020) was simply for clarity.
84. To be clear, by using the wording "JKM minus TTF", I was not intending to change anything in terms of the parties' understanding or meaning of Clause 10 or deviate from Item 12 of the HOA. As noted above, my understanding of the "difference in the spread" wording and "JKM-TTF" table used in the HOA was that this already meant "JKM minus TTF"— and I knew Mr Jolliffe shared this understanding. However, as we were now drafting the actual binding TCP wording, I wanted to make this crystal clear so that there could be no basis for future disagreement.
85. On 17 June 2020 Mr Jones emailed me stating that Owners had accepted my Clause 10 revised proposed wording. I understood that Owners had reviewed the language carefully because they proposed two amendments (which are not relevant for present purposes), and Mr Jones attached an amended TCP from Owners which incorporated the newly agreed Clause 10 wording including the express references to "JKM minus TTF".
86. Thereafter negotiations in respect of Owners' two proposed amendments to Clause 10 and other terms of the TCP continued for the second half of June/early July.
87. On 10 July 2020:
- a. Mr Jones sent me a further revised version of Clause 10 at 0933hrs in the morning. I printed the attachment, gave it a clean read and made some further changes to the wording
 - b. I sent Mr Jones a further revised version of the TCP in which I made certain further additions to the Clause 10 wording, including additional wording to Clause 10 for a "Step 3" and "Step 4" in the calculations for the JKM-TTF Spread definition.
88. I expressly set out that "the TTF quote shall be deducted from the JKM publication creating a spread "daily spread"". Whilst I believed this was already obvious from the existing wording and all discussions to date, I added this wording so that someone doing the calculation would have all the relevant steps to calculate the hire in any given month, and so the parties were clear on how the clause would operate. This was consistent with all discussions throughout – that the "arb" was to be calculated by deducting TTF from JKM, i.e. JKM minus TTF. I

understood that this calculation could result in negative or minus numbers if TTF was greater than JKM, and that for all such “negative spread” calculations the floor rate would apply, since all negative numbers were less than US\$1.30 and the arb would be closed. I discussed the addition of the “Step 3” and “Step 4” wording with Mr Jones and he agreed they provided clarity on all the steps required to calculate TCP hire.

89. I did not at any point consider the possibility of such a calculation producing the “absolute value” of the difference between the indices, nor did Mr Jones or anyone on behalf of Owners ever communicate to me that Owners intended or understood that the hire adjustment mechanism should be based on a calculation of the “absolute value” of the difference between the indices, or that hire should increase when TTF exceeded JKM by more than the agreed trigger. If that had been communicated to me, I would have pointed out to Owners that I had a different understanding and intention. If I had intended and thought it was agreed that the rate of hire should also increase when TTF exceeded JKM by more than the agreed trigger, a different form of wording would have been needed to capture that.
90. I also added a “Step 4” explaining how the overall average was to be calculated and would be used for the “TTF JKM Spread in the Table of Hire Rates”. The averaging of each of the daily spread figures to reach a “monthly average spread” would necessarily involve positive and negative daily spread figures netting off against each other. The reference to the “TTF JKM Spread” was a typographical error. The Table of Hire Rates itself refers to the “JKM-TTF Spread”, not the “TTF JKM Spread”.
91. Again, to be clear, by adding the “Step 3” wording referring expressly to TTF being deducted from JKM, I was not seeking to change anything in terms of the parties’ understanding or meaning of Clause 10. As noted above, my understanding of the “difference in the spread” wording and “JKM-TTF” used in the HOA was that this referred to “JKM minus TTF” anyway and reflected the parties’ discussions and agreement throughout. However, I wanted to make each step of the calculation crystal clear so that there could be no possible basis for future disagreement. I did not at any point intend to depart in any way from my understanding of the agreed hire adjustment mechanism described in item 12 of the HOA, which I understood to be entirely consistent with the detailed 4-step process in Clause 10 of the TCP. But in any event as noted above, whatever the wording of the HOA and the initial draft of clause 10 had been, Owners and I had always understood that the detailed final wording of Clause 10 would still need to be drafted and agreed, which is what we were now doing.
92. Later on 10 July 2020 Mr Jones sent me an Excel document titled “Clause 10 Rate Calculation”. This table contained a “July 2020” tab with JKM and TTF data for July and a delta” (i.e. difference) column G which contained a mathematical formula of column C (JKM) minus column D (TTF). This JKM minus TTF calculation had been a constant feature of every spreadsheet since the very first one shared by Mr Jones on 10 December 2019. The Spreadsheet also contained a “Table” tab which contained in Excel form the same table of JKM-TTF Spread (i.e. JKM minus TTF Spread) as appeared in the draft version of Clause 10.
93. On 13 July 2020 Mr Jones sent me comments from Owners in respect of the latest version of the draft TCP. It was apparent that Owners had been through Clause 10 in fine detail. Mr Jones alerted me that Owners proposed clause 10 be adjusted so that the hire rate calculations would entail “... 4 decimals to daily spreads but final average to 2 decimal places then to be used in appendix J (table of hire rates) ...”. I also saw in the draft that Owners had made various detailed changes to clause 10, but otherwise agreed to the additions of “Step 3” and “Step 4” in the calculations for the JKM-TTF Spread definition in Clause 10. As Mr Jones had indicated, Owners also proposed that additional text be added before “Step 1” and to “Step 4” specifying that the daily figures used to compute the monthly average would be rounded to four decimal places, whilst the calculation of the monthly average would be rounded to two decimal places.
94. Given Owners’ responses to and comments on the iterations of Clause 10 as the drafting of the TCP progressed during negotiations, I understood at the time that Owners’ understanding and intentions for the effect of Clause 10 mirrored my own. I also felt that Owners were paying very close attention to the detail, which I expected and which did not surprise me.”

351. I should interpose in this chronology the email sent by Mr Saporis to Mr Jones at 12.12pm on 10 July. It post-dated Mr Murley's making of the further changes to Clause 10 earlier that day, but obviously Briety did not know that because Mr Jones email containing them (and Mr O'Sullivan's changes) was not sent until the evening. It reads thus:

"Dear Tristan,

thanks for Chrtrs last and Owners are pleased to revert with their latest counter as attached.

For clarity purposes we follow the same numbering as per your last below. Also please note that we have made some corrections on the tcp either typos/clarifications etc which believe that Chrtrs shall agree with in order to obtain a "clean" TCP.

We would kindly request from your side that you check also and ensure that all insertions, ie compatibility/gas form B are correctly inserted and the Appendices are also numbered properly.

Clause 6 and 51.19 — Owners accept Chrtrs last

Clause 10 — Owners accept Chrtrs last

Clause 19: checked the inserted wording - as per legal discussion and found in order except 2 corrections

Clause 51.3 — Owners accept Chrtrs last

Clause 51.6 — checked inserted wording - as per legal discussion and found in order

Clause 52 — checked inserted wording — as per legal discussion and made 2 minor clarifications

Please see appendix for PCG, wording - we did check and have made corrections on the part of Owners and Charterers PCG..."

352. As a general point (and leaving aside the cross-examination of Mr Murley) Briety contends at paragraph 101 (1) of its Written Closing that:

"It is implicit in his realisation that there could be a future disagreement that Mr Murley either (a) appreciated that, based on the last version of the TCP prior to inclusion of Steps 3 and 4 (ie. that agreed by Owners early on 10 July 2020 {D/720} {D/721}), Owners intended the clause to operate where the TTF (materially) exceeded the JKM or (b) that he was reckless as to whether they operated under what was (ex hypothesi) such a mistake."

353. The submission contended for there simply does not follow, and it is contradicted by the passages in Mr Murley's evidence referred to above and which explain his thinking. The fact that he (or any person in his position in the commercial negotiation of an important agreement) wanted the wording to be as clear and workable as possible and to avoid any potential disagreement in the future, does not mean that he must have known that the opposite party intended something different which was contrary to his own understanding of the provision, or that he was reckless as to that being the case. I therefore agree with what is said in paragraph 89 of Trafigura's Written Closing, namely that seeking to include belts and braces wording, for the avoidance of any doubt and even to avoid any possible future dispute, does not entail knowledge that the other party is presently labouring under a fundamental mistake.

354. This is particularly so here where, on the basis of Mr Murley's evidence which I accept, he never previously knew (if it was the case) that Briety intended that Clause 10 would operate the absolute value concept. His understanding (supported by the contemporaneous

documents) was always that both parties were aligned in their thinking. This is especially the case where Briety had never, in any of the documents that (crossed the line) gave the impression that it had a different understanding to his own.

355. I then turn to paragraph 101 (4) of Briety's Written Closing which says that:

"It is inequitable to allow Charterers to resist rectification to give effect to Owners' intention in any event, but *a fortiori* because Mr Murley sought to obscure the changes he was introducing. He added them at the last minute. He left no paper trail by sending emails devoid of any text or explanation and instead seemingly conducted everything on the phone with Mr Jones that day. He also sought the input of another Fearnleys employee, Mr O'Sullivan, so that the introduction of Steps 3 and 4 would be less noticeable, and he referred to the "TTF-JKM Spread" in Step 4. All this was done to underplay the change to Step 3;..."

356. Without yet considering the cross-examination of Mr Murley on these points, simply looking at this submission, it does not make much sense to me. First, it is posited on the premise that the addition of Steps 3 and 4 is what changed Clause 10 into a formula limited to the Arb rather than what had gone before which permitted a "both ways" increase. That must be Briety's position because it alleges that Mr Murley deliberately sought to obscure this change in terms of its importance. But if so, this suggests that while up until then, Trafigura was content to have an "absolute value" deal now, at the last minute, thought of a way to improve its position at the expense of Briety. That characterisation of events seems highly unlikely. There is then the reference to not leaving a paper trail. However that cannot add anything since there was obviously a paper trail, i.e. the text of the changes themselves and since Mr Murley was not sending them direct to Briety, he had no control over how they would be described by Mr Jones (subject to one point put to him in cross-examination which I consider below). In the event, Mr Jones email does not seek to hide anything in my view; see paragraph 323.(6) above. Nor is it surprising that he spoke to Mr Jones on the phone that day. Things were moving quickly and at one point it had been expressed that the TCP should be signed on that day, Friday 10 July, and if not then on Monday 13 July; see the messages from Mr Jolliffe to this effect. The "obscuring" theory also assumes, incorrectly, that Briety would not have its lawyers consider every drafting change, and that Trafigura would know this.

357. As for Mr Jones, of course, it appears from the documents that he did not perceive there was any significant change being made, yet Briety's position would seem to suggest that he, also, was of the view that previously Clause 10 would operate both ways but not now. There is nothing in the documents to show that, however.

358. This thesis also assumes that without Steps 3 and 4, Clause 10 would have to be interpreted objectively as Briety contents. I agree the Step 3 is important, when considering the language of clause 10. However, it was not the only factor, especially when the factual matrix materials were added.
359. The final point of this thesis is that Mr Murley at the last minute secured the assistance of Mr O’Sullivan to look at the document, not because he was going to, anyway, but in order to assist Mr Murley in the “obscuring exercise”. Leaving aside Mr Murley’s specific denial of this (see below) this is in my view a fanciful suggestion. Briety argues that there can be no other explanation for Mr Murley asking Mr O’Sullivan to do this review, but that assumes that he was the one that asked him, rather than Mr Jones. For myself, I do not think that it was unlikely that someone else at Fearnleys was asked to do a final check.
360. I now turn to the cross-examination of Mr Murley on these points. First, I accept his evidence that this was a “belt and braces” exercise; it was not a “commercial” change in the sense of altering the basic tenets of the agreement thus far (including the HOA). It also made sense to have the steps spelled-out so that those (in fact at Fearnleys) who did the calculation in the future would be in no doubt about what had to be done.
361. Next, Mr Murley was asked about the email from Mr Jones to him containing Mr O’Sullivan’s changes which also had no commentary, but simply referred to the attachment “PO Comments”. Mr Murley denied that he asked for that review and added that Mr O’Sullivan was not Trafigura’s broker at Fearnleys anyway, and he had had no communications with him. Logically, as Mr O’Sullivan was a broker at Fearnleys and Mr Murley dealt with Mr Jones on this deal, the person likely to have commissioned this review would have been Mr Jones, as Mr Murley himself said.
362. There is then the suggestion (again not pleaded) that in order to obscure the important changes being slipped in by Mr Murley, he deliberately put within Step 4 the expression “TTF-JKM” (i.e. the other way round from usual) in order “to make it look like it didn’t matter which was first, which was higher” i.e. in order to throw Briety off the scent, as it were. Mr Murley rejected this suggestion to, and I have to say I regard it as somewhat far-fetched. It was, as he said, just a typo.

363. Nor was there anything misleading in Mr Jones' various messages to Mr Jolliffe on 10 July. Mr Murley denied the further suggestion that effectively, he and Mr Jones had spoken on the phone about how best to present all of this to Briety, with the implied suggestion that this is why the emails to and from Mr Jones were left blank. What is also implicit in this suggestion is that Mr Jones was conspiring with Mr Murley to convey a mistaken message about the import of Steps 3 and 4 i.e. that Briety's own "super broker" was being as disingenuous if not (as alleged) as dishonest as Mr Murley. I regard that as highly improbable. Mr Murley also said that he had not asked Mr Jones to convey as he did in one of the messages that the changes were beneficial to Briety although in fact the change concerning the increments was, as noted above. Briety says that it is not necessarily suggesting that Mr Jones did anything wrong in agreeing this supposed course with Mr Murley but it is hard to see what else was being suggested.
364. In addition (though not necessary for my conclusion here) it is not clearly put to Mr Murley that at the time, he knew that Briety's understanding and intention had been and was, that Clause 10 was to operate both ways – or that he was reckless as to that. Saying that he wanted to avoid "future disagreement" is not the same thing.
365. I therefore reject the submission that Mr Murley had the necessary knowledge or recklessness in relation to Briety's supposed subjective intention and the mistake it was allegedly about to make by agreeing to Clause 10 in that form.
366. Moving on to the third requirement in *Thomas v Bates*, obviously Mr Murley did not draw Briety's attention to its mistake, but that is because he was not aware of or suspected any mistake, which in fact did not exist.
367. Similarly, as to the fourth requirement, obviously if the matters about the respective subjective intentions of the parties and Briety's mistake were all as contended for by it, the mistake would have enured to Trafigura's benefit. But none of those matters are established.
368. For the sake of completeness, insofar as Briety is also relying on the more general case set out in paragraph 17.2 of the Particulars of Claim the evidence does not establish that, either.

Conclusion on the Unilateral Mistake Claim

369. For all those reasons, Briety has not come even close to showing convincing proof of the elements necessary to be established for the unilateral rectification claim. Those elements plainly do not exist. Therefore, this claim must be rejected.

THE TIME BAR POINT

370. As Briety's substantive claims have failed, Trafigura's defences of *laches* and time-bar are academic. However, it does not strictly arise, I will at least deal with Trafigura's argument that were Briety's claim for unpaid hire to succeed in principle (because it was correct on its construction, alternatively rectification claim) part of that claim is now time-barred. I do so because it is a short point and does not depend on attempting to work on what I might have found, had I taken a different view on construction or rectification.
371. It is agreed between the parties that if the time bar applied the claim would be in the reduced amount of US\$14,766,830.00.
372. The following provisions of the TCP are relevant:

"10. Rate of Hire

A. Payment of Hire

Charterers shall pay for the use and hire of the Vessel at a daily hire rate, and pro rata for any part of a day, commencing from the time and date of delivery of the Vessel (UTC) (the "Hire Payment Commencement Date") until the time and date of redelivery (UTC) to Owners.

The daily rate of hire of the Vessel, per day pro rata ("Hire Rate") shall be as set out in this Clause. Owners shall invoice Charterers monthly, and latest by the 15th day of the month in advance, for the payment of hire and Charterers shall pay the invoice in immediately available funds by the last Business Day prior to the start of the initial hire period or each subsequent month. In the event of any disagreement on the applicable Hire Rate for any month, Charterers shall pay the base Hire Rate of USD 50,000 (USD fifty thousand) per day/pro-rata ("the Floor") while any such dispute as to Hire Rate is resolved.

11. Payment of Hire

Subject to Clauses 3 (c), 3 (e) and 10, payment of hire, and all other costs shall be paid in full, without deduction (unless expressly agreed in this Charter), set off or withholding of any nature whatsoever, monthly in advance in immediately available funds per calendar month, prorated for partial months/days:

TO: TBA

in United States Dollars per calendar month in advance, less the following deductions which Charterers may make:

In default of such proper and timely payment:

(i) Owners shall notify Charterers of such default and Charterers shall within seven (7) days of receipt of such notice pay to Owners the amount due, including interest, failing which Owners may withdraw the Vessel from the service of Charterers without prejudice to any other rights Owners may have under this charter or otherwise; and

(ii) interest on any amount due but not paid on the due date shall accrue from the day after the due date up to and including the day when payment is made, at a rate per annum which shall be two (2) percent above the Libor Interest Rate. ..

51.12 Claim Validity Period

Any claim for breach of the speed or performance warranties must be brought within six (6) months of the end of the relevant Performance Period. Any other claims arising under this charter must be brought within the earlier of ;

...12 months of the event that gives rise to such claim, or

...6 months of the termination of the charter period, excluding always indemnities arising under or in connection with Bills of Lading issued under the Charter.

373. Trafigura contends that the claim for unpaid hire is subject to the 12 month limitation period because it is a claim other than for breach of the speed or performance warranties. Briety argues first that the claims governed by the 12 month limitation period are confined to damages claims, on the basis that claims for breach of speed or performance warranties would also be damages claims. There is nothing in that point. The words “Any other claims arising under this charter” are entirely unqualified. Moreover, if Briety was correct here, there would be no applicable limitation period for unpaid hire claims which would be commercially absurd.
374. However, Briety’s main point concerns the meaning of the expression “the event that gives rise to such a claim” in the context of this case. In the usual case, where hire simply goes unpaid or underpaid, the relevant event would be the period of hire which is said to give rise to the payment in question. Here, hire was due on the 15th of each month in advance as can be seen from the second main paragraph of Clause 10 (A) and the first paragraph of Clause 11.
375. What Briety argues here is that in this case there has been a disagreement as to the applicable hire rate, and so one turns to the last sentence of Clause 10 (A) which provides that where there is such a disagreement, charterers should pay the base rate of US\$50,000 per month until the dispute is resolved. Briety says that the relevant “event “in these circumstances is the resolution of that dispute. On that footing it must follow that time does not even begin to run until the resolution, and accordingly time is not running even now.
376. Alternatively, as a matter of construction or because of an implied term, charterers became liable to pay the additional hire within a reasonable time of a dispute arising even if not yet resolved. On that footing, there would not have been 12 months elapsing from the end of that

reasonable time so as to cause the time-bar to take effect with regard to any underpayment of hire.

377. Dealing with the first of Briety's two arguments, it assumes that no hire even falls due until time start running in a case where there has been a disagreement, and that is once it is resolved. However, if that was right, it rather suggests that Briety did not even have the right to bring this claim because at that point there was no completed cause of action. That cannot be the intention of Clause 10 (A).
378. In fact, the true intent becomes clear when one takes into account Clause 11. This provides for, among other things, the implementation of owners' important right of withdrawal of the vessel in the event of non-payment or insufficient payment. However, that right will not apply where charterers have properly exercised a right to treat the vessel as off hire (see Clause 3 (c) and (e)) or where there is the disagreement as to the correct hire rate as provided for in Clause 10 (A). Therefore, for so long as there is a disagreement which is not resolved, charterers are not exposed to the risk of the vessel being withdrawn provided they pay the base rate.
379. Nonetheless, the cause of action will have accrued, and time will have started to run when the unpaid hire fell due. That being the case, there is nothing to prevent owners from taking proceedings to claim the unpaid hire, and indeed it may be necessary to take proceedings in order to have the disagreement resolved. That, of course, is exactly what has happened here. This also makes commercial sense because it means that if there is a disagreement which enables charterers to pay only the base rate without any risk of withdrawal, owners must nonetheless bring a claim timeously (i.e. within 12 months) to ensure that recovery of the unpaid hire if the disagreement is resolved in their favour.
380. It should be noted that another effect of Clause 11 not applying (because of the disagreement) is that contractual interest will not fall due on the unpaid hire even if owners succeed in recovering it at the end of the case. However, that would not prevent an award of interest pursuant to the power of the Court to award it under section 35A of the Senior Courts Act. Also, and consistent with a relatively short limitation period, where there is a disagreement, the sooner that owners claim the unpaid hire, the sooner it will be resolved and then paid.
381. Therefore, I reject the first of Briety's arguments.

382. As to the second argument, based on proper construction or an implied term, I reject this, too. First, any such construction or implied term would contradict what I consider to be the clear interpretation given to the combination of Clauses 10 (A), 11 and 51 (12). Second, this argument would give rise to commercially unworkable consequences where there would be likely to be disagreement or uncertainty as to what period of time would be reasonable following the disagreement. Third, this argument has lost sight of the trigger for the limitation period being “the event”. Finally, it is impossible to see how such an implied term can be said to be necessary or obvious.
383. For all those reasons, I consider that the 12 months time bar would have applied here, had Briety’s underlying claim for unpaid hire succeeded. In the event of course it did not.

OVERALL CONCLUSION

384. The action against Trafigura must therefore be dismissed. I am most grateful to counsel for the very helpful oral and written submissions.