Case No: CL-2014-000874

Neutral Citation Number: [2016] EWHC 2774 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2016

Before :

THE HONOURABLE MRS JUSTICE CARR DBE

- -

Between :

PAN OCEANIC CHARTERING INC **Claimant**

- versus -

UNIPEC UK CO. LIMITED **First Defendant**

and

UNIPEC ASIA CO. LIMITED **Second Defendant**

- -
- -

Mr Charles Kimmins QC and Mr Henry Ellis (instructed by **Bentleys, Stokes and Lowless**) for the **Claimant**
Ms Philippa Hopkins (instructed by **Holman Fenwick Willan LLP**) for the **First Defendant**
Mr Ian Gatt QC and Mr Michael Holmes (instructed by **Herbert Smith Freehills LLP**) for the **Second Defendant**

Hearing dates: 6 October, 10-14 October, 17, 19 and 20 October 2016

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Judgment

Mrs Justice Carr :

Summary

1. This judgment is divided into the following sections :

    A. Introduction to the parties

    B. Introduction to the claim

    C. A chronological overview of the facts

    D. An overview of the issues

    E. The New Jersey law experts

    F. Was UHK's reduction and then cessation of nominations under the 2010 WAF COA effected with the predominant motive of retaking control of the brokerage under the 2010 WAF COA?

    G. Was there an enforceable brokerage agreement between POC and TI by which TI agreed, amongst other things, to pay POC commission of 1.25% of gross freight, deadfreight and demurrage earned by TI on the 2010 WAF COA?

    H. Implied in law promise: UHK

    I. Tortious interference with contractual relations: UUK and UHK

    J. Quantum

    K. Conclusion

Introduction to the parties

2. The Claimant, Pan Oceanic Chartering Inc ("POC"), is a Delaware company domiciled in New Jersey, operating out of offices at 1 Meadowlands Plaza, East Rutherford. It was at all material times engaged in the ship charter brokerage business, assisting in the making of contracts between vessel owners and charterers and providing after-fixture services in connection with the management and operation of the contracts. Mr Mark Ma ("Mr Ma") is POC's chairman and majority shareholder. Mr Peter Guo ("Mr Guo") is POC's vice-president and a minority shareholder.

3. The First Defendant, UNIPEC UK Co. Limited ("UUK"), is an English company and a wholly owned subsidiary of China International United Petroleum & Chemicals Co Ltd ("UNIPEC"). UNIPEC is based in Beijing, China. It was originally a third defendant in this action, but such proceedings were discontinued before service. UUK has its registered office at 74 Lawn House, Shepherd's Bush Green, London. It has its own directors and employees and is UNIPEC's largest subsidiary. It is engaged in the acquisition of crude oil from West Africa and the chartering of vessels to carry the

crude oil from West Africa to China. It also acts as a trader of crude oil and petroleum to third parties.

4. The Second Defendant, UNIPEC Asia Co. Ltd ("UHK"), is a Hong Kong corporation and also a wholly owned subsidiary of UNIPEC based outside mainland China with a Hong Kong registered office. It also has its own directors and employees. It is engaged in the acquisition of crude oil largely from the Middle and Far East. It was a contractual counterparty for certain long-term contracts from 2006 onwards. It began to act as a financial settlement centre within the UNIPEC group from May 2011 onwards.

5. UNIPEC in turn is a wholly-owned subsidiary of China Petroleum & Chemical Corporation ("SINOPEC"), based in Beijing. SINOPEC is state-owned and China's largest trading company and one of the largest oil and petrochemical companies in the world. It refines and distributes petroleum products in China. UNIPEC acquires and transports to China crude oil cargoes for SINOPEC's 30 or so refineries, as well as acting as a trader.

B. Introduction to the claim

6. This claim relates to a 3 year renewable contract of affreightment dated 30th April 2010 between UHK, as charterer, and Tankers International LLC ("TI"), as owner, for West African ("WAF") crude oil cargoes ("the 2010 WAF COA"). The 2010 WAF COA was on an amended ASBATANKVOY form with rider clauses and governed by English law with a London arbitration clause. It provided for a minimum of 8 and a maximum of 11 liftings of Very Large Crude Carrier ("VLCC") cargoes per month. It was on any view a very substantial contract.

7. The 2010 WAF COA identified POC as TI's nominated broker, with reference to 1.25% brokerage commission on freight, deadfreight and demurrage payable by TI to POC. POC contends that this reflected an earlier brokerage agreement reached between POC and TI in October 2009 for the payment to POC of 1.25% brokerage commission on all gross freight, deadfreight and demurrage earned by TI on the 2010 WAF COA ("the brokerage agreement").

8. There is no complaint that UHK did not fulfil its contractual nomination obligations throughout 2010 and into 2011. However, there were only 7 liftings in May, 6 in July, 7 in August, 6 in each of September and October, and 5 in December 2011. In December 2011, January and February 2012, UHK again met the minimum nomination of 8 liftings a month. But in March 2012 it nominated only 6 liftings for April, and as from 12th April 2012 it ceased nominations altogether. It is common ground that UHK thus acted in breach of the 2010 WAF COA and that POC was deprived of commission from TI as a result. POC describes the breaches as "*deliberate and cynical*".

9. There is and has been no claim by TI against UHK for such breach. Indeed, it is a striking feature on the facts that TI at no stage pursued UHK for its failure to perform with any real vigour, let alone arbitrated against it. Rather TI and the UNIPEC group continue to do business together.

10. POC, however, brings this claim for damages ranging between US$6.1 million to over US$20million, (depending on the outcome of various issues on quantum). It contends that UHK acted in breach of an "*implied in law*" promise arising under New Jersey law, whereby UHK agreed to perform the 2010 WAF COA and not to do anything improper or unjustified which would deprive POC of its commissions. It also contends that UUK and UHK intentionally interfered with the brokerage agreement by so ceasing to nominate cargoes. The predominant motive behind these actions was to prevent the payment of commissions to POC under the brokerage agreement and to enable them to effect the payment of equivalent commissions to other brokers by nominating them for the charterparties for the replacement vessels. They knew that the abandonment of the 2010 WAF COA would prevent performance of the brokerage agreement by TI and intended to interfere with TI's performance of the brokerage agreement.

11. POC maintains that UUK and UHK are liable as follows:

    a) (Under New Jersey law) for breach of an "*implied in law*" promise to perform the 2010 WAF COA and not to do anything improper or unjustified which would deprive POC of its commissions (UHK only);

    b) (Under New Jersey law) for tortious interference with contractual relations (UUK and UHK).

12. The above represents a far narrower attack than was originally faced by UUK and UHK. Various allegations made by POC have fallen by the wayside, some very late in the day. Thus, by the commencement of trial, POC no longer pursued any claim for punitive damages, nor any claim against UUK for tortious interference with the alleged implied in law promise. During the course of the trial, in response to questions from the court and UUK and UHK, POC stated that it no longer alleged bad faith or actual malice. On the eve of oral closing submissions, POC also withdrew its claim in conspiracy against both UUK and UHK.

13. UUK and UHK say that the two maintained claims are also both bad in law and on the evidence. UUK maintains that it has only ever been a misconceived "*anchor*" defendant for jurisdictional purposes, enabling POC to bring proceedings against UHK (and originally UNIPEC too) in London. There are substantive disputes as to the applicable law, the outcome of which potentially determine at least the implied in law promise claim outright. There are substantive disputes as to the effect of New Jersey law, even if it applies. As to the facts, UUK and UHK deny any unlawful intentional interference with any brokerage agreement between POC and TI. The reduction and ultimate cessation of nominations under the 2010 WAF COA resulted from changes in the way in which the UNIPEC group procured and shipped crude oil. In particular, the business focus changed from simply acquiring crude oil for SINOPEC's refineries to actively engaging in trading crude oil cargoes. The decisions to act as they did were made in furtherance of the commercial aims of the group and were wholly unrelated to POC's position. A corporate entity that decides to bring its contract with a counterparty to an early end for reasons of commercial efficiency is not answerable to a third party who suffers a loss of expected or hoped for benefit as a consequence of that decision.

C. Background and chronological overview of the facts

14. I set out below an overview of the facts, based on the evidence of the witnesses and the documentary material. Where there are areas of contention, they are identified.

15. Mr Guo was the only witness for POC. For UUK, the following witnesses gave evidence:

    a) Ms Jian Meer ("Ms Meer"). Ms Meer has been UUK's operations manager since 2003. She explains her operational role. She had no decision-making powers in relation to the 2010 WAF COA – she did not nominate cargoes to TI or POC, nor did she decide which vessels were acceptable. She did not negotiate freight. Her role was an operations function only. Her evidence was not challenged;

    b) Mr Wang Zheng ("Mr Wang"). Mr Wang was a UNIPEC employee between 2005 and 2007. He has been employed by UUK since 2007 and has been head of shipping and deputy general manager since 2010. He is also UUK's head of oil trading, head of oil analytics and a member of UUK's risk management committee;

    c) Mr Chang Guibin ("Mr Chang"). Mr Chang was a chartering/shipping co-ordinator at UNIPEC between August 2011 and May 2012. From August 2012 to January 2013 he was a shipping operator at UNIPEC and then until November 2014 at UUK. He is currently manager of UUK's chartering team;

    d) Mr Chen Gang ("Mr Chen Gang"). Mr Chen Gang was deputy general manager at UNIPEC between 2006 and 2013. He was acting President of UNIPEC in 2012. He has been the managing director of UUK since September 2013 and is also a director of UNIPEC. He was not aware of the main terms of the 2010 WAF COA, having taken no part in their negotiation. He played no role in the performance of the 2010 WAF COA or the decision not to continue utilising it. He states, however, that as UUK's trading has expanded, it has increasingly needed its own shipping support. A significant trading team cannot rely on a shipping team in a different time zone and without detailed knowledge of its activities to provide first-rate support. The growth in the UUK shipping team, which makes good business sense to him, was a natural development of the expansion of the UUK trading business. His evidence was not challenged.

16. For UHK, the following witnesses gave evidence :

    a) Mr Zhu Jian ("Mr Zhu"). Mr Zhu was deputy general manager of UNIPEC's shipping and operations department until July 2011 and is presently deputy general manager of SINOPEC Kantons Holding Ltd, another UNIPEC subsidiary;

    b) Mr Xiao Guanping ("Mr Xiao"). Mr Xiao has been deputy general manager of UNIPEC's shipping and operations department since November 2007.

    Both Mr Xiao and Mr Zhu gave their evidence with the assistance of an interpreter.

17. In general terms, with the possible exception of Mr Chang and those witnesses whose evidence was agreed, I did not find any of the factual witnesses to be entirely satisfactory in their evidence. All seemed to have difficulty at times in making appropriate concessions, once a certain position had been adopted. But this is not to say that in other material respects I have not been able to rely on what they have said.

1993 to 2010

18. Between 1993 and 1999 POC acted as broker on various single voyage charterparties involving UNIPEC as charterers. In 2000 POC acted as broker on a 1 year WAF COA dated 23rd March 2000 between UNIPEC and TI ("the March 2000 WAF COA"). TI is a Marshall Islands corporation with its registered office in Limassol, Cyprus, established in 2000 by six major shipowners (including AP Moller–Maersk ("Maersk")). It is responsible for TI's pool of VLCCs. The pool consists of numerous vessels owned or controlled by third parties, which give TI the use of their vessels in return for a share of resulting profits and losses. Tankers (UK) Agencies Ltd ("TI Agencies") is an English company based in London and a wholly-owned subsidiary of TI. It is responsible for the management and operation of TI's pool of VLCCs on behalf of TI.

19. There is a factual dispute as to whether or not POC introduced UNIPEC to the TI tanker pool. POC's statement of case, supported by Mr Guo in his witness statement, contends that POC (through Mr Guo) did. In cross-examination Mr Guo explained that by his witness statement he meant an introduction "*in the sense that we want to have a COA UNIPEC and TI together*". He went on to explain the build-up to the first COA. UHK denied that POC had introduced UNIPEC to TI. Mr Xiao stated that UNIPEC had existing commercial relations with at least 3 of the owners participating in the TI pool. UNIPEC had frequent contact with some of TI's founders before the first COA, including Maersk, where Mr Hu was UNIPEC's contact. Mr Hu then moved to TI Agencies. TI was obviously keen for UNIPEC's business, as a charterer with very significant demand. UNIPEC's initial introduction to TI was through Mr Hu. Although Mr Xiao had no first-hand knowledge of this, and Ms Xu Ning ("Ms Xu"), manager of the shipping and operations department at UNIPEC, upon whom he essentially relied for this information, was not called as a witness, I find it more likely than not that UNIPEC came to the TI tanker pool independently of Mr Guo in a general sense, given UNIPEC's past relationship with Mr Hu. And Mr Guo's evidence, on proper analysis, is consistent with such a conclusion, given his focus on bringing about the first COA more than anything else. Thus, when it was put to him that TI did not need POC to effect an introduction, given the pre-existing contact with Mr Hu, Mr Guo confirmed that "*the introduction is in relation to the COA."* For the sake of completeness, I also mention that Mr Hüttemeier, POC's tanker chartering expert and at one time the Maersk representative on the board of TI, mentioned first meeting UNIPEC through POC around the end of 1999. But he did not make any reference to Mr Hu, and I do not treat his evidence as going beyond that of Mr Guo. Save perhaps in the most general of credibility terms, it does not appear to me that the outcome of this dispute materially affects any of the issues in the case.

20. Under the March 2000 WAF COA TI agreed to provide VLCCs to carry 12 cargoes of at least 260,000 mt each over 12 months from WAF loadports to discharge ports in

the Singapore/Japan range. In addition, TI was to have first refusal of any additional cargoes that UNIPEC acquired in WAF. The freight rate was based on the Reuters Tanker Industry Index with a discount of 7 Worldscale points, subject to a minimum rate of WS45. If the actual rate with discount fell below WS45, TI was not obliged to carry out any liftings at all. The March 2000 COA was on an ASBATANKVOY form as amended by the parties with additional clauses attached, and also set out pre-agreed terms that would be incorporated into the voyage charters for individual liftings.

21. The March 2000 WAF COA was followed by a 3 year contract dated 26th December 2000 (UNIPEC/TI) ("the December 2000 WAF COA"). It provided that UNIPEC would nominate 12 to 24 cargoes a year for carriage to Chinese ports. TI again had a right of first refusal on additional cargoes. The freight rate was market related minus 4 Worldscale points but always with a floor and ceiling. There were then further WAF COAs dated 14th April 2005 for 1 year (UNIPEC/TI), 3rd February 2006 for 1 year (UHK/TI) and 26th January 2007 for 3 years commencing 1st April 2007 (UHK/TI) ("the 2007 WAF COA").

22. All of the WAF COAs had the same ranges: loading ports: 1 to 2 safe ports West Africa; discharge ports: 1 to 2 safe ports Singapore/Japan. Some of the WAF COAs had market rates with a discount, some had floors and ceilings, as indicated.

23. All of the WAF COAs were brokered by POC for TI and provided for 1.25% commission to be payable by TI to POC on the actual amount of freight, deadfreight and demurrage when and as freight was paid, and POC provided after-fixture services. All of the WAF COAs provided for:

> *"General Average/Arbitration in London, English law to apply…"*

and for disputes that could not be settled amicably to be settled in London by arbitration.

24. There is no suggestion that these WAF COAs were not duly performed. TI was able to provide secure and stable shipment for UNIPEC's crude oil cargoes. The rationale behind the relationship between TI and UNIPEC is not controversial: the purpose of the WAF (and AG) COAs was to ensure a consistent source of tonnage for the shipment of crude cargoes from the WAF and AG regions to SINOPEC's Chinese refineries.

25. Between March 2001 and 2007 TI and UNIPEC/UHK also entered into a series of COAs for the transport of crude oil from Arabian Gulf ports ("AG COAs"). The AG COAs also had freight rates that were market related, with or without discounts. All of the AG COAs also had express English law and London arbitration clauses.

26. Although POC was involved in the negotiations for these agreements as well, as evidenced by POC's stamps on the contracts, POC did not receive commission under them. Instead, UNIPEC/UHK would have the right to nominate a broker: commission was payable to "*Charterer's nominated broker*", who would perform the after-fixture services rather than POC. The tanker chartering experts are agreed that this was an unusual arrangement for a broker other than the one involved in the negotiations for

the contract or renewal to be nominated, although Mr Pearce for UUK and UHK says it was not unheard of.

27. POC contends that it was so excluded at UNIPEC's request as a result of negotiations for the first 2001 AG COA and that this is significant, in that it demonstrates UNIPEC's desire to control the brokerage under the COAs. POC states that UNIPEC objected to POC receiving commissions on that contract, and indicated a) that UNIPEC wanted to award the brokerage commissions during the performance of the contract and b) that POC should be content with the brokerage commission that it would earn under the 2000 WAF COA. POC describes UNIPEC's demand as an "*extraordinary"* one.

28. Mr Guo's witness statements did not address this allegation, save to refer to it by way of cross-reference. This was a notable omission, given the emphasis now placed on the incident by POC. In cross-examination however he expanded the position to say that a meeting took place between him and three representatives of UNIPEC: Mr Tang Suxin, Mr Zhou Yibing and Mr Cui Zhenchu. No date or place for this meeting was given. Whilst UNIPEC did not say in terms that POC should be content with the brokerage commission under the 2000 WAF COA, words "*to that effect"* were used. When UNIPEC indicated that it would not be nominating POC as broker, he said that he could not make a decision right away but needed to check with POC and TI. He spoke with Mr Ma and Mr Hu. Both Mr Ma and Mr Hu agreed, given the overall relationship with UNIPEC, to accede to UNIPEC's request. There is not a single document, whether letter or email, recording or evidencing any of these discussions, which Mr Guo said all take place either in person or by telephone. As indicated above, neither Mr Ma or Mr Hu gave evidence to support Mr Guo.

29. Mr Xiao gave evidence that he had never heard that UNIPEC had asked TI to exclude POC as a broker under the early AG COAs. Had this happened, he would have been made aware. POC had played only a limited co-ordinating role in the AG COAs. The AG shipping market has a more stable supply of shipping resources than the WAF shipping market. Charterers therefore normally use a wider range of brokers in the AG shipping market, amongst other things to reduce cost with more brokers and so better information on the market. Mr Xiao did of course not join the UNIPEC shipping and operation department until late 2007.

30. Standing back, it is clear that POC was not nominated as broker under the 2001 AG COA, or any of the subsequent AG COAs, although it was involved in negotiations for them. I do not attach any significance to this. The obvious inference is that UNIPEC preferred to be able to diversify its pool of brokers in the AG shipping market. In fact, Mr Guo agreed in cross-examination that at no point during the negotiations was it proposed that POC be designated as sole broker. He agreed that UNIPEC wanted a diversified pool of brokers from which it could nominate 1 broker for each individual lifting to cater for its particular requirement. This does not sit easily with the rest of Mr Guo's evidence as outlined above or the suggestion that POC was "*excluded*" as such. Whether or not UNIPEC suggested that POC should simply be content with its commission under the 2000 WAF COA does not in my judgment advance matters one way or the other.

31. More materially, I do not accept that UNIPEC's position was seen as "*extraordinary*" by either POC, TI or UNIPEC at the time. UNIPEC wanted a diverse pool in the AG

shipping market and told POC this. The meeting and subsequent conversations did not stand out in Mr Guo's mind at the time of making his witness statements. If UNIPEC's stance was seen as so objectionable, POC and TI would have at least made an attempt to resist it; there is no suggestion of any such attempt. The absence of any record, including any email, whatsoever on the topic is also inconsistent with the issue being seen as a remarkable one at the time.

The 2010 WAF COA

32. The 2007 WAF COA was due to expire on 31st March 2010. POC contends that prior to negotiations for a new WAF COA it was appointed by TI as its broker and tasked with assisting TI in obtaining a further 3 year COA with UHK. POC agreed to do so during a series of meetings between 18th and 22nd October 2009 in Beijing. The attendees were Mr Ma and Mr Guo for POC; Mr Michael Steimler, Mr Jon Birkholm and Mr Hu, chairman, CEO and vice-president of TI Agencies respectively. No specific terms were discussed but POC alleges that it was understood that those terms were:

    i) POC would advise TI Agencies concerning the terms of TI's eventual proposal to UNIPEC for a new WAF COA;

    ii) POC would assist in the negotiation of the new COA;

    iii) If a new COA was concluded: (1) POC would provide after-fixture services to both parties to the COA and (2) POC would receive from TI 1.25% of gross freight, deadfreight and demurrage earned by TI under the new COA.

33. Mr Guo's evidence was that these were the customary terms between a broker and his owner principal in the VLCC chartering business, and were the same as had applied in relation to the previous WAF COAs concluded by TI and UNIPEC with POC's assistance.

34. Only Mr Guo was called to give evidence on this issue. There is a dispute between the parties as to whether or not TI and POC entered into a separate and enduring brokerage agreement as a result of these discussions and if so, what its terms were, which I address separately below.

35. The first approach to UNIPEC for a new WAF COA seems to have been made on 8th February 2010 by Mr Hu of TI Agencies. He emailed Ms Xu, copied to Mr Zhu and Mr Xiao, proposing an extension of the 2007 WAF COA for 3, alternatively, 5 years. He also proposed an increase in the number of monthly liftings from 4 to 7 fixtures to 11 to 13 fixtures. UNIPEC does not appear to have responded to this approach.

36. On 7th March Mr Guo emailed Mr Chen Bo ("Mr Chen"), vice president of UNIPEC and a director of UUK, referring to the approach of 8th February 2010 and encouraging a positive response. On 8th March 2010 Mr Guo sent a further email to Mr Chen, Ms Xu, Mr Zhu and Mr Xiao in similar terms. On 9th March 2010 Mr Guo emailed Ms Xu following a telephone call with Mr Chen. Mr Guo reported that Mr Chen had clearly instructed him to make 3 points to TI:

a) The relationship between UNIPEC and TI was for the long term;

b) The relationship between UNIPEC and TI did not conflict with UNIPEC's relationship with Chinese owners;

c) There was no problem in renewing the COA for three years. As for the number of liftings, he was waiting for the shipping department, of which Ms Xu was head, to respond.

37. He asked Ms Xu to call him. On 17th March 2010 Mr Guo emailed TI and separately Ms Xu, copied to Mr Zhu and Mr Xiao, with certain wording for extra loadings and a clause providing for co-operation for additional cargoes loading in different areas within the western hemisphere. On 30th March 2010 Mr Guo emailed TI Agencies apologising for the delay but indicating that management approval for an extension of the 2010 WAF COA for three years with an expanded loading area covering the western hemisphere was underway. In the interim the 2007 WAF COA would be extended to 30th April 2010 whilst the parties were finalising terms of the next agreement. The terms of the 2010 WAF COA were then finalised by telephone directly between UNIPEC and TI and by an exchange of emails between Mr Guo and Mr Zhu, Ms Xu and Mr Xiao and Mr Hu during March and April 2010. During the course of those negotiations Mr Guo met with Mr Chen on 21st April 2010 to confirm the extension of 3 years, including expansion of the loading areas in the western hemisphere to achieve 8 to 11 liftings per month. He recorded that there would be no more AG COAs, where co-operation between UNIPEC and TI would be in the spot market. A final draft recap was issued on 4th May 2010 and approved. On 5th May 2010 POC sent UNIPEC and TI a clean fixture recap which led in turn to the formal execution of the 2010 WAF COA.

38. For the avoidance of doubt, I reject the suggestion made by Mr Xiao and Mr Zhu that Mr Guo merely recorded the matters agreed directly between the parties and, in effect, carried out no substantive brokering function. However, it is fair to say that the negotiations do not appear to have been unduly complex or time-consuming. Mr Guo's substantive emails are few in number and the amendments to the COA terms were minor, as Mr Guo accepted.

39. The 2010 WAF COA was for a 3 year period with freight to be calculated on a market-related basis. It was very similar in form to the terms of the 2007 WAF COA. The main changes however were:

a) An increase in number of liftings per month to 8 to 11 (from 4 to 7);

b) UHK could nominate cargoes in different loading areas within the western hemisphere;

c) UHK could declare a discharging range other than that specified in the contract;

d) Removal of the "right of first refusal" clause.

40. The express terms of the 2010 WAF COA included the following:

"Part 1

…

B. Laydays: commencing May 1, 2010

…

C. Loading Port(s): 1-3 SAFE PORT(S) WEST AFRICA

...

D. Discharging Port(s): 1-2 SAFE PORT(S) SINGAPORE/JAPAN RANGE

...

K. The place of General Average and arbitration proceedings to be London.

L. Special provisions :

ATTACHED PLEASE FIND THE FOLLOWING CLAUSES :

SPECIAL PROVISIONS 1 – 17

…SINOCHEM STANDARD TERMS…

Part II

…

24. ARBITRATION. Any and all disputes and differences of whatsoever nature arising out of this Charter shall be put to operation in the City of London... pursuant to the laws relating to arbitration there in force.

...

M. <u>SPECIAL PROVISIONS</u>

1. <u>TONNAGE:</u>

VLCC double hull tonnage built 1993 or later in Owner's option either employed in Owner's pool or chartered in by Owner...

…

3. <u>PERIOD</u>:

Three (3) years Contract of Affreightment.

This contract should be automatically renewed annually upon its expiration, unless notice would be given by either party for anything otherwise 60 days prior to expiration of the governing contract.

4. NUMBER OF LIFTINGS:

Minimum 8 / Maximum 11 liftings per month.

Charterer endeavors to spread the 11 liftings evenly within each year.

…

5. CARGO:

No heat crude oil, maximum four (4) grades within vessel's natural segregation...

6. CARGO QUANTITY

Part cargo, minimum 260,000 mts with Charterer's option up to full cargo. No deadfreight to be for Charterer's account provided minimum quantity supplied...

7. FREIGHT RATE:

Market related rate…

…

8. DEMURRAGE

Market related.

9. COMMISSION:

2.5% address commission on freight, deadfreight and demurrage to Charterer deductible from the source and Owners have nominated Pan Oceanic as the broker and pay 1.25% brokerage commission on freight, deadfreight and demurrage.

10. SCHEDULING AND NOMINATION CLAUSE

The Owner shall provide Charterer with updated position basis West Africa of Tanker International's tonnages (the vessels) on the first day of each week... Charterers shall nominate by telex or fax or email of each cargo's date minimum twenty-five (25) days prior to the first day of the laycan. Charterer endeavors to nominate the laycan as early as possible. Each cargo will be nominated with two (2) days laycan.

Owner shall then nominate one of the vessels ...which should be acceptable to Charterer, Suppliers and/or Receivers, for the designated cargo not later than one (1) working day after receipt of Charterer's nomination.

...

SINOCHEM STANDARD TERMS

...

3. General Average/Arbitration in London, English law to apply.

...

11. Should a dispute arise between the Owner and the Charterer, both parties shall endeavour to settle the matter in dispute amicably, otherwise same to be settled in London by arbitration as per Charter Party."

41. The 2010 WAF COA was the overarching agreement between the parties. As had happened under the previous COAs, each individual fixture was then the subject of a separate charter by way of recap, on each occasion again governed by English law and the subject of a London arbitration clause.

42. There is a factual dispute relating to the wording of SP9, the commission clause in the 2010 WAF COA. The wording of SP9 as set out above represented a change to the wording of the commission clause contained in the 2007 WAF COA which read as follows :

"10. COMMISSION

2.5% address commission on freight, deadfreight and demurrage to Charterer plus 1.25% brokerage commission on freight, deadfreight and demurrage to Pan Oceanic payable by Owner."

43. POC contends that during the course of the negotiations for the 2010 WAF COA UNIPEC made a direct request to TI Agencies that POC's name be deleted and the commission clause amended to provide:

"1.25% commission on freight, deadfreight and demurrage to Charterer's nominated broker."

44. This was what had been achieved on the AG COAs. TI Agencies refused the request. In response, UNIPEC insisted that the wording of the commission clause be amended to reflect the fact that POC was TI's nominated broker. TI agreed to this. This is relied upon by POC as another example of UNIPEC's desire to take control of the brokerage.

45. UHK denies that there was any such request. Rather the defence contends that the change to the wording was at UNIPEC's request but merely so as to clarify that POC was TI's nominated broker.

46. Mr Guo does not suggest that the alleged request was ever communicated to him direct. His first witness statement does not descend into any detail as to the manner in which POC was informed of UNIPEC's alleged request and TI Agencies' refusal to grant it. However, in cross-examination Mr Guo stated that he had been informed of these matters by Mr Hu during the course of a conversation or conversations (which he did not date or particularise in the sense of whether it took place by telephone or in a meeting). He said that Mr Hu did not identify to him who it was at UNIPEC who had made the request.

47. Mr Xiao stated that he had never heard or seen from any correspondence any information indicating that anyone in UNIPEC had ever asked TI to exclude POC from the business relationship going forward. He had not asked Ms Xu specifically in terms about this. He did understand from Ms Xu, however, that the wording was only intended to clarify that POC was TI's nominated broker.

48. In response to POC's allegation, Mr Zhu said this :

> *"As one of the main negotiators of the 2010 WAF COA I certainly never made such a request. I also never heard that anyone else within UNIPEC had made such a request."*

49. In cross-examination Mr Zhu suggested that he had checked with Ms Xu on this specific point before making this statement, and that she had clearly and plainly stated that she had not made such a request. This was a convenient answer, which I do not accept. Had Mr Zhu checked specifically with Ms Xu, I would have expected him to have said so in his witness statement. It was an answer given against the backdrop of repeated cross-examination on behalf of POC of previous witnesses as to the absence of Ms Xu (which Mr Zhu had seen and heard in court).

50. Mr Zhu also stated that the reason behind the change in wording was simply to clarify the position as to POC's status. In cross-examination he expanded to say that SINOPEC had carried out a contract review. UNIPEC had been asked for data and analysis of trading partners, for example owners and brokers. The change had been made to avoid criticism, for example, as to why POC was being given such large volume. Mr Zhu was accused of lying at this stage. Having watched and listened to Mr Zhu carefully, I do not accept that he was lying on this issue (despite my finding above). This was additional information on an issue which Mr Zhu always knew to be important. However, Mr Zhu stated that he had kept his witness statement simple and brief and thought that he had said enough. He gave this further evidence freely and convincingly.

51. I am not satisfied on the evidence that POC has proved on a balance of probabilities that UNIPEC requested TI to remove POC as the broker entitled to commission under the 2010 WAF COA:

a) POC has not called Mr Hu to give direct evidence of the request. All that Mr Guo can testify is as to what Mr Hu said to him, not what UNIPEC said to Mr Hu;

b) Mr Guo made no record or follow-up whatsoever of what must, from his point of view, have been a most disturbing development at the time. His apparent ability, years down the line, in the absence of any documentation, to recall the precise wording of the proposed new clause from UNIPEC is unconvincing;

c) Additionally, if Mr Hu had indeed informed Mr Guo of such a request by UNIPEC, I would at the very least have expected Mr Guo to ask Mr Hu who it was at UNIPEC who had made the request, even if the issue had by then been resolved in POC's favour. The TI/UNIPEC relationship constituted at least POC's main source of income. (Mr Guo was reticent on the numbers, which I found odd given that he is very much a "numbers man", as displayed in his various calculations and charts.) He was clear that he did not so ask;

d) The suggestion that this was somehow a "repeat" of UNIPEC's request in relation to the AG COAs does not resonate. The commission position under the AG COAs had long been treated differently;

e) There is no obvious logic in the change being made on POC's version of events. If UNIPEC had been rebuffed as alleged, it is difficult to see why the revised wording improved its position. It was suggested that it protected Ms Xu and Mr Zhu because it recorded their attempt to exclude POC. But all it actually reflects is some thought being given to the wording of the commission clause. It does no more than record the position as it had always been. A better and simpler way of achieving protection would have been to make the request to TI in writing or at least record the making of the request and its rejection;

f) POC suggest that the change must have been made to reflect UNIPEC's attempt because TI had always nominated POC. But the fact remains that the wording was expressly clear for the first time that the broker was nominated by the owner;

g) The evidence of Mr Xiao and Mr Zhu was consistent. Although I have not accepted Mr Zhu's evidence that he checked specifically with Ms Xu on this issue, I do accept that Mr Zhu was a fellow key negotiator and that he did not make any request as alleged, nor was he aware of anyone else making such a request. I would have expected him to be aware of one, had it been made. This was a relatively small team and Mr Zhu was one of the major negotiators and included in the negotiators' email distribution. Additionally, Mr Zhu's fuller explanation of the reasons behind the change makes sense.

52. In reaching this conclusion, I make it clear that I do not find that Mr Guo has set out deliberately to mislead in his evidence in this regard. Rather, he is mistaken in his recollection in circumstances where the obtaining of brokerage control has now become a major theme of POC's case.

Performance of the 2010 WAF COA

53. From May 2010 to April 2011 the 2010 WAF COA was performed broadly satisfactorily on both sides. POC provided its after-fixture services to UHK and TI, including the receipt and onward transmission of cargo nominations from UNIPEC, the completion of vessel questionnaires and preparation of freight invoices. UNIPEC, for UHK, nominated cargoes to be carried under the 2010 WAF COA (some, if not all, of which had been acquired by UUK, which was engaged in the acquisition of WAF cargoes for shipment to China). UUK also provided limited operational support in relation to the 2010 WAF COA.

54. From April 2011 UNIPEC, for UHK began to nominate fewer cargoes than the minimum required of 8 per month, with only 7 liftings in May, 6 in July, 7 in August, 6 in each of September and October, and 5 in December 2011. POC lost out on commission as a result.

55. In September 2011 Mr Chang emailed Mr Guo following an episode when a port crane on board MT "*Overseas Sovereign*" had failed to work properly. The vessel had age and condition problems per Mr Chang.

56. On 22nd November 2011 Mr Guo emailed Ms Xu, Mr Xiao and Mr Chang, referring to their many previous telephone discussions and the continuing non-performance of the 2010 WAF COA. He asked for the situation to be rectified. In January, February and March 2012 the minimum lifting obligations were met.

57. On 26th March 2012 Mr Chang emailed Mr Guo a) about a gangway problem and clearance issues on MT "*Shinyo Splendor*" and b) a broken rope on MT "*Meridian Lion*". Mr Chang maintained that these were serious issues, in the first place losing 2 or 3 days and secondly being vetting issues being capable of causing material losses.

58. In March 2012 UHK only nominated 6 cargoes for lifting in April 2012. On 21st March 2012 Mr Guo emailed Mr Chang asking for confirmation as to April liftings with a "*gentle reminder"* of the minimum requirements. Mr Chang forwarded the email internally to Ms Xu confirming that only one lifting in the second half of April could be nominated to TI, and one parcel in early May. On that basis, the total liftings in April would be 6. Mr Chang left Mr Guo to discuss the matter further with Ms Xu. Only 6 cargo liftings were made in April 2012. After 12th April 2012 no more cargo nominations under the 2010 WAF COA were made. POC was again deprived of commission.

59. Various chasers or protests were sent to UNIPEC between April and August 2012 none of which were answered (at least not in writing), as follows:

    a) On 3rd April 2012 an email from Mr Guo to UNIPEC complaining at the under-nomination for that month and stating that, if the minimum cargo liftings were not nominated, TI had to re-position/schedule the extra committed vessels, a loss suffered on top of "*the already disastrous returns for the vessels/Owners."*;

    b) On 9th April 2012 an email from Mr Guo to UNIPEC again protesting at the shortage of cargo nominations that month and referred to huge loss to TI;

c) On 17th April 2012 an email from Mr Guo to UNIPEC, confirming that only 3 liftings had been nominated for May 2012. TI would suffer huge losses if UNIPEC failed to nominate the minimum 8 liftings;

d) On 8th May 2012 an email from Mr Guo to UNIPEC identifying the shortfall in nominations;

e) On 10th May 2012 a letter from TI to UNIPEC about the failure to nominate in accordance with the 2010 WAF COA, noting that UUK (identified in error as UNIPEC) was lifting other cargoes with other carriers;

f) On 3rd July 2012 a letter sent by TI to UNIPEC about the failure to nominate, again noting that UUK (again referred to as UNIPEC) was regularly lifting other cargoes with other carriers. TI stated that it had tried to mitigate its position as much as possible, but the lack of any prior warning had placed TI in a "*significantly disadvantageous position"*. It estimated its losses as a result of UNIPEC not performing the 2010 WAF COA as "*in the region of $14,000,000."*

60. POC contends that it never received any explanation from UUK or UHK or UNIPEC as to the reason for the under-nomination and then cessation of nominations. Mr Chang said that he spoke to Mr Guo in response to Mr Guo's email of 21st March 2012 but only to tell him to discuss the matter further with Ms Xu. Mr Guo stated that he did speak with Ms Xu in the second half of April 2012 but she gave no information, rather she said that Mr Guo should just talk to "*the boss*", Mr Chen. Mr Guo states that Mr Hu told him in April likewise that Ms Xu had spoken to him to similar effect. Mr Hu also told Mr Guo that when he was in Beijing in the summer of 2012 he had tried several times without success to contact Mr Chen.

61. Mr Xiao in his first witness statement states that he understood that Ms Xu explained to Mr Guo why cargo nominations had ceased, namely that it was as a result of a shift in UNIPEC's business strategy, away from purely in-system cargoes, and that UUK was gradually taking over the WAF chartering business. In cross-examination Mr Xiao stated that Mr Chang had also spoken to TI Agencies or POC or both of them, because Mr Chang had sought his approval to do so. These matters were not put specifically to Mr Guo.

62. On the state of the evidence before me, I conclude that POC was probably not given any detailed explanation by Ms Xu or Mr Chang (who does not assert otherwise) or Mr Chen in 2012 as to the reason for UHK's failure to perform the 2010 WAF COA. (That is not to say that no explanation was ever given to TI, which has continued to trade with UNIPEC. Indeed, Mr Wang's unchallenged evidence was that at least in May 2013 TI was told of UNIPEC's change of business plan, as had been foreshadowed in their meeting in November 2010 referred to in more detail below. There UUK had made its desire to do third-party trading clear to TI.) But I do not accept the assertion made for POC that the failure to give an explanation to POC means that there was no "*good explanation*" in the sense that the UNIPEC group was only acting in this way because its predominant motive was to capture the brokerage. Rather, the failure to give an explanation would be just as consistent with there being no "*good explanation*" from POC's point of view, in the sense that the explanation

was the UNIPEC group's change of business strategy and a move of the chartering business to UUK.

63. Under the 2010 WAF COA TI was obliged to provide regular vessel positions pursuant to SP10 of the 2010 WAF COA. It did so, by way of example, on 14th May and 29th May 2012. The last occasion on which TI did so was on 2nd August 2012, when TI Agencies emailed UUK with the availability of 2 vessels. UUK and UHK contend that thereafter TI took no steps or action under the COA after this and accordingly that the COA was abandoned in or about September 2012 and in any event by the end of April 2013.

64. On 30th April 2013 the 3 year term of the 2010 WAF COA completed. No notice of termination was given by either party under SP3 in 2013 or 2014. POC contends that the 2010 WAF COA thus continued. UHK and UUK contend that the 2010 WAF COA had by this stage terminated by way of mutual abandonment (and that SP3 does not operate automatically to extend the 2010 WAF COA absent termination notice).

65. After proceedings had been commenced and served, on 16th February 2015 UHK sent a notice that the 2010 WAF COA would not renew in April 2015, without prejudice to its position that the 2010 WAF COA had already come to an end.

66. POC contends that it missed some 192 liftings in all in 2014 and 2015, during which time UUK continued to lift large quantities of WAF cargoes every month with other owners, mostly bound for SINOPEC refineries.

Events within the UNIPEC group

67. The events above took place against the following background of developments within the UNIPEC group. This background is relevant to the question of malice for the purpose of the claim for tortious interference.

68. UUK was established in 1995, initially as a crude oil trading company. Its primary business then was to purchase crude oil cargoes for use in SINOPEC's refineries, referred to as "in-system cargoes", principally from Europe, the Mediterranean and West Africa. It relied on UNIPEC to handle the shipping of cargoes purchased. It had authority to conclude oil trades in the name of UHK and later on authority to enter into charters in the name of UHK. Once cargoes had been acquired, the role of UUK was to pass information between the terminal and UNIPEC/POC; UUK did not itself nominate cargoes for carriage.

69. UHK had no independent chartering department. It became the named charterer under the WAF COAs as of 2006. Its role was to act as a settlement centre through which payments under the charters under the COA were made.

70. In or around 2007 SINOPEC, in common with other oil companies at the time, determined a strategy to develop its trading business, so as to buy oil cargoes and sell them on to third parties at a profit. Pursuant to that strategy, according to Mr Wang, UNIPEC instructed UUK to build up the third party trading business. At this stage UNIPEC was handling all shipping and chartering, including for UUK. UUK duly began to increase its trading activities, as did the trading activity of the UNIPEC group as a whole.

71. Without a shipping department, UUK could not handle its own shipping operations and delivery. All of that was handled by UNIPEC. According to Mr Wang, that was and was seen by UUK's traders as an unsatisfactory position, causing unnecessary delays and frustrations. UUK saw a need in this context to establish its own in-house chartering department, which it did in early 2010. A Matthew Lambert ("Mr Lambert") came on board with UUK in March 2010 as head of chartering. His interest in UUK appears to have started in around January 2010 when he met Mr Wang. Mr Lambert had 16 years' shipping experience in BP and Glencore, amongst others. The department was authorised to conclude charters, mostly for trading cargoes, in UHK's name. Its creation gave UUK more flexibility and scope to conclude advantageous oil trades.

72. On 30th March 2010 Mr Lambert emailed Mr Wang seeking various pieces of information from UNIPEC to help start up the shipping department, which request Mr Wang passed up the chain to Mr Gao Jianfeng, Mr Chen Gang's predecessor as Managing Director of UUK. On 1st April 2010 Mr Qinghui Liu of UUK emailed Mr Wang seeking his comments on a draft letter to Ms Xu and Mr Chen. The draft identified various items for discussion, including issues relating to trading counterparties, and the possibility of adding new brokers to the list of transportation trading counterparties. On 20th April 2010 UNIPEC emailed Mr Lambert a list of current panel brokers and members of the UNIPEC shipping team. Mr Lambert responded to say that he would like to add some more European shipbrokers to the panel and asked how to go about this. On 26th April 2010 he repeated that request, amongst others. On 22nd June 2010 Mr Lambert emailed Mr Gao and Mr Wang, amongst others, to report that 7 new brokers had been added to the London shipbroker panel.

73. In the second half of 2010 UNIPEC made UUK responsible for shipping in-system cargoes for the first time, albeit only from the North Sea and Mediterranean regions. An August 2010 memorandum was prepared by UUK for UNIPEC with a positive report on the performance of UUK's new chartering department ("the August 2010 memo"). It recorded that UUK was selecting good brokers and included the following passage :

> *"…Therefore, we shall, according to features of our business, select brokers which are large in scale, have a long record of operation and excellent goodwill and are the most powerful in a particular market.*
>
> *To hold our reputation undamaged, we shall not cooperate with companies which only have a few people, as they have a low credit cost, small market coverage and a higher compliance risk. Meanwhile, we will require brokers to send the original charter contract to us for comparison with the contract presented by the charterer and for filing purpose. Generally, big brokers will not risk their credit by forging an AB contract for a particular charter contract. So the risk of commercial fraud will be minimized."*

74. A meeting took place between UUK and UNIPEC in August 2010, following up on this memorandum. Mr Wang emphasised UUK's strong performance. He observed

that if UNIPEC were over-reliant on TI, it would be in a weak bargaining position. He suggested that UUK be allowed to set up its own time charter fleet to service WAF cargoes. That suggestion was rejected, but subsequent to the meeting, in September 2010 it was decided that UUK would handle the chartering for any WAF partial cargoes – i.e. vessel loads that were part trading, part in-system cargoes.

75. In the same month an incident occurred involving the MT "*Ardenne Venture*" which, said Mr Wang, confirmed his view that UUK needed to be in control of its own shipping, including cargoes by VLCC from WAF to China. There were difficulties in communication between UUK and UNIPEC in relation to a REBCO crude oil cargo which UUK wanted to discharge in North-West Europe. Because Mr Lambert was unable to reach anyone in UNIPEC he contacted TI directly. TI then complained about UUK's direct communication. UNIPEC lost out on the opportunity of discharging and reloading a cargo on board. Mr Wang set out his views as to the problems arising in a draft email on 21st September 2010. He wanted better communication channels, and for UUK to be able to contact TI directly.

76. According to Mr Wang's unchallenged evidence, on 3rd November 2010 a meeting took place between UUK and TI in London, triggered by the "*Ardenne Venture*" incident. In the course of the meeting, UUK made it clear that it planned to develop its third party trading business and would need quicker and more flexible shipping support as a result. It needed tonnage to develop its third-party trading business. Mr Gao stated that UNIPEC was looking to be able to fix vessels for the third party trading business from the North Sea/Mediterranean to China. TI however indicated that it was unwilling to assist; it did not have the extra capacity to support UNIPEC's third party trading business. TI would only focus on UNIPEC's programmed cargoes with fixed laycans and ports. Mr Wang said that UUK was surprised by TI's position. Mr Gao informed TI that the main business of UNIPEC in the future would be third party trading and that it was group strategy. Third party cargo volume would grow whilst pure programmed cargo volumes would decrease. UUK would approach other owners if TI refused to provide capacity. Mr Wang's unchallenged evidence was that the outcome of this meeting was reported to UNIPEC in December 2010.

77. On 5th November 2010 Mr Lambert and Mr Wang received an unsigned copy of the 2010 WAF COA. Upon its receipt Mr Lambert sought comments from within UUK on its terms and to see "*how we can all benefit from it".* Comment was duly provided, for example, from a Mr Lavenstein who commented amongst other things on scope for a better co-operation clause and better freight rate levels.

78. In December 2010 UUK sent a lengthy memo to UNIPEC prepared by Mr Gao gathering all comments on the 2010 WAF COA together ("the December 2010 memo"). It is relied on heavily by POC on the question of motive. It read as follows:

> "*After my department received the above-mentioned contract, we distributed it to the management and personnel in the relevant business, particularly the externally hired crude oil trade and shipping personnel, and organised a special conference to collect and arrange feedback.*
>
> *However, the relevant personnel, especially the external hires, thought that the long-term contract signed between UNIPEC*

and TI had major problems and was too biased in favour of TI, with serious losses to the legitimate interests of UNIPEC and even Sinopec. UNIPEC UK's management felt a heavy responsibility after receiving this feedback, and drafted a special report to submit to you. If this feedback is accurate, we hope that you can ask UNIPEC UK to form a taskforce, and revise the TI contract and its implementation in order to protect the interests of UNIPEC and Sinopec, and fully implement Sinopec's executive management for freight's goal of "protecting supplies and lowering costs", and instruct the freight transport team to learn from this lesson, and improve their work efficiency.

The main issues in the framework agreement between UNIPEC and TI are:

1. ***By failing to obtain freight discounts, the core objective of a long-term shipping contract is not achieved.***

…

2. ***TI strictly limited the scope of loading and unloading, earning handsome profits but severely restricting UNIPEC's opportunities to optimise by securing supplies and reducing costs, and by enlarging self-operation****.*

…

3. ***TI's designation of a "briefcase" ship-broking company defies Sinopec's management guidelines on counterparties.***

4. ***Core clauses leave grey areas, increasing moral hazard for the corresponding job positions***

…

Conclusion:

Based on broad estimate ***the loss for Sinopec from this three-year freight contract, and the windfall profit for TI, is as high as US$113. 5M (53.54M + 49.5M + 10.5M), or 756m yuan****, and as for losses due to the blocking of agency business and development of our own business, the losses are larger and are impossible to estimate.*

The points mentioned above are only the clauses to which personnel for the related business have had the strongest reaction and the most doubts. Please also see the attachments, which contain opinions on the main clauses as well.

The purpose of this report is to hopefully draw senior management's attention to these issues, promptly correct the erroneous practices of the Transport and Execution Department in contract negotiations with TI, and recover the huge economic losses created, as well as avoid possibly being called into question by Sinopec or externally, and prevent avoidable harm to UNIPEC's image and reputation."

79. Each headline concern was followed by substantive and lengthy commentary. In relation to rates, UUK was surprised that TI was only offering market rates, given the volume of cargo involved. UUK was aware of a long-term COA with a maximum of 3 liftings a month where a discount on market rates was on offer. It was noted that clause M.10 was a significant concession on the part of UHK, removing part of the incentive on TI to schedule the movement of fleet efficiently. There was a lack of flexibility in range. There was an ability to use vessels over 15 years old. The contract term was disadvantageous, providing for a single block period of 3 years.

80. In relation to the third headline concern relating to POC, the memorandum stated:

"The contract clearly states, TI has appointed a briefcase shipping company named PAN OCEAN as the sole beneficiary of this freight contracting agreement, which nominally will receive US$6.6M annually (US$50,000 brokerage fee per ship, times 11 ships per month, times 12 months) for brokerage fees and a portion of demurrage fees, with the total amount not less than US$7M annually.

First of all, in accordance with the conventions of the freight shipping market, as the freight owner and the contract originator, the lessor is responsible for assigning freight shipping brokers; what TI has done runs completely counter to business conventions.

Secondly, for the international shipping market, and especially for the VLCC market, because of the large amounts of money involved, and its major influence, an important feature of the market for large freight carrier brokerage firms is that they have large sales coverage, and many agents, and are well-known and respected, and their core capability is that based on their good relationships with ship-owners and freight companies, they are able to provide quality reliable information to both sides, promoting contracts, and even actively participating with the ship-owner or lessor in determining their long-term freight needs. In the case of PAN OCEAN, it is an unknown briefcase company with only one sales employee (named Peter Guo) and two assistants, and it seems is only actively involved in the business between UNIPEC and TI, and not only is it unknown internationally, and in other contracts with TI, is appointed by the lessors, and has never used the name PAN OCEAN. From this we can see, PAN OCEAN, which is such a small company, cannot possibly

provide the same level of quality information as the other companies.

In addition, in its contracts for Mideast freight, UNIPEC has specified to use several large freight brokerage firms (including ICAP, GALBRAITHS, CLARKSONS and other internationally known brokerage firms) to be responsible for drafting contracts, which all shows that UNIPEC recognizes these market conventions for shipping.

Finally, in the 3 November meeting with UNIPEC UK in London, TI's managing director Jan Birkholm clearly stated that they could completely accept the appointment of brokerage firm/s, and would not take offense at their appointment. To summarise the above information, TI's explicit requirement in the contract to designate PAN OCEAN seems very questionable.

Finally, according to Sinopec's counterparty management regulations, there are strict provisions regarding the scale, creditworthiness and commercial track records of counterparties. However, TI seized upon a flaw in Sinopec's shipbroker management and even had a briefcase company like this participating in such a huge commercial contract. According to my department's estimates, a reasonable explanation ought to be that for PAN OCEAN, as a small company, to be able to have the exclusive enjoyment of such a huge commercial contract, it would have to be willing to lower its brokerage rates, and even though the contract between TI and UNIPEC indicates 1.25%, the level in the actual deal between TI and PAN OCEAN might be only 0.75%. This is how TI, with the acquiescence of the freight shipping department in this three-year contract saved US$10.5M, which is roughly 69.93M yuan (business convention is that the ship-owner is responsible for making payment to the shipping broker), and UNIPEC is responsible for incomplete information, and for all losses incurred by such incomplete information, drastically hurting agency optimization and the development of our own sales business. The important thing, however, is that it undermines UNIPEC's image at Sinopec and even in the market, and once Sinopec starts rigorously managing ship-broking companies, UNIPEC will surely have no defence for the above arrangement."

81. It would appear that in response to that memo Ms Xu asked Mr Zhu to provide a comparison of TI fixtures with the market. His researches, as provided to her on 15th December 2010, showed that UNIPEC had in fact been beating the market for the years 2006 to 2010.

82. A meeting then took place between UUK and UNIPEC (Mr Wang and Mr Zhu, Ms Xu, Mr Chen and Mr Xiao) on 17th December 2010. Mr Wang explained the

expansion of UUK's trading business and made it clear that UUK was keen to have more control of the chartering business in WAF. He proposed that UUK's chartering department be put in charge of the VLCC chartering business in WAF. UNIPEC rejected this proposal. But, as Mr Zhu put it, UUK's ambition was clear. Mr Wang followed up with a report on the meeting in an email of 13th January 2011.

83. Despite this rebuff, UNIPEC did begin gradually to assign responsibility for WAF trading cargoes to UUK, as set out below. According to Mr Xiao, by May 2012 all responsibility for chartering WAF cargoes had shifted to UUK.

84. This shifting of responsibility is reflected in a document issued by UNIPEC In May 2011 entitled "*Measures of UNIPEC for Management of Transportation"*. In relation to "*British Companies"* the entry read :

> *"2.3.1 Negotiate, sign and execute short-term transportation contracts concerning crude oil of customers or of their own within some regions of Europe, Mediterranean, North Africa and West Africa.*
>
> *2.3.2 Negotiate, sign and execute short-term transportation contracts concerning self-operated crude oil and refined oil within the region.*
>
> *2.3.3 Prepare and execute the transportation hedging plan for self-operated real products.*
>
> *2.3.4 Execute long-term transportation contract.*
>
> *2.3.5 Handle the transportation of self-operated items.*
>
> *2.3.6 Report the transportation partners within the region to Beijing Transportation and Execution Department.*
>
> *2.3.7 Carry out analysis and prediction of the crude oil and refined oil tanker market within the region."*

85. The document also made it clear that all charterparties for crude oil had to be signed in the name of UHK and UHK was to act as UNIPEC's overseas payment settlement and accounting centre for freight and any other expenses arising from charterparties for crude oil.

86. In September 2011 Mr Chang sent Ms Meer and the rest of the UUK operations team an email stating that most Q88 questionnaires sent by Mr Guo were not up to date, risking problems with port clearance. (Owners have to specify certification expiry dates on Q88 questionnaires; in the absence of satisfactory and up to date information a terminal will not accept a vessel.) Additionally, according to Ms Meer, at that time fixed vessels sometimes got delayed and did not arrive at the loading port within the agreed loading window, particularly in the winter season. This caused problems and financial loss.

87. In November 2011 Mr Wang and Mr Gao drafted and sent a letter to Mr Chen headed: "*Request of Instructions on Integrating the Shipping Resources in the Western*

Hemisphere". UUK asked UNIPEC to allow it to take over the operation of the 2010 WAF COA. It explained in detail why such a step would be beneficial for UNIPEC and why UUK was best placed to take over the 2010 WAF COA. Amongst other things, UUK stated that the multi-party approach to chartering WAF cargoes (in circumstances where UNIPEC remained responsible for the charter of VLCCs for in-system cargoes under the 2010 WAF COA and where UUK could charter smaller vessels for third party trading so long as they were not TI vessels) was disadvantageous to the UNIPEC group. UUK asked to be designated to take overall charge of the shipping of crude oil for UNIPEC. UNIPEC again did not accede to this request. But from around late 2011 UUK increased chartering of vessels for the WAF region (in the name of UHK) for third party trading cargoes.

88. In mid-2011 UUK also started using NORPLAY. This was a practice whereby UUK sought to obtain as much control over a vessel's laycan, and hence the bill of lading date, as was possible. (According to Mr Chang, NORPLAY was very difficult under the 2010 WAF COA because of the short (2-day) laycan period provided for, and TI's right to issue NOR at any time after the laycan had commenced.) It appears to have done so successfully.

89. By a document dated 8th March 2012 UUK made a "*Request relating to adjustment on chartering business for NOR Play of crude oil in West Africa*" to UNIPEC. It sought transfer of the WAF chartering business involving NORPLAY to UUK. It reported that it had made a profit of more than US$7 million in about 6 months by matching the time of submitting NOR with the adjustment of the paper market positions. UUK needed to be in charge of chartering:

> *"1. Without time differences, timely responses will guarantee profits….*
>
> *2. Trading and shipping coordination will improve accuracy….*
>
> *3. The nature of trading is incompatible with the terms of the TI COA*
>
> *NORPLAY is a crude oil trading model heavily featured with trading. However, from the communication between UK company and TI, TI has made clear that they cannot support the shipping of Unipec's trading business and that they are only responsible for shipping the system cargoes which have fixed loading time while they are unwilling to offer business flexibility. However, in NORPLAY, the key is to make full use of the flexibility of loading time and vessels and to make proper adjustments so as to maximise the trading profits…"*

90. Mr Chen approved the request on 13th March 2012 in the following terms:

> *"Approved. Please can the Shipping and Operations Department take corresponding actions. NORPLAY is a usually-seen method for oil companies to make profits. UK*

company has made good attempts. At the same time, the fast growth of the UK Company's shipping team provides a security for the continued growth of that practice…"

91. When, on 4th May 2012 TI Agencies sent Mr Wang vessel positions for WAF, Mr Wang forwarded the email internally within UUK with the question:

"How should I reply".

92. When, Mr Wang was sent POC's email of complaint of 9th April 2012 by Mr Gao (who received it from Mr Chen) Mr Wang responded on 22nd May 2012:

"Great, show time. I think next letter will reach us 10th June."

and:

"Thanks a lot boss. I will handle".

93. As set out above, by May 2012, responsibility for all the UNIPEC Group's WAF chartering had been shifted to UUK. And nominations under the 2010 WAF COA effectively ceased around this time. Mr Xiao's evidence was that from May 2012 UNIPEC simply no longer had any requirements for simple in-system cargoes which were traditionally shipped under the 2010 WAF COA.

94. On 21st May 2013 Mr Wang attended a meeting between TI and UUK in London with a view to doing future business together. Mr Wang says that he explained clearly UUK's business plan and welcomed TI's wish to restore co-operation. There was no suggestion by the parties that the 2010 WAF COA was still alive at this stage. Following that meeting, UUK commenced spot chartering TI VLCCs to carry crude oil from WAF to Chinese ports on behalf of UHK. At the end of 2014 UUK was authorised by UNIPEC to conclude charters in its own name.

95. The essentially unchallenged evidence is to the effect that, as time has gone on and UUK's chartering skills have increased, UUK has been able to achieve significant savings in freight costs; there is a greater choice of vessels; there is more flexibility, in particular with respect to NORPLAY, and overall vessel performance has improved.

D. <u>An overview of the issues</u>

96. The issues are multiple, complex and in places overlapping. On the claim against UHK for breach of an implied in law promise they can however be distilled as follows:

a) What is the applicable regime and putative proper law in relation to an implied in law promise - English or New Jersey law? It is common ground that if Regulation EC 593/2008 on the Law applicable to Contractual Obligations ("Rome I") applies, New Jersey law does not apply and the claim based on an implied in law promise falls away;

b) If Regulation EC 864/2007 on the Law applicable to Non-Contractual Obligations ("Rome II") applies, what is the proper law of the obligation? POC contends that it is New Jersey law, UHK that it is English. If the proper

law is English, then again it is common ground that the claim based on an implied in law promise falls away;

c) If New Jersey law applies, does an implied in law promise arise on the present facts? If so, it is common ground that UHK acted in breach of such promise.

97. The issues on the claim against both UUK and UHK for tortious interference with contractual relations can also be distilled as follows:

a) Under the applicable law, was there a separate enforceable brokerage agreement between TI and POC by which TI agreed, amongst other things, to pay POC 1.25% of gross freight, deadfreight and demurrage earned by TI on the COA?

b) If the brokerage agreement so existed, was there tortious interference with contractual relations?

i) Was there interference with contractual relations for the purpose of the tort?

ii) Did UUK's conduct amount to sufficient interference for the purpose of the tort? Put another way, can UUK's conduct be said to have caused any loss?

iii) If there was sufficient interference by either UHK and/or UUK, was the interference intentional and without justification?

98. Additionally, there are discrete issues arising in relation to quantum. It is common ground that damages will be governed by New Jersey law. The parties are also agreed as to the measure of damages, namely that POC would be entitled to the commissions that would have been paid to POC had the 2010 WAF COA been performed by UHK (with credit for savings). But, as already indicated above, there is an issue as to the proper construction of SP3 in the 2010 WAF COA and whether or not the 2010 WAF COA automatically renewed in 2013 and 2014 as POC contends. UUK and UHK also contend that the 2010 WAF COA was in any event terminated by mutual abandonment in late 2012/early 2013. There are issues as to whether the English doctrine of minimum performance applies, and for example whether or not POC is entitled to commission on demurrage.

E. The New Jersey law experts

99. It is apparent from the overview of the issues that questions of New Jersey law are raised. I have been provided with no fewer than 7 bundles of New Jersey state and federal law authorities, sources and commentaries.

100. When deciding a claim, a New Jersey court will first consider the New Jersey State Constitution where relevant, along with any other applicable statutory provisions, and then New Jersey case law. All New Jersey courts are bound by the decisions of the New Jersey Supreme Court; the courts of the Law and Chancery Divisions of the New Jersey Superior Court are bound by decisions of the New Jersey Superior Court, Appellate Division (although the Appellate Division does not bind itself); trial court

decisions are binding only on parties to that case, but are sometimes referred to as persuasive, but not binding, authority. Federal court decisions do not bind the New Jersey courts. Where a federal court has considered New Jersey law, and there is no binding authority on the issue from the New Jersey courts themselves, such decisions are seen as persuasive.

101. New Jersey law experts gave evidence as follows :

a) **for POC**: Justice Virginia A. Long ("Justice Long"), who provided reports dated 23rd March, 9th May and 19th August 2016. Justice Long is a former Associate Justice of the New Jersey Supreme Court;

b) **for UUK and UHK**: Judge Joel A. Pisano ("Judge Pisano"), who provided reports dated 23rd March, 9th May and 20th August 2016. Judge Pisano is a former District Court Judge for the District of New Jersey.

Justice Long and Judge Pisano also prepared a joint memorandum dated 20th April 2016.

102. I address their evidence on the specific topics as they arise in more detail below. In broad terms, I found both experts to be frank and co-operative, as one would expect.

103. There was a suggestion on behalf of UHK that Justice Long had failed to make proper disclosure to the parties and the court of a retainer by her firm, where her husband is an equity partner, by Mr Guo in unrelated but ongoing legal proceedings. It is not necessary to rehearse the detail. Justice Long frankly accepted that with the benefit of hindsight it would have been better to make a disclosure in this regard. The matter was in the end not pressed, and no allegation of bias was ever put. I take no account of this development in reaching my conclusions below.

104. A generalised attack was also made on Justice Long to the effect that she had been too ready to argue POC's case and too ready to draw conclusions without, for example, reading underlying documents. Justice Long accepted that in parts of her reports she may have been a little too ready to impose her own views. I do not find that Justice Long in any way intentionally overstepped the mark. However, as will become apparent below, I do not accept several of her opinions. There were occasions when she became confused as to the status of various New Jersey law authorities, and she was also incorrect in material respects on some of their facts. She had had the assistance of a partner in her firm and another legal "*intermediary*" in providing her opinions. They had carried out research for her and the issues had been the subject of discussion between them. I accept without reservation Justice Long's statement that she and she alone wrote her reports. But when pressed on some of her opinions by reference to certain authorities, she was forced ultimately to make material concessions, which she fairly did.

105. Judge Pisano had also had some research assistance for the purpose of preparing his reports. His deployment of the authorities was also sometimes inaccurate and his approach at times was over-simplistic. But he was clear and consistent in the views that he expressed, and from which he did not resile.

106. In the end, I have not accepted the views of either expert outright. Rather, the expert evidence has in the normal way informed and assisted me in reaching such conclusions on New Jersey law as I have below.

F. Was UHK's reduction and then cessation of nominations under the 2010 WAF COA effected with the predominant motive of retaking control of brokerage under the COA?

107. This is an issue which goes essentially to the question of malice for the purpose of the cause of action in tortious interference, but is convenient to address separately at the outset. It is a pure (if substantial) question of fact.

108. In its revised case formulated at trial, POC advances:

> *"that the predominant motive of UUK and UHK in acting as they did was to re-take control of the brokerage commission otherwise destined for POC, such that it could be allocated to other brokers. In this limited sense, POC contends that [UUK and UHK] specifically "targeted" the commission which would have become payable to POC under [the] brokerage agreement…."*

109. The case essentially put to the witnesses for UUK and UHK was as follows:

a) That at some time in or before mid-May 2011, it was agreed between Mr Gao, Mr Wang and Lambert (for UUK) and individuals representing UNIPEC and UHK (most likely Mr Chen, Ms Xu, Mr Zhu and Mr Xiao):

i) That UHK would cease to make the minimum number of required nominations under the 2010 WAF COA;

ii) Instead UHK would charter in replacement tonnage outside of the 2010 WAF COA; and

iii) This circumvention of the 2010 WAF COA would start with a handful of voyages here and there to test the water;

b) That at some time in or before April 2012, UUK, UNIPEC and UHK agreed that UHK would case any further nominations under the 2010 WAF COA and instead UUK would charter in replacement tonnage outside of the COA.

110. In each case, POC contends that the predominant motive of UUK, UHK and UNIPEC was to re-take control of the brokerage otherwise destined for POC, such that it could be re-allocated to other brokers. There was no consensus within the UNIPEC group as to whether or not the 2010 WAF COA was commercially disadvantageous. But the one point upon which there was agreement was that the brokerage needed to be re-distributed. All at UUK, UHK and UNIPEC knew that the result of the circumvention of the COA would be that POC would be deprived of its commission.

111. POC suggests that the case for UUK and UHK on motive faces considerable difficulties as a result of their failure to call material witnesses, in particular Ms Xu and Mr Chen. There is an absence of evidence from the relevant decision maker

within UNIPEC or UHK. The failure to call Mr Chen is not altogether surprising: he did not feature in POC's pleaded case, nor does he feature as a central figure in any of the witness statements, for example. The failure to call Ms Xu is perhaps more surprising, but a) Mr Zhu and Mr Xiao were called and b) it has always been for POC to prove its case on predominant motive, a case which was until very recently a far more serious one of bad faith, conspiracy and an entitlement to punitive damages. UUK and UHK have only ever had to meet a case, not make one. And witnesses have been called who are alleged by POC to have been party to the alleged agreements to cease nominations under the 2010 WAF COA in 2011 and 2012. In so far as there ever was a formal decision taken, no formal written decision appears ever to have been sent to UUK or UHK. The thrust of the evidence of Mr Wang and Mr Xiao was simply that they were told that there would be no further nominations from UNIPEC.

112. POC contends that it is obvious, regardless of alternative explanations offered by UUK/UHK, that the central motivation behind their conduct was to gain control of the very substantial brokerage commissions payable as a result of their WAF chartering activity. They had "*form*" for this: see UNIPEC's attitude to the AG COAs and the attempt to exclude POC from the 2010 WAF COA. To have control over the destination of these commissions was an extremely powerful tool in the international oil trading industry. The *ex post facto* attempts by UUK and UHK to justify circumvention have been inconsistent and "*ever-developing*" in nature. The evidence of their witnesses needs to be treated with real caution.

113. The planks of POC's case are built up as follows:

a) UNIPEC attempted to exclude POC from commission under the 2010 WAF COA. What happened later (in 2011 and 2012) was UNIPEC achieving "*by the back door"* that which it had been unable to negotiate in 2010. As set out above, POC has in fact not satisfied me that there was any such attempt;

b) UUK was an aggressive player within the UNIPEC group. Mr Wang was highly ambitious and wanted to build the business. He was vocal in his desire to do so. He considered it to be very much in UUK's interests for the shipping business to grow as quickly as possible. He recruited Mr Lambert. To grow the business, UUK needed to nurture relationships with powerful brokers. The 2010 WAF COA was a source of a great deal of brokerage. Mr Lambert was interested in it from the moment of his arrival at UUK. Mr Lambert proposed in August 2010 that only large brokers should be used;

c) Tensions developed between UUK and UNIPEC. UUK wanted to take control of the 2010 WAF COA, as Mr Wang conceded. There were incidents when UUK complained about negative comments from UNIPEC without proper consultation;

d) The receipt by UUK of the 2010 WAF COA finally gave UUK its opportunity. POC contends that it was distributed within UUK with a "*mandate*" that everyone should come up with every conceivable criticism. This was the best way of obtaining future control of the contract;

e) The December 2010 memo was designed to get control of the 2010 WAF COA back to UUK so that the brokerage could be used to assist in UUK's

empire-building. It suggested that UUK (not UNIPEC) form a task force to renegotiate the contract;

f) All of UUK's criticisms in the December 2010 memo were unfounded:

i) As to rates, the market in April 2010 was very high. There is no evidence that any discount would have been available from an owner like TI. TI was one of the most respected vessel owners in the world, with top quality tonnage. Mr Pearce, the shipbroking expert for UUK/UHK, acknowledged that someone like Maersk would not be likely to grant discounts;

ii) As to any alleged lack of geographical flexibility, this foundered since during mid-April 2012 to April 2013 and May 2013 to December 2014, only 2 charters had a more flexible range than that under the 2010 WAF COA. And in any event TI extended the range when necessary;

iii) As to the brokerage situation, it was unfair to suggest that POC did not have access to market information. The suggestion that there might be a "*backhander*" to TI was pure guess and speculation, as Mr Wang conceded;

iv) As to any lack of clarity as to who had the option to choose the number of liftings, it was industry standard for charterers to have the option, and the clause itself (SP4) made that clear;

v) As to vessel age, the 2010 WAF COA freight pricing clause built into the price that the vessel could have been built 1991 or later. And age should not automatically result in a discount, as Mr Pearce agreed. As to size of vessel, UHK was under no obligation to accept a vessel that could carry less than 260,000 mt;

vi) As to the length of the contract term, where the market favoured owners, there was nothing surprising in a 3 year term.

g) In short, POC contends that the criticisms in the December 2010 memo were just a means to an end, to get the 2010 WAF COA back in order to be able to re-distribute the brokerage. The likelihood is that UNIPEC did not accept the criticisms (see for example Mr Zhu's comparison tables). It is inherently unlikely that UNIPEC did not respond formally to the memo in writing, as Mr Wang suggested. The "*only mud that stuck"* was that relating to the brokerage, where UUK and UNIPEC were agreed;

h) Against this background the agreements to cease nominations were made;

i) UUK continued in late 2011 and into 2012 to press UNIPEC for outright control of WAF chartering. NORPLAY was just another means to its end. The argument based on NORPLAY only emerged late in the day, and in any event was overstated. It was no reason to stop performance under the 2010 WAF COA;

j) Equally, other *ex post facto* justifications, such as poor performance by TI, that the 2010 WAF COA no longer suited TI, and criticisms of SP10 do not withstand scrutiny.

114. Having considered carefully the submissions made and all the evidence before me, I have reached the clear conclusion that POC has not established that it is likely that the predominant motive behind the reduction and cessation of nominations under the 2010 WAF COA was to wrest control of the brokerage from POC (or that agreements were reached in 2011 or 2012 to cease nominations with control of the brokerage as the main target).

115. It is right to record that several of the witnesses for UUK and UHK suffered credibility problems at certain points in their evidence. I have addressed aspects of Mr Zhu's evidence already above. As for:

a) **Mr Wang**: in his witness statement, Mr Wang stated that he did not discover that the 2010 WAF COA had in fact been concluded until after the December 2010 memo had been sent. POC suggests that he said this in order to make his criticisms of the 2010 WAF COA more palatable. On a full reading of the December 2010 memo itself, it appears that UUK did understand at the time of writing that the 2010 WAF COA had been signed. Mr Wang's attempt to explain his witness statement by suggesting that the "*feedback"* to which he was referring was some other (oral) feedback was unfortunate and wholly unconvincing. Equally, his suggestion that UUK did not know that UHK was (at least to some extent) under-nominating until 22nd May 2012 was difficult to accept (in the light of the tone and content of the email correspondence of the same month). Equally, the suggestion that the reference to "*Great, show time"* by him on 22nd May 2012 did not refer to potential fall-out as a result of cessation of nomination under the 2010 WAF COA seems implausible. However, in my judgment, these episodes did not destroy his credibility on all other aspects of his evidence. First, there clearly was some confusion as to the date of execution of the 2010 WAF COA. Secondly, Mr Wang's refusal to accept any error in his witness statement reflected a defensive refusal on his part generally to accept any personal fault, rather than a more widespread lack of candour. Elsewhere, he made fair concessions where they did not involve admission of personal error, for example, in relation to the role of brokers in the market and his ambitions for UUK;

b) **Mr Xiao**: overstated his position by reference to matters of which he had no direct knowledge, for example, as to what had happened back in 2000 and 2001.

116. However, set against the full evidence, I am not persuaded that the essence of their evidence as to the development of UNIPEC's business strategy and the circumstances surrounding the cessation of nominations was undermined. I do not, for example, accept that, upon receipt of the 2010 WAF COA, Mr Wang and Mr Lambert "*licked their lips*" at the prospect of getting control of the brokerage in order to build up UUK's shipping department.

117. The seeds of the change within the UNIPEC group were planted in 2007/2008. There has been no challenge to the evidence that SINOPEC at around this time decided to

expand its third party trading business, and that this fed down to UUK and led to the creation of its new chartering department. It is right that UUK was ambitious in 2010 and onwards and wanted more control over shipping. It made repeated attempts to get such control, and in particular attempted to get control of the 2010 WAF COA. Mr Wang also fairly accepted that it was critical to build good relationships with brokers in order to build up a shipping department. Broker network was important. But he was clear that UUK had access to information from different brokers and that there was no need to be "*as nice as possible*" to brokers. UUK also had direct access to shipowners. As Mr Wang put it later:

> *"….we are the star of the market because we are UNIPEC. When they know UNIPEC is looking for a vessel and people is look…come to us…"* .

118. Elsewhere, addressing the question of broker relations, Mr Wang said:

> *"…broker will chasing you whenever you have a chartering position. This is the reality in this industry."*

UNIPEC was "*number 1 charterer".* And the UNIPEC group already had an established panel of well-known broker names.

119. All this is very far from making it likely that the predominant motive of the UNIPEC group of ceasing performance under the 2010 WAF COA was to get the brokerage. There is also force in UUK/UHK's submission that the plan alleged by POC to have been agreed in or before 2011 (to cease nominations) does not sit well with UUK's continued attempts thereafter to take control of the 2010 WAF COA (for example in November 2011 and March 2012).

120. What was driving UUK was the widening UNIPEC group strategy and its own ambition to increase its own profitability. UUK's attempt to involve TI in its new strategy to get involved in third party trading was a turning point for the 2010 WAF COA. TI made it clear that it would not get involved in UNIPEC's new business model. The "*Ardenne Venture*" incident at around the same time also demonstrated to UUK the difficulties arising out of the then existing arrangements between UUK and UNIPEC.

121. As for the December 2010 memo, it is important to set it in its proper context. It was an internal group document, from a subsidiary to its parent company. It was not a contract or a formal document for external consumption. Rather it was a bid by UUK to persuade UNIPEC to allow it to take control of the 2010 WAF COA based on what it knew at the time.

122. It is not necessary for me to decide whether each and every criticism of the 2010 WAF COA was or was not well-founded. The question is whether the criticisms represented genuinely held beliefs within UUK, or whether they were simply a smokescreen to mask UUK's desire to take over the 2010 WAF COA in order to get control of the brokerage. Whether or not there were good grounds for such beliefs may inform that question but it does not determine it. It was suggested to Mr Wang that in the December 2010 memo he was simply raising points without any "*proper*"

consideration as to their correctness. That is of course slightly different to a suggestion that he did not believe what was being said.

123. I am clear that, whilst the points made may have been overstated or inaccurate in parts, the December 2010 memo contained the genuine views of those within UUK at the time and did not represent merely a figleaf to cover up UUK's true alleged ambition (to obtain control of the brokerage). It is highly significant that several of the criticisms had been identified sometime earlier, not only in emails from others within UUK, but also in August 2010. Thus, for example, the August 2010 memo recorded that UUK was selecting large-scale and not small brokers. It raised concerns about over-reliance on TI, and the lack of competition in the WAF market. The August 2010 memo did not mention the question of brokerage commission.

124. The key points made in the December 2010 memo cannot be dismissed as fanciful or even unreasonable. On the contrary, for example:

a) Lack of discount: Mr Wang was compelling in his evidence on this issue. He accepted that the market in April 2010 was very high, but did not accept that that was a reason for not seeking to negotiate a discount:

> *"So when you negotiate a term contract, especially for three years, do you have any prediction about the further trend which is very - frankly speaking, is the professional prediction you should make for three years term. If you just look at one month or a quarter, I don't think it's a reasonable ground to sign such kind of term. So that's why we don't agree on that. And, back to the Taiwan CPC contract, they sign just one year, but the same period, early 2010. They can make a discount based on such a small volume. We give such a big volume and at roughly the same period and we have no discount. I think we are very logic to challenge whether our core interest has been protected, my Lady."*

Whatever arguments there may be as to whether or not discounts would in fact have been achieved, the suggestion that a discount should have been at least considered and/or actively sought was not unreasonable. Mr Pearce, who was a most impressive witness, considered it likely that some sort of discount could have been obtained, (although he agreed that Maersk would be very far from his first port of call for a discount). The 2010 WAF COA was a very large and lengthy commitment;

b) In relation to the concerns over POC, as set out above, Mr Wang had no evidence to suggest that TI was receiving any "*backhander*". But Mr Wang was impressive under cross-examination when he explained why UUK could and did have real concerns about the UNIPEC group engaging with a very small broker;

c) The 3 year term of the 2010 WAF COA was less than ideal from UNIPEC's point of view. Mr Hüttemeier, POC's brokering expert, accepted that a 1 year

+ 1 year + 1 year structure would have been better for UNIPEC. And UNIPEC would have more vessel choice under spot chartering.

125. As for the lack of any formal written response from UNIPEC to the December 2010 memo, I accept the evidence of Mr Wang that this was not surprising (and he was not surprised) in the light of the UNIPEC culture/*modus operandi*. There were occasions when UUK raised policy/strategy issues and received no formal written response. It is also important to remember that UUK and UNIPEC were to and did meet in Beijing very shortly after the December 2010 memo was sent.

126. In summary, whilst there is no doubt, as Mr Wang conceded, that UUK wanted to control the 2010 WAF COA, I do not accept that this was primarily in order to get the brokerage. POC's position under the 2010 WAF COA was in no way top of the list, as reflected in the order of concerns set out in the December 2010 memo. That brokerage was far from the top of the UNIPEC list is also reinforced by UUK's November 2011 and March 2012 proposals/request to UNIPEC. Neither of those bids made any reference to POC, brokers or commission under the 2010 WAF COA. Nor had the August 2010 memo referred to brokerage commission.

127. Nor do I accept the suggestion that the desirability of NORPLAY raised by UUK in March 2012 was a late artifice designed to get at the brokerage under the 2010 WAF COA. NORPLAY was an important issue for UUK, as evidenced by the fact that full defence disclosure on the issue was made demonstrating that UUK and UHK engaged in NORPLAY commencing during the second half of 2011. It is striking that the new charters entered into by UUK for UHK have laycan operations which can be narrowed to 1 day at the charterer's option, so that the charterer has control over when the NOR is issued (and so the bill of lading date).

128. The likelihood is that, as the UNIPEC strategy continued to gain traction, so nominations under the 2010 WAF COA dried up. UNIPEC no longer needed the security of a COA and TI had indicated an unwillingness to change its arrangements with UNIPEC. As Mr Hüttemeier agreed, the spot market, which could be operated by the increasingly experienced UUK chartering department, was a preferable option for UNIPEC's needs, which now involved far more sophisticated trading, which in turn required more flexibility. Mr Pearce confirmed that such a change of strategy was eminently understandable. Whilst it is fair to say that additional arguments have been raised by UUK and UHK as this action has progressed, it is also fair to say that it has always been UHK's pleaded defence that performance ceased because the 2010 WAF COA did not meet the developing business needs of the UNIPEC group.

129. In my judgment, whilst POC may have been a foreseeable casualty of the cessation of nominations under the 2010 WAF COA, it was certainly not the main target of UHK's change of strategy. Nor was the predominant motive behind the actions of UUK and UHK the obtaining of the brokerage under the 2010 WAF COA. Rather the cessation was the product of the changing business strategy within the UNIPEC group, set out in some detail by the defence witnesses. For the avoidance of doubt, I would have reached the same conclusion even if I had found that there was an attempt by UNIPEC to exclude POC from commission under the 2010 WAF COA. As Mr Guo's first witness statement reveals, the allegation of motive was one based largely on inference. In situations such as this, that is often of necessity the position at the

outset. But as the documents and evidence have emerged, POC's premise has proved to be a false one.

G. Was there an enforceable brokerage agreement between TI and POC by which TI agreed, amongst other things, to pay POC 1.25% of gross freight, deadfreight and demurrage earned by TI on the 2010 WAF COA?

130. This is a gateway issue for the claim for tortious interference with contractual relations. It is common ground that if there was no enforceable brokerage agreement between TI and POC, then POC's claims for tortious interference with contractual relations fall away. Again, it is convenient to deal with the matter separately at this stage.

131. POC says that New Jersey law applies to determine the existence of a contract, but that, whether under New Jersey or English law, such an agreement is established. UUK and UHK contend that English law applies and that no such agreement is established.

132. The alleged brokerage agreement is said to have been concluded during the course of meetings between TI and POC Beijing in October 2009. This was prior to Rome I coming into force on 17 December 2009. Accordingly, its governing law is to be determined by the Rome Convention, as incorporated into English law by the Contracts (Applicable Law) Act 1990.

133. Article 8 (Material Validity) provides:

> *"1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid…"*

134. Article 3 (Freedom of Choice) provides:

> *"1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case…"*

135. Article 4 (Applicable law in the absence of choice) provides:

> *"1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected…*
>
> *2. …it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the*

contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated…"

136. There is a dispute between the parties as to whether or not, by reference to these Articles, English or New Jersey law applies. I have in fact not found it necessary to resolve this particular dispute, since the outcome is in my judgment the same in either case.

137. The factual evidence in support of the alleged agreement is sparse indeed. Only Mr Guo testified to it. Even then, he could only point to the parties' past dealings, the request made by TI to POC to assist it for the purpose of a new COA with UHK (from which it is said that the parties' understanding arose), and SP9 in the 2010 WAF COA said to reflect the agreement allegedly reached. It is perhaps remarkable, given the sums at stake, that there is not a single note or email – either internal or between TI and POC – recording or even referring to the agreement said to have been made.

138. However, I have come to the conclusion that, whether under English or New Jersey law, a separate brokerage agreement did exist. As a matter of fact, Mr Guo was clear and broadly consistent in his evidence, which was not criticised as being untruthful. The agreement was that:

a) POC would advise TI Agencies on the terms of a proposal to UNIPEC for a new WAF COA and assist in its negotiation;

b) If a new COA was concluded, POC would provide after-fixture services to both parties to the COA and would receive from TI 1.25% of gross freight, deadfreight and demurrage earned by TI under the new COA.

139. Mr Guo's evidence that these terms represented the customary terms between a broker and his principal in the ship chartering business of the kind of business at hand was not challenged.

Under New Jersey law

140. In New Jersey law, a broker's right to commission may arise from a written or oral agreement (*Fitt v Schneidewind Realty Corp.* 81 N.J. Super. 497, 504 (Law Div 1963).

141. The New Jersey law experts agree in their reports that for an oral agreement to exist there must have been offer and acceptance, and the agreement "*must be sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty.*" (*Weichert Co. v Ryan* 128 N.J. 427, 435 (1992)). Such a contract can be formed through words, creating an express contract, or by conduct, creating a contract implied in fact. Silence does not normally constitute assent to an offer, but where an offeree accepts the offeror's services without objecting to the offer's essential terms, assent to the terms of the offer can be inferred.

142. In Justice Long's opinion, if the court finds that POC has proved that it performed services in connection with the making and servicing of the 2010 WAF COA, and was paid commission by TI under SP9 of the 2010 WAF COA, that would be

sufficient evidence under New Jersey law of an enforceable implied in fact contract. In her Supplemental Report Justice Long added that regardless of the characterisation of the contractual nature of the brokerage agreement, its terms are "*memorialised*" in SP9 of the 2010 WAF COA. Judge Pisano did not take issue as a matter of law.

143. A binding agreement was therefore capable of being concluded by the parties under New Jersey law as alleged by POC. I am satisfied on the evidence of Mr Guo, the parties' past dealings and the existence of SP9, that there was sufficient offer, acceptance and certainty of terms for a separate brokerage agreement to have come into existence in October 2009 as alleged under New Jersey law.

Under English law

144. In the shipbroking context the ordinary position is that there is a contract between principal and broker, as stated in Jamieson on Shipbrokers and the Law (1997):

> *"In normal circumstances, the relationship between the principal and the shipbroker he has employed is one of contract. The principal receives the broker's services, and if all goes well, the broker receives its commission…It is rare for the contractual duties of a shipbroker to be set out in the form of a written agreement with the principal…"*

145. UUK and UHK contend that even if there was a brokerage agreement concluded between POC and TI, as I have found there to be, it ceased to exist as an enforceable contract once the COA and/or the individual charters subsequent to it were concluded. Reliance is placed on *Les Affréteurs Réunis v Walford* [1919] AC 801 and Cooke on Voyage Charters (4th ed.) at paragraph 24.25. The broker would be protected in particular by the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act") – see *Nisshin v Cleaves* [2004] 1 Lloyd's Rep 38 (or by the common law doctrine whereby the charterer is to be regarded as the trustee of the promise to pay the broker and could be compelled to sue the owner on the broker's behalf, as was the result in *Les Affréteurs*). As the submission developed, it was contended that, to the extent that there was an agreement in 2009, it was at most an agreement that POC would assist TI in the obtaining of a new COA. If the COA was obtained, TI would try to appoint POC as a broker.

146. In my judgment, the defence approach is misconceived. *Les Affréteurs* and the passages relied on in Voyage Charters arise very clearly out of situations where a brokerage clause in a charter differs from an alleged prior brokerage agreement. As the heading in Voyage Charters makes clear, the context is where there is a "*Brokerage clause in the charter not reflecting the true brokerage agreement."* They do not support the proposition that a pre-existing brokerage agreement concluded between an owner as principal and his broker as agent will cease to exist as an enforceable contract once a subsequent charterparty is concluded by the charterer and owner. There is nothing surprising in the sole agreement between the principal and agent being that contained in the COA/individual charters if the terms of that agreement differed to an earlier agreement. But that is not to say that an earlier agreement is somehow "*superseded*" if its terms remain unaltered, as is the case here. There was no need for any supersession. I also accept POC's submission a) that the limited agreement contended for is commercially unrealistic and b) that the defence

reliance on the existence of a claim by POC under the 1999 Act (or a claim by the charterer as trustee) has an air of commercial artificiality to it. In any event, the fact that a separate agreement may not have been necessary for POC to have enforceable legal rights against TI does not mean that it did not exist.

147. For all these reasons, I find that, whether under New Jersey or English law, POC has established the existence of a separate enforceable brokerage agreement between POC and TI.

Breach of implied in law promise

148. In broad terms the New Jersey law experts are agreed that an implied in law promise will arise where:

a) two or more parties have made a contract; and

b) they are aware that a broker will earn commission upon the performance of the contract; then

c) each of the parties is deemed by implication of law to have promised to the broker that it will perform the contract and will not do anything improper or unjustified which would prevent the broker from earning its commissions; and

d) where a party fails to perform the contract without legal justification, which prevents the broker from receiving his commission, he will have breached his implied promise and the broker will be entitled to recover those commissions from the non-performing party.

149. There are however real differences between the New Jersey law experts as to the circumstances in which the implication will arise, including whether or not, under New Jersey law, an implied in law promise will be held to arise outside the field of real estate brokerage.

Applicable law

150. Given that the cause of action relied upon by POC arises under New Jersey law, it is first necessary to determine the applicable law.

151. The questions that arise are:

a) whether Rome I (contractual obligations) or Rome II (non-contractual obligations) applies. POC concedes that if Rome I applies, English law is the applicable law and the claim for breach of an implied in law promise falls away;

b) even if Rome II applies, whether the applicable law is that of New Jersey, as POC contends, or of England, as UHK contends. Again, POC concedes that if English law applies, the claim for breach of an implied in law promise falls away.

Rome I

152. Article 1(1) of Rome I provides:

> *"This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters."*

153. The exercise of determining whether an obligation is contractual is an autonomous one, without regard to the characterisation of the obligation by the *lex fori* (English law) or the *lex causae* (New Jersey law).

154. A contractual obligation for the purposes of Rome I is "*not to be understood as covering a situation in which there is no obligation freely assumed by one party towards the other*." (see *Jakob Handte v TMCS* [1992] ECR I-3967). It has also been described, in more positive terms, as "*a legal obligation freely consented to by one person towards another*." (see *Gjensidige Baltic v UAB* Case C-475/14).

155. In McParland, The Rome Regulation, at chapter 6.11 the following is stated:

> *"Strictly speaking, there is no "contract" under Rome I, nor a "tort" under Rome II. Instead, the conflict-of-law rules of both Rome Regulations are triggered by the underlying factual circumstances that encompass that obligation and not with either the substantive law to be applied to them, nor how any such claims, issues, or disputes arising out of them are pleaded, proved, or brought under the law selected to govern them. As has been rightly said in relation to the treatment of non-contractual obligations in the text of the Rome II Regulation, '[i]t neither refers to non-contractual claims, nor non-contractual issues, matters or disputes. Its choice of law rules look to the events out of which those obligations arise. They do not refer to a claim's purpose or object'.*
>
> *The same is true of Rome I, which is concerned with contractual obligations, not contractual 'claims', 'issues' or disputes".*

156. POC submits that this passage confirms that the autonomous test should be conducted by assessing the facts upon which POC relies, with absolutely no regard to New Jersey law. Anything else would be impermissible under the Rome Regime, putting "*the applicable law cart before the characterisation horse*". Reliance is also placed on *Brogsitter v Fabrication de Montres Normandes EURL* [2014] QB 753, albeit a case dealing with Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels Regulation"). There the court held (at para. 21) that:

> *"[i]n order to determine the nature of the civil liability claims brought before the referring court, it is important to check whether they are, regardless of their classification under national law, contractual in nature…".*

157. UHK, on the other hand, submits that one must look at the factual paradigm giving rise to the legal obligation, which, while disregarding legal labels, does not involve stepping outside of the legal context of the obligation in question. It relies on:

a) *Atlas Shipping v Suisse Atlantique* [1995] 2 Lloyd's Rep 188, where Rix J (as he then was) considered the English law relating to suits under charters by third parties on the basis of trusts of a promise before characterising the nature of the claim as contractual under Article 5(1) of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ("the Brussels Convention");

b) *Benatti v WPP* [2007] 1 WLR 2316, where the Court of Appeal considered the effect of the 1999 Act in characterising the relevant obligations;

c) *Committeri v Club Méditerranée SA* [2016] EWHC 1510 (QB), in which the court considered evidence on the French Code de Tourisme for the purpose of deciding whether to categorise the claim as a contractual obligation under Rome I.

158. Useful guidance is to be found in The Rome II Regulation: the Law Applicable to Non-Contractual Obligations (1st ed. (2009), at 3.67), where Dickinson states*:*

> *"A non-contractual obligation, which cannot exist in a legal vacuum, must be based on a factual situation triggering certain legal consequences under the law of one or more countries. The factual situation and the civil law consequences flowing from it are linked by, and cannot be understood without reference to, particular legal rules and an appreciation of those rules is essential if the character of the obligation in question is to be understood. Those legal rules will shape the existence, content and consequence of a non-contractual obligation and identify the elements of the factual situation on which the obligation is founded. In every case, therefore, the "obligation in question" will combine legal elements (i.e. rules regulating the content and consequences of the defendant's supposed obligation) and factual elements (i.e. the facts which, under the applicable legal rules, give rise to legal consequences)."*

159. I accept that the exercise that the court must perform is to apply the Rome Regime to the underlying factual circumstances and determine which Regulation is application to the relevant obligations, autonomously characterised. But I do not accept that New Jersey law is irrelevant. On the contrary, in my judgment, in order to determine whether the present alleged obligation falls properly to be considered under Rome I or Rome II, one must look at the facts which, if made out, will give rise to an implied in law promise as a matter of New Jersey law.

160. This is not to say that consideration is to be given to the characterisation of the obligation under New Jersey law itself. The search is for the relevant facts: those facts cannot be identified without an understanding of what New Jersey law requires. It cannot be right to look in isolation – or in a *"legal vacuum"* – at the instant facts, which after analysis may or may not give rise to the relevant cause of action, in order

to characterise the relevant obligation. It is to be noted that this is not a situation where an obligation already exists and the question is whether or not a term is to be implied into it as a matter of foreign law. Rather, without the foreign law, the source obligation does not exist at all. Thus it is necessary to consider New Jersey law at this stage and to this limited extent, an approach consistent in particular with the discussion by Dickinson and that of the court in *Committeri v Club Méditerranée SA* (supra) where, contrary to POC's submissions, it is clear that the court did take into account French law for the purpose of classifying the cause of action (see for example paragraphs 49 to 52).

161. For the avoidance of doubt, I do not consider that this approach is in any way inconsistent with the passage from McParland above, or *Brogsitter v Fabrications de Montres Normandes EURL* (supra). McParland is not authority for the proposition that one does not look to foreign law to identify the underlying factual circumstances that encompass the obligation in question. *Brogsitter* confirms that one does not look to how the foreign law classifies the obligation, which is common ground.

162. I proceed therefore to consider whether or not the implied in law promise is a contractual obligation, autonomously characterised, by reference to the New Jersey law doctrine on which it is based.

Nature of the implied in law promise

163. The New Jersey law experts are agreed that the concept of the implied in law promise, as it is applied by the New Jersey courts today, was first enshrined in the case of *Tanner Associates, Inc. v Ciraldo* 33 NJ 51 (1960), and developed by *Ellsworth Dobbs, Inc v Johnson* 50 NJ 528 (1967).

164. In *Tanner* the facts giving rise to the implied in law promise were expressed as follows (at pp. 67 to 68):

> *"Plaintiff's affidavits reveal facts and circumstances from which it may be implied that defendants employed plaintiff to obtain lands for defendants, at favorable terms, which would be suitable for the particular purpose which defendants related to Alexander, i.e., a housing development of substantial one family residences. The affidavits justify the inference that, in exchange for these services, defendants would, if plaintiff found lands satisfactory to them, complete and perform an agreement of sale with the vendor so that plaintiff might earn a commission from the vendor. It makes no difference that plaintiff and defendants agreed that the defendants should pay no commissions to plaintiff. Damages which may be recovered by plaintiff on its action against defendants may be measured by the amount of commission which would have been earned had defendants performed according to their agreement, but recovery will not be predicated on an agreement of defendants to pay plaintiff commissions. Defendants agreed to act so as to allow plaintiff to earn a commission from some third party, and, if the affidavits be correct and if defendants have no defense to the contract we find to exist here on the basis of the*

facts alleged, it is on this agreement that defendants are liable, the damages being measured by the amount of commission plaintiff would have earned had defendants performed as agreed."

165. In *Ellsworth Dobbs*, another real estate case, the court stated (at p. 559):

"It is true that Tanner involved a prospective buyer who was looking for land to be used for residential development, and the solicitation of the broker's services was in furtherance of that intention. But the language of the Court does not indicate that imposition of an implied promise to perform if the broker found land on agreeable terms, so as to enable the broker to earn commission from the owner, is limited to such a factual setting. A broader view of the principle established there finds support in the texts. For example, in 12 C.J.S. Brokers § 82 (1938) it is stated:

> *"[W]here a broker is employed by the owner of property to sell the same, the purchaser is not liable for the broker's commissions, unless he has agreed to pay them or is liable therefore by way of damages for failing or refusing to carry out his contract, or for some other wrongful act or omission which interferes with the broker's right to recover commissions from his principal."*

Moreover, there is substantial authority elsewhere to the effect that a real estate broker may sue a purchaser who refuses to carry out his contract with the vendor, even though the broker has agreed to look to the vendor for his commission. Blache v. Goodier, 22 So.2d 82 (La. App. 1945); Probst v. Di Giovanni, 232 La. 811, 95 So.2d 321 (1957); Danciger Oil & Ref. Co. v. Wayman, 169 Okl. 534, 37 P.2d 976, 97 A.L.R. 854 (1934); Grossman v. Herman, 266 N.Y. 249, 194 N.E. 694, 695 (1935); Livermore v. Crane, 26 Wash. 529, 67 P. 221, 57 L.R.A. 401 (1901).

In Blache v. Goodier, supra, the Court of Appeal of Louisiana said this on the subject:

> *"It is settled that * * * the [broker's] commission is due by the prospective purchaser if, after binding himself, he refuses to comply with his agreement." 22 So.2d, at pp. 85-86.*

In discussing the same type of case, the Supreme Court of Washington, in Livermore v. Crane, supra, regarded as immaterial the question whether in the original negotiation on the sale the broker was the agent of the vendor or the purchaser. It said the cause of action was for violation of the contract to purchase, from which violation damages directly resulted to the broker. 67 P., at p. 222. In this connection, it may be noted that in Treadaway v. Piazza, 156 So.2d 328, 329 (La. App. 1963) the court declared that when a prospective

> *vendor engages the services of a real estate broker, the legal relationship is that of principal and agent. But once the broker finds a prospective vendee, he becomes an agent of both parties.*
>
> **561 We accept the broad view of the purchaser's liability suggested by these authorities, and find no conflict between it and the holding of this Court in Tanner. As set forth above, Iarussi requested Dobbs to find land suitable for residential development, which could be bought by him on agreeable terms. When the Johnsons' acreage was shown to him and he contracted to buy it, he knew they had agreed to pay commission to Dobbs upon sale. Under the circumstances, the Tanner rule is clearly applicable and Iarussi became subject to an implied obligation to Dobbs to complete the purchase, and upon default in completion he became liable to pay the commission which Dobbs was thereby deprived of from the Johnsons. See also, Duross Co. v. Evans, 22 A.D.2d 573, 257 N.Y.S.2d 674 (1965); Brawner v. Cumbie, 264 S.W. 497 (Tex. Civ. App. 1924); McKnight v. McGuire, 117 Misc. 306, 191 N.Y.S. 323 (1921); James v. Home of the Sons & Daughters of Israel, 153 N.Y.S. 169 (Sup. Ct. App. Term 1915); Eells Bros. v. Parsons, 132 Iowa 543, 109 N.W. 1098 (1906).”*

166. POC asserts that *Ellsworth Dobbs* makes it clear that the implied in law promise does not spring from any implied in fact agency or employment contract between the buyer and broker. It is therefore fundamentally different to an obligation freely consented to. Rather, it is more akin to the voluntary assumption of responsibility of a tortious duty (see *Base Metal v Shamurin* [2004] EWCA 1316). Tortious or equitable obligations may arise from a voluntary assumption of responsibility, but that does not equate to consent or agreement. POC submits that the implied in law promise, in its truest construction, only requires (a) knowledge on the part of the buyer/charterer that commission will be paid by the seller/owner and then (b) entering into a contract on that basis.

167. UHK submits that the free consent of the buyer to the obligation can be inferred from his acceptance of the broker’s services, knowledge of the commission arrangement and his subsequent entry into the contract of sale. *Ellsworth Dobbs* is authority for the proposition that, while it is not necessary for the broker to be engaged as agent, the broker does provide services, in the real estate context by the finding or showing of property.

168. Despite Justice Long’s assertion, at paragraph 62 of her first Expert Report, that “*all parties to a contract owe a broker an implied in law obligation to perform irrespective of the absence of an underlying agreement or relationship with the broker*”, during cross-examination she confirmed that the implied promise of the buyer arose in return for the broking services (Day 1, page 151, lines 2 to 13):

> *“Q. So the language is that of contract, isn't it?*
>
> *A. Well, it's promise not contract.*

Q. Well, what is a promise but -- a contract but an exchange of promises?

A. Well, that's an exchange of promises. This is not an exchange of promises.

Q. Well, it's a promise in return --

A. This is an implied promise, yes, on one party's part.

Q. In return for the service of the broker having introduced; correct?

A. Yes."

169. She also accepted earlier in cross-examination that the fundamental jurisprudential basis for the obligation was a) services b) knowledge of the brokerage commission mechanism and c) entry into the contract of sale.

170. Judge Pisano was of the firm opinion that the New Jersey courts imply the promise based on the service that the buyer elects to obtain from the broker (*Ellsworth Dobbs*, and *Rothman Realty Corp. v Bereck*, 73 N.J. 590 (1977); cf. paragraph 6(b) of Judge Pisano's Supplemental Expert Report).

171. In my judgment, the broad view accepted by the Supreme Court of New Jersey in *Ellsworth Dobbs* (as set out above) demonstrates that where a property is shown by the broker and the buyer and seller then enter into a contract for sale knowing that the broker stands to receive commission from the seller, then a promise by the buyer will be implied (regardless of whether the buyer or the seller initially engaged or approached the broker) to complete the purchase. If the seller defaults and frustrates (without valid reason) the completion of the sale, then it will be liable to pay commission to the broker pursuant to the contract for sale, and if the buyer frustrates (without valid reason) the completion then it will be liable for the broker's commission by virtue of the implied in law promise.

172. I accept therefore UHK's characterisation of the relevant facts giving rise to the implied in law promise as comprising a) the provision of services by the broker, b) knowledge by the buyer of the mechanism by which the broker will be paid commission by the seller on completion, and c) in those circumstances, entry into a contract for sale.

Is the implied in law promise freely consented to?

173. POC submits that, while as a matter of New Jersey law a buyer may have constructive knowledge of the broker's commission arrangement with the seller, this does not mean that the buyer freely consents to the resulting implied in law promise. In support of this proposition, it relies on a series of cases relating to the Brussels Regulation and the Lugano Convention.

174. In *Jacob Handte v Traitements Mecano* [1992] ECR I-3967 the European Court of Justice held that the obligation cannot be one that "*derives from general rules of law applicable absent a contractual relationship between the parties*". The court held that

an obligation will not be freely consented to if it is imposed as a matter of law by the operation of a statute (see also *Austro-Mechana v Amazon* [2016] EUECJ C-572/14, paragraphs 32 to 38).

175. In the English case, *Atlas v Suisse Atlantique* [1995] 2 Lloyd's Rep.188, Rix J (as he then was) also addressed this issue. In that case a broker sued the buyer of a ship, who was under a contractual obligation pursuant to the contract for sale to deduct and pay to the broker commission from the purchase funds, but had failed to do so. Rix J held that the obligation was freely assumed by the buyer through agreement with the seller to pay the broker, and was therefore "*a matter relating to a contract*" (the language of Article 5(1) of the Lugano Convention). The claim was allowed, with the broker entitled to enforce the trust created for its benefit by virtue of its contractual right to commission.

176. *Handte* was distinguished on the ground that *"there is no sign from the report that the claimant was relying on breach of any express term of the intermediate supplier's contract as distinct from French public rules"* (p.191, column 2). He went on to say (p.194, column 1):

> *"I turn next, therefore, to the decisions of the European Court of Justice, and first of all to the Handte case. It seems to me that it is too narrow a reading of that case to say that it insists upon privity of contract between the parties to the litigation. If it did, then not even the legal assignee of a contract could bring a claim to enforce the contract and maintain jurisdiction within art. 5(1). It has to be borne in mind that the decision in Handte is about the problems which arise out of a chain of contracts. In such a case, because the sub-buyer and the manufacturer are not in direct contractual relations, there is no obligation freely entered into between the parties; on the contrary, each may have entered into contracts with their direct contractual partners on different terms. Moreover, the identity and domicile of the ultimate sub-buyer may be entirely unknown to the manufacturer so that he cannot predict the court in which he may be sued. In these circumstances the jurisdictional connecting factor of the place of performance may become an arbitrary touchstone.*
>
> *None of this reasoning applies to the case before me of a contract between A and B to pay C. There is only one contractual obligation in question; there is privity between the parties to it; the obligation was freely entered into by those parties; although neither of them may have realised that English law would give to the plaintiffs an independent right to enforce the buyers' promise to the sellers to pay the brokers, they both knew the identity and domicile of the plaintiffs and, ex hypothesi, both intended to benefit them by means of the contracted payment. Moreover, both parties to the contract will also be parties to the litigation, in the promisee sellers' case either as plaintiffs or as co-defendants."*

177. In *WPP v Benatti* [2007] EWCA Civ 263, the Court of Appeal held that a third party's right to enforce an obligation owed to him by a party to the contract pursuant to the 1999 Act was contractual in nature for the purpose of Article 5 of the Brussels Regulation. Toulson LJ (as he then was), delivering the lead judgment, held that:

> *"54. Briggs and Rees on Civil Jurisdiction and Judgments, 4th ed, 2005, are in no doubt about the answer. They say at para 2.1.26:*
>
> > *"If an agreement entered into by two parties as a contract provides for a third party to have directly enforceable rights thereunder, it seems that this will not prevent the claim being seen for jurisdictional purposes as falling within Article 5(1). Such arrangements are familiar to a civilian lawyer, and are seen as contractual in nature. … [The authors refer in a footnote to the stipulation pour autrui of French law as being clearly contractual according to substantive French law.]*
> >
> > *Likewise, the Contracts (Rights of Third Parties) Act 1999 now provides that two contracting parties may confer a benefit on a stranger to the contract, which that stranger may enforce in his own right, if that is their intention and they demonstrate it in the form required by section 1 of the 1999 Act. It is clear beyond doubt that the claim brought by the intended beneficiary is contractual for the jurisdictional purposes of the Regulation."*
>
> *55. I would agree."*

178. This case law, which of course relates to the Brussels Regulation and Lugano Convention concept of "*matters relating to a contract"* and not to Rome I, suggests that for a contractual obligation to arise there need to be directly enforceable contractual relations between the third party and the parties to the principal contract. As the court held in *Atlas*, if such relations exist, then the fact that the parties did not necessarily realise that the third party would have an implied right to enforce the obligation would not prevent it from being contractual in nature.

179. Having reviewed the authorities, the expert evidence and the submissions, in my judgment, when an implied in law promise arises under New Jersey law, the parties freely consent to the facts giving rise to the obligation by directly accepting the broker's services and negotiating and entering into the contract between them in the knowledge of the brokerage commission arrangement. It would be well within the power of either party to refuse the services or to seek renegotiation of any of the clauses to the contract, including those dealing with commission. I prefer the view that in this scenario the parties have actual knowledge of and freely consent to the relevant facts, including the mechanism by which the broker stands to receive its commission, from which the free consent to the obligation to the broker is to be inferred. A party does not need to have knowledge of an obligation's existence as a matter of law in order for there to be free consent.

180. This conclusion chimes with instinct. In this case, POC, TI and UHK were bound together contractually by the 2010 WAF COA. Under SP9 of the 2010 WAF COA,

TI and UHK freely consented to the payment of brokerage of 1.25% on freight, deadfreight and demurrage to POC. Should an implied in law promise arise under such circumstances, regardless of UHK's knowledge of New Jersey law, it is predicated on the parties' free consent to the circumstances giving rise to it. In short, contrary to POC's submission, the relevant facts look very like a contract, as Justice Long's evidence confirmed: the principle is contractual in nature. Although labels are to be disregarded, and I have disregarded them as a matter of substance, this conclusion is also entirely consistent with the natural manner in which the case has been pleaded by POC as a claim for breach of an implied contract and for damages for breach of contract, and with the fact that until recently POC advanced a claim for tortious interference with it (as a contract).

181. Autonomously characterised, therefore, the implied in law promise is a contractual obligation for the purpose of Rome I. English law applies and the claim based on the implied in law promise falls away.

182. If, however, that is not correct, and the implied in law promise is a non-contractual obligation, then it would fall to me to consider the provisions of Rome II.

Rome II

183. Rome II provides the framework for determining the applicable law to non-contractual obligations. As set out above, POC contends that the applicable law under Rome II is that of New Jersey by operation of Article 4(1). UHK contends that English law applies by operation of Article 14(1)(b), alternatively Article 4(1), alternatively Article 4(3). I give no weight to POC's (essentially forensic) point that because UHK conceded that the applicable law for the tortious interference claim (under Rome II) was that of New Jersey, the applicable law of the implied in law promise should be the same. A similar point might be made by UHK regarding POC's concession as to the applicable law (English) under Rome I. In any event, the question must be approached as a matter of principle.

184. Articles 4 and 14 provide materially as follows:

> *"**Article 4***
>
> *General rule*
>
> *1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*
>
> *…*
>
> *3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the*

law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

Article 14 (1)

Freedom of choice

1. *The parties may agree to submit non-contractual obligations to the law of their choice:*

   a) *by an agreement entered into after the event giving rise to the damage occurred; or*

   b) *where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.*

   The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties."

Was there a choice of law under Article 14(1)(b)

185. This is the logical starting point. UHK's case is that Article 14(1)(b) applies to choice of law or jurisdiction agreements in existing, related contracts. The 2010 WAF COA, an English law contract in which POC at least arguably has enforceable rights under the 1999 Act, is the sole progenitor of the implied in law promise. Furthermore, as Mr Guo was directly involved in the negotiation of the 2010 WAF COA (as indeed he had been with all previous COAs), POC implicitly consented to the inclusion of its enforceable right to commission within the terms of the English law contract. This, it says, demonstrates with reasonable certainty that POC and UHK intended the implied in law promise to be governed by English law.

186. POC disagrees. POC was neither a party to the 2010 WAF COA nor did it "*freely negotiate*" the choice of law clause contained within it. POC's limited rights under the 1999 Act fall far short of an agreement as to the applicable law governing POC and UHK's non-contractual obligations.

187. Guidance on Article 14(1)(b) can be found in *Dicey, Morris & Collins,* The Conflict of Laws (15th ed.) ("Dicey") at 34-045:

> *"The parties, whatever their circumstances may make a choice of law by an agreement entered into after the event giving rise to the damage occurred. Where all the parties are pursuing a commercial activity, the choice of law may also be made by an agreement freely negotiated before the event giving rise to the damage occurred. Presumably, this restriction on the freedom to choose the applicable law* ex ante *is intended to protect the*

weaker party, i.e. *normally the victim of the tort. It appears that the requirement that an advance agreement be "freely negotiated" was intended, primarily at least, to exclude standard form contracts (contrats d'adhésion). This appears similar to the concept of a contractual term being "individually negotiated" used in the EEC Council Directive on unfair terms in consumer contracts. Article 3(2) of that Directive provides that "a term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract". In practice, choice of law provisions, like other boilerplate provisions in contracts, are often not actively negotiated and may be based on standard wording used by one party or in an industry standard agreement. Nevertheless, it is suggested that an agreement as to the law applicable to non-contractual obligations should be treated as having been "freely negotiated" if each party has had a genuine opportunity to influence its content, even if such standard wording of this kind has been adopted without challenge or amendment. The burden of demonstrating this should rest with the party who seeks to rely on the agreement. Finally, if all the parties are pursuing a commercial activity, the fact that they may not have equal bargaining power should not invalidate an agreement which is "freely negotiated" in the sense just described."*

188. 34-046 provides as follows:

"The choice of law must be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties. An express or "implied" choice of law is thereby permitted, although an express choice of the law applicable to non-contractual obligations appears the more likely of the two possibilities. As to the possibility of an "implied" choice, it is suggested that the choice of a particular law to govern the parties' contractual relationship does not, of itself, demonstrate with reasonable certainty that the parties also intended that law to govern non-contractual obligations arising between them in connection with that relationship. If, however, a choice of law provision, although not referring specifically to non-contractual obligations, is coupled with a choice of court agreement in terms which confer on the courts of the country whose law applies jurisdiction to determine both contractual and non-contractual disputes between the parties, or with an arbitration agreement conferring similar jurisdiction on an arbitral tribunal with its seat in that country, this combination may meet the necessary threshold to demonstrate a choice of the law applicable to non-contractual obligations for the purposes of

> *Art.14. In line with the approach taken in the Rome Convention and the Rome I Regulation, it is submitted that questions concerning the existence and validity of the parties' consent to a choice of law agreement under Art.14 should principally be determined by reference to the law applicable (or putatively applicable) to the agreement containing the term in question, which will normally be the same law as that which, if there is a valid choice, will govern non-contractual obligations."*

189. Clause 24 of Part II of the ASBATANKVOY standard terms, which are incorporated into the 2010 WAF COA, states that:

> *"[a]ny and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of London…pursuant to the laws relating to arbitration there in force…".*

190. This clause would cover both contractual and non-contractual disputes arising out of the 2010 WAF COA. According to Dicey this militates in favour of the court being able to imply a choice of law applicable to non-contractual relations between the parties to the 2010 WAF COA.

191. In my judgment, however, even though POC did play a part in the negotiation of the COA, it did not do so on its own behalf. It is therefore difficult to see how POC had a "*genuine opportunity to influence its content*", at least for its own benefit. As POC posited in submissions, it is very unlikely that POC would have been able to refuse the inclusion of a term applying Singaporean law if either TI or UHK had proposed such a term during negotiation of the 2010 WAF COA. UHK has not discharged its burden of proof under Article 14.

192. Accordingly, Article 14 would not lead to the conclusion that the applicable law is English.

Where was the place of damage under Article 4(1)?

193. POC's analysis in relation to Article 4(1) is as follows:

a) The search is for the country where the direct damage first occurred;

b) The country where the unlawful event and/or indirect damage occurred is irrelevant to the issue of where the direct damage first occurred. However, they can and often do occur in the same place as the direct damage (see *Dolphin Maritime v Sveriges Angfartygs Assurans Forening* [2009] 2 Lloyd's Rep. 123);

c) The direct damage in the present case occurred when the Defendants failed to nominate cargoes to TI (see *Union Transport v Continental Lines* [1992] 1 Lloyd's Rep. 229, and see further *AMT Futures v Marzillier* [2014] EWHC 1085 (Comm)). POC suffered indirect damage in the form of lost commissions (see *Dumez France S.A. v Hessische Landesbank* (Case C-220/88) [1990] ECR I-49);

d) The "*country*" where the direct damage to TI occurred was New Jersey because the cargo nominations would have been made at POC's office in New Jersey, but for UHK's breach of the 2010 WAF COA.

194. UHK claims that the failure to nominate cargoes is merely "*the event giving rise to the damage*" and that POC's damage is the failure to receive commission, which can only be construed as pure economic loss. The country where the damage was suffered by POC is therefore New York, where POC's bank accounts are located. POC counters that a claimant should not be able to claim the domicile of its bank account as its place of damage: it would give claimants an unfair advantage, being able usually to point to damage in their home country, and therefore be able to apply that law.

195. I do not accept POC's analysis by reference to direct and indirect damage on the facts of this case. *Dumez France SA v Hessische Landesbank* is distinguishable from the present case, and indeed distinguishable from the paradigm factual scenario that would give rise to an implied in law promise under New Jersey law. *Dumez* was a case about secondary victims in circumstances where a tort had primary and secondary victims. The parent and subsidiary had suffered loss in different jurisdictions, though the parent company was the claimant. The question was whether the damage occurred where the subsidiary had suffered loss or where the parent had suffered loss. In those circumstances, the court looked to see where the place of primary loss was. Here there is only one form of damage caused by the relevant unlawful act (i.e. breach of the implied in law promise), namely loss of commission to the broker. Additionally, it is questionable as to whether or not it is appropriate to transpose the approach in *Dumez* (under the Brussels Regulation) to issues arising under Rome II (see for example Plender and Wilderspin on The European Private International Law of Obligations (4th ed.) at paragraph 18-013)).

196. In *AMT Futures v Marzillier* [2014] EWHC 1085 (Comm), Popplewell J conducted a comprehensive review of the cases relating to Article 5(3) of the Brussels Regulation. This decision has since been examined by the Court of Appeal [2015 QB 699] (and at the time of this judgment is currently under consideration by the Supreme Court). The Court of Appeal overturned Popplewell J's decision, but did not criticise his analysis of the relevant legal principles. Popplewell J's decision provides some useful guidance as to where POC suffered its damage in this case (at page 361):

> *"(4) In cases of economic loss, the search is for the place where the harmful event directly had its effect on the immediate victim and where the original damage is manifested: the Dumez case [1990] ECR I-49, paras 20-21. The damage occurs where the direct harmful consequences are suffered, not at the place where indirect or more remote damage occurs or consequential financial damage is felt which has arisen out of an event which has already caused initial and actual damage elsewhere: the Marinari case [1996] QB 217, paras 14-15 (and Advocate General's opinion, at paras 26-27); the Kronhofer case [2004] All ER (EC) 939, paras 19, 21 and the Réunion Européenne case [2000] QB 690 , Advocate General's opinion, at para 48.*

(5) These formulations give effect to two important aspects of the search: (a) the task is so far as possible to identify a single place for the occurrence of damage. The search is for the place where the damage occurred. This reflects the fundamental objective of certainty. (b) The search will be for the element of damage which is closest in causal proximity to the harmful event. This is because it is this causal connection which justifies attribution of jurisdiction to the courts of the place where damage occurs: see the Bier case [1978] QB 708, paras 16-17 and the Dumez case [1990] ECR I-49 , para 20.

(6) There is a difference between a case in which the claimant complains that he has lost his money or goods (as in the Marinari case [1996] QB 217 or the Domicrest case [1999] QB 548) and a case in which the claimant complains that he has not received money or goods which he should have received. In the former case the harm may be regarded as occurring in the place where the money or goods were lost, although the loss may be said to have been consequentially felt in the claimant's domicile. In the latter case the harm lies in the non-receipt of the money or goods at the place where they ought to have been received, and the damage to him is likely to have occurred in the place where he should have received them: the Dolphin case [2010] 1 All ER (Comm) 473, para 60 and the Réunion Européenne case [2000] QB 690 , paras 35-36.

(7) It may assist in identifying the place where damage occurred to ask what would have happened if the tort or delict had not been committed: the Domicrest case [1999] QB 548, 568E-F and the Dolphin case [2010] 1 All ER (Comm) 473, para 59. That is not, however, always an answer to where the damage has occurred. That question engages the issues of which damage is direct, immediate and initial and which merely indirect or consequential."

197. *Kronhofer v Maier* (Case C-168/02) [2004] All ER (EC) 939, referred to by both Popplewell J at first instance and Christopher Clarke LJ in the Court of Appeal in *AMT*, is authority for the proposition that (at paragraph 21) "*article 5(3) of the Convention must be interpreted as meaning that the expression 'place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where 'his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another contracting state.*" In *Kronhofer* the claimant investor argued that Article 5(3) of the Brussels Regulation was engaged because he had suffered a diminution of value in his assets in Austria by reason of having made investments in Germany under the advice of the German investment company. The

court held that the place where the damages occurred and the place of the event giving rise to it were both in Germany.

198. In *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* [2010] 1 All ER (Comm) 473, also considered in *AMT*, the failure to pay in England, which the defendants were said to have induced, was the sole, direct and immediate cause of the loss which the claimant had suffered, namely the non receipt of the money. Christopher Clarke J (as he then was) observed:

> *"60. I do not ignore the danger of conflating the place where the damage occurred with the place where the loss was suffered. There is, however, a difference between a case in which the claimant complains that he has lost his money or goods (as in the Domicrest case or the Sunderland Marine case [Sunderland Mutual Insurance Co Ltd v Wiseman [2007] 2 All ER Comm 937]) and a case in which the claimant complains that he has not received a sum which he should have received. In the former case the harm may be regarded as occurring in the place where the goods were lost (see the Domicrest case) or the place from or to which the moneys were paid (see the Sunderland Marine case), although the loss may be said to have been suffered in the claimant's domicile. In the latter case the harm lies in the non-receipt of the moneys at the place where they ought to have been received, and the damage to him is likely to have occurred in the place where he should have received it. That place may well be the place of his domicile and, therefore, also the place where he has suffered loss. An analogy may be drawn with the non-delivery of cargo at the destination port: see the Réunion Européene case."*

199. In the Court of Appeal in *AMT*, Christopher Clarke LJ formulated a test to ensure that the decision was congruous with the key decisions of the ECJ as follows:

> *"54. Such a conclusion is consistent with the authorities of the Court of Justice. If I ask myself (i) what is "the place where the event giving rise to the damage … directly produced its harmful effects upon" AMTF (the Dumez France case [1990] ECRI-49); or (ii) where was the " actual damage" which "elsewhere can be felt" or the "initial damage" suffered (the Marinari case [1996] QB 217); or (iii) what was the place where the damage which can be attributed to the harmful event (commencement of proceedings) by "a direct and causal link" (the Réunion Européenne case [2000] QB 690) was sustained, the answer is, in my judgment, Germany."*

200. The case before me is not, as POC contends, one where there is both direct and indirect damage as a result of the alleged unlawful act, as was the case in *Dumez*. Rather it is a case where, as in *Dolphin Maritime*, there was a sole, direct and

immediate loss, namely the non-receipt of money. There is a single victim of the breach of the non-contractual obligation: POC. This is a case where POC complains that it has not received money which it should have received. As identified in *AMT* at first instance (see paragraph 34(6)), the harm lies in the non-receipt of money at the place where it ought to have been received, and the damage occurred where POC should have received it. Such a conclusion is not in any way inconsistent with the principle in *Kronhofer*: it is not a question of where the "*ultimate"* loss is felt, but where the direct and only loss is felt.

201. Whether TI suffered damage at the place of the failure to make nominations or elsewhere, which would in any event constitute a breach of contract, is immaterial. For POC, the failure to nominate was merely the event giving rise to its damage, something which Article 4(1) expressly distinguishes from the damage itself. Damage was caused to POC by non-payment of the commission it would have earned, which should have been made to POC's bank account in New York.

202. This is consistent with ECJ case law, as demonstrated by adopting Christopher Clarke LJ's test set out in *AMT*, as follows:

    a) What is the place where the event giving rise to the damage directly produced its harmful effects upon the claimant?

    b) Where was the "*actual damage*" which "*elsewhere can be felt*" or the "*initial damage*" suffered?

    c) What was the place where the damage which can be attributed to the harmful event by "*a direct and causal link*" was sustained?

203. The answer to all three of these questions is New York.

204. In the absence of any New York law evidence before the Court, New York law must be assumed to take the same approach as English law. And in any event New Jersey law does not apply. The implied in law promise claim would therefore again fail.

Was there a manifestly closer connection under Article 4(3)?

205. Were it necessary, and had I concluded that the place of damage for the purpose of Article 4(1) was New Jersey, I would next have had to consider whether under Article 4(3) the law of an alternative, manifestly more closely connected, country should apply. The only suggestion (by UHK) is that English law should then apply. There is no suggestion (by POC) that, were I to find the place of damage not to be New Jersey, as I have done, that New Jersey law should apply by reason of Article 4(3).

206. Article 4(3) will act to displace the applicable law under Article 4(1) of Rome II only in exceptional circumstances (see Plender & Wilderspin at 18-105). For the law of an alternative country to be manifestly more closely connected to the relevant act, a "*high hurdle*" (see *Committeri v Club Méditerranée* [2016] EWHC 1510 (at paragraph 57)) is to be overcome.

207. UHK, on which the burden of proving that the law applicable under Article 4(1) Rome II should be displaced lies, submits that:

a) The obligation only arises, and indeed is parasitic, on the conclusion of the 2010 WAF COA (which Justice Long referred to as the "*principal contract*"), an English law contract under which POC has enforceable rights as a matter of English law (firstly by way of a trust over the promise to pay commission (*Les Affréteurs Réunis Société Anonyme v Leopold Walford Limited (London)* [1919] AC 801) and secondly pursuant to the 1999 Act);

b) The alleged promise is not to act improperly with regard to the 2010 WAF COA. The damage said to have been suffered is the loss of commission payable under the voyage charters under the 2010 WAF COA;

c) Further, the pre-existing relationship between the parties dates back to 2000 under the early WAF COAs and has always been subject to English law and London arbitration;

d) UUK and TI Agencies are both incorporated and domiciled in England;

e) Proceedings have actively been pursued in the Commercial Court in England, which was held to be "*an important factor to take into consideration under Article 4(3)*" in *Stylianou v Toyoshima* [2013] EWHC 2188 (QB)). (*Stylianou* has been criticised in Plender & Wilderspin (at 18-114) for bringing "*matters that were highly relevant to the forum conveniens issue into his consideration of the applicable law, where they had no place"*). Whilst Slade J took the existence of proceedings in the English court into account in *Winroe v Hemphill* [2015] I.L.Pr 12 (at paragraph 61) she did not treat it as a strong connecting factor, and does not appear to have been taken to the passage cited above in Plender & Wilderspin. I attach no real weight to the fact that proceedings in this claim are being heard in England).

208. POC disagrees, pointing out that even if there is a connection to England, it is not manifestly more close than the connection with New Jersey, as there are other countries which fall to be considered.

209. Having considered the various possible connections that this case throws up, in my judgment it cannot be said that there is a manifestly closer connection to England such as to displace the general rule in Article 4(1). The failure to nominate occurred in New Jersey. The loss of commission occurred in New York. UHK is based in Hong Kong. UHK would not have overcome the high threshold required to meet the exceptional test in Article 4(3).

210. Thus, had it been necessary for me to come to a decision on Article 4(3) of Rome II, I would have concluded that English law did not displace New Jersey law (assuming this had indeed been established as the country where damage occurred for the purpose of Article 4(1) of Rome II).

Conclusions on applicable law

211. As set out above, in my judgment the implied in law promise is contractual in nature, leading to the application of English law under Rome I.

212. If, however, the obligation had been non-contractual, bringing Rome II into consideration, I would have found that, although there was no choice of English law for the purpose of Article 14, the place where the damage to POC occurred for the purpose of Article 4(1) was not New Jersey.

213. Thus, regardless of whether Rome I or Rome II provides the relevant regime, New Jersey law does not apply and this part of the claim fails.

214. This conclusion means that the cause of action does not arise on the current factual matrix. However, as set out below, even if New Jersey law had been applicable, and therefore the implied in law promise been capable of arising, it would have faced the question of whether or not New Jersey law would apply the implied in law promise doctrine to the facts of the present case.

Does the implied in law promise doctrine extend to the facts of this case?

215. UHK's position, supported by Judge Pisano, is that the implied in law promise doctrine would not be applied by the New Jersey Supreme Court outside the field of real estate.

216. Judge Pisano considers that in *Ellsworth Dobbs* the New Jersey Supreme Court confined its analysis to transactions involving real estate, relying on *Harris v Perl*, 41 NJ 455, 462 (1964). Judge Pisano's opinion is that the reason that *Ellsworth Dobbs* has been applied only to real estate contracts is explained by the following passage from *Harris v Perl*:

> *"The broker's stock and trade is his knowledge of what property is or can be made available and who is or can be interested in a given parcel. The inherent uniqueness of each parcel distinguishes the real estate broker from the salesman of automobiles or cutlery, for the very act of identifying real property or the prospective purchaser is itself both a rendition of a valuable service and an opportunity for a dishonest man to make off with the broker's stock in trade."*

217. Furthermore, Judge Pisano recognises specific concerns of public policy that underpin the treatment of brokers involved in the sale and purchase of land as distinct from other brokers. He cites *Ellsworth Dobbs*, among other authorities (at p. 522):

> *"…there can be no doubt that the business of the real estate broker is affected with a public interest. The Legislature has marked it off as distinct from occupations which are pursued of common right without regulation or restriction."*

218. An example of the legislation referred to was the Statute of Frauds. Although Judge Pisano conceded that the statute only applied to a seller's promise to pay commission, he maintained that the fact the Statute of Frauds had been applied to real estate transactions is evidence that in general public policy dictates that the area required regulation.

219. Justice Long's opinion, however, is that the role of the broker is the same regardless of the nature of the transaction brokered and that there is no reason why the implied in law promise doctrine should not be extended outside the field of real estate.

220. Justice Long cited the case of *Banquesource Capital Corp v Pine Brook Care Center, Inc.*, 265 N.J. Super. 446 (Law Div. 1992), a case involving an obligation for a borrower to pay commission to a broker for arranging a loan, as an authority for the application of the principles in *Ellsworth Dobbs*, including the implied in law contract principle, to transactions outside of real estate. She relied (paragraph 6 of her Supplemental Report) on the statement in *Banquesource* (at p. 451) that there is "*no jurisprudential reason why there should be a difference between the law relating to brokerage commissions payable in real estate transactions and brokerage commissions payable in mortgage transactions*". She concluded that "*there is simply nothing about the nature of a particular product or service that would warrant the non-applicability of basic brokerage principles, including the implied-in-law contract.*" In cross-examination, Justice Long continued to rely heavily on *Banquesource*, initially resisting the contention that the principle in *Tanner* had not been applied to scenarios outside real estate in the 56 years since it had been decided.

221. However, *Banquesource* is not an application of the *Ellsworth Dobbs* principle at all. Justice Long, when taken in cross-examination to *Banquesource* and its one reference to *Ellsworth Dobbs*, was forced to accept that the passage in question did not consider or apply the implied in law promise principle but rather simply referred to the decision in *Ellsworth Dobbs* as modifying the law as it applied to real estate contracts in requiring an actual closing to be completed in order for a broker to become entitled to its commission.

222. Thus, neither Justice Long nor Judge Pisano were able to take the court to a case where the implied in law promise had ever been applied outside of real estate. This was at the end of the day Judge Pisano's main point.

223. Had it been necessary for me to make a finding on this issue, I would have concluded that, in assessing whether the New Jersey Supreme Court would apply the principle in a non-real estate case, the court would go back to first principles, as both experts agreed it would. The fact that there has been no decision outside the real estate context would not therefore have been fatal to POC's claim. Put another way, the fact that there has never been a decision in some 56 years or so applying the principle in any other context does not answer the question as a matter of principle. Judge Pisano simply relied in this context on the mantra that it had never been so applied, but that is an over-simplistic approach.

224. On the basis that I were satisfied that the New Jersey Supreme Court would be prepared to extend the doctrine outside the field of real estate as a matter of principle, however, this case does not appear to be one where such an application would be appropriate.

225. As Justice Long agreed in cross-examination, the circumstances found in a typical real estate brokerage case are likely to be factually different from the facts of the present case. Thus, for example, in a typical real estate case the buyer will have solicited the services of broker, and the broker, by the time a contract is entered into between buyer and seller, will have done everything it needs to do to earn its

commission. The real estate broker can only recover payment upon completion of the sale transaction. This is an important part of the rationale behind the implied in law doctrine (see eg *Kuhn v Spatial Design Inc* 245 NJ Super 378 (1991) (at p. 388)). As UHK submits, the mischief at which the implied in law promise doctrine is aimed is allowing the broker to go unremunerated for all the work that it has done. In a sense, as POC says, UHK is thus relying on its own breaches. But on the current state of New Jersey law as I find it to be, the implied in law promise protects the broker from non-payment for work done, not for non-payment for work not done.

226. In shipping brokerage, while a broker does assist in introducing the owner and the charterer and with negotiations between them, this is by no means all that it has to do in order to become entitled to commission; the provision of after-fixture services is also an important part of the service that it provides on an ongoing basis. Thus commission becomes payable on a voyage-by-voyage basis, rather than on the successful signing of a contract of affreightment. (It might be thought instructive to consider the position under the AG COAs where POC did not provide after-fixture services and did not receive any commission.) As Judge Pisano states at paragraph 14 of his Supplemental Report, "*if the COA is not performed, POC does not go unpaid for work already done*". Thus, unlike the real estate broker, whose function is to bring the deal together, the shipbroker's role is not so confined. The services provided, and the right to receive payment for such services, by a real estate broker and shipping broker are materially different.

227. In conclusion, POC has not established that it is likely that a New Jersey Supreme Court would apply the implied in law promise doctrine on the facts of the present case for the following reasons:

a) Justice Long's views appear to have been based, at least in part, on an erroneous understanding of the decision in *Banquesource*;

b) Whilst in no way decisive, it is noteworthy that in 56 years the principle has never been extended outside the field of real estate. The extension contended for by POC would therefore be ground-breaking;

c) Fundamentally, a "first principles" analysis of the implied in law promise does not lead to the conclusion that the doctrine would probably apply to the facts of the instant case.

Breach

228. In these circumstances, the question of breach also does not arise. For the sake of completeness only, therefore, the New Jersey law experts were agreed that if an implied in law promise is established then it will be breached by frustrating or improper conduct, such as a material misrepresentation (*Kuhn v Spatial Design, Inc.* at p. 382). Where a party has acted in good faith but is prevented from completing the transaction due either to circumstances beyond their control (*Rothman Realty Corp. v Bereck*) or a "*reason legally sufficient or authorised by the law*" it is unlikely to be liable for any lost commission (*Atlas v Silvan,* 128 N.J. 247, 252 (App. Div. 1974)). UHK concedes that it acted in breach of the implied in law promise, were such a promise to have existed.

I. Tortious interference with contractual relations

229. It is common ground (by concession on the part of UUK and UHK) that New Jersey law applies to the claim for tortious interference.

Is there a requirement for there to be a breach of the contract being interfered with?

230. The *Restatement (Second) of Torts* (1979) (the "Restatement") is a summary of the general principles of common tort law in the United States, published by the American Law Institute. The Restatement is not binding authority, except where its sections have been adopted by the New Jersey courts, but it is often considered as persuasive by judges.

Tortious interference

231. New Jersey case law identifies two separate causes of action for intentional interference with contractual relations: a) interference with an existing contract, and b) interference with prospective contractual relations (which has also been referred to as interference with prospective economic advantage). The two are materially different, particularly when it comes to intention/motive. Thus, for example, a party will not be found liable for interference with prospective contractual relations if it is acting in its own best commercial interests.

232. The only cause of action advanced against UUK and UHK is intentional interference with an existing contract. The Restatement defines the tort of interference with contractual relations at § 766 as follows:

> *"…766 Intentional Interference with Performance of Contract by Third Person*
>
> *One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."*

233. This definition has been incorporated into the law of New Jersey by its adoption in case law, most recently in *Nostrame v Santiago*, 213 N.J. 109, 122 (2013).

234. The New Jersey law experts agree that in order to establish tortious interference with an existing contract a claimant must prove: a) a protected interest, i.e. a contract; b) malice – that is, the defendant's intentional interference without justification; c) a reasonable likelihood that the interference caused the loss of the prospective gain; and d) resulting damages (*Vosough v Kierce*, 437 N.J. Super. 218, 234 (App. Div. 2014)).

235. The issues in dispute are:

    a) Whether there was a valid separate brokerage agreement. As set out above, I have concluded that there was;

b) Whether there was actionable interference with an existing contract and whether or not breach of contract is necessary for actionable interference to have taken place;

c) What the relevant legal test is for establishing malice and how it falls to be applied on the facts;

d) Whether in any event UUK can be said to have interfered (with the necessary malice or at all).

Was there actionable interference with an existing contract and is breach of contract necessary for actionable interference to have taken place?

236. POC contends that UUK and UHK interfered with the brokerage agreement: a) (UUK) by ceasing to send cargo loading information to UNIPEC for forwarding to POC as cargo nominations and by chartering vessels to carry WAF cargoes which would otherwise have been carried under the 2010 WAF COA and b) (UHK) by failing to make nominations under the 2010 WAF COA.

237. UUK and UHK deny that there has been any actionable interference with an existing contract such as to give rise to a claim for tortious interference under New Jersey law. In order for there to be tortious interference with an existing contract, a claimant must demonstrate an established contractual right (that was interfered with). This emerged graphically in the evidence of Justice Long in cross-examination :

> *"**Q**. What is your understanding of what the plaintiff's established contractual right under the brokerage agreement is in this case which you contend has been interfered with?*
>
> ***A**. The right to receive commissions on at least eight nominations for the freight, dead freight and demurrage. Eight per month. That's what I think the contract right is.*
>
> ***Q**. If the learned judge here were to conclude that the brokerage agreement gave to minimum contract right to that, but only a right to receive commissions on such freight, dead freight and demurrage as had actually been received by TI, would you, therefore, agree that, under New Jersey law, there would not be any enforceable contractual right worthy of protection by this tort?*
>
> ***A**. If the court -- I'm sorry, are you saying to me if the court were to determine that there was -- that the guarantee in the COA that was negotiated by POC is not part and parcel of the brokerage agreement.*
>
> ***Q**. Just pause --*
>
> ***A**. Is that what you are saying?*
>
> ***Q**. -- what do you say is the guarantee?*

A. *The minimum of eight nominations per month.*

Q. *Right. Let's go back to how this agreement is alleged in bundle A, tab 5.*

MRS JUSTICE CARR*: And this is really -- yes.*

MR GATT*: Justice, have you assumed that there is a guarantee to a minimum performance of the number of liftings as part of your opinion? That that's part of the brokerage agreement -- have you assumed that that guarantee forms --*

A. *I have. I have. I have. Because otherwise -- yes.*

Q. *Go on.*

MRS JUSTICE CARR*: Because otherwise? I would be interested. Why? You have made that assumption because?*

A. *Because if -- otherwise there would -- it would be a prospective advantage case.*

MR GATT*: Exactly. And if it was a prospective economic advantage case, then UHK would be entitled to act in its own self interests, wouldn't it?*

A. *Yes, it would, so long as it proper meaning.* [sic]

Q. *So if this judge were to conclude that there is no minimum guarantee and that the only existing contractual right under the brokerage agreement is to be paid commissions on freight actually received by TI, you would agree that your assumption is incorrect?*

A. *I would."*

238. It is clear in my judgment that for a claim for tortious interference with an existing contract there has to be interference with an existing contractual right, and POC's claim has apparently been pursued by reference to a mistaken apprehension on the part of Justice Long. It is right that in the body of her first report she correctly recited the terms of the brokerage agreement (with no reference to any guarantee of minimum performance) and in re-examination she was led to those passages and stated that that had been her understanding all along. But I prefer her full and measured responses in cross-examination. When she had to focus on what interference was necessary, she (correctly) searched for an established contractual right. She (incorrectly) identified a guarantee to a minimum number of liftings. The fact that POC's expectation of a minimum number of liftings under the 2010 WAF COA may have been a "*definite*" one, as POC suggests it was, does not transform it into a contractual right. Absent an existing contractual right in the brokerage agreement with which there was interference, the claim for tortious interference must fail.

239. Beyond this, there is the related question of whether or not, in order for there to be actionable interference, a defendant must have caused a breach of contract. It is common ground here that there never was any breach of the brokerage agreement by TI, because its obligation to pay commission was entirely conditional. UUK and UHK contend that, without any such breach, there is no sustainable claim under New Jersey law.

240. POC contends that UUK and UHK's failures amount to sufficient interference because they prevented commission becoming due to POC:

a) Judge Pisano only took the point on breach very late, because the point is counter-intuitive. Reliance is placed on a passage from a (1975) Los Angeles Law Review which suggests that interference with contractual relations is a broader tort than that of inducing breach of contract and does not require proof of breach of contract;

b) There is no New Jersey authority or text supporting the requirement for a breach. Such authority as there is suggests that no breach is required. Reliance is also placed on §766A of the Restatement.

241. As to POC's first limb, it is right that Judge Pisano did not take the point that breach is necessary until late in the day. However, I accept his evidence that he has always been aware of it as a matter of law (consistent with his judgment in *Wellness Publishing et al v Barefoot et al* (2008) WL 108889 D.N.J. Jan. 9, 2008) (at p. 19)). This is a case with many complex issues. Additionally, as Judge Pisano commented, under New Jersey law one often sees both interference with contractual relations and interference with prospective economic advantage (where there is no requirement for breach) pleaded together. In any event, the issue has to be addressed substantively.

242. As for the second limb, I do not accept that there is no authority supporting the requirement for a breach. There is certainly no case where a claim for tortious interference with an existing contract has been upheld in the absence of a breach.

243. As set out above, the Restatement, which has been adopted in New Jersey law through *Nostrame*, approaches the tort as interference with performance of a contract by: "*inducing or otherwise causing the third person not to perform the contract".* A natural reading of the phrase: "*not to perform*" is that it means that a defendant must induce or otherwise cause the third person to breach the contract. This construction of the black letter provision is supported by the commentary to §766 (which Justice Long confirmed that the court may consider as an aid to interpretation, provided it is not out of synchronicity with New Jersey case law). The commentary is littered with references to breach, see Comment (o) (on 'Causation') in particular:

> *"the question whether the actor's conduct causes the third person to break his contract with the other raises an issue of fact"* (emphasis added).

244. Judge Pisano also relies on the following passage from the judgment of District Judge Walls in the federal case of *DiGiorgio Corp. v Mendez & Co.*, 2301 F. Supp. 2d 552, 566 (D.N.J. 2002):

> *"[O]ne interferes with a contract only where he causes a party not to perform under it. As noted, a plaintiff must show that the defendant's intentional and malicious interference resulted in a breach or loss of contract. Velop 693 A/2d at 926 301 NJ Super 32, citing Printing Mart 116 NJ at 751, 563 A 2d 31."*

245. In cross-examination Judge Pisano was taken to the passage in *Velop*, and conceded that it did not contain an express reference to a claimant having to show a breach of contract to make out the tort. And *Printing Mart* only cited §766 of the Restatement. The fact remains however, that, one way or another, District Judge Walls was of the view that breach or loss of contract was required. He went on in the same paragraph to say:

> *"If the contract is performed despite the actions of the defendant, then those actions do not amount [to] tortious interference with contract. The cause of action requires a failure to perform."*

246. For the avoidance of doubt, I reject POC's suggestion that "*loss of contract"* is to be treated as meaning "*a complete loss of the benefit*" of the contract. Those are not the words used: the phrase "*loss of contract*" means what it says.

247. In support of her opinion that it was not necessary for there to be a breach of the relevant contract, Justice Long relied on the cases of *Aalfo Co. Inc. v Kinney*, 105 N.J.L. 345, 144 A. 715 (1929), and *Velop*. But she accepted that the decision in *Aalfo* predated the introduction of a clear distinction between the tort of interference with an existing contract and interference with prospective economic advantage. The claimant in Aalfo was party to a contract that conferred on it the right to buy any car whistles that its counterparty ("Blake") manufactured. It did not have a contractual right requiring Blake to manufacture whistles. The claimant had an expectation that whistles would be manufactured, and was entitled to buy such whistles that were manufactured. Upon the defendant interfering with Blake's manufacturing of the whistles, the claimant did not have a contractual right to require such manufacture, and therefore it was only its expectation that was thwarted. In other words, Aalfo had a prospective economic advantage that was interfered with. The case appears to have been treated as such by the relatively recent cases of *Van Natta Mechanical Corpn. v. Di Staulo*, 277 NJ Super 175 (1994) *and Zippertubing Co. v. Teleflex Inc.*, 757 F.2d 1401, 1411–12 (3d Cir. 1985). Whilst Justice Long conceded that Aalfo had no right to require the manufacture of whistles, she was unable to accept that the case was not one of interference with an existing contract. In my judgment, however, *Aalfo* is to be treated as a prospective economic advantage case.

248. *Velop* does not assist POC's case either. The facts of *Velop* are complex, but a close reading of the judgment and documents on the New Jersey court file reveals that some of the defendants did indeed cause a breach of the contract for sale of land by excavating soil from the land in breach of the contract. The trial judge's directions to the jury included the following:

> *"the party must prove that the Defendant intentionally and maliciously, that is with motive to harm and without justification interfered with a contractual relation existing*

> *between the parties and the other party by inducing, procuring or causing a breach or termination of the agreement*." (emphasis added)

249. Accordingly, in my judgment, neither *Aalfo* nor *Velop* is authority for the proposition that breach is not required for interference to be made out; indeed, *Velop* appears to suggest the opposite. Authorities relied on by Justice Long elsewhere also suggest that breach of the contract interfered with needs to be established: see *Louis Schlesinger Co v Rice* 4 NJ 169 (150) (at p. 257) and *Albert M Greenfield & Co of NJ Inc v SGS Enterprises* 213 NJ Super 1 (1986) (at p. 180).

250. As for POC's reliance on §766A of the Restatement, it is noteworthy that Justice Long did not consider it to be of any relevance to her opinions, since she did not address it. §766A (the status of which in New Jersey law is not entirely clear to me, although Judge Pisano thought that it had been adopted,) deals with the tort of intentional interference with another's performance of his own contract. It reads as follows:

> *"One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for pecuniary loss resulting to him."*

251. §766A thus describes the tort where a third party interferes with a claimant's performance of its own contract (as opposed to interference with the performance of a counterparty's performance). The relevant interference is either (a) where a third party prevents the claimant's performance of a contract or (b) where it causes performance to be more expensive or burdensome for the claimant. When taken to this paragraph for the first time in cross-examination, Judge Pisano stated that he could think of no logical reason why §766 might require breach but paragraph §766A might not, aside from the fact that the torts clearly covered different circumstances.

252. However, the first limb of the tort does indeed require a breach (consistent with §766). The second limb (i.e. making performance more expensive/burdensome), where a breach of contract would not be necessary, is not conceptually applicable to the tort in §766. If a third party causes the performance of the claimant's counterparty (rather than the claimant, as prescribed by §766A) to become more expensive or burdensome then the potential claimant in the §766A scenario would by definition not suffer any loss and there would be no cause of action. This means of interference could not give rise to a claim under §766. Such an equation does nothing to rebut the need for breach under §766.

253. In conclusion, having carefully considered the competing arguments, I have reached the clear conclusion that breach of the contract interfered with is required for the tort of interference with an existing contract. That there is such a requirement is reflected in Justice Long's concessions in relation to the need for a contractual right to a minimum number of liftings referred to above. In the settled state of New Jersey law,

it is clear to me that the plain and ordinary meaning of "*not to perform*" is that breach of contract is required. This is consistent with the case law, as set out above.

254. Accordingly, the claim for tortious interference with an existing contract fails.

Malice

255. I address the question of malice for the sake of completeness only, and relatively briefly. In order to assess whether an interference is improper and intentional a New Jersey court will conduct an assessment of whether the interfering party acted with malice. There are two aspects to the concept of malice: a) that the interference be intentional, and b) that it be without justification (*Russo v Nagel*, 358 N.J. Super. 254, 268-69 (App. Div. 2003). It does not require ill-will towards the claimant.

256. The New Jersey law experts agree that the interference is intentional *"if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action"* (*Russo v Nagel* at page 268). It is common ground that the necessary knowledge, at least on the part of UHK, existed. Without justification means contrary to "*generally accepted standards of common morality or of law"* (Lamorte *Burns & Co. Inc. v Walters*, 167 N.J. 285, 306 to 307 A.2d 1158 (2001).

257. The Restatement at §767 (as endorsed in *MacDougall v. Weichert,* 144 N.J. 380 (1995)) indicates that in determining whether an actor's conduct in intentionally interfering with a contract is improper or not a court will consider the following seven factors:

a) The nature of the actor's conduct;

b) The actor's motive;

c) The interests of the other with which the actor's conduct interferes;

d) The interests sought to be advanced by the other;

e) The social interest in protecting the freedom of action of the actor and the contractual interests of the other;

f) The proximity or remoteness of the actor's conduct to the interference; and

g) The relations between the parties.

The court will apply the above to the facts of the case in a balancing exercise.

258. POC submits that there is a long-established and overriding principle, namely that a party may not lawfully intentionally interfere with a superior right (which a contract is). Justice Long relies on *Louis Schlesinger* (supra) for the proposition that interference with an actual contract will be deemed improper unless there is an exercise of an "*equal or superior right*". Her opinion is that Judge Pisano misstates the law of New Jersey in claiming that a party acting solely "*to advance its own interest and financial position*" cannot be found to have acted with malice. She cites *Albert Greenfield & Co. of NJ Inc. v SSG,* 213 N.J. Super. 1, 15 (App. Div. 1986) as

authority that economic self-interest does not stand on the same footing as a contract and is not an equal or superior right justifying interference:

> *"A justification or excuse, however, cannot be "the indirect purpose of benefitting the actor at the expense of another, unless done in the exercise of an equal or superior right…Trump could not aid SSG to breach its agreement merely to obtain a better price."*

259. And she refers to *Louis Kamm v Flink* 113 NJL 582 (1934) (at p. 587):

> *"[I]f disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with……Self-enrichment…may well have been the motive. But it is malice nevertheless. While ill-will toward a person is malice in its common acceptance or popular sense, in the technical, legal sense it is the intentional doing of a wrongful act without justification."*

260. However, Justice Long accepted that the test laid out in *MacDougall* was the law of New Jersey. If a court were to apply that test and consider whether the conduct was injurious and transgressive of generally accepted standards of common morality or of law, it would be applying New Jersey law. However, her opinion remained that a court must overlay the equal or superior right concept.

261. The question thus arises as to how to treat the *Louis Schlesinger* line of authority, which has not been overruled, in the light of *MacDougall.* It is perhaps a curiosity that the New Jersey courts have not addressed this in terms. In the light of Justice Long's answers above, I prefer Judge Pisano's proposition that the equal or superior right test is now to be subsumed within the balancing test, although to be given significant weight as appropriate. Additionally, although I note (at least from reported cases) that no New Jersey court appears to have conducted the *MacDougall* test in full, I can see no reason why as a matter of principle that is not the exercise to be carried out.

UHK

262. For this purpose, I must assume, contrary to my findings above, that there has been actionable interference with an existing contract by UHK.

263. ***The nature of the actor's conduct***. UHK's conduct amounted to a breach of the 2010 WAF COA. The Restatement alludes to threats, physical violence and misrepresentation *inter alia* as examples of potentially wrongful conduct. A breach of contract appears to fall short of this. In light of Justice Long's opinion that a "*simple*" breach is unlikely to be considered wrongful, the nature of UHK's conduct does not appear to be particularly injurious or transgressive of generally accepted standards of morality or law. It certainly comes nowhere near the type of activity seen in *Velop*, for example. I do not accept POC's submission that UHK's failure to engage with POC directly as to its reasons for non-performance of the 2010 WAF COA adds materially to this issue.

264. ***The actor's motive***. As set out above, UHK's predominant motive in breaching the 2010 WAF COA was to further its own commercial interests, rather than a concerted attempt to retake control of POC's brokerage commission. There is no longer any question of bad faith or intent to injure. UHK must have appreciated that in stopping performance of the 2010 WAF COA commission would cease to be paid by TI to POC, but that goes to knowledge not motive.

265. ***The interests of the other with which the actor's conduct interferes***. POC submits that it is highly relevant that UHK interfered with a superior right, namely a contract. The commentary on this factor in the Restatement states that interference with an existing contract is more likely to be improper compared to interference with prospective contractual relations, due to "*the greater definiteness of the other's expectancy and his stronger claim to security for it, and…to the lesser social utility of the actor's conduct*". But the position here is nuanced. Whilst there was interference with the brokerage agreement, there was no interference with a contractual right under that contract. Rather there was only interference with an expectation under that contract. For this reason, even if I had simply applied *Louis Schlesinger*, it would not have been conclusive in POC's favour.

266. ***The interests sought to be advanced by the actor***. UHK was seeking to advance its own commercial interests. The commentary in the Restatement makes it clear that "*if the interest of the other has already been consolidated into the binding legal obligation of a contract, however, then that interest will normally outweigh the actor's own interest in taking that established right from him*". But here, as set out above, POC never had a contractual right to commission on a minimum number of liftings.

267. ***The social interests in protecting the freedom of action of the actor and contractual interests of the other***. This consideration adds little to what has gone before where, amongst other things, the question of equal or superior right comes into play. POC had an interest in receiving commissions under an existing contract. UHK had an interest in improving its business performance.

268. ***The proximity or remoteness of the actor's conduct to the interference***. POC's rights were memorialised in the 2010 WAF COA, to which UHK was a party, and with which the brokerage agreement was linked.

269. ***The relations between the parties***. POC was not UHK's broker but had helped to negotiate the 2010 WAF COA and provided after-fixture services. It was bound up in the 2010 WAF COA.

270. Had it been necessary for me to come to a conclusion on the *MacDougall* test in respect of UHK's conduct, I would have considered that the scales had (just) tipped in favour of UHK's interference amounting to malicious conduct. UHK's performance under the 2010 WAF COA had an obviously foreseeable impact on POC, with POC's entitlement to commission recognised in the body of UHK's own contract with TI. UHK chose to breach the 2010 WAF COA in circumstances where it was on notice that losses were being suffered. Whilst obtaining control of the brokerage was not UHK's predominant motive, brokerage was part of the overall consideration with the UNIPEC group, as evidenced in the December 2010 memo. POC did not have a contractual entitlement to commission on a minimum number of liftings, but it was

party to an existing contract under which it had a clear expectation of such commission. This interest outweighs (just) UHK's commercial freedom to act in its own best interest.

UUK

271. POC's claim against UUK raises a number of discrete additional considerations:

a) Was there actionable interference in fact by UUK?

b) Did UUK act with malice – did it intentionally interfere and act without justification under the *MacDougall* test?

272. POC alleges that UUK interfered with the brokerage agreement by:

a) Ceasing to send cargo loading information to UNIPEC for forwarding to POC as cargo nominations; and

b) Chartering vessels to carry WAF cargoes which would otherwise have been carried under the 2010 WAF COA. POC maintains that UHK could not have ceased to make nominations under the 2010 WAF COA unless UUK agreed to provide replacement vessels.

273. I do not accept these submissions. UUK was not a party to the 2010 WAF COA and, as such, by definition could not have stopped performing it. As to the first limb relied upon by POC, UNIPEC, not UUK, was responsible for deciding which cargoes were to be carried on TI pool vessels under the 2010 WAF COA. As to the second, it was only UHK's cessation of performance, and UNIPEC's decision to move chartering to UUK, that resulted in breach of the 2010 WAF COA. UUK could scarcely forward cargo nominations in the absence of instructions from UNIPEC, nor could it make UHK (and/or UNIPEC) perform the 2010 WAF COA by refusing to charter vessels when instructed to do so, or (as appears to be suggested) by not chartering vessels for WAF cargoes. Putting it another way, POC has not established a reasonable likelihood that UUK's interference caused its loss.

274. Even if there had been sufficient interference by UUK, malice would not have been established. Even if were established that UUK knew that its actions would mean that the interference with the brokerage agreement would be *"certain or substantially certain to occur as a result"* (which is by no means clear), the balancing exercise where UUK is concerned on justification is quite different to that involving UHK. UUK was not party to any contract involving POC. It was at least at one remove and acting in its own legitimate business interests and those of the UNIPEC group as a whole.

275. Thus, had it been necessary for me to come to a conclusion on the *MacDougall* test in respect of UHK's conduct, I would have found that UUK did not interfere and in any event that any interference was not malicious.

Conclusion

276. For the reasons set out above, I would dismiss the claim for tortious interference with contractual relations under New Jersey law against both UHK and UUK.

J. Quantum

277. As indicated above, the relevant law for the purpose of assessing damages is that of New Jersey. New Jersey law does not allow the recovery of damages which are speculative. There is agreement on the applicable measure of loss: compensatory damages would consist of the commissions that POC would otherwise have earned i.e. 1.25% of the amount that would have been received by TI had the COA been performed according to its terms. Although there has been no proper disclosure or evidence on the question of savings, POC concedes that it must give credit for its savings as a result of not having serviced the 2010 WAF COA in respect of the missed liftings.

278. A number of discrete additional issues arise, including whether or not the 2010 WAF COA was terminated by mutual abandonment and whether or not the doctrine of minimum performance applies. None of those were the subject of full oral submission at trial, due to constraints of time, although written submissions were available. POC invited me to adjourn questions of quantum altogether since, on any view, I would not be able to make a final award in the absence of evidence on savings. Matters were left on the basis that I should proceed as I thought fit at the end of my judgment.

279. On my findings of liability above, of course, POC is to recover nothing and questions of quantum do not therefore arise. I nevertheless record, albeit briefly, my conclusions on the two aspects of quantum on which it seems to me that I can safely reach final conclusions without further argument as follows:

a) The proper construction of SP3, which I set out again for ease of reference:

> *"3. PERIOD*
>
> *Three (3) years Contract of Affreightment.*
>
> *This contract should be automatically renewed annually upon its expiration, unless notice would be given by either party for anything otherwise 60 days prior to expiration of the governing contract."*

This is a question of English law, the governing law of the 2010 WAF COA. UHK and UUK contend that SP3 is no more than an unenforceable agreement to agree or that, on a true construction, the 2010 WAF COA is not renewed automatically in circumstances where it is no longer being performed and neither party is insisting on its continued performance. I reject both defence submissions. A provision that a contract term will roll for further periods unless prior notice is served is not unusual; it is certainly enforceable – see for example: *Commercial Union Assurance v Sun Alliance Insurance* [1992] 1 Lloyds' Rep 475. The construction advanced by UUK/UHK places too much weight on the clumsy language of SP3, in particular on the use of the word "*should*" rather than "*shall*". Objectively construed, the meaning of the clause is clear: the contract will renew automatically if no notice is given. The existence of a contractual mechanism for preventing renewal confirms this. Nor is there any proper basis for the suggestion that, properly construed,

renewal would not take place if the contract were not being performed. Indeed it is contrary to the express language of the clause;

b) The counterfactual, had UHK not ceased nominations under the 2010 WAF COA. This goes to the factual question of what commissions POC would otherwise have earned, and so is not a matter for the New Jersey law experts. I accept the evidence of Mr Xiao that, had the 2010 WAF COA continued to function, UHK would have served notice to terminate at least 60 days before the end of the 3 year term. As is apparent from my findings of fact on motive above, the 2010 WAF COA no longer suited the commercial trading interests of UHK and the UNIPEC group. UHK would have sought to exit at the first available opportunity. The fact that it did not serve notice in 2013 was most probably the product of UHK's belief that the 2010 WAF COA had fallen away and/or the fact that the 2010 WAF COA was not in UHK's mind at the relevant time in 2013, as it would otherwise have been. Additionally, there had been operational issues under the 2010 WAF COA, although I accept that they were, albeit in no way without significance, not major. Any damages would therefore be limited to loss of commission by reference to a 3 year contract period commencing on 1st May 2010.

280. The other issues on quantum would have had to be the subject of further submissions (and evidence on savings) in order for me to resolve them.

K. Conclusion

281. These were always difficult and ambitious claims. So much is demonstrated by the fact that POC has been forced during the course of the litigation to abandon many of its allegations, including bad faith, interference with the implied in law contract by UUK, and most recently conspiracy.

282. The enduring claim for breach of an implied in law promise against UHK fails because the proper law is not that of New Jersey. Even if New Jersey law were to have applied, I would not have been satisfied that the implied in law promise doctrine extended to the facts of the present case.

283. The claim for tortious interference with contractual relations fails against UUK and UHK because there was no interference with an established contractual right and no breach of the brokerage agreement between POC and TI. Even if that were not the case, there would have been no sustainable case against UUK for interference in fact or for the necessary malice.

284. POC, through Mr Guo, clearly has a strong sense of moral grievance with an expectation that, in some way, UUK and UHK must pay for – or bear the "*consequences*" of, as Mr Guo put it, – UHK's deliberate breach of the 2010 WAF COA. But in my judgment POC has no proper claim against either defendant in law. The claims will therefore be dismissed.

285. Finally, it would be wrong to leave this judgment without recording my thanks and appreciation to all counsel for the careful and courteous assistance with which they have provided me throughout this matter.