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Case No: CL-2023-000033

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 January 2026

Before :

LIONEL PERSEY KC
(sitting as a Judge of the High Court)

Between :

MERCURIA ENERGY TRADING SA

Claimant

- and -

ONEX DMCC

Defendant

David Lewis KC and Andrew Feld (instructed by **Stephenson Harwood LLP**) for the
Claimant
Simon Rainey KC and Henry Ellis (instructed by **Hill Dickinson LLP**) for the **Defendant**

Hearing dates: 7-8, 12 and 14 May 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 27th January 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Lionel Persey KC:

Introduction

1. This claim arises out of the tainting of a cargo (the “**Cargo**”) of Iraqi SOMO (State Oil Marketing Organisation) Basrah Pipeline High Sulphur Straight-Run Fuel Oil (“**SRFO**”). The Cargo was tainted with a higher than normal quantity of Organic Chlorides. The Cargo was sold by the Defendant, Onex DMCC (“**Onex**”), to the Claimant, Mercuria Energy Trading SA (“**Mercuria**”) pursuant to a contract concluded on CIF terms. Delivery was to be made in the US Gulf Coast.
2. The Parties are both oil traders. Mercuria is a substantial global trader based in Switzerland. Onex is based in the Middle East and its trade is largely focussed on the sale of oil that originates in Iraq. The Parties had traded Iraqi SRFO cargoes before on two or three previous occasions. Each of these trades had been concluded between Mr von Schweinitz for Mercuria and Mr Taeeb for Onex.

The witnesses

3. Each party called one witness of fact and two expert witnesses.
4. Mercuria led evidence from Mr Wilhelm von Schweinitz. He is Mercuria’s head of fuel oil trading and origination for Europe, the Middle East and the Americas. He is an experienced and obviously competent trader. He was an excellent witness and I found his evidence to be compelling. Onex called Mr Bawan Taeeb. He is a trader employed by Onex and is based in Dubai. He was a confident witness and seemed to me to be highly competent. His evidence was, however, marred by a tendency to exaggerate – for example, he sought to give the impression that he would have been able to sell cargo with a high OC content with relative ease. I did not find this to be supported by any evidence. I accordingly found it necessary to treat Mr Taeeb’s evidence with care.
5. Mr Neil Whitehead and Mr Peter Jones were called respectively by Mercuria and Onex as chemistry experts. Mr Whitehead is a consultant at Minton, Treharne Davies and Mr Jones gave evidence on behalf of CJH Experts. They both have considerable experience of dealing with contaminated oil cargoes and both gave their evidence well and fairly.
6. Dr Ian Holdaway and Ms Catherine Jago were called as pricing and quantum experts. Both have considerable experience as consultants and expert witnesses. Neither has experience of trading SRFO into the USGC. I found Dr Holdaway’s evidence to be more realistic than Ms Jago’s. Ms Jago accepted that she had adopted a very hypothetical approach when assessing what Mercuria could have achieved had it acted differently.

The Cargo and Organic Chlorides

7. SRFO is a petroleum mix which does not contain cracked products - those products which emanate from refinery downstream cracking processes such as fluid catalytic cracking, hydrocracking, and thermal cracking.

8. The main (and often only) component of SRFO is atmospheric residue from the crude oil atmospheric distillation column. Atmospheric residue may be blended with other straight-run and/or cracked components for the bunker fuel market. However, its main use is as refinery feedstock for cracking processes. These downstream cracking processes transform the heavy atmospheric residue to more valuable lighter products like gasoline and gas oil/diesel. In the refinery feedstock market, SRFO tends to attract a premium price compared to its use within the lower-value bunker fuel market.
9. Traders sell SRFO either by means of a differential to a Brent crude benchmark, or to cracked fuel oil (HSFO). While it is more common for SRFO to be sold into the US at a differential to Brent, it can be traded at a differential to a cracked fuel oil benchmark. The differential that might be achievable to Brent prices varies depending on, amongst other factors, the market prices of gasoil and gasoline relative to Brent.
10. Two types of chlorides exist in crude oil – inorganic chlorides and organic chlorides. Inorganic chlorides are easily removed in the refinery via the crude oil desalting process. However, Organic Chlorides are not removed by desalting. They are generally deleterious to refinery processes.
11. Historically, SRFO, comprising as it did solely atmospheric residue, was not expected to contain any significant quantity of Organic Chlorides. This was based on two assumptions. First, Organic Chlorides were assumed to be present only in the lighter components of crude oil, such that they would not be present in heavier residues, and secondly, SRFO did not contain any of these lighter components. Neither of these assumptions, however, is correct in all cases. SRFO can potentially contain Organic Chlorides from “naturally occurring” sources (i.e. if it is present in the crude oil being processed) and/or from upstream chlorinated chemicals, where the Organic Chlorides are present within the boiling point range of the SRFO.
12. Organic Chlorides can lead to chloride corrosion of a refinery’s atmospheric crude oil distillation column. This is caused by hydrolysis of the Organic Chlorides to hydrochloric acid which deposits on the internal colder surfaces of the distillation overheads cooling system equipment. Because of this crude oil distillation tower overheads have effective corrosion mitigation systems. However, SRFO is typically not processed in the refinery crude oil atmospheric distillation column, but is heated and fed to a downstream vacuum distillation tower. Generally vacuum tower overhead systems are not fitted with corrosion mitigation systems and therefore Organic Chlorides can cause accelerated corrosion of the tower overhead facilities.
13. Whether or not Organic Chlorides are excessively corrosive to refinery equipment will depend on their actual level. Increasing Organic Chloride levels in refinery feedstock will, certainly over time, lead to greater corrosion rates if it is not possible to mitigate those higher levels.

The facts

14. The “RELIABLE WARRIOR” (“**the Vessel**”) loaded a total Cargo of 138,504.768mt (equivalent to 913,541bbls) in stages between 11 July 2022 and 6 August 2022. She first loaded 96,053.917mt at Kaz OPL between 11 and 12 July 2022 via STS with MT

“NEW TINOS”. She then proceeded to Vopak Terminal at Fujairah, UAE, where she part discharged 44,476.21mt of the original parcel loaded at Kaz. This discharge was completed on 18 July 2022. The Vessel returned to Kaz and loaded a further parcel of 70,166.167MT via STS with MT “GOOD NEWS”, loading completing on 27 July 2022. She then proceeded back to Vopak Terminal at Fujairah and loaded a final parcel of 18,656.775MT. Loading was completed on 6 August 2022.

15. It is common ground that the high Organic Chlorides in the Cargo originated from the parcel loaded from the MT “GOOD NEWS” at Kaz. This parcel comprised approximately 51% of the total Cargo.
16. On 25 August 2022 Mr Taeeb was informed that Vitol and SK traders had lifted Iraqi cargoes with an Organic Chloride content exceeding 50ppm. On 30 August 2022, after an enquiry by Mercuria about the Organic Chloride content of the Cargo that had been prompted by noise in the market about higher than usual Organic Chloride levels in Iraqi cargoes, Mercuria received from Bureau Veritas what purported to be a certificate of analysis (“CoA”) produced on 8 August 2022. This certificate was issued in relation to a sample taken from the Vessel after completion of loading at Fujairah. It stated that the Organic Chloride content of the Cargo was <1ppm under test method UOP 779. Although dated 8 August 2022, the CoA had not been provided with the other quality documents that had been prepared by Bureau Veritas on around that date. The testing of the sample which led to the CoA had been arranged by Mr Taeeb.
17. It is common ground between the Parties that the analysis in this CoA was erroneous. No explanation has been given as to the circumstances in which the CoA came to be produced.
18. Given the rumours about Organic Chloride contamination in other SOMO cargoes, Mercuria sought further testing of samples from the loading of the Cargo. On 1 September 2022, Mercuria received the results of an analysis by AmSpec indicating the presence of Organic Chlorides at 8ppm in a composite sample from the Vessel after loading.
19. On 7 September 2022, the Vessel arrived at the Southwest Lightering area in the USGC and commenced lightering into MT “PACIFIC PEARL”. Thereafter a series of tests using a variety of test methods were performed on behalf of Mercuria and Valero in an attempt to ascertain the exact Organic Chloride content of the Cargo.
20. On 8 September 2022, Mr von Schweinitz informed Mr Taeeb that “*we are testing 48ppm organic chlorides at disport*”. Mr Taeeb responded, providing a suggested test method, and continued thereafter to offer suggestions and advice to Mr von Schweinitz on finding test methods that might show a lower Organic Chloride level.
21. On 9 September 2022 the Vessel completed the lightering of 46,300 MT into MT “PACIFIC PEARL”. Also on 9 September 2022, as part of a discussion of how to mitigate the situation, Mr Taeeb suggested to Mr von Schweinitz a method for heating “*to 60.00c*” and purging the SRFO in order to reduce its Organic Chloride content. On 11 September 2022, Mr Taeeb again raised the possibility of heating and purging with

Mr von Schweinitz, saying: *“Morning chief, the heating really does work... Heat to 45, 50, 55 and 60. ... If you can agree surveyor to do the stirring and remain representative of cargo on board, I’m sure you’ll get less than 1ppm”*.

22. On 13 September 2022, Valero rejected the Cargo by reason of its high Organic Chloride content. Valero identified the MT “GOOD NEWS” as the “source” of the Organic Chloride.
23. Following Valero’s rejection, Mr Taeeb continued to encourage Mr von Schweinitz to heat and purge the Cargo on board the Vessel by way of mitigation, and Mercuria sought to do so.
24. In tandem, Mercuria also made attempts to persuade Valero to take the Cargo “as is” or as a blend, including by using the alternative testing methods suggested by Mr Taeeb. On 15 September 2022, Mr von Schweinitz told Mr Taeeb that Valero would “20% accept with discount; 80% reject”.
25. On 20 September 2022, Mercuria began to investigate reselling part of the Cargo to PBF Holding Company LLC (“PBF”) with the balance to Exxon. On 22 September 2022, the MT “PACIFIC PEARL” completed de-lightering back to the Vessel and Valero’s rejection was confirmed.
26. On 23 September 2022, Mercuria entered into a contract of sale with PBF for 525,00 bbl +/- 5% “IRAQI HIGH-SULPHUR STRAIGH-RUN FUEL OIL” with Organic Chloride of maximum 5ppm, for delivery DAP Chalmette from the Vessel in the period 1 to 10 November 2022 (“the PBF Sale”). At that point, Mr von Schweinitz believed that he would be able to reduce the Organic Chloride content of the Cargo on board the Vessel in time for delivery in November 2022.
27. Following the sale to PBF, Mercuria continued to investigate the possibility of making a further sale to Exxon, as well as exploring other opportunities to sell the Cargo, including to Galaxy Energy Group. Mr von Schweinitz also began to consider opportunities to purchase blendstock.
28. By 14 October 2022, it had become apparent that heating and purging of the Cargo would not work. Mr von Schweinitz advised PBF of this and sought to agree a discount for a sale on an “as is” basis. PBF rejected the Cargo on 19 October 2022.
29. Given the failure of the heating and purging, Mr von Schweinitz then sought to explore the possibility of blending the Cargo and marketing the proposed blend.
30. On 20 October 2022, Mr von Schweinitz contacted PBF to enquire whether it would accept a blend of the Cargo with a cargo of medium sulphur SRFO from BP. On 23 October 2022, Mercuria entered into a contract with BP to purchase 41,000mt medium sulphur SRFO with a maximum Organic Chloride content of 2 ppm as determined by method EN14077, DES USGC in the period 5-7 November 2022 (“the BP Purchase”).

31. On 24 and 25 October 2022, Mr von Schweinitz continued to try to persuade PBF to accept a blend with the BP cargo. In parallel, Mercuria began looking for other blendstock and also made further enquiries as to whether Valero would take the Cargo “as is” at a discount, or accept a blended cargo. PBF rejected the proposed blend, and on 27 October 2022 Mercuria and PBF agreed to cancel the PBF Sale.
32. By 27 October 2022, Mr von Schweinitz had concluded that the best option would be to move the Cargo to storage at Borco, particularly in circumstances where demurrage on the Vessel was continuing to accrue and the fuel oil market was weakening.
33. On 28 October 2022, having failed to find a buyer for the planned blend using the cargo it had purchased from BP, Mercuria resold that cargo back to BP.
34. Concurrently, Mr von Schweinitz observed to Mr Taeeb that the Cargo was “*extremely hard to place*”, because USGC refiners were becoming paranoid about the Cargo and because Onex’s own practice of blending contaminated cargoes into low Organic Chloride Iraqi cargoes at source was making it difficult for Mercuria to source blendstock and market a blend. Mr Taeeb observed “*I think they know you’re distressed...*”.
35. In late October 2022, Mr von Schweinitz continued to look into the possibility of marketing Iraqi/Mexican or Iraqi/Colombian blends as well as looking out for any opportunity to sell part of the Cargo “as is”.
36. On 4 November 2022, the Vessel arrived at Borco. The Vessel commenced discharging into Tanks 8033, 8020 and 8003. Mr von Schweinitz was at the time assessing the possibility of blending part of the Cargo with a Mexican cargo of SRFO from Vitol.
37. On 8 November 2022, Mr von Schweinitz started exploring selling quantities of the Cargo “as is” to Aramco as “top ups”. In parallel, he had still not given up on the possibility of selling at least part of the Cargo “as is” to Valero. This was being investigated by one of Mercuria’s brokers.
38. On 13 November 2022, the Vessel completed discharge of the Cargo into shore tanks at Borco.
39. In mid-November, Mr von Schweinitz continued with his efforts to source blendstock and market a blend. These efforts include a possible sale to Motiva Enterprises (a refinery belonging to Aramco). To that end, Mercuria instructed AmSpec to test a hand blend of the Cargo (20% Cargo/80% blendstock). However, on 15 November 2022 Mr von Schweinitz reported that “*Motiva don’t want inventory over year-end and are drawing down stocks, so unfortunately not a buyer at the moment*”.
40. On 16 November 2022, Mr von Schweinitz reported internally that he was “*working 4 angles: a) diluting with 1ppm chlorides Iraqi to sell as max 5ppm into the USD. b) sell small topups to incoming USG-bound Aramco Iraqi cargoes c) Motiva coker feed for*

January d) Blending with Colombian into HSFO bunkers. This will last into January for sure”.

41. On 28 November 2022, Mr von Schweinitz informed Mr Taeeb that he was still seeking to buy blendstock and blend the Cargo “... *but only if I can match with a short!... plenty [low Organic Chloride cargo] around, buying is easy – selling is the tricky bit”*. Mr von Schweinitz suggested that Onex buy the Cargo in Borco, but Mr Taeeb refused. Mr Taeeb did, however, say that “*I’ll help you correct so you don’t lose on the additional cargo you buy*”. Mr von Schweinitz asked Mr Taeeb for evidence of the quality of the low Organic Chloride cargo Onex had in storage, who offered to provide samples.
42. Following that conversation, on 29 November 2022 Mr von Schweinitz asked Mr Taeeb to release samples of Onex’s SRFO at Borco (which had been discharged from MT “SHENLONG SPIRIT” into Tanks 8021, 8027 and 8037) to “*find out what ratio works to blend your and my Iraqi in Borco to 5ppm max*”. Onex released these samples.
43. Thereafter, AmSpec proceeded to test a series of hand blends using Onex’s Borco SRFO between 29 November 2022 and around 7 December 2022. The analyses of the Organic Chloride content of the Onex SRFO at Borco showed that these averaged between 2ppm and 3ppm.
44. On 30 November 2022, Mr von Schweinitz reported back to Mr Taeeb on his attempt to sell top-ups to Aramco. On 6 December 2022, Mr von Schweinitz sent an update internally: “*Due to refinery’s year-end pressure to minimize stock levels, getting a part of this Iraqi sold for December is not possible.*”
45. As at 15 December 2022, Mr Taeeb was continuing to press the merits of heating and purging contaminated cargo, notwithstanding Mr von Schweinitz’ view that it “*sounds almost too good to be true*”. Meanwhile, Mr von Schweinitz was concerned that Onex flooding the market with SRFO was making it more difficult for him to dispose of the Cargo.
46. On 22 December 2022, Mr von Schweinitz was still pursuing the possibility of selling a blended cargo to Motiva, and asked internally for an analysis of blends for that purpose. He was also seeking to sell a blended cargo to PBF or Litasco, although noted that the position was complicated by the fact that Onex was also competing for the same sales with a large quantity of SRFO: “*I just don’t want to compete too hard here ... with Onex for the same short...*”. The same day, Mr von Schweinitz said: “*Of course continuing to try and place the phys, but it’s a crowded space still, quite a bit of overhang stored in Borco*”.
47. On 11 January 2022, Mr von Schweinitz enquired about whether a further Onex cargo at Borco was of a specification that could make it suitable for blending with the Cargo. By the end of January/early February 2023, however, Mr von Schweinitz made the decision that the only option was to downgrade the Cargo and sell it “as is” into the cracked/bunker fuel oil market.

48. Mercuria sold the Cargo in four parcels as follows:-
- (1) On 3 February 2023, Mercuria sold part of the Cargo to Trafigura (“**the Trafigura Resale**”). The Trafigura Resale was for 300,000-400,000bbls “*HSSR, IRAQI ORIGIN*” FOB Borco in the period 4-20 February 2023. The price was the mean of Platts Gulf Coast Houston No. 6 Fuel Oil 3% quotations plus a premium of USD 3.00/bbl, with a pricing period of 8-28 February 2023 for the first 300,000bbls and 10 consecutive quotes after the BL date for the balance. The Trafigura Resale came about in circumstances where Trafigura required a specific quality of fuel oil for a blend they were preparing for a sale into the Dominican Republic for use in a power generation plant. On 8 February 2022, Mr von Schweinitz discussed this Trafigura Resale with Mr Taeab: *“I hear you think I sold too cheaply from Borco, some of the contaminated Iraqi I got from you... You have not presented me with a bid while I had asked that from you to rectify the chlorides situation. I have tried for months to get this cargo sold.... Given you have literally flooded the market with Iraqi HSSR in the last months, you made it impossible really to correct. It would have taken like a 20% of min with 80% of other ie need to buy 4m bbls to rectify 1mb, huge cost... numbers that you and others are selling in the USG are pretty close to cracked levels”*. On 19 February 2023, Mercuria delivered 392,652.23bbls of the Cargo to Trafigura under the Trafigura Resale;
 - (2) On 9 February 2023, Mercuria resold a further parcel of the Cargo to Shell (“**the Shell Resale**”). The Shell Resale was for 56,000bbls +/- 5% “*HSFO*” ex-tank Borco during the period 11-15 February. The price was the mean of Platts Gulf Coast Houston No. 6 3% Fuel Oil quotations in the period 13-15 February 2023 plus a premium of USD 0.8/bbl. On 12 February 2023, Mercuria delivered 59,010.94 bbls of the Cargo to Shell under the Shell Resale;
 - (3) On 13 February 2023, Mercuria resold a further parcel of the Cargo to Hartree Partners LLP (“**the Hartree Resale**”). The Hartree Resale was for 454,000bbls “*HIGH SULPHUR STRAIGHT-RUN OR SOMO IRAQI ORIGIN*” FOB Borco in the period 13 to 14 February 2023. The price was the mean of Platts USGC HSFO during the period 13-28 February 2023 plus a premium of USD 3.25/bbl. The Hartree Resale came about because Hartree needed supply into a power plant in Panama. On 17 February 2023, Mercuria delivered 455,930.40 bbls of the Cargo to Hartree under the Hartree Resale;
 - (4) On 28 February 2023, Mercuria sold the balance of the Cargo to Buckeye Bahamas Hub Limited (“**the Buckeye Resale**”). The Buckeye Resale was for 4,005 bbl “*IRAQI HSSR*” FOB Borco in the period 7-20 March 2023. The price was the mean of Platts USGC HSFO quotations on 7 March 2023 plus a premium of UDS 3.25/bbl. On 10 March 2023, Mercuria delivered 4,005 bbls of the Cargo to Buckeye under the Buckeye Resale.
49. Very varied results had been obtained for the Organic Chloride content of the Cargo. The Parties had at the time used test methods such as UOP 779, ASTM D4029 and ASTM D7536, or variations thereof. It is common ground between the Parties’ experts that none of these in fact provided an accurate assessment. They agreed that the only suitable method for accurately determining the Organic Chloride content was the EN 14077 test method. The Cargo was not analysed using this method at the time. When samples from the Cargo were tested according to the EN 14077 method they showed that the level of Organic Chlorides in them averaged 16ppm.

Liability

The Contract terms

50. The following terms of the Contract are relevant:

(1) The Recap provided that the “*PRODUCT*” was:

“... SOMO BASRAH PIPELINE HIGH-SULPHUR STRAIGHT-RUN FUEL OIL IN LINE WITH THE FOLLOWING TYPICALS:

Test	Method	Unit	Result	Min - Max
...
Organic Chloride	UOP 779	ppm (m/m)	4.10	5 Max
...

AND MEETING THE FOLLOWING GUARANTEES :

...
[TABLE OF GUARANTEED SPECIFICATIONS: these did not include Organic Chlorides]
...

(2) The Additional Terms provide, inter alia, as follows:

“... Commodity/Product:

...

ii) Parcel B

SOMO Basrah pipeline high-sulphur straight-run fuel oil in line with typicals as per Table 1

Table 1: SRFO Typicals

Test	Method	Unit	Result	Min - Max
...
Organic Chloride	UOP 779	ppm	4.10	5 Max

		(m/m)		
...

Quantity:

...

ii) *Parcel B:*

150,000 Metric Tonnes, (+/-10%) of SOMO High-Sulphur Straight-Run Fuel Oil.

Quality:

Both parcels meeting all the following specifications specified below in Table 2:

Table 2: Guarantees

[TABLE 2 - these did not include Organic Chlorides]

...

General Terms and Conditions [“the BP GTCs”]:

Except as specifically detailed above, BP Oil International Limited General Terms and Conditions for Sale and Purchases of Crude Oil and Petroleum Products 2015, version 1.2 shall govern this transaction...

(3) The BP GTCs provide, inter alia, as follows:

“... Section 57 – Definitions and Interpretation

57.1 Definitions

In the Agreement (as hereafter defined) unless the context otherwise requires:

...

57.1.3 *“the Agreement” means these General Terms and Conditions (including, where applicable, the Schedules attached hereto) together with the Special Provisions;*

...

57.1.51 *“Product” means wholly or partially refined petroleum product ... of the grade specified in the Special Provisions...*

...

57.1.59 *“Special Provisions” means the oral or written agreement in which, by reference, these General Terms and Conditions are incorporated to form the Agreement;*

...

57.1.61 “typical” means a quality or characteristic often attributable to ... Product from a particular source, given without guarantee and not amounting to a representation or warranty that such typical quality or attribute will be present in the ... Product supplied ...

...

Section 59 – Quality and claims in respect of quantity/quality

59.1 Quality

59.1.1 Unless otherwise stated in the Special Provisions, the quality of ...[the] Product delivered hereunder shall not be inferior to the specification (if any) set out in the Special Provisions. Whether set out in these General Terms and Conditions or in the Special Provisions neither typicals nor any stipulation as to time of delivery shall form part of the ... Product’s description, quality or fitness for purpose. This sub-section constitutes the whole of the Seller’s obligations with respect to the description, quality and fitness for purpose of the ... Product and (save to the extent that exclusion thereof is not permitted or is ineffective by operation of law) all statutory or other conditions or warranties, express or implied, with respect to the description or satisfactory quality of the ... Product or its fitness for any particular purpose or otherwise are hereby excluded ...

...

74.4 Conflict

In the event of conflict or inconsistency between these General Terms and Conditions and the Special Provisions, the Special Provisions will prevail over these General Terms and Conditions ...”

The issues

51. The following issues of liability arise between the Parties:-
- (1) Mercuria contends that Onex had an obligation to deliver a Cargo “in line with” a typical Organic Chloride content of 4.1ppm (in the context of a maximum of 5ppm), notwithstanding the incorporation into the Contract of the BP GTCs. Onex says that effect of s.59.1.1 of the BP GTCs is that there was no such obligation;
 - (2) Alternatively, Mercuria relies upon the terms of the Contract that the Cargo (1) be “100% SOMO IRAQI HSSR”, and in any event (2) be not inferior to its specification as “SOMO BASRAH PIPELINE HIGH-SUPHUR STRAIGHT-RUN FUEL OIL”. Onex does not dispute that these were terms of the Contract but denies that it was in breach of them.

“In line with the following typicals”

52. Mercuria submits that the words “in line with” are words of obligation and that section 59.1.1 of the BP GTCs does not “declaim” that agreement in circumstances where

- (1) this provision was not incorporated because the BP GTCs were only incorporated “except as specifically detailed above” and the Additional Terms specifically required that the Cargo must be “*in line with the following typical*s”; and/or
 - (2) the provision would be in conflict with and/or inconsistent with the provision in the Recap or the Additional Terms that the Cargo be “*in line with the following typical*s” and so the latter terms prevails; and/or
 - (3) the Parties had “*otherwise stated in the Special Provisions*” for the purposes of section 59.1.1.
53. Onex submits that, on a proper construction of the Contract:
- (1) The Parties in describing the “*Product*” by reference to “TYPICALS” were using the term in the sense defined in the definitions section of the BP GTCs at Section 57.1.61, i.e. that it is a quality or characteristic “*often attributable to the “Product” but given without guarantee and without any promise that the typical quality or attribute would in fact be present*”;
 - (2) Section 59.1.1 of the BP GTCs is the exclusive contractual provision dealing with “Quality of Product” and confined this to the agreed “Specifications” set out in and as part of the Recap under the heading “Quality” and in Table 2 thereof;
 - (3) Section 59.1.1 took full effect in excluding “typicals” as not forming part of the description, quality etc of the “Product”;
 - (4) The words “*in line with*” do not override the preceding provisions; and
 - (5) There is no conflict between section 59.1.1 (or section 57.6.1) and the Recap and/or the Additional Terms, nor did the Parties “*otherwise state in the Special Provisions*” for the purposes of Section 59.1.1.
54. Both Parties referred me to the judgment of Males LJ in *Septo Trading Inc v Tintrade Ltd* (“**The Nounou**”) [2021] EWCA Civ 718; [2021] 2 Lloyds Rep 591. In *The Nounou* Males LJ addressed the approach that a Court should take towards the construction of a contract which contains both printed and specially agreed terms. He said this at [28]:
- “... there is a distinction between a printed term which qualifies or supplements a specially agreed term and one which transforms or negates it. In order to decide on which side of this line any particular term falls, the question is whether the two clauses can be read together fairly and sensibly so as to give effect to both. This question must be approached practically, having regard to business common sense, and is not a literal or mechanical exercise. It will be relevant to consider whether the printed term effectively deprives the special term of any effect (some of the cases describe this as the special term being “emasculated”), but in my view it [is] more helpful to say that it is deprived of effect). If so, the two clauses are likely to be inconsistent. It will also be relevant to consider whether the specially agreed term is part of the main purpose of the contract or, which is much the same thing, whether it forms a central feature of the contractual scheme. If so, a printed term which detracts from that scheme is likely to be inconsistent with it. Ultimately, the object is to ascertain the intention of the parties as it appears from the language in its commercial setting ...”*
55. Onex also relied upon the judgment of Popplewell J (as he then was) in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* (“**The Ocean Neptune**”) [2018] 1 Lloyd’s Rep. 654, in which he said this at [8]:

“... The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each ...”

56. The following arises out of the above decisions:
- (1) First, the approach to construction depends upon ascertaining the intention of the parties as it appears from the language that they have used against the commercial setting in which the contract has been concluded. In other words, the court must ascertain what a reasonable person, that is to say a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant.
 - (2) Secondly, there is no magic in the fact that a contract contains both printed and specially agreed terms. The correct approach to construction is to take a practical approach, and not a literal or mechanical one.
 - (3) Thirdly, if upon a practical construction, the printed term effectively deprives the special term of any effect, then the two clauses are likely to be inconsistent.
 - (4) Fourthly, if, however, the two clauses can be read fairly and sensibly so as to give effect to both then the court is likely to construe the Contract accordingly.
57. I start, as did Males LJ in *The Nounou*, with the specially agreed terms. The first point to note is that the Contract contains two tables: a table of Typical and a table of Guaranteed Specifications. The table of Typical refers to the Organic Chloride content of the Cargo. The table of Guaranteed Specifications does not. Both tables, however, include references to, for example, the water, ash and sulphur content of the product. This strongly suggests that those parameters identified in the Typical table fall to be considered separately from those in the Guaranteed Specifications table. It also suggests that the matters identified in the table of Typical are something other than guaranteed specifications. It is noteworthy that the table of Guaranteed Specifications,

albeit quoted by them, was not addressed by Mercuria in its skeleton argument before trial.

58. The table of Guaranteed Specifications means what it says. These are the specifications that the seller is prepared to guarantee and does guarantee.
59. For the meaning of “Typicals” it is, I consider, appropriate to turn to the BP GTCs in which they are defined and explained. The BP GTCs provide at clause 57.1.61 that a typical is a characteristic that is “*often attributable to the “Product” but given without guarantee and without any promise that the typical quality or attribute would in fact be present*” and at clause 59.1.1 that “*neither typicals nor any stipulation as to time of delivery shall form part of the ... Product’s description, quality or fitness for purpose*”. On the face of the printed terms, therefore, a Typical is not a guaranteed specification or even a warranty.
60. Mercuria contends, however, that this is not the meaning that I should ascribe to the word “typicals” as used in the Special Conditions. The relevant words there are “*in line with the following typicals*” and Mercuria says that I should construe these words without reference to the BP GTCs. Viewed alone, the argument goes, these words amount to a warranty that the Cargo sold will meet the typicals there identified. Onex submitted that this approach is wrong, and that it is inconsistent with the authorities.
61. I agree with Onex. It is, in my judgment, as Bingham LJ found in *Pagnan SpA v Tradax Ocean Transportation* [1987] 2 All ER 565 at 573:
“... *quite wrong to approach this question of construction with any predisposition to find inconsistency between the special condition and the [printed terms]. They are all part of the same contract ... the parties expressly chose to make their contract subject to the [printed terms]...*”
The Contract must, therefore, be construed as a whole. By including the inconsistency clause the parties have acknowledged that there may be some inconsistency. As Bingham LJ went on to hold (at 574):-
“... *One should therefore approach the documents in a cool and objective spirit to see whether there is inconsistency or not. It is a commonplace of documentary construction that an apparently wide and absolute provision is subject to limitation, modification or qualification by other provisions. That does not make the later provisions inconsistent or repugnant. ...*”
62. It is, therefore, incorrect to construe the special conditions without reference to the printed terms. The Contract must be construed as a whole. The BP GTCs contain a clear explanation of the meaning of “typicals”. In any event, I am entirely unpersuaded by Mercuria’s submission that “*in line with the following typicals*” has the meaning for which it contends. The Contract, when read as a whole, draws a distinction between the guaranteed specifications on the one hand and Typicals on the other. The use of the words “*in line with*” is not sufficient to elevate a “typical” characteristic into a warranty. They have no more significance than if the Contract had, for example, instead provided “typicals as follows” or in “accordance with the following typicals”. The crucial word is “typicals” and that is defined and explained in sections 57.1.61 and section 59.1.1 of the BP GTCs.

63. I now consider the matter according to the four steps that I have identified in paragraph 56 above.
- (1) *The intention of the parties.* A reasonable person in the position of these experienced parties would, in my view, have understood the Contract ordinarily to draw a distinction between Guaranteed Specifications and Typicals. The BP GTCs are often incorporated into sale contracts of this kind. Mercuria accepted that they were commonly used. Mercuria submitted that Onex had not pleaded that the incorporation of the BP GTCs was customary in this sort of sale contract and that it had therefore been prejudiced in being unable to lead evidence to address this point. I do not agree. Although their incorporation may not be customary, the BP GTCs are nevertheless well known in this industry, and are frequently used by sellers and buyers (including in *The Nounou*, where Males LJ observed at [30] that they were widely used). I find that both parties were in fact, and in any event should have been, aware of these terms.
 - (2) *A practical approach.* In my judgment the taking of a practical approach involves considering all of the terms in the Contract, that is to say both the special conditions and the BP GTCs.
 - (3) *Do the printed terms deprive the special conditions of any effect?* No, they do not. I consider that they do no more than supplement and, where necessary, explain or define the terms used in the special conditions. There is, in my judgment, no relevant inconsistency between the special conditions and the printed terms.
 - (4) *Can the special conditions and the printed terms be read fairly and sensibly together?* I consider that the special conditions and the printed terms both can, and indeed should, be read together. The Contract clearly shows which characteristics were guaranteed specifications and which were merely non-binding typicals.
64. It follows from the above that I am unable to accept Mercuria's case that Onex was in breach of any obligation to supply cargo that complied with the Organic Chloride typical identified in the Contract. Had Mercuria wished Onex to be under a contractual obligation with regard to Organic Chloride levels then they should have ensured (as had Valero in their contract with Mercuria) that the Contract contained a guarantee that the Organic Chloride content of the SRFO would not exceed 5ppm.

Was the Cargo "100% SOMO IRAQI HSSR"?

65. Mercuria asserts that because, as was agreed between the chemical experts, "the cargo contained material of non-SR origin" Onex was therefore in breach of a guarantee that the product was *100% SOMO IRAQI HSSR*. This argument was first raised by Mercuria in their skeleton argument for this trial. Onex submits that there was no such breach and that the only guarantee which they gave was that 100% of the Cargo would be of Iraqi origin, supplied by SOMO. Alternatively, Onex contends that the Organic Chloride was insignificant, volumetrically speaking, and was therefore *de minimis*.
66. I consider that Onex is correct in submitting that the 100% requirement was concerned with the origin of the Cargo. The relevant contract term, in full, is
"*... 100% SOMO IRAQI HSSR, TRACEABLE BY COO ISSUED AT KAZ AND INDIVIDUAL COO'S FOR SHUTTLES THAT MAKE UP THE FUJAIRAH PARCELS ...*"

This 100% requirement has, in my view, nothing to do with quality requirements. The obligation is to deliver 100% of SOMO supplied HSSR of Iraqi origin. Mr Lewis submitted that this requirement should be regarded as one relating to the quality of the HSSR because it appears in a part of the contract which deals with quality. That may be so, but this does not alter the fact that the provision is dealing with the origin of the cargo and not its quality, save perhaps insofar as its origin can properly be regarded as part of its quality.

67. It is accordingly unnecessary for me to consider Mercuria's case further save to observe that, even if I had considered that their construction was correct I would nevertheless reject it. This is because it is accepted that Organic Chlorides will be present in HSSR. If there had been 5ppm of Organic Chlorides present Mercuria would still, on their 100% case, be able to reject the Cargo. That would clearly not be correct.

Was the Cargo SOMO BASRAH PIPELINE HIGH-SULPHUR SRFO?

68. Mercuria's third argument is that the level of Organic Chlorides was such that the Cargo no longer complied with its specification and/or that it was inferior to that specification in breach of section 59.1.1 of the BP GTCs. Onex submits that the Cargo had not lost its commercial identity by reason of the contamination.
69. The key question, in my judgment, is whether the Cargo had lost its commercial identity as a result of the contamination. In a contract for a sale of unascertained goods by description, the description is "*confined to those words in the contract which were intended by the parties to identify the kind of goods which were to be supplied*": *Ashington Piggeries v Christopher Hill* [1972] AC 441, per Lord Diplock, at 503. The test for whether the goods supplied by the seller meet the contractual description is "*whether the buyer could fairly and reasonably refuse to accept the physical goods proffered to him on the ground that their failure to correspond with that part of what was said about them in the contract makes them goods of a different kind from those he had agreed to buy*": *Ashington Piggeries*, per Lord Diplock, at 503-504.
70. In the present case Mercuria alleges that the Cargo was contaminated with a significant quantity of Organic Chlorides. The learned editors of *Benjamin: Sale of Goods* 12th Ed (2023) have observed as follows (at §11-020):

"... As regards substances which contain admixtures of other substances...the question is normally whether the admixture...is sufficiently significant to make the basic substance lose its identity from a commercial point of view. Goods may be subject to a defect which is commercially significant in the sense that it reduces their value in the market without suffering a change of description. Often the test employed is quantitative. But where the admixture makes the resultant substance toxic, quite a small amount of foreign matter may prevent the goods from conforming with description. Toxicity is nevertheless to some extent a relative notion, for substances may be poisonous to certain creatures and not to others, or in certain quantities and not in others. The extent to which a product should be regarded as toxic may therefore depend on the description under which it is sold, its normal use and so forth ..."

71. Did the goods lose their commercial identity by reason of the contamination? It is not enough for the contamination simply to impact on their value. As Mustill J held in *Gill*

& *Duffus v Berger* [1981] 2 Lloyd's Rep. 233 at 236, when deciding whether a contamination of Bolita beans resulted in a change of description:

"... The finding that the admixture was "commercially significant" is not enough for the purpose of the buyers' case under s. 13. Goods may well be subject to a defect which is commercially significant – in the sense, for example, that the defect makes them worth less in the market than they would otherwise be worth – without the goods necessarily suffering a change of description as a result ...

... What matters is not whether coloured beans are different from Argentine Bolita beans, but whether a consignment consisting principally of Argentine Bolita beans but admixed with the quantity of coloured beans which the arbitrators found to have been present, can or cannot still be described as a consignment of Argentine Bolita beans ..."

72. The present Contract was a sale by description. Pursuant to the specification and clause 59.1.1, the Parties replaced the general obligations under the Sale of Goods Act 1979 with a single obligation to deliver on-specification product in compliance with the guaranteed levels. The guaranteed specification was a statement as to the quality of the Cargo. This was not, however, part of the description of the goods: see *Benjamin* at §11-016.
73. The relevant description of the "Product" was: "*SOMO BASRAH PIPELINE HIGH-SULPHUR STRAIGHT-RUN FUEL OIL*". The question that I have to determine is whether the Cargo had lost its commercial identity as SRFO? There is no dispute that the Cargo originated from Iraq and from SOMO or that it was high-sulphur and complied with its guaranteed specification. The only dispute between the parties was whether it was (or was only) SRFO.
74. The case for *Mercuria* depended upon the evidence of Mr Whitehead who stated that (1) the Organic Chloride content and composition was such that the Cargo was not comprised solely of SRFO and on a technical basis was not SRFO because it contained non-straight run material; and that (2) the high Organic Chloride content of the Cargo would have been harmful from a corrosion perspective to refineries. These refineries could only manage SRFO with lower maximum concentrations, if the Cargo was to be used as a feedstock on an "as is" basis; and (3) although the presence of non-straight run material would not necessarily preclude its use in a refinery in a similar manner to SRFO (i.e. being fed into the refinery units which process SRFO), because the Cargo would have required some modification (e.g. by blending) to convert it into feedstock that a refinery could actually process in the same manner as SRFO, the Cargo could not be processed as would be expected for a cargo complying with a description of SRFO.
75. *Onex* submitted that it was apparent from his evidence that Mr Whitehead's real objection was not that the Cargo ceased to be SRFO by reason of its elevated Organic Chloride content, but that it was unsuitable for use "as is" as refinery feedstock. That was not, however, how the Cargo was described in the Contract. I am satisfied on the evidence before me that the Cargo remained SRFO, notwithstanding its elevated Organic Chloride content. There was no breach of description.

76. The most powerful evidence that the Cargo had not lost its commercial identity as SRFO is the fact that the product in each of the Trafigura, Hartree and Buckeye on-sales (comprising about 93.53% of the Cargo) was, as I have set out above, described as Iraqi SRFO. This is to my mind clear evidence that the Cargo remained saleable as Iraqi SRFO. As the authorities I have cited above make clear, the mere fact that an admixture diminishes the value of the product (i.e. that it is “commercially significant”) is not sufficient to demonstrate that it has thereby lost its commercial identity. The effect of the admixture may have been that the SRFO became an inferior SRFO. It did not, however, altogether destroy its commercial identity as SRFO.
77. Mercuria further alleged that the cargo was not Basrah Pipeline HSSR fuel oil in circumstances where they alleged that the cargo had been contaminated with volatile Organic Chlorides originating from the introduction of cleaning chemicals or other industrial chlorides. Mercuria submitted that this was due to truck drivers swapping in “trucking barrels” of residues such that the cargo loaded was not pure Basrah. This was rumoured at the time to have taken place and it may have been that it did so. The point was not, however, pleaded by Mercuria with the result that Onex did not have an opportunity to investigate the facts. It is not possible on the evidence before me to determine the reason why there were elevated Organic Chlorides in the cargo. In any event, I consider that these small traces of Organic Chlorides did not alter the fact that the Cargo was, and remained, Basrah Pipeline HSSR fuel oil.

Conclusions on Liability

78. For the reasons given above I find that Onex was not in breach of its Contract with Mercuria in delivering a Cargo that contained 16ppm of Organic Chloride. Mercuria’s claim therefore fails.

Quantum and Mitigation

79. In view of my conclusions on liability issues relating to quantum do not arise. In case, however, that I am wrong on the question of liability and in deference to the considerable evidence and argument that were deployed by the parties, I shall briefly deal with the issues of quantum and mitigation.

Quantum – the Parties’ cases

80. The total amount of Mercuria’s claim is US\$ 26,033,735. This is made up of a primary loss of US\$ 18,997,931.96 together with secondary losses of US\$ 7,055,803.04.
81. Onex’s case varied considerably during the course of pleadings and during the trial. In its closing submissions it contended that Mercuria;
- (1) ought to have sold the Cargo at a discount to a refiner or trader in the US Gulf. Onex further contends that if Mercuria is entitled to the difference in value between the Iraqi SRFO and the Cargo then these should both be assessed on the date of the resale. Mercuria contends that sound value of the Cargo ought to be assessed on the date of rejection;
 - or
 - (2) that it should have blended the Cargo with other SRFO in order to reduce the Organic Chloride content to 5ppm or less and sold the Cargo as SRFO; and
 - (3) that Mercuria acted unreasonably in attempting to heat and purge the Cargo.

Resale: The appropriate measure of damages

82. The correct measure of damages is usually governed by Section 53 of the *Sale of Goods Act 1979*. This provides, insofar as material, as follows:

“... 53. *Remedy for breach of warranty*

...

(2) *The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.*

(3) *In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty ...”*

83. As to section 53, *Mercuria* submits as follows:

- (1) The measure of loss in section 53(3) is only a prima facie rule, the purpose of which is to give effect to the underlying compensatory principle in section 53(2). It is “*not an abstract and freestanding measure, to be applied for its own sake*” and “*it must give way to other methods where it does not effectively serve that purpose*”: *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711 (Comm) at [115], per Leggatt J; *Chitty on Contracts* (35th Ed., 2023) at 47-420.
- (2) Consistently with the foregoing, there is no absolute rule that the value of the sound goods and the value of the defective goods must be taken at the same time. To the contrary, it may be appropriate to assess the value of the sound goods on one date and the value of the defective goods on a later date by reference to an actual sale: see *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm) in particular at [116], [123], [141] and [151]-[161], per Christopher Clarke J; *BP Oil International Limited v Glencore Energy UK Limited* [2022] EWHC 499 (Comm) at [237], [255], [270], per Moulder J.
- (3) In the same vein, there is normally no market for defective goods in the generally accepted sense, such that the value of the defective goods may be ascertained by the price at which the innocent party has in fact been able to resell them: see *Benjamin* at 17-052, *BP v Glencore* at [227]-[228].
- (4) The propositions in (2) and (3) above reflect the fact that the prima facie measure in section 53(3) is an application of the principle of mitigation: see *Hirtenstein* (above) at [117]. Section 53(3) gives effect to the underlying measure in section 53(2) by way of *presumption* that an injured party can reasonably be expected to mitigate its loss by immediately: (1) purchasing replacement sound goods in the market; and (2) recovering the value of the unsound goods by selling them: see *Kramer on Damages* (3rd Ed., 2022) at 4-31-4-33, 4-130. The presumption is displaced where either (1) or (2) do not reflect the mitigation that could be expected of a reasonable person in the innocent party’s shoes.

84. *Onex* disagrees, and says that the authorities relied upon by *Mercuria* as authority for its argument instead support *Onex*’s case. It argues that there are compelling reasons for applying the difference in value measure on the resale dates and relies, in particular, upon the decision of Hamblen J. (as he then was) in *The Mercini Lady* [2013] 1 Lloyd’s Rep. 360 [61]-[65]. In that case Hamblen J. held that, in principle, the same date should be taken for the assessment of both sound and unsound values. This was, however, a case in which the defect did not become patent until later than the delivery date [60] and it was in these circumstances that Hamblen J. found that the loss directly and naturally resulting was that which resulted from the buyer’s actual resale of the

gasoil in question and that the same date should be taken for the assessment of sound and unsound values.

85. Having reviewed the authorities I consider that the cases are each of them highly fact sensitive. They should not be taken as setting out any rules pursuant to which section 53 must be applied in a particular case. They do not, I think, support Onex's case that the difference in value must be assessed by taking both the sound value of the Cargo and its resale value as at the date of the resale. This is hardly surprising, given the fact that section 53(3) sets out what is explicitly described as a **prima facie** measure of loss. As Leggatt J. held in *Hirtenstein* the prima facie rule "*must give way to other methods where it does not effectively serve that purpose*".

The facts of the present case

86. My findings as to the facts and upon the expert evidence are as follows:-
- (1) Onex's criticism that Mercuria failed to sell the Cargo "as is" as refinery feedstock is not made out. I am satisfied that this was not reasonably possible and that Mr von Schweinitz did take unsuccessful steps to propose a discount with Valero;
 - (2) It is common ground that Mercuria cannot be criticised for not immediately downgrading the Cargo and selling it into the cracked fuel market;
 - (3) Mercuria's attempts to heat and purge the Cargo were not, in the circumstances, unreasonable. Mercuria was attempting to follow Onex's suggestion and advice. It may well have been that this heating and purging would have been unsuccessful in any event. It lies ill in Onex's mouth, however, to submit, as they did, that no reasonable trader would have attempted to heat and purge the Cargo in which Mercuria did;
 - (4) Reasonable attempts were made by Mercuria to investigate the blending of the Cargo with blendstock SRFO with a low content of Organic Chlorides. This was all done with the active encouragement of Onex;
 - (5) It was reasonable for Mercuria to decide to pivot away from blending the feedstock. There was no certainty about the quantities of blendstock that would have been needed to reduce Organic Chlorides to below 5ppm, or the cost of blending the Cargo, or the willingness of refiners to purchase blended oil at the end of the day;
 - (6) It was reasonable for Mercuria to sell the Cargo at the time, and for the prices, at which they did sell it.
87. In my view, it would, had I decided liability in favour of Mercuria, have been appropriate in light of these findings for me to award the principal damages in the amount claimed by it. Mercuria acted reasonably from the date upon which the claim arose until the dates upon which their losses were crystallised. Onex has failed to establish that Mercuria should have acted otherwise. I consider that, in the circumstances of this particular case, the measure of Mercuria's loss is realistically and fairly to be assessed by comparing the value of the Cargo at the time of breach with its value as at the date it was sold. I would also have awarded Mercuria the full amount of its secondary losses.

Conclusion

88. Mercuria has failed to establish that Onex is liable for breach of the Contract and its claim must be dismissed. If I am wrong about that I would have awarded Mercuria

damages in the sum of US\$ 26,033,735.