

Neutral Citation Number: [2020] EWHC 170 (Comm)

Claim No: CL-2018-000016

**IN THE HIGH COURT OF JUSTICE**  
**THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**  
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

[2020] EWHC 170 (Comm)

Date: 31/01/2020

**Before:**

**MR JUSTICE ROBIN KNOWLES CBE**

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**Between :**

**(1) FORUM SERVICES INTERNATIONAL  
LIMITED**

**(2) FORUM MACAÉ SERVIÇOS DE PETROLEO  
EIRELI**

**Claimants**

**- and -**

**OOS INTERNATIONAL BV**

**Defendants**

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**Christopher Harris QC and Ryan Ferro** (instructed by **Schjodt**) for the **Claimants**  
**Nigel Eaton QC** (instructed by **Holman Fenwick Willan LLP**) for the **Defendant**

Hearing dates: 7-10 and 15 October 2019

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**Approved Judgment**

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

**Robin Knowles J:**

**Introduction**

1. The Petrobras group (“Petrobras”) is engaged in the oil and gas industry centred in Brazil.
2. At times Petrobras would have requirements to contract for the provision of vessels, including offshore accommodation units, and for local or support services to those vessels. The businesses of the parties to this litigation included involvement in attempts to win contracts from Petrobras.
3. In March 2013 the Defendant (“OOS”) and Petrobras concluded charters for two vessels. The contract value exceeded US\$450 million. The First Claimant (“Forum”) claims to be entitled to commission of approximately US\$13.5 million from OOS as a result, at 3% of the contract value.
4. There are also far smaller claims by Forum and the Second Claimant (“Forum Macaé”) against OOS for the provision of support services between March and May 2013, and by OOS against Forum for repayment of a loan.
5. Where it is not material to distinguish between them I refer for convenience to Forum and Forum Macaé compendiously as Forum.

**The parties**

6. In a little more detail, Forum is a company incorporated under the laws of the British Virgin Islands which provides consultancy, engineering, yard supervision and offshore drilling operations management services.
7. Forum Macaé is a company in the same group as Forum, incorporated under the laws of Brazil and providing similar services in Brazil. Mr Thomas Duhén (“Mr Duhén”), who gave evidence at trial, is the principal figure at Forum and Forum Macaé.
8. OOS is a company incorporated under the laws of the Netherlands. It is in the business of providing offshore accommodation, ship management, engineering, maintenance and operational services. Mr Leon Overdulve (“Mr Overdulve”), who also gave evidence at trial, is the principal figure at OOS.

**The facts**

9. In the paragraphs that follow, I set out the principal facts that I find from the evidence at trial and which are most material to the issues that I have to resolve.

10. In finding these facts I have found the documentary record to be a primary source in the present case. However, the oral evidence of the witnesses of fact, and the expert evidence, has helped me understand and evaluate that record and the conclusions to be drawn from it. I found value in the evidence of all witnesses, but not to the point of accepting the evidence of any witness unreservedly.

#### The 2010 Bid

11. By 2010 OOS had tried but failed to win charters with Petrobras. Mr Duhén and Mr Overdulse were first in touch in summer 2010. On 30 August 2010 Mr Duhén outlined to Mr Overdulse how Forum could assist OOS in Brazil, including with networking and intelligence, agency, administration, and local services.
12. At around the same time, Mr Overdulse sent to Mr Duhén correspondence that OOS had received from Petrobras requesting an offshore accommodation unit. Mr Overdulse said that he would “like to discuss our cooperation for all the projects in Brazil ... Maybe we can use this project as a pilot”.
13. Mr Duhén explained that, from the point Forum and OOS started working together, “every communication [Mr Overdulse] was receiving by Petrobras was forwarded to me as a matter of information ... as a matter of coordination of our work”. Mr Overdulse accepted that “it would be a wide-ranging cooperation, not just for Petrobras bids and market inquiries, but also if there were any spot opportunities”, and that the “main part” of the relationship was that Forum would act as agent in dealing with bids and market inquiries from Petrobras.
14. On 20 September 2010 Petrobras launched a bid (“the 2010 Bid”) seeking proposals for the supply of two vessels. On 23 September 2010 Mr Duhén wrote to Mr Overdulse saying “I guess you’ve received all the tender specifications. What is the deadline?”. Mr Overdulse replied to Mr Duhén on the same day, informing Mr Duhén that OOS intended to “offer two units with Ostensjo and the Halanigroup as partners”.
15. On 23 September 2010 Mr Duhén and Mr Overdulse also discussed executing an agreement between Forum and OOS. Mr Overdulse requested Mr Duhén to provide a draft. Mr Duhén responded saying “we can use attached proposed agreement for the commercial representation for the contract. Then, when the contract with Petrobras is signed, we can establish a local services agreement for services to be provided in Brazil by us (our Brazilian entity)”.
16. Mr Duhén attached by email a draft “representation agreement”. The draft referred to an “Exhibit A” in which what was termed the “Asset” and the location would be (but were not) identified. At paragraph 3.1 the draft provided that OOS would pay Forum a commission of 3% of contract value, including mobilisation of “the Asset” to the location, should a customer contract for “the Asset”.
17. Before anything further happened with the draft, on 24 September 2010 Mr Duhén sent to Mr Overdulse the specifications required for the 2010 Bid. Mr Duhén also informed Mr Overdulse “We have received a bid from Petrobras for the provision of AHTS 12,000 BHP.” Mr Overdulse replied, “Spoke to our partners in Singapore and they have attached 12,000 BHP unit ready to go. If okay, we will offer ...”.

18. On 27 September 2010 Mr Duhén wrote to Mr Overdulse in relation to the “AHTS 12,000 BHP” vessel saying “The intention is to have Forum Services sign the bareboat charter, you acting as agent of owners. Then Forum Services Brazil runs the operation as Brazilian partner”.
19. On 28 September 2010 Mr Overdulse replied, saying “Completely agreed”. Mr Overdulse added “How do we handle the 3% agency fee to Forum on this one?” Mr Duhén’s reply was “On this one, if we are the charterer, there is no need for agency fee. We will act as charterer and service provider to local partners, not as agent. For the OOS business we act as agents”.
20. Between 6 and 12 October 2010 Mr Overdulse sought Mr Duhén’s input on other vessels, the “Crest Olympus”, the “10800 BHP”, the “Toisa Defiant”, the “Stril TBN” and the “PSV 3000”. On 11 October 2010 Mr Overdulse asked Mr Duhén to provide a “checklist” needed for the 2010 Bid, to provide local service costs and to “formalize the tender documents”. Mr Duhén responded on 12 October 2010 that Forum and OOS first needed to finalise an agreement between themselves.
21. On 18 October 2010 OOS sent to Mr Duhén a copy of the Representation Agreement in the form of the earlier draft. This was now signed by Mr Overdulse. Exhibit A was completed but “the Asset” there identified was simply the “Halani 1”. On 19 October 2010 Mr Duhén returned the document to Mr Overdulse, having signed it but without including Exhibit A.
22. On 21 October 2010 Mr Overdulse sent to Mr Duhén a photograph of another vessel, the “HOS Achiever”, with the subject line “second vessel for SMU requirement”. In the same week, Mr Overdulse wrote to Petrobras confirming that OOS would submit “documentation related to two units namely the Halani 1 and the HOS Achiever”.
23. The “Halani 1” was owned by Halani International Limited. On 22 October 2010 Mr Overdulse sent Mr Duhén a copy of an agency fee agreement between OOS and Halani International Limited, by which OOS would be entitled to a 6.5% commission if it facilitated a charter of “Halani 1” between its owner and Petrobras. On 26 October 2010 Mr Duhén told Mr Overdulse that he would prepare the “SMU bid”. On 27 October 2010 OOS proposed the “Halani 1” and the “HOS Achiever” to Petrobras.
24. On 28 October 2010 OOS sent Mr Duhén a Power of Attorney (“procuracao”) and a Letter of Authorisation (“carta de credenciamento”). These were required by Petrobras as evidence of authorisation. The documents authorised Forum to act on behalf of OOS in relation to the 2010 Bid. They were not confined to the “Halani 1”.
25. On 5 November 2010 Petrobras revised the submission date for the 2010 Bid to 17 November 2010. Also on 5 November 2010 Mr Overdulse proposed to Mr Duhén that Forum sub-charter the vessel the “BeeMar PSV” to Petrobras on behalf of OOS. Mr Overdulse wrote to Mr Duhén, “please add 3% on your proposal to Petrobras on behalf of [OOS] as discussed”. A week later Mr Overdulse proposed an alternative vessel for the 2010 Bid, the “Toisa Proteus” and, at OOS’ request, Mr Duhén facilitated negotiations with Sealion, the owners or operators of the “Toisa Proteus”.

26. On 12 November 2010 Petrobras issued a notice modifying the 2010 Bid. OOS decided to propose the “Halani 1” and the “Toisa Proteus” to Petrobras. In the next days Mr Duhen carried out work on documentation relating to the proposals.
27. Mr Duhen hand-delivered the bid envelopes containing the proposals, which were by OOS, to Petrobras for the “Halani 1” and the “Toisa Proteus” on 15 and 17 November 2010 respectively. In the course of this, on 15 November 2010, Mr Duhen indicated to Mr Overdulse that Forum would charge a 10% mark-up on local services. Attached to Mr Duhen’s email was the “Halani 1 Ops Budget.xlsx” showing “FS Commission (3%)”.
28. Mr Duhen continued to assist OOS with the 2010 Bid, including advising on communications with Petrobras and representatives of the proposed vessels, and corresponding with and attending meetings with Petrobras.
29. In November and December 2010 Mr Overdulse also sought out a relationship with a Mr Mauriac of the agency named PHM Servicos de Comercio Internacional Ltda (“PHM”) for future Brazilian projects. On 23 and 24 November 2010 Mr Mauriac and Mr Overdulse discussed opportunities for PHM to work with OOS.
30. Mr Overdulse emailed Mr Mauriac and Mr Duhen on 13 December 2010 in respect of the 2010 Bid, saying that they both had “full authorization to act and deal on our behalf”. On 4 January 2011 Mr Duhen complained to Mr Overdulse that he did not see Mr Mauriac’s “added value” and that he did not consider Mr Mauriac to be a team player.
31. On 28 January 2011 Petrobras informed OOS that OOS had been unsuccessful and that Petrobras had selected the “Dan Swift” for the 2010 Bid. Mr Overdulse contacted Mr Mauriac, requesting his support in a prospective appeal against the decision. OOS went on to lodge appeals against Petrobras’ decision. The appeals were unsuccessful.
32. Throughout the appeal period of the 2010 Bid, Mr Mauriac kept in touch with Mr Overdulse. On or about 1 February 2011 OOS and PHM executed a “representation agreement” appointing PHM to “represent” OOS in Brazil. On 16 February 2011 Mr Overdulse recorded that he was “v pleased having Mauriac in our team, PHM is our rep together with [Forum], pleased with productivity”.
33. In or around March 2011 Mr Overdulse also considered involving a Mr Mayer, through another agency named DRJ Projectos e Consultoria Ltda (“DRJ”), to assist with OOS projects in Brazil.

#### The 2011 Market Inquiry

34. On 23 March 2011 Mr Mauriac emailed Mr Overdulse, saying “[I had] another very interesting meeting with Petrobras yesterday ... We could focus on ... the preparation of next tender which I would put a High Priority for the coming weeks”. He also provided information about Petrobras’ “preferred vessels”.
35. Mr Overdulse continued to consult Mr Duhen in respect of the presentation of vessels for charter to Petrobras. On 30 March 2011 Mr Overdulse forwarded to Mr Duhen an

email from Mr Mauriac entitled “SMUs for Petrobras in 2011 and 2012” with technical comments from Petrobras about what they required in their “preferred vessels”.

36. On 1 April 2011 Mr Mauriac emailed Petrobras on behalf of OOS, copying Mr Overdulse and saying, “the following vessels will be offered for next Petrobras tender by OOS International”. On 7 April 2011 Mr Mauriac emailed Mr Overdulse, saying he was trying to arrange meetings for Mr Overdulse with Petrobras on 18 to 20 April 2011.
37. On 25 May 2011 Petrobras issued a market inquiry (the “2011 Market Inquiry”) for further vessels.
38. In June 2011 another agency, Aspen Solutions Ltds (“Aspen”), was introduced to Mr Overdulse by Mr Mayer.
39. On 30 June 2011 OOS submitted to Petrobras, in response to the 2011 Market Inquiry, proposals for the “DP3 OOS TBN”, the “Toisa Proteus” and the “Halani 1”. These were prepared with Mr Duhén’s assistance.
40. Mr Overdulse continued to rely heavily upon Mr Duhén to prepare, present and promote proposals for the 2011 Market Inquiry. Mr Duhén advised Mr Overdulse on budgeting and financing mobilisation, engaged with Petrobras with a view to promoting vessels for charter by OOS, and provided input on Petrobras’ draft contract documents forming part of the 2011 Market Inquiry.
41. Meanwhile on 7 July 2011 following earlier discussions, Mr Mayer proposed that OOS and DRJ agree a “mandate/agreement” with OOS in respect of the “SMU project”, which would include a payment to a DRJ contact called “Anaje”. The total commission requested by DRJ (including Anaje’s fee) was “7.5% (2.5% + 5%) as discussed in Brazil”.
42. Mr Overdulse confirmed the 7.5% commission the following day and attached a draft commission agreement. On 10 July 2011 Mr Overdulse emailed Mr Mayer, saying “with all the commission to be paid (presently 10.5%) can you please inform Anaje that we cannot go below 130K per day for the units”. The figure of 10.5% included 3% in respect of Forum.
43. On 12 July 2011 Mr Overdulse wrote to Mr Mayer by email, copying Mr Duhén, with the subject line “Re: Anaje”, saying “we need some kind of confirmation of their lobby strength before we sign the 7.5% agreement”. On 16 July 2011 Mr Mayer replied to Mr Overdulse, again copying Mr Duhén, saying, “with so many participants, it becomes even more important our “political support” to the SMU tender”.
44. In the event OOS did execute a commission fee agreement with DRJ, which provided for the payment of a 7.5% commission “regarding the SMU Tender/Market Inquiry sent by Petrobras to OOS”.
45. On 28 July 2011 Mr Overdulse requested that Mr Duhén take the lead during the negotiations with Petrobras “since you have that experience with them”. After discussing pricing and budgetary considerations with Mr Overdulse, Mr Duhén

prepared and sent on 25 August 2011 to Mr Overdulse an updated costs analysis and commercial proposals for the “Halani 1” and the “Toisa Proteus”.

46. At the end of August 2011 Petrobras invited OOS to attend negotiation meetings on 12 and 13 September 2011 for the 2011 Market Inquiry.
47. By now Mr Duhén and Mr Overdulse had been considering a relationship between OOS and Forum that was one of partnership or as joint venturers. From 19 September 2011 Mr Duhén and Mr Overdulse discussed executing a “short and simple partnership agreement” with OOS, including Forum Macaé for Brazilian activity and Forum for activity outside Brazil. Mr Overdulse agreed to set up an agreement “asap”, referring to earlier discussions as to the corporate and financial structure of the arrangement.
48. On 20 September 2011 Mr Duhén wrote by email to Mr Overdulse, “I thought we had moved to a 50/50 SMU (before we had 30/70 but also a 3% commission)”. Mr Overdulse responded, “Let us stick to the original 30/70, there are more parties involved within OOS, ... The original idea is very attractive to both parties”.
49. On 21 September 2011 Mr Overdulse emailed Mr Duhén with the subject line: “Re Partnership between OOS + Forum Services” and asked Mr Duhén to review accounts attached (a document with the name, “SMU Halani Financials”), adding “your professional input would be highly appreciated”.
50. Mr Duhén reviewed the accounts which showed a line for “commission” giving two figures, 1.5% and 7.5%. There was no reference to a 3% commission for Forum. However Mr Duhén responded to Mr Overdulse, “presentation excellent ... we can start preparing Halani upon letter of award... Where do the figures come from? capex charter: I need upgrade plan, schedule... will you add a sheet for JV [i.e. joint venture] split?”.
51. On 30 September 2011 Petrobras emailed OOS to inform it that Petrobras was still analysing OOS’ commercial proposals and requested OOS to extend the validity of its proposal to 7 October 2011. On that extended date Mr Mauriac informed Mr Overdulse that “another offer has retained their [Petrobras’] preference and may be presented to Petrobras board for approval”.
52. Mr Overdulse immediately sought clarification from Mr Mayer. By 12 October 2011 Mr Overdulse had not received a response from Mr Mayer. Mr Overdulse asked Mr Mayer for information about Petrobras’ preferred vessel and continued, “As you will see these are simple questions, if a lobby is connected [Anaje] will be able to answer these, if not he is not well connected”.
53. Mr Mayer responded on 13 October 2011 reassuring Mr Overdulse, and forwarding an email from Anaje to Mr Mayer reading “I have been on the 11<sup>th</sup> with “THE” director and we are in the game”. However, on 24 October 2011 Mr Mayer emailed Mr Duhén and Mr Overdulse, suggesting that OOS’ proposal would probably not succeed, but that he would continue pressing.
54. On 26 October 2011 Mr Overdulse terminated OOS’ agreement with PHM, and emailed Mr Mayer, suggesting that DRJ would receive PHM’s 1.25% and saying “get

this contract no matter what, you now have sufficient funds”. The same day Petrobras informed OOS that its proposal was unsuccessful.

55. On 5 December 2011 Mr Overdulse asked Mr Duhén to review a draft commission agreement with Aspen. Mr Duhén provided feedback. On 6 December 2011 Mr Overdulse emailed Aspen with his comments. He forwarded this email to Mr Duhén, saying “forgot to copy the best horse in the stable”.
56. On 12 January 2012 Mr Duhén prepared a draft cooperation agreement between Forum (“including Forum Macaé”) and OOS. This envisaged that “the Parties will be actively looking at acquiring new business or projects (“Projects”) and agree to cooperate for the execution of such business or Projects”. Mr Overdulse responded the following day that the draft looked “ok”. Mr Duhén and Mr Overdulse proposed modifications to the draft on 13 January 2012. The document was not ultimately executed.

### The 2012 Market Inquiry

57. Petrobras issued its next relevant market inquiry (“the 2012 Market Inquiry”) on 13 September 2012.
58. In advance of this, on 31 July 2012 Mr Mayer had emailed Mr Overdulse, saying that Aspen “became very strong within Petrobras after the recent changes”. On 10 August 2012 Mr Duhén emailed Mr Overdulse, saying that Aspen “can start immediately the lobbying”. Mr Eduardo Veiga gave evidence at the trial. It is relevant to note that “lobbying” is, in the context of widely publicised problems with corruption that surrounded Petrobras, readily seen as an accusation; Mr Eduardo Veiga regarded it as not legal in Brazil.
59. On 23 August 2012 Forum executed a confidentiality agreement with Transocean Management Inc (“Transocean”) through Transocean’s brokers, Fearnleys, in relation to the potential purchase of what was known as the “ex-SEDCO 700” vessel. On 24 August 2012 Mr Duhén emailed Mr Overdulse, “I think we can consider the Borgholm Dolphin”.
60. On 27 August 2012 Mr Overdulse emailed Mr Duhén, attaching technical specifications for three vessels (the “GSP SSCV 1”, the “GSP SSCV 2” and a “DP3 Unit”). He indicated that these would be the vessels next to be offered to Petrobras.
61. OOS acknowledged receipt of the 2012 Market Inquiry on 14 September 2012. The following day Mr Overdulse emailed Mr Duhén, saying that he would “call to discuss”. Mr Duhén responded that “we need to define strategy”.
62. Mr Duhén proposed various strategies to Mr Overdulse, including that each of OOS and Forum would make a proposal, with different vessels, with each of OOS and Forum acting respectively as “partners” of the other, to maximise the chances of a successful proposal. The approach envisaged that each of Mr Overdulse and Mr Duhén would utilise separate contacts with vessel owners and shipyards, and that OOS and Forum would agree an “agent/sponsor” for each proposal. The vessels would, however, all be submitted on behalf of OOS.



63. Mr Carlos Veiga of Aspen sent Mr Overdulse an email on 1 October 2012, asking whether he wanted to “work with us” on the 2012 Market Inquiry.
64. On 7 October 2012 Mr Overdulse responded, copying Mr Duhen, saying that “[OOS] and partners” would like to request Aspen to represent “our offer”, in exchange for a 1.25% commission. Mr Overdulse requested Aspen to sign off a draft agreement and proceed to “jointly finalize a contract with Petrobras”.
65. On 16 October 2012 Aspen responded to OOS that it had “total interest[] to help you”, on the basis of 1.25% payable to Aspen, with OOS being responsible to pay any “finders fee” to DRJ. On 22 October 2012 Mr Overdulse requested Aspen to formalise an agreement with OOS.
66. The following day, Mr Eduardo Veiga responded, expressing concern that Petrobras would not invite brokers to tender negotiations but only “registered companies”. He said, “We will need to know before sign anything, the company which we will work [with], and also the name of the vessel, and we will need one letter of authorization from the owner saying that OOS can present the vessel, without that, we can’t manager”.
67. Mr Duhen emailed Mr Overdulse, saying “You need to state how is OOS Brazilian partners if you wish and if you have one (you do, it is us). Here, Aspen would act as commercial agent, not as partner”. Mr Duhen suggested that OOS respond to Aspen clarifying that “we would like Aspen to act as commercial agent only”. On 25 October 2012 Mr Overdulse again requested Aspen to send a signed agreement between Aspen and OOS. Mr Eduardo Veiga returned a signed version.
68. Meanwhile on 11 October 2012 Mr Duhen had emailed Mr Overdulse with specifications for the “ex-SEDCO 700” vessel, suggesting that “we can get it for \$50m”. The “ex SEDCO 700” was an anchored semi-submersible vessel which could be converted to a “flotel” with a short lead-time for mobilisation to Brazil. Mr Duhen liaised with Fearnleys and Transocean throughout October 2012 to negotiate the purchase of the “ex SEDCO 700”.
69. Much further activity followed with different possible vessels.
70. On 16 October 2012 Mr Overdulse and Mr Duhen also corresponded over the price of an “Aker H3” semi-submersible vessel to propose to Petrobras.
71. On 25 October 2012 Mr Duhen contacted Samsung Heavy Industries Co (“Samsung”) requesting a quotation for a “DP2” or “DP3” semi-submersible vessel. Samsung provided a non-binding indicative price for various “DP2” and “DP3” models on 31 October 2012. Mr Duhen liaised with Samsung as to adapting the vessels to comply with Petrobras’ technical description.
72. On 28 October 2012 Mr Duhen contacted CIMC Raffles Shipyards (“CIMC”), requesting the exclusive right to propose the “DP3 SSCV” vessel to Petrobras for the 2012 Market Inquiry. It transpired that the “DP3 SSCV” vessel had initially been offered exclusively to a Norwegian competitor. Mr Duhen met with CIMC representatives to discuss the possibility of an outright purchase option in favour of OOS if the vessel were chartered to Petrobras. Mr Duhen and Mr Overdulse continued

discussions with CIMC to procure a purchase option in OOS' favour in October and November 2012.

73. At the end of October 2012 Mr Duhén contacted Bassoe Technology AB ("Bassoe") requesting suitable vessel options to propose to Petrobras, and asking whether they could recommend a shipyard for the conversion of another vessel into a dynamic positioning semi-submersible vessel. Mr Duhén subsequently secured a confidentiality agreement with Bassoe in relation to a "BT-300E" design, which was under construction, to propose to Petrobras.
74. Mr Duhén also liaised with Dalian Shipyard in respect of their pricing and delivery schedule for a similar "BT-3500E" design that was then under construction. He reviewed the general arrangement drawings, system flow sheets, budgetary schedules and makers' list to check conformity against Petrobras' technical requirements.
75. Eventually at the beginning of November 2012 OOS and Forum between them submitted 13 vessels to Petrobras in response to the 2012 Market Inquiry. All offers were expressed to be on behalf of OOS and Forum. Mr Overdulse submitted technical proposals for "Atlantida" as a 1,250-passenger version, "Atlantida" as a 2,000-passenger version, "Serooskerke", "GVA 3000E", "DP3 SSCV", "Toisa Proteus" and "TBN DP3 Vessel".
76. By a further email on 5 November 2012 Mr Duhén submitted to Petrobras the "Proposal of Forum Services/OOS International for the [2012 Market Inquiry]", which was described to be "in addition to the proposal directly sent to Petrobras by OOS International. OOS International and Forum Services come together to provide all units included in the two proposals". That email was followed by a series of emails from Mr Duhén attaching proposals for "ex-SEDCO 700", "BT 3500E DP3", two versions of a "Samsung DP2", and two versions of a "Samsung DP3".
77. Mr Overdulse signed a commission agreement with Aspen on 6 November 2012. Aspen requested OOS to provide two "credential letters" in Aspen's favour, which Mr Overdulse did on 6 November 2012. On the same day, OOS informed Petrobras that OOS had appointed Aspen to act on its behalf.
78. On 6 November 2012 Mr Eduardo Veiga of Aspen remarked that "the proposals are very good". From around 6 November 2012 Aspen corresponded with Petrobras and attended various Petrobras meetings in respect of some of the vessels proposed. Mr Duhén also corresponded directly with Petrobras in response to clarification requests from Petrobras, including as to the "ex-SEDCO 700", the "DP3 SSCV" and the "BT3500E" vessels in late November 2012 and on costs pricing information in December 2012.
79. In early December 2012 Mr Duhén contacted Mr Overdulse, noting that he had a short-term cash-flow difficulty. He asked "Is there a way OOS can help to pass this short term cash need? \$50k or \$100k would work...for a refund by mid-January". Mr Overdulse agreed a transfer of US\$30,000, which was transferred on or about 5 December 2012.
80. On 3 December 2012 Petrobras requested Mr Duhén to send a commercial proposal for the "ex-SEDCO 700" and invited "OOS/Forum Services" for negotiation meetings in

respect of that vessel on 13 December 2012. Mr Duhén confirmed that he would attend. On 5 December 2012 Mr Duhén confirmed that Mr Overdulse would also attend. Petrobras also requested analyses for “Toisa Proteus” and “OOS TBN”.

81. On 9 December 2012 Mr Overdulse asked Mr Duhén by email “...is the meeting with HP (Hamylton Padilha) confirmed? Should we have a small meeting with [Mr Eduardo] Veiga prior to the meeting or after the meeting?”. Mr Duhén replied on 10 December 2012 that Mr Eduardo Veiga did not yet know about the “Toisa Proteus” and that “we do not need him at the meeting on Dec 13”.
82. On 13 December 2012 Mr Duhén and Mr Overdulse attended a meeting with Petrobras to negotiate the charter of the “ex SEDCO 700”. They were described in the meeting minutes as representing “OOS/Forum (FOROOS)”.
83. Mr Duhén continued negotiations for the purposes of purchasing the “ex-SEDCO 700” from Transocean. He developed OPEX and CAPEX budgets for the “ex SEDCO 700” while both he and Mr Overdulse sought financing for chartering the vessel if accepted, and negotiated the price and terms of purchase of the “ex-SEDCO 700” with Fearnleys.
84. On 29 December 2012 Mr Overdulse emailed Mr Duhén regarding a US\$10,000 advance to a Thomas Abraham, saying “we are of course 50% partners”.
85. Mr Duhén attended meetings with Petrobras to negotiate the charter of other vessels, including the “GVA 300E” and “BT3500E”, alongside Aspen. He arranged inspection and proposals for the conversion of the “ex-SEDCO 700” pre-mobilisation. Mr Duhén corresponded with Petrobras in respect of OOS’ offer for the “DP3 SSCV”.
86. In early January 2013 Mr Overdulse sought to employ Mr Oakley to assist with seeking financing for the purchase of vessels to be chartered to Petrobras in the 2012 Market Inquiry. Mr Oakley was shortly to become CEO of OOS.
87. On 2 January 2013 Mr Overdulse emailed Mr Duhén, saying “Have informed Aspen. Please inform HP urgently that the DP3 SSCV is available as we speak. Let’s discuss who will go to Brazil, it might be a good idea for at least one of us goes”. Petrobras was informed that “DP3 SSCV” could be made available sooner than expected. On 9 January 2013 Petrobras invited OOS to submit its commercial proposal for the “DP3 SSCV” at a meeting due to take place on the same day.
88. Mr Carlos Veiga of Aspen attended a meeting with Petrobras on 11 January 2013. Petrobras’ bid committee verbally confirmed that, if OOS accepted a daily rate of US\$170,000 for the “DP3 SSCV” then the bid committee would recommend to the Petrobras board the charter from OOS of “ex SEDCO 700” and the “DP3 SSCV” and would also provide a letter of intent subject to Board approval.
89. On 13 January 2013 Mr Overdulse sought Mr Duhén’s comments on the draft proposal for the “DP3 SSCV”. Mr Overdulse submitted to Petrobras a “best revised” commercial proposal for the “DP3 SSCV”, on behalf of “We (OOS-International BV and Forum Services Brazil, FOROOS)”. The revised offer read “This offer is only applicable and valid if both the DP3 SSCV and the Sedco 700 will be contracted and for both vessels an official signed LOI (subject Petrobras’ Board approval) will be issued closing Friday January 18<sup>th</sup> 2013”.

90. The next day, Petrobras confirmed that it “accepts all conditions in your letter except the 50% payment upon contract award”. On 14 January 2013 Mr Overdulse confirmed that the “mob payment in brazil after 72hrs gangway connected is acceptable to us”.
91. On 14 January 2013 Mr Duhén wrote regarding the “ex-SEDCO 700” with Mr Overdulse in copy, thanking the Transocean team and arranging inspection of the vessel.
92. On 16 January 2013 Mr Overdulse wrote to CIMC requesting a meeting, with (among others) Mr Duhén and himself in attendance, to finalise negotiations for the “DP3 SSCV”.
93. Also on 16 January 2013 Petrobras asked for clarification on the company name to award the contract. Mr Duhén suggested “FOROOS BV”. Mr Overdulse responded that “at this stage it has to be a legal[] existing entity...we will provide you a signed agreement stating your 33.3[%] ownership”.
94. On the same day, Mr Overdulse confirmed to Petrobras that “OOS-International BV to be place[d] on the contract”. In a separate email to Mr Duhén, Mr Overdulse said “please do not doubt us, we have a very bright and prosperous future in front of us, let us enjoy it. We like working with you and are sure we will until we enter the “box””.
95. On the following day, 17 January 2013, Mr Overdulse emailed his accountant asking him to “formalise a BV called FOROOS BV...There will be three shareholders namely, Jacco, Thomas Duhén and myself”. Mr Duhén emailed separately suggesting that he would prefer Forum, and not himself, to be the contracting entity.
96. On 21 January 2013 Mr Overdulse again informed Petrobras that OOS would be the contracting entity. At a meeting with Petrobras on 22 January 2013 Mr Duhén indicated there was a partnership between Forum and OOS. Mr Overdulse requested Aspen to “inform [Petrobras] once more that OOS-International BV is the contract entity”. He said that OOS would “deal with any partnership”.
97. On 24 January 2013 Mr Duhén proposed a “possible structure” for a joint venture. In February 2013 Mr Duhén proposed a “very simple, one page agreement at this stage”. On 26 January 2013 Mr Overdulse requested an update. Mr Duhén responded to the effect that he needed more time.
98. On 28 January 2013 Petrobras issued a letter confirming that negotiations for the 2012 Market Inquiry had concluded, that “ex SEDCO 700” and the “DP3 SSCV” were technically qualified, and that both vessels would be recommended to the Petrobras board for charter.
99. On 30 January 2013 Mr Overdulse emailed Petrobras about the “Sedco 700” saying “OOS International is the contracting entity and therefore you should direct future commercial and contractual correspondence to Mr Oakley, the CEO. In relation to all technical matters relating to the Sedco 700, please communicate with Mr Duhén ensuring that OOS is kept in copy.”
100. At the end of January 2013 Mr Oakley and Mr Overdulse corresponded over the possible substitution of the “Sedco 700” with another vessel, In or around early

February 2013 and unknown to Mr Duhén at the time, OOS began discussions to substitute the “ex-SEDCO” vessel with another vessel, the “C. Ajax”, following execution of contracts with Petrobras.

101. Meanwhile in the following weeks Mr Duhén received communications from Petrobras in relation to docking system documents and technical information, which he addressed. He liaised with Mr Overdulse in respect of negotiations with Transocean for the financing and purchase of the “ex-SEDCO 700”.
102. On 13 February 2013 Mr Overdulse forwarded to Mr Oakley a copy of his correspondence with Mr Duhén on 23 September 2010 concerning the Representation Agreement. The body of Mr Overdulse’s email was blank. Mr Oakley asked whether the contract was ever signed with Forum and which vessels/tenders it was intended to cover. Mr Overdulse replied, “This was only related to the first tender, will double check if it was ever signed”. Mr Oakley followed up with a further query, “When you say the “first tender”, was this the one from 2010 involving monohulls (Toisa Proteus amongst others), or did it include either of the DP SSCV (Explorer Lifter) or the Sedco 700 conversion?”.
103. On 15 February 2013, Mr Oakley wrote to Mr Duhén, “As matters are now very sensitive, and to avoid giving possibly confusing signals in Petrobras, please could we request that you allow [Mr Carlos Veiga] at Aspen to continue to chase things within Petrobras. We will obviously keep you informed as necessary as things continue to develop”. On the same day Mr Oakley emailed Mr Carlos Veiga of Aspen, “regarding the substitution of the new-build moored SMU in place of the ex-SEDCO 700 conversion, can you discuss this quietly with [Petrobras] as to the optimum timing for its introduction?”. Mr Oakley also emailed Mr Overdulse, saying that “indeed we have been deliberately neutralising [HP’s] and Thomas Duhén’s involvement with the semi’s”.
104. OOS stopped updating Mr Duhén on progress on the project, prompting Mr Duhén to request updates in February 2013. His requests went unanswered.
105. On 1 March 2013 Petrobras issued a formal letter of intent for the two vessels. This was addressed to Mr Overdulse, and confirmed that Petrobras would sign contracts for the charter of the vessels, each for a period of 1,460 days.
106. On 2 March 2013 Mr Oakley requested Aspen to ask Petrobras that “all correspondence in respect of these two contracts is directed to myself and the Principals of OOS international BV as the contracting party”. On the same day, he told Mr Duhén not to make any commitments to Petrobras in respect of vessel visits, and to make no offers or “commitments or implied commitments on behalf of OOS international BV in respect of the Sedco 700 – either to owners or shipments ...”. He added “Forum is not authorised to act on behalf of OOS International BV”.
107. On 12 March 2013 Mr Duhén met with Mr Overdulse and Mr Oakley. On the same day, Mr Overdulse wrote to Mr Duhén by email, “...following the changed circumstances in regards to the proposed relationship between the parties, it is now the intention of [OOS] to place a contract with Forum Services for the provision of essentially all local activities in Brazil to support the project”.

108. On 13 March 2013 Mr Duhén wrote to Mr Overdulve, “I understand that for the execution of the two SMU contracts in Brazil, Forum Services is to provide local personnel, local operations and logistics, offices, administration, representation, interface with Petrobras operations, and other related services”.
109. Contracts were executed between OOS and Petrobras for the charter of the two vessels on or about 18 March 2013.

From mid-March 2013

110. At OOS’ request Forum arranged for a Mr Ron Norris to inspect the “ex SEDCO 700” vessel in Labuan.
111. Forum arranged for the provision of services to OOS by Captain Bertrand Apperry, who was required to assist with ISM and ISPS certification and safety processes. Forum Macaé provided Ms Erica Drummond as an operations manager who carried out work at OOS’ request as well at local administrative offices in Macaé, Brazil.
112. On 26 March 2013 Mr Duhén emailed Mr Overdulve suggesting that the earlier loan of US\$30,000 could be considered an advance payment for future services. On 30 March 2013 Mr Overdulve responded “I think it Ok to use the 30K (partly) for the moment to pay Ron Norris, if we do not have the start-up capital in the bank by mid April we will need the remaining balance asap”.
113. Throughout April 2013 Mr Duhén and Mr Overdulve discussed the rates for the services provided. On 1 May 2013 Mr Duhén emailed to Mr Overdulve invoices for services rendered in April 2013. The invoices, totalling US\$16,312.96 and US\$16,309.22, bear Forum Macaé’s letterhead.
114. On 20 May 2013 Mr Duhén wrote to Mr Overdulve, “as per our latest meetings in Rio and Macaé and e-mail exchanges, we now need to set up the contracts for services provided by Forum Services...”. The next day Mr Duhén emailed Mr Overdulve with draft service agreements.
115. Mr Overdulve responded that “At this stage we are not allowed to sign any agreement”. Mr Duhén wrote in reply, “I am afraid we cannot continue providing services without signed agreements”. Mr Duhén attached invoices for services rendered up to 24 May 2013, totalling US\$56,677.98, and requested payment of US\$26,677.98 from OOS. On 14 May 2013 Mr Duhén chased Mr Overdulve for payment against those invoices.
116. On 10 June 2013 Mr Duhén requested payments of amounts said to be owed by OOS to Forum, less “US\$30,000,00 paid in advance”. On 8 and 14 May 2014 Mr Duhén again requested payment for the local services provided to OOS.
117. In due course Aspen was involved in the substitution of the “ex-SEDCO 700” with the “C.Ajax” (later named the “OOS Prometheus”).

**Forum’s claim for rectification or that the Representation Agreement was varied**

118. Forum argues that the Representation Agreement should be rectified to reflect what it describes as the parties' continuing common intention and outward expression of accord that "Asset" in the Representation Agreement "would include all those marine assets that Forum and OOS agreed from time to time that Forum would market and promote to potential oil and gas companies for the chartering out of those assets by OOS".
119. In the alternative Forum argues that the Representation Agreement was varied by conduct to the same effect.
120. In my judgment there is no sufficient evidential basis for the claim to rectification. The parties' common intention and outward expression of accord was no more than that the Representation Agreement would extend to assets that were identified in Exhibit A from time to time.
121. I also consider there to be no sufficient evidential basis for the claim for variation by conduct so as to include the general, open-ended, wording advanced. This does not rule out the possibility that the parties might have varied the Representation Agreement so as to apply to a vessel other than the "Halani 1" even though an Exhibit A had not been completed for that other vessel. However this was not the case for the vessels "DP3 SSCV" and "ex-SEDCO 700", and those are the vessels in respect of which commission is sought in these proceedings.
122. In any event, by the words "agreed from time to time", the arguments of Forum would introduce a term that itself contemplates that the parties would from time to time reach additional agreements, namely agreements "that Forum would market and promote to potential oil and gas companies for the chartering out of" a particular vessel or vessels. For the purpose of these proceedings, which concern the two vessels "DP3 SSCV" and "ex-SEDCO 700", Forum would need to show that these vessels were the subject of additional agreements to that effect. In that respect too, in my judgment Forum fails.
123. Forum sets the background by emphasising that OOS had never chartered units to Petrobras before Forum's involvement, and that OOS did not and could not understand Petrobras' bid procedures and tender documents. OOS had expressly told Forum that "we do need all the support".
124. Forum argues that it is impossible to discern from the correspondence any intention to restrict the Representation Agreement to the "Halani 1". It points out that the 2010 Bid had been issued seeking two units, and that OOS had intimated that it intended to submit two units, not one. Mr Duhén marketed and promoted two vessels for the 2010 Bid, the "Halani 1" and the "HOS Achiever". Forum adds that Mr Overdulse did not ever say to Mr Duhén that the Representation Agreement did not apply to the "Toisa Proteus".
125. Forum points out that after Mr Duhén had sent Mr Overdulse the draft Representation Agreement on 23 September 2010, Mr Overdulse and Mr Duhén discussed the application of a 3% commission to other projects, a level of commission which was derived from clause 3.1 of the draft. It says Mr Overdulse's request, "how do we handle the 3% agency fee to Forum on this one?" is only consistent with Mr Overdulse's belief, as at 28 September 2010, that the draft Representation Agreement applied to "all marine assets and all projects between OOS and Forum". Forum argues

that the only credible explanation for OOS' reference to a 3% commission in reply is that both Forum and OOS understood that they had agreed upon 3% as a commission that would apply to "all projects between Forum and OOS".

126. Forum contends that whilst Mr Duhén had deliberately filled in "Brazil" as the geographical region in Exhibit A, he left the "Asset" box empty because the idea was that Exhibit A "would be filled up every time we had an asset to be proposed to Brazil and to Petrobras in particular". That Exhibit A was insignificant, contends Forum, to how the parties intended for the Representation Agreement to operate, is illustrated by the facts that Mr Duhén did not return Exhibit A back to Mr Overdulse, that there is no document from Mr Overdulse asking about or chasing for Exhibit A, and that Exhibit A is not mentioned by the parties after 18 October 2010.
127. Forum argues there can be no serious question that the requirement for an outward expression of accord is satisfied. It says that that the parties' common intention was evinced in a wealth of correspondence and actions between them. The documentary record is, in itself, argues Forum, sufficient to demonstrate the common intention, and to show an outward expression of accord.
128. Looking ahead to the 2011 Market Inquiry, Forum points out that Mr Duhén provided assistance similar to the assistance he had provided in relation to the 2010 Bid. It points out that Mr Overdulse did not terminate the Representation Agreement, remained in very close contact with Mr Duhén, and continued to value Mr Duhén's specialist knowledge of Petrobras' bidding procedures. Forum remained OOS' "point of contact" for Brazil, it says. Forum points out that 3% commission was indicated in exchanges of 10 July 2011 and 20 September 2011.
129. With great respect to the persuasive way in which Mr Christopher Harris QC and Mr Ryan Ferro for Forum advanced Forum's argument, I am unable to accept that there was the common intention or the outward expression of accord alleged by Forum.
130. I can accept that Forum and OOS intended to collaborate on projects in Brazil other than one involving "Halani 1". I can accept that despite Mr Overdulse's inclusion of the "Halani 1" (alone) in Exhibit A the parties might nonetheless contemplate that they might go on to agree to the terms of the Representation Agreement applying in relation to one or more other vessels in due course.
131. However I can accept, from an examination of the facts and in particular the documentary record (on which Forum itself relies heavily), no more than that there was a common intention and outward expression of accord to the effect that the parties might agree to apply the terms of the Representation Agreement in respect of other vessels. The difference between this and Forum's case is that the mere fact that Forum and OOS engaged together with a vessel would not be sufficient to engage the Representation Agreement. The Representation Agreement would only apply if the parties agreed to its terms applying in relation to the vessel.
132. It is common ground that the Representation Agreement concerned at least "Halani 1". It may be that there was sufficient conduct to imply an agreement that the terms of the Representation Agreement applied in relation to the "HOS Achiever" and the "Toisa Proteus". Then even in 2010 it was clear that the parties did not agree that the terms of the Representation Agreement would apply to the "AHTS 12,000 BHTS" vessel.



133. What of the indication of 3% commission in the exchanges of 10 July 2011 and 20 September 2011? These showed that the Representation Agreement could still be applied if the parties agreed it should apply to a particular vessel. They do not, in my judgment, show more than that.
134. In the substantial amount of documentary evidence in respect of the 2012 Market Inquiry there is no reference between Forum and OOS to the Representation Agreement, or to 3% commission being payable to Forum.
135. I can accept that Forum (through Mr Duhén) carried out a substantial amount of work in respect of both the 2011 and 2012 Market Inquiries. I also accept that that work included work that can properly be described as marketing and promoting. But the question is on what basis did Forum work in relation to the 2012 Market Inquiry and in particular the “ex SEDCO 700” and the “DP3 SSCV”?
136. OOS argues Forum did not act as OOS’ agent in the 2011 or 2012 Market Inquiries because PHM, DRJ and Aspen replaced it. Forum responds by saying that it was lobbying support that was added by PHM, DRJ and Aspen. I find that the involvement of PHM, DRJ and especially (having heard Mr Eduardo Veiga) Aspen was not so limited, whether or not it was accurate to use the term “lobbying” for some of the support given. However I accept that their involvement did not by itself mean that Forum was not also acting as agent. The presence at times (in particular in July 2011) of documentation recognising multiple commissions is consistent with that possibility.
137. OOS argues that Forum was rendering services to OOS in anticipation of a local services contract. However in the present case whilst I accept that Forum anticipated that it or Forum Macaé could secure local services contracts, this was a separate matter. It does not, in my judgment, explain the basis on which Forum worked in relation to the 2012 Market Inquiry. Mr Overdulse sought to draw a comparison from the fact that “at that time I spent millions hoping to get a contract, and that’s called costs for tendering”. But here I agree with Forum that its position was not comparable with the situation that Mr Overdulse was describing.
138. However OOS also argues that Forum worked in relation to the 2012 Market Inquiry in anticipation of a joint venture between Forum and OOS, and not because the parties had agreed to apply the terms of the Representation Agreement in respect of other vessels.
139. This argument I accept on the evidence. As the parties’ relationship developed it became less and less likely that they would agree to apply the terms of the Representation Agreement. They were working towards a joint venture or like agreement. Mr Duhén’s preparation of a draft cooperation agreement between Forum (“including Forum Macaé”) and OOS in January 2012 also indicates that the Representation Agreement was being left in the past. By October 2012 Mr Duhén was describing Forum as partner, in contrast to Aspen as agent, and by December 2012 Mr Overdulse was describing Forum as 50% partners. The preparation of a joint venture agreement was discussed from early 2013.
140. There is also the fact that the strategies agreed for the 2012 Market Inquiry were very different to the approach previously. Mr Duhén proposed that Forum and OOS put forward twelve vessels to Petrobras, divided equally between them and that a new joint

company named “FOROOS BV” should contract with Petrobras. It is also very noticeable that in 2012 and 2013 Mr Duhén went well beyond the role he played in relation to the 2010 Bid and the 2011 Market Inquiry. He engaged in direct negotiations with a shipyard regarding the conversion of a drilling rig into an SMU and arranged financing for the purchase of the “ex Sedco 700”.

141. This conduct could be said to be consistent with the Representation Agreement in that it is what OOS would expect of a helpful agent, looking for ways of finessing their strategy for securing the Petrobras contracts. However, there are also other possibilities of the work being undertaken pursuant to proposed agreements such as for a partnership or a joint venture. It is in this context that one has to ask whether the parties agreed to apply the terms of the Representation Agreement to the “ex SEDCO 700” and the “DP3 SSCV”. In my view, the absence of any express reference to the Representation Agreement weighs heavily against the conclusion that they did.
142. Forum also submitted that Mr Duhén would not proceed with work without having a secure contractual basis for his remuneration and that Mr Overdulse understood this. Whatever the position in 2010 or even 2011, I was not persuaded that this was the position by the time of the 2012 Market Inquiry. I note that no contract was executed following detailed discussions between the parties on 12 and 13 January 2012 about a draft cooperation agreement. Despite this, Mr Duhén continued to undertake extensive work in respect of the 2012 Market Inquiry.
143. Forum points out that no joint venture or partnership agreement was ever executed, and OOS had put an end to the prospect in the course of seeking to “neutralise” Mr Duhén’s involvement in the 2012 Market Inquiry. However it does not follow from these facts that the work Forum did was not, when undertaken, in anticipation of a joint venture.
144. Forum adds that the prospect of a partnership or joint venture arrangement was raised for the first time in correspondence in late September 2011, and it follows that the “hope” of securing a joint venture or partnership cannot have motivated Forum to participate in the 2011 Market Inquiry, which was issued on 25 May 2011, and for which OOS submitted its proposals on 30 June 2011. That may be, but the position that matters is the position in relation to the 2012 Market Inquiry and specifically the “ex SEDCO 700” and the “DP3 SSCV” vessels.
145. Forum also argues that it is plain that Forum’s entitlement to commission was firmly in the parties’ minds from the outset of their discussions about a joint venture, and that explains Mr Duhén’s reference to the “3% commission” in his discussions with Mr Overdulse about a prospective joint venture on 20 September 2011. Here however it is important to note that reference to 3% commission did not continue. I can accept that commission for Forum was still in the parties’ minds in 2011, but not that it was the basis on which they were still working when they tackled, in the way they did, the 2012 Market Inquiry and specifically the “ex SEDCO 700” and the “DP3 SSCV” vessels.
146. What of the possibility that Forum worked both in anticipation of a joint venture and also because the parties had agreed to apply the terms of the Representation Agreement in respect of the “ex SEDCO 700” and the “DP3 SSCV”? Forum argues that OOS knew that Forum continued to act as its agent until a partnership or joint venture agreement was actually executed. I do not accept that is made out on the facts. Forum points to Mr Duhén’s email of 11 September 2011 to Mr Overdulse suggesting the

parties had “moved” to a “50/50 SMU” from a 30/70 “but also a 3% commission”. I agree that this does contemplate a world in which a joint venture or a partnership co-exists with a commission, but only at that date and not in relation to the 2012 Market Inquiry and the two vessels the subject of these proceedings. It is also significant that financial statements or budgets subsequently prepared do not refer to any commission being payable to Forum.

147. Forum points to Mr Duhén’s email of 7 November 2012 to Mr Overdulse suggesting that it was confirmed to Petrobras that proposals were from OOS and to Mr Overdulse’s confirmation that he has “clarified that position” and noting that he considered that Forum “was submitting documents on our behalf”. However, the possibility of a joint venture sits perfectly consistently with the proposals to Petrobras being from or on behalf of OOS; even a concluded joint venture might still transact through one party (but for the benefit of both).
148. Mr Duhén’s evidence was that Forum was “still working as agent under the representation agreement”. However that advances a legal position, and in my judgment is, with respect, incorrect. Fundamentally, what is missing, in my judgment, is sufficient evidence to allow a conclusion that the parties had agreed to apply the terms of the Representation Agreement in respect of the “ex SEDCO 700” and the “DP3 SSCV”.
149. By this time the Representation Agreement was in disuse and had been overtaken by events. I do not accept Mr Duhén’s suggestion in evidence that the reason Exhibit A was not filled in was mistake through trusting Mr Overdulse and being overconfident about their mutual cooperation.

### **Forum’s claim in restitution**

150. Forum advances claims in unjust enrichment as an alternative to its contractual case. The enrichment comprises the benefit to OOS of Forum’s work. In the present case Forum accepts “the key issue is the unjust factor”.
151. In my judgment Forum does not establish the unjust factor. Forum worked in relation to the 2012 Market Inquiry in anticipation that Forum and OOS would reach agreement on a joint venture. In the event Forum did not secure a concluded joint venture (or like) agreement. It took a commercial risk and the risk did not pay off. Forum and OOS knew where they stood. There was no default position: the parties had not agreed to apply the terms of the Representation Agreement in respect of the “ex SEDCO 700” and the “DP3 SSCV”.
152. Forum argues that it rendered services on the basis of an operative mistake that the Representation Agreement applied to the “ex SEDCO 700” and the “DP3 SSCV”. It argues that it is not open to question that Mr Duhén rendered the services to OOS on the premise that the Representation Agreement applied to the Units. The evidence does not support these arguments.
153. Forum argues that OOS had every opportunity to tell Forum to stop providing services on its behalf and that Mr Overdulse encouraged Mr Duhén’s participation. This is

correct, although it is equally correct that Mr Duhén had every opportunity to insist on a contract, or to withhold services until he had a contract, or to make clear that he was providing services on the basis of the Representation Agreement. Mr Duhén made no reference to the terms of the Representation Agreement or to commission.

154. In any event it does not follow (as Forum argues) that the only reasonable reaction to Mr Duhén's marketing and promotion of the Units is that he expected to be paid, rather than that he hoped for reward in the form of a concluded joint venture (or like) agreement.

### **Payment for local services**

155. Understandably, and proportionately, very little indeed of the trial was spent on this issue. Some aspects were agreed. I was largely left to consider the position by reference to the limited documents, and an agreed schedule. I have done so and am satisfied with Forum's claims up to the amount of US\$50,000.
156. This reflects sums invoiced at May 2013 less a reduction to give some reflection to the points made by OOS about the rate charged for Ms Drummond, and an increase to reflect a small amount of work undertaken by Ms Drummond after the invoiced period. It allows 8 days for Captain Apperry. Against those sums should be set the unpaid loaned monies. So far as relevant, Forum did not satisfy me that the loan was converted into an advance payment.

### **Conclusions**

157. In my judgment Forum's claim for commission (or equivalent) fails. It is entitled to the claimed payment for local services, less unpaid loan monies.