Case No: 2012 Folio 1281

Neutral Citation Number: [2015] EWHC 463 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2015

Before :

MR JUSTICE BURTON

- -

Between :

METLIFE SEGUROS DE RETIRO S.A.	**Claimant**
- and -	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION	**Defendant**

- -
- -

John Taylor QC (instructed by **Taylor Wessing LLP**) for the **Claimant**
David Wolfson QC and Patricia Burns (instructed by **Allen & Overy LLP**) for the **Defendant**

Hearing dates: 20, 21, 22, 26, 27 January and 2, 3 February 2015

- -

Judgment

Mr Justice Burton :

1. The claim by the Claimant (MetLife) is for sums alleged to be due to it by the Defendant (JPMorgan) pursuant to structured USD and CER-Linked Notes issued to MetLife, for which it subscribed on 6 February 2006, and whose maturity date was 6 February 2011. The Defendant has paid out at the maturity date all it admits to have been due under the Notes, and the Claimant alleges that further sums remain outstanding.

2. The Claimant subscribed for 462,048,909 Argentine Pesos ("ARS") on the terms (subject to English law) set out in the Defendant's Series Prospectus (supplemented where necessary by the JPMorgan Base Prospectus) and in the Final Terms, both dated 6 February 2006. The Final Redemption Amount ("FRA") payable on the maturity date depended upon the increase in inflation between 23 January 2006 and 3 February 2011, measured by reference to the CER as at those dates. The CER is defined in the Final Terms as:

   > "*in respect of any day, the Argentine Coeficiente de Estabilización de Referencia published in respect of such day by the Banco Central de la Republica Argentina ("the BCRA") as reported* [on its] *website. The CER is calculated according to Resolution 47/2002 of the Argentine Ministry of Economy.*"

   Resolution 47/2002 contained a formula for calculating the CER which involves using monthly figures from the "*Índice de Precios al Consumidor*", meaning Argentina's monthly Consumer Price Index ("CPI") for Buenos Aires City and Greater Buenos Aires ("GBA"), calculated and published by the "*Instituto Nacional de Estadística y Censos*", the Argentine Institute of National Statistics, known as INDEC. INDEC announced the monthly CPI on its website by the seventh day of the following month. The BCRA used that figure to announce the CER on its website, which it did on a daily basis. At the time of the issue of the Notes the method of calculation pursuant to Resolution 47/2002 which was in place, and had been since October 2000, was INDEC's Methodology 13, but this is nowhere referred to in the Notes.

3. The CER at the outset (23 January 2006), called $CER_{INITIAL}$, was, and was recorded in the Notes as, 1.7317. At the Maturity Date the CER calculated and published by INDEC was 2.6539, and by reference to that figure as the CER_{FINAL} the Defendant paid out as the FRA the sum of US$176,541,651.36, calculated by reference to it. As will be seen, the Claimant asserts that there had been a "CER Event" which had occurred and was continuing on the valuation date, such as to oblige the Calculation Agent under the Notes (which was in fact the Defendant, acting through its New York office), to re-determine the CER_{FINAL}. Had the Defendant as Calculation Agent done so, the Claimant submits that the sum due is up to US$275,540,000, such that it claims the balance of some US$100 million as damages for breach of contract.

4. The central provisions, the subject of the dispute before me, both appear in Clause 22 of the Final Terms, and they are as follows:

   (i) "*CER Event means the occurrence of one or more of the following:*

(a) *the CER is not timely announced by the BCRA; or*

(b) *the CER is replaced by a successor index; or*

(c) *the CER is no longer published and has not been replaced by a successor index; or*

(d) *The Republic of Argentina, or any of its agencies, instrumentalities or entities (including, without limitation, the BCRA) by means of any law, regulation, ruling, directive or interpretation whether or not having the force of law, takes any action which legally or de facto prevents or has the effect of restricting or limiting the calculation or announcement of the CER or any of the values used to determine the CER.*"

("The CER Event Provision").

(ii) "*If a CER Event has occurred and is continuing on the ARS Valuation Date then CER_{FINAL} shall be determined and $CER_{INITIAL}$ may be recalculated as for January 23, 2006 if determined to be necessary by the Calculation Agent, such determination and recalculation (if any) to be made by the Calculation Agent in good faith and in a commercially reasonable manner based on such available market information and other information as it deems necessary and relevant, including the new calculation method applicable to (i) the successor index or to (ii) the securities issued by the Republic of Argentina linked to CER or other obligations of the Central Bank linked to CER.*

Notwithstanding any provision in the Notes that the determinations of the Calculation Agent are binding absent wilful default, bad faith or manifest error, the Calculation Agent's determination of CER_{FINAL} or $CER_{INITIAL}$ after the occurrence of a CER Event will only be binding if such determination is in good faith and in a commercially reasonable manner."

("The CER Calculation Provision").

5. If there was a CER Event, there is a dispute about the effect of the CER Calculation Provision, and hence as to quantum. It is common ground, as above, that if there was no CER Event the sum was correctly calculated as US$176.54m. If there was a CER Event, there is a series of figures whose calculations are agreed between the experts, the choice from which depends upon a number of findings which are for me to make

by reference to the quantum issues, discussed below, ranging between US$236.38m and US$275.54m.

6. The CER Event, or Events, upon which the Claimant relies, and alleges to have occurred, arise by reference to the events of which I shall give a short summary below. Such events are mainly derived from the evidence of Ms Bevacqua, who was INDEC's Director of CPI from 2001, and had over 20 years' experience working in statistics and statistical analysis in Argentina and Latin America. Her evidence was unchallenged, in that it was, by agreement, read and she was not cross-examined. It is also derived from three Reports, by a Mr Manuel Garrido dated 15 May 2007 of the Office of the Argentine Attorney General, by a Dr Carlos Stornelli of the Argentine Federal Criminal and Correctional Prosecutor's Office also prepared in 2007 and by the Assessment and Follow-up Academic Committee (CAES) Report on the operation of the Argentine Statistics and Census Bureau dated September 2010, produced by experts from Argentina's leading universities ("the CAES Report"); and also by reference to, or inference from, a number of press articles and/or trade releases between 2007 and 2010, many of them produced by one of JPMorgan's own analysts Mr Werning (now Head of Latin America Research). Given that a report from a Dr Bianchi as to Argentine law and government structure was non contentious and also not adduced, the only live evidence I heard was from 2 experts on each side. For the Claimant I heard Mr Sébastien Goldenberg and Dr Pablo Guidotti, and for the Defendant Mr Veeswanaden Patten and Dr Guido Sandleris. Dr Guidotti's report included a lengthy summary of the history of events, to support the Claimant's case that a CER Event or CER Events occurred, and similarly to the lack of challenge by the Defendant to the factual evidence, as referred to above, so too there was no challenge to this aspect of Dr Guidotti's evidence.

7. The evidence of Mr Goldenberg and Mr Patten related primarily to the role of a Calculation Agent. Mr Goldenberg is a very experienced trader, with more than 15 years' experience in the inflation-linked market. Mr Patten is also very experienced, with 25 years in relevant markets, including the property derivative market: he has also had recent and detailed experience of the role of a Calculation Agent. Neither of them had seen before a clause such as the CER Calculation Provision (or indeed the CER Event Provision) in this case, although both accept that it is common to have market disruption clauses.

8. There was criticism by Mr Taylor QC for the Claimant of Mr Patten on 2 bases, neither of which I consider to be justified. First I am satisfied that he did not say or imply in his reports that this provision was a standard provision. Secondly his assertion that a Calculation Agent would adopt the published CER, if it were available, even in the circumstances that the events relied upon by the Claimant constituted a CER Event, was in my view entirely consistent with his strongly held view, as an independent expert, that he was unable to accept such a premise, and that what were referred to as the "*last five lines*" of the main paragraph of the CER Calculation Provision would drive a Calculation Agent to accept and adopt a continuing CER, if it was still widely adopted.

9. Dr Guidotti was a very distinguished expert, with very relevant experience, including a period between 1996 and 1999 as Deputy Minister of Finance and Secretary of the Treasury of Argentina. He was the Claimant's quantum expert, giving evidence as to what sum should be calculated as the FRA in the event that the CER Event Provision

and the CER Calculation Provision were triggered. Dr Sandleris is also very experienced and, like Dr Guidotti, has held senior academic positions, and is presently Dean of the Business School and Director of the Financial Research Centre at Universidad Torcuato Di Tella in Buenos Aires. He did not do himself full justice by failing to accept the force of the evidence of Ms Bevacqua and the other evidence e.g. from the three Reports set out above, which in fact the Defendant has not challenged: but nonetheless he was persuasively engaged with Dr Guidotti on the various issues of quantum, and indeed together they have isolated only three respects in which they disagree, to which I shall return below. I have been very much assisted by all 4 experts.

10. Before recounting the events to which I have referred in paragraph 6 above, I should set out a number of matters of common ground:

(i) The INDEC CPI had (prior to the events here in question) accurately and reliably recorded inflation in GBA, and has done so since 1924. It is effectively used as an index measuring consumer expenditure and inflation nationally in Argentina, though there are in fact separate indices for 15 Provinces of Argentina.

(ii) Throughout the term of the Notes INDEC published a figure for the CPI on the seventh day of every month and the BCRA published a daily figure on its website for the CER.

(iii) Throughout the term of the Notes, Resolution 47/2002 continued to govern the calculation of the CER (see paragraph 2 above).

(iv) Throughout the term of the Notes, and to date, the CER continues to be used in securities issued by and in Argentina, and other financial instruments, and the experts for both sides do not know of any case in which a provision for application of the CER index has not been followed.

(v) The actions taken as described below are accepted to be actions by "*the Republic of Argentina or any of its agencies, instrumentalities or entities*".

(vi) In the circumstances set out in paragraph 7 above, it is not suggested that the Provisions are standard terms.

<u>The Events</u>

11. Ms Bevacqua describes how from December 2005 to early 2006, against the background of the rate of inflation in Argentina becoming a cause of concern for the Argentine Government, she and her superior Mr Mármora were summoned to attend a number of meetings with Mr Moreno, the Secretary of State for Domestic Trade in Argentina. He requested information about the calculation of CPI, including details as to outlets and products, and INDEC's Committee of Statistical Secrecy was only prepared to give limited information to Mr Moreno. On 29 May 2006 Ms Bevacqua and her superior Ms Trabuchi attended another meeting with Mr Moreno, which she describes in paragraphs 34-35 of her witness statement:

> "*34. Ms Trabuchi and I attended the meeting, which lasted approximately two and a half hours. Mr Moreno asked questions throughout the meeting about specific items included in INDEC CPI, and about the methodology for calculating INDEC CPI. Whatever answers we gave, he laughed at us and was abusive throughout the meeting, saying that we were incompetent. He also said at that meeting that his department wanted to lower inflation, specifically because of the effect it had on CER-linked government bonds. The reason for this was that if the CER was low, the payments the government had to make to international bondholders was much lower than it would have been if the INDEC CPI reflected true inflation in Argentina. Moreno said that he wanted all the items in the basket at zero per cent inflation. He also said that if we did not lower the INDEC CPI we were acting against the interests of the country and reminded us that he was a Secretary of State. In my opinion he expected us to comply with his instructions.*
>
> *35. The meeting finished with Ms Trabuchi saying that while Mr Moreno might not agree with our methodology, we did our best from a technical perspective; Mr Moreno's response to this was to say that the dictators in Argentina in the 1970s "did their best". He went on to say that if we did not provide him with the data he requested, he would do "as they did in the old Peron times", and sit down at the front entrance to INDEC and take each CPI surveyor away to "have a coffee with him" as they came into work at the INDEC building in the morning. I took this to be a direct threat against the confidentiality and safety of the data that INDEC surveyors delivered each morning (he implied he would personally alter such data) and, consequently, that he was threatening to manipulate the INDEC CPI.*"

12. During 2006 Mr Moreno made further requests, saying that he wanted to see "*low prices*", but matters came to a head in January 2007, when INDEC produced an indicative CPI figure of 2.1% based on data collected in the first 2 weeks of that month. This caused Mr Moreno to send into INDEC a Ms Paglieri, who installed herself in an office next to Ms Bevacqua, and said that the Ministry of Economy was concerned about January CPI and in particular the figures for tourism, medical insurance and lettuce, which had been the main contributors to the rise in CPI for January, asking for a simulation to be run using lower figures than the true increases for those items. This was done on 25 January 2007 and produced a lower CPI of 1.5%. At a meeting on 26 January between Ms Paglieri and Ms Bevacqua and her superiors, Ms Paglieri asked for items to be removed from the basket of goods and for weightings to be lowered, with a view to lowering the CPI figure. When Ms Bevacqua was not prepared to cooperate, Ms Paglieri lost her temper:

> "43. *Mrs Paglieri seemed to me to be concerned with reaching a number for INDEC CPI for January 2007 that she could report to the Minister of Economy which matched the Minister*

> *for Economy's expectations, not with the calculation and preparation of a true and accurate INDEC CPI figure prepared in accordance with Methodology 13 and reflecting data that INDEC had captured.*"

13. When Ms Bevacqua was not prepared to agree, she was removed by an Executive Order issued by the President of Argentina (Decree No. 100/2007) and replaced by Ms Paglieri: the figure announced for January was then 1.1% when it would have been 1.9%.

14. After Ms Bevacqua was removed, she is not able to give any more direct evidence of what occurred, but that can be derived indirectly from the various Reports, to which I have referred in paragraph 6 above, by reference to evidence taken from a number of INDEC employees, including Ms Bevacqua. On or about 1 February 2007 a computer patch was installed, at Ms Paglieri's direction, upon INDEC computers which enabled (i) artificial caps to be applied to price increases and (ii) the removal of individual products and categories of products which showed, or otherwise would have shown, a substantial increase in price in a particular month. Mr Mamora and Ms Trabuchi were also removed from office, and Ms Paglieri then signed the INDEC report for January CPI. Shortly after Ms Bevacqua was dismissed from INDEC in January 2007, she was contacted by Mr Werning (referred to in paragraph 6 above) who asked Ms Bevacqua if she thought that INDEC CPI had been distorted, and she confirmed to him that it had.

15. The Reports describe how Ms Paglieri required that INDEC employees highlight on the survey forms those items which had increased in price in respect of the previous month, and, after consideration by Ms Paglieri and Mr Moreno's department, Ms Paglieri then decided which caps were to be entered into INDEC computers through the patch: once the price was calculated, if there was a percentage variation which exceeded the cap, the percentage of the variety was modified so as not to exceed that cap. By March 2007, more than half the products in the CPI basket were subject to caps, and Ms Paglieri instructed INDEC employees to delete from the database prices which she did not like, and in some cases to exclude some goods and services from the basket entirely.

16. The intervention by Ms Paglieri became to an extent publicly known, and it was the subject of comment at a JPMorgan internal meeting on 3 May 2007:

> "*INDEC employees reported serious manipulation by the authorities of that national organisation. Through a press release the employees of the Consumer Price Index department indicated that since Monday 30 April, Beatriz Paglieri and her three trusted colleagues . . . have been deleting prices from the CPI database since April.*"

Mr Werning stated in the JPMorgan Global Data Watch for Argentina on 8 June 2007:

> "*Because the official statistics institute methodological intervention remains firmly in place, CPI measurement distortions continued in May, much as expected. . . . Seasonal*

> *patterns suggest that CPI inflation will remain modest in June . . . Following that, a pickup should be expected in July . . . the magnitude of the pickup will likely remain capped by INDEC's methodological changes, similar to what happened last January. The extent of CPI inflation underreporting - which according to JP Morgan estimates stood close to 40% in 1Q - gets harder to estimate as time goes by and distortions are amplified.*"

Notwithstanding the reports, it seems from an exchange of JPMorgan emails in September 2007 that MetLife did not wish to unwind or restructure their Notes, because they could not be '*underinvested*' in CER.

17. A number of Senators in Argentina called for an investigation by the Attorney General's office, hence the Report by Mr Garrido followed by that of Dr Stornelli, and Ms Bevacqua was interviewed along with a further 22 witnesses from INDEC. The Reports cover the period to June 2007. They confirmed the inappropriate use of "*IT patches*". Mr Werning commented in November 2007 that "*the changes to INDEC are geared towards saving face and of trying to re-label the CPI discussion as one stemming from methodological issues instead of one relating to manipulation*".

18. In an internal JPMorgan email of January 2008, Mr Werning recorded that there was a protest by INDEC employees to mark "*one year of government intervention*", and they published their "*parallel estimate*" for CPI inflation, which in a simultaneous press release from Credit Suisse was said to be put at 22.3-26.2% compared to the 8.5% published by INDEC; and a similar JPMorgan Global Data Watch of 11 January 2008 stated that: "*In 2007 official CPI inflation was 8.5% but true CPI inflation was 20%*".

19. In February 2008 the Argentine Government formally announced that it would introduce a new methodology for CPI before mid-2008: and Ms Vazquez of JPMorgan concluded, after a conference she attended on 7 May 2008, at which the proposed methodological update was revealed, that "*the new index will lack credibility and will only serve the Government's purpose of being able to argue that they have effectively moved on in terms of 'updating' the methodology*". Mr Werning commented in April 2008 that "*Argentina's CPI inflation data have been severely distorted since January 2007*", and in June 2008, when figures under the update were first published, that "*the key distortion of CPI inflation involves the price inputs being used, which means that methodological changes are of secondary importance*". The Update of Methodological Changes was published in October 2008, some 6 months after it in fact had already been put in place, and this recorded that there were changes to Methodology 13, implemented in April 2008, including a reduction from 818 to 440 of the number of goods and services included in the consumption basket used in the calculation of the CPI, and from 90,000 prices to approximately 30,000, changes to the contents of the so-called seasonal baskets and alteration of the locations used for the collection of prices.

20. There was public criticism of the new Methodology and its effect, and the Argentine Government passed a Decree which led to the CAES Report referred to in paragraph 6 above, whose remit included reporting on the "*quality and consistency of information and the integrity . . . timeliness, regularity and publication of the INDEC's statistics*".

A Technical Report in July 2010 by the University of Buenos Aires on the Situation of the INDEC stated at paragraph 3.2.1 that INDEC as from 2007 had been "*intervened, and changes were introduced in the data-gathering and index calculation methods, which were only released to the public incompletely and vaguely as from mid-2008*". The CAES Report was produced in September 2010, which confirmed that the Update of April/October 2008 did not correct the way in which CPI was being calculated. Although there is no specific mention in the CAES Report of the continued use of the computer patch, Dr Guidotti was of the opinion, as to which he was not challenged in cross-examination, that the findings of the CAES Report showed that it was still in use, so as to cap or mask price increases. CAES reported the use of hundreds of zero prices (Dr Sandleris accepted that the use of a single zero price meant that the value of all entities in the category became effectively zero, as the calculation of the geometric mean includes multiplying by zero), large amounts of data being excluded under the guise of being "*outliers*" and a "*magnitude of . . . inconsistencies . . . between the official statistics, mainly on prices, and other estimates and indicators, both public and private*". Dr Sandleris accepts that the CAES Report also shows that the use of Government-supplied figures in place of surveyed data was continuing in 2010, and that that was wrong.

21. The CAES Report recorded that "*INDEC's loss of credibility is an undeniable fact*", and Dr Sandleris also said as much in an article he wrote in November 2013, stating that this resulted from actions taken at the instance of Mr Moreno. Meanwhile, Ms Bevacqua, after her removal from INDEC, set up a new measure of inflation for GBA, based on INDEC's pre-intervention methodology, and her index was subsequently published by a private consultancy in Buenos Aires called BA City. In 2010, Ms Bevacqua carried out a test on the 2008 Update, using the prices that BA City observed in the market at the time and the weightings in the new Methodology. This produced figures which were close to those produced by BA City under its measure, and higher than those published by INDEC. In her second witness statement, Ms Bevacqua explained that the published changes in the Methodology thus did not explain the low CPI figures that were being published by INDEC, supporting her view that "*after January 2007 INDEC applied unprincipled processes and methodology, (such as the use of a software patch) which resulted in INDEC publishing a wholly inaccurate CPI*". As set out in paragraph 6 above, Ms Bevacqua's evidence was not challenged.

22. As a result of the CAES Report in November 2010 the Argentine Government invited the IMF to advise. Mr Werning noted on 15 December 2010 that "*although an IMF technical team is currently in Argentina reviewing the CPI methodology . . . the main distortions in CPI reporting are understood to be driven by price inputs rather than technicalities*". On 1 February 2012 the IMF issued a statement which "*regretted the absence of progress in aligning the CPI-GBA with international statistical guidelines*" calling on Argentina to implement specific remedial measures. Notwithstanding a second statement issued by the IMF on 18 September 2012, the IMF Board concluded on 1 February 2013 that remedial measures to address the concerns had not been sufficient, meaning that Argentina was in breach of obligation to the Fund under its Articles of Agreement, and, for the first time in its history, the IMF issued a declaration of censure against Argentina, for failing to implement remedial measures to address the inaccuracy of the GBA CPI.

23. In the meanwhile on 6 February 2011 the Calculation Agent had calculated, and on 7 February the Defendant paid out, the FRA, on the basis of the published CER. The Claimant had written to the Calculation Agent on 12 November 2009:

> "*We believe that the Argentine government has taken certain actions in the course of the last two years by means of . . . (INDEC) to manipulate the . . . (CPI). Such manipulation of the CPI affects the CER as reported by the* [BCRA]*, which in turn adjusts the principal due under our Note at maturity. Since INDEC has taken action which limits the appropriate calculation of the CER and affects values used to determine the CER, such as the CPI, we expect that you, as Calculation Agent, determine the* [FRA] *with respect to the ARS Valuation Date in a commercially reasonable manner as mandated by the terms of the Note and not follow the official but erroneous CER being published by* [BCRA] *or any other arm of the Argentine government.*"

By solicitor's letter dated 8 February 2011 the Claimant asserted that a CER Event had occurred and was continuing at the ARS Valuation Date "*because the Argentinean Government has during the term of the Notes taken action which has legally and/or de facto had the effect of restricting or limiting the calculation of the CER and/or values used to determine the CER*". The measures which were relied upon as establishing a CER Event were in that letter listed as:

> "▪ *Reducing the number of items considered by INDEC in the Consumer Price Index upon which the CER is based from 818 to 440.*
>
> ▪ *Altering the weighting of the items used to determine the Consumer Price Index upon which the CER is based;*
>
> ▪ *Restricting the geographic area from which prices are taken to compile the Consumer Price Index upon which the CER is based.*"

All these matters in fact arose from the 2008 Update. There is no mention at that time of either the use of the patch or of zero prices. JPMorgan by letter dated 1 March 2011 rejected the suggestion that there had been a CER Event. That is now for my determination.

<u>The issues</u>

24. This case hinges on the construction of the CER Event Provision, in the context of the consequential impact of the CER Calculation Provision. It is common ground that a CER Event occurs in the case of sub-paragraph (a) if there is not timely announcement of the CER by the BCRA, of (b) if the CER is replaced by a successor index and of (c) if the CER is no longer published and has not been replaced by a successor index. In all those cases the CER is not *available*. There is then resort to the CER Calculation Provision. Sub-paragraph (d) arises if some governmental action "*legally or de facto prevents or has the effect of restricting or limiting* [(i)] *the*

calculation or [(ii)] *announcement of the CER or any of the values used to determine the CER*". I have inserted (i) and (ii) into the sub-paragraph because in the course of argument it was easier to differentiate *calculation* and *announcement* in that way. In the case of what I thus called (d)(ii), i.e. the absence of an announcement of the CER (or the CPI, without which the CER could not be announced), again the CER would not be *available.* In all these cases, in which the CER would not be *available*, there is then recourse to the CER Calculation Provision, by which the Calculation Agent must carry out his task. If there is a *successor index*, as there would be in the event of sub-paragraph (b), his job would likely be a straightforward one. In any other of these cases the Calculation Agent would carry out its task "*in good faith and in a commercially reasonable manner based on such available market information and other information as it deems necessary and relevant*", and the Calculation Agent is directed (by the "*last five lines*") to include in its consideration not only the *successor index*, if there be one, but *the securities issued by the Republic of Argentina linked to CER or other obligations of* BCRA *linked to CER*.

25. The issue in this case arises in the context of what I called d(i), whereby Government action has legally or de facto prevented or had the effect of restricting or limiting the *calculation* of the CER or the CPI:

    (i) The Claimant submits that this deals, and is intended to deal, with a quite different scenario. It is not a question of the CER being *unavailable*, because it continues to be calculated and published, but that through Government action the figures published have been distorted or fabricated. The Claimant submits that the actions by the Government and/or by INDEC in paragraphs 11 to 22 above have, if not prevented, certainly *had the effect of restricting or limiting* the calculation of the CER and/or the CPI. This amounted to a *CER Event*, or series of *CER Events*, which continued until (and after) February 2011, even though the CER ostensibly continued to be published. The Calculation Agent was thus obliged to re-determine or recalculate CER_{FINAL} by reference to what it would or should have been but for the intervention by the Government, and, as neither of the sources of information specified in the *last five lines* would be appropriate, there being no *successor index*, and the Government and BCRA securities linked to CER continuing to be so linked to the published CER, the Calculation Agent was obliged to determine, without reference to them, an alternative figure.

    (ii) The Defendant's case is that there are not two severable parts of sub-paragraph (d), but the whole of (d) is, like the other 3 sub-paragraphs, an example of *unavailability* of the CER, as a result of Government action having prevented or limited the *calculation or announcement* of the CER or CPI. These being CER-Linked Notes, if the CER, and the underlying CPI, are still calculated by INDEC and published by the BCRA (and used and adopted by the Government and BCRA CER-linked securities) then there is no place for fresh determination of the CER, and to do so is outside the responsibility of the Calculation Agent.

26. If the clause means what the Claimant asserts, Mr Taylor makes a case which falls into two components. He first alleges that all of the actions by the Government

entities of which they complain, as above, amount (on his construction of sub-paragraph (d)) to *CER Events*. They are as follows:

(a) INDEC changed from surveying prices paid by consumers to using "estimated prices" provided by Ministries and State Secretaries of the Argentine Republic, such as the Tourism Secretariat and the Ministry of Health.

(b) The amount of "imputed data" (being data which was not based on actual prices paid by consumers but instead based on figures chosen by INDEC) increased from approximately 10% to 30%.

(c) INDEC changed the way in which it classified and identified "outliers" (i.e. atypical prices to be excluded from the calculation of the CPI), thereby excluding significantly more prices than had previously been the case by removing high outliers while low outliers were left in.

(d) INDEC made changes to its computer systems and/or programmes so as to monitor the variation in prices of goods and services from the previous month and place a cap on the price increase and such capped prices were then used in the calculation of the CPI.

(e) INDEC removed some categories or products and items and allocated a zero price to some items, which had not been done previously.

("*The Primary Actions*")

(f) Whereas INDEC used to survey over 800 items each month, this was reduced to 440 items by, inter alia, removing higher value goods which had higher value inflation.

(g) Whereas INDEC used to obtain approximately 90,000 prices, this was reduced to fewer than 30,000.

(h) The weightings applied to the basket of goods were changed with greater weight being attributed to lower value items with low inflation.

(i) INDEC introduced new "seasonal baskets" and a new method for calculating the index for such baskets each month by using a moving average of the past 12 months. Different fruit and vegetable baskets for each month were chosen on the basis that they had the same calorific content, whereas INDEC had previously selected baskets based on consumption.

("*The Secondary Actions*")

27. Of these, the *Primary Actions* (a) to (e) are the interventions caused by Mr Moreno and Ms Paglieri described in paragraphs 11 to 15 above.

28. The *Secondary Actions* (f), (g), (h) and (i) resulted from the Methodology Update of April/October 2008, which Mr Taylor criticises as "*unprincipled*" and contrary to international standards. Mr Taylor describes reliance on the *Primary Actions* as his primary case, in the sense that in closing submissions he diverted his reliance, in opening, on all those events to primary reliance on the *Primary Actions*, describing reliance on all of the events as his secondary case. The advantage to the Claimant's case is that the *Primary Actions* are more obviously interventions or *distortions*. The advantage to him of the *Secondary Actions* are that, unlike the *Primary Actions*, they were public, in the sense that the Methodology Update was a published document, and thus known, or capable of being known, to the Calculation Agent. Only the *Secondary Actions* (f), (h) and (i) were included in the 8 February 2011 letter to the Calculation Agent.

29. Insofar as it is necessary for the CER Event or events relied upon to have been *continuing on the ARS Valuation Date*, I am satisfied that the *Secondary Actions*, insofar as they are relevant, were continuing, and as to the *Primary Actions*, and in particular the computer patch and the zero prices, I am satisfied that they too continued until at least February 2011. Even though there is no direct evidence of them after the dismissal of Ms Bevacqua and the recording of the witnesses' evidence in the Garrido and Stornelli Reports, I am persuaded that they continued by:

(i) the evidence of Ms Bevacqua and the BA City Index, referred to in paragraph 21 above;

(ii) the fact that both sides' experts agree that inflation was substantially under-recorded at least until February 2011, although there is a dispute about precisely by how much;

(iii) the fact that there was no 'spike' in the CER records of inflation before 2011, which indicates that the methods must have continued, because otherwise there would have been a substantial 'catch up' of increased prices;

(iv) the, albeit unparticularised, resolution of censure by the IMF.

The *Primary Actions*, alternatively all these actions, continuing as above, constitute *CER Events*, by virtue of falling within the Claimant's construction of (d)(i).

30. As set out in paragraph 25 above, there is a complete stand-off in the approach of the two sides. The Claimant asserts, by reference to the facts, that (d)(i) must have been intended to deal with the event that the CER was manipulated, such that the published CER should be disregarded, and inflation recalculated. The Defendant submits that the parties agreed that the CER rate would govern the return under the CER-Linked Notes, whether such rate was accurately calculated or not.

31. As always where construction is in issue, there are leading cases to bear in mind. It is, as set out in paragraph 10(vi) above, common ground that these provisions are not standard provisions, and neither expert has ever seen them before. Construction must be an exercise of considering the language used and ascertaining what a reasonable informed person would have understood the parties to mean (**Reardon Smith Line v Hansen-Tangen**, [1976] 1 WLR 989 HL at 996 and (**Rainy Sky SA and others v**

Kookmin Bank [2011] 1 WLR 2900 esp at 14 and 21) but the Court must not be hidebound by literalism (e.g. **Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1)** [1998] 1 WLR 896 at 912) and must apply a commercial approach, preferring, where there are alternative constructions, that which accords more with common sense (**Sirius International Insurance Company v FAI General Insurance Ltd** [2004] 1 WLR 3251 HL) and not in a vacuum, following a "*composite exercise, neither uncompromisingly literal nor unswervingly purposive*" (per Bingham MR in **Arbuthnott v Fagan** [1995] CLC 1396 at 1400F). In this case I must take the following course:

(i) address clause 22 of the Final Terms (which contains both the CER Event Provision and the CER Calculation Provision) as a whole, taking account of it all if possible, if consistent with the approach set out above.

(ii) address the CER Event Provision as a whole, similarly as above.

(iii) take full account, if I can assess it, of the commercial purpose of the Notes.

(iv) take into account the factual matrix, namely those matters which were either in the public domain or had 'crossed the line' between the parties.

32. The commercial purpose in this case is not straightforward to resolve because, as will be seen, the parties are at odds in relation to it and, as Mr Wolfson QC for the Defendant submitted, in fact the ascertainment of what the commercial purpose is may be the clue, but is in any event integral, to resolving the construction:

(i) The commercial purpose of the Notes which the Claimant asserts is to ensure a return for the Claimant referable to the increase in inflation over the period of the Notes in the GBA. Hence the CER Index is only a reflection of that inflation, and must be, as Mr Taylor submits, *reliable*, and the CPI, upon which it is based, must also be *reliable* and based upon *representative* prices: and is expressly to be replaced/overridden if it is not.

(ii) The commercial purpose of the Notes on the Defendant's case is to ensure a return for the Claimant by reference to the CER, to which they are linked, and the only need for 'back up' is if for some reason the CER is not calculated or published, i.e. not *available*, in which case (alone) a substitute or replacement CER will be found. Mr Wolfson submits that if the CER were manipulated, the parties are nevertheless bound to it, not surprisingly where the CPI has been *reliable* and unchallenged since 1924 and was and is a universally recognised inflation index.

33. Another way of addressing the question is to ask who, on the basis of the contract contained in the Notes, took the risk of this unprecedented manipulation. There is a section in the Notes headed up "Risk Factors", from which I set out below material extracts (with my underlinings):

"*(i) Argentine Pesos Exchange Rate Risk*

The amount of any payment on the Notes of principal in U.S. Dollars will be affected by the exchange rate of Argentine Pesos to U.S. Dollars, since the

underlying amounts by reference to which U.S. Dollar amounts are determined are in Argentine Pesos. The USD equivalent of the ARS Nominal Amount adjusted by the *<u>CER rate</u>* *and any payments due under the Notes will be based on the exchange rate of Argentine Pesos to U.S. Dollars and that of the CER rate. Currency exchange rates and* *<u>inflation rates may be volatile</u>* *and will affect the USD equivalent return to the holder of the Notes. The movement of the currency exchange rates and* *<u>of the CER rate</u>* *could result in any amount due under the Notes being less than the initial USD paid for the Notes. As a result, a holder could lose a substantial amount of its investment in these Notes.*

(ii) *Potentially Limited Market*

There may exist at times only limited markets for the Notes and for the obligations linked to the inflation index to which the Notes are linked, resulting in low or non-existent volumes of trading in the Notes and such obligations, and therefore a lack of liquidity and price volatility of the Notes and such obligations.

(iii) *Noteholder Analysis of Risk*

The Notes are complex instruments which involve a high degree of risk and are suitable for purchase only by sophisticated investors who are capable of understanding the risks involved. In particular, the Notes should not be purchased by or sold to individuals and other non-expert investors. Each prospective purchaser of Notes must determine, based on its own independent review of the business, financial condition, prospects, creditworthiness, status and affairs of the Issuer, *<u>the CER rate</u>*, *the ARS/USD exchange rate and the Notes and of the rights attaching to the Notes (without reliance upon the Issuer or any Dealer or any of their affiliates) and such professional advice as it deems appropriate under the circumstances.*

(iv) *Because the Calculation Agent is an affiliate of the Issuer, potential conflicts of interest may exist between the Calculation Agent and the Noteholders of the Notes, including with respect to certain determinations and judgments that the Calculation Agent must make as to the amount (if any) due on redemption of the Notes.*

(v) *The terms of the Notes entitle the Calculation Agent to* *<u>exercise discretion in determining an applicable exchange rate</u>*. *Although the Calculation Agent will make any such determination in good faith, any such determination may have adverse effects on the market prices, rates or other market factors underlying the Notes. In addition, different dealers may arrive at different rates. Consequently, the Calculation Agent cannot and does not represent to investors that the rates, determined by the Calculation Agent will be the most favourable rates to investors or the rates that are available in the market generally.*"

34. The following matters are those upon which the Claimant relies in respect of the factual matrix:

(i) The CPI/CER was a reliable measure of inflation in the GBA.

(ii) Argentina had had in recent years what Mr Patten agreed to have been a "*chequered financial history*".

(iii) With regard to the Risk Factors referred to above, it was stated that "*currency exchange rates and inflation rates may be volatile*": there was no risk warning as to the possible manipulation of the CPI.

The Claimant refers to the fact that Methodology 13 was in place at the time of the Notes: Mr Taylor accepts that there is no mention of it in the Notes, and it is not suggested that it was in any way a term or condition of the Notes that it should remain the Methodology. The Claimant however refers to the fact that it was a reliable Methodology, including the statement in its Introduction:

> "*Operationally, the CPI is an indicator that seeks to reduce large amounts of data to manageable sizes, in order to obtain useful measurements as accurate as possible, always within the scope of its limitations. Its design is consistent with the purpose of achieving a reliable, accurate, representative, understandable, coherent, comparable, useful, and timely indicator. . .*
>
> *A price index's statistical reliability depends upon the representativeness of collected price information, on the representativeness of the weights attached to the goods and services included in the basket, and on the calculation formulas.*"

35. As to the Defendant's approach to the factual matrix:

(i) The Claimant's first item is not in contention.

(ii) The second is submitted to be irrelevant, where there has never been any doubt about the CER.

(iii) As to the third, the passage in the quotation from the "*Risk Factors*", set out in paragraph 33(i) above, plainly relates to the volatility of the CER rate, which is the rate referred to twice in that paragraph (and further in paragraph 33(iii)), and not any kind of reference to some different method of calculating inflation. The Defendant agreed that there was no risk warning with regard to the CER, but there is also no warning of any risk in relation to the calculation or determination to be carried out by the Calculation Agent with regard to CER, otherwise referred to in paragraph 33(v) above, whereas there is such a reference in relation to the Calculation Agent's discretion in determining an applicable exchange rate (as to which there is a detailed methodology set out in Annex 1 to the Notes).

(iv) The Defendant notes that it is clear from the experts' evidence that they agree that inflation-linked financial instruments are often used as a hedge or offset for inflation-linked liabilities; and that a pension/insurance company

such as the Claimant trading in Argentina would have CER-linked liabilities: and that such was the case in relation to the Claimant is clear from the Claimant's own Submission to the SEC to that effect in 2005. Reference was made by Mr Wolfson to a post-contractual note of August 2007 of a meeting where the Claimant is referring to CPI impacting "*equally assets and liabilities*", which he submits is admissible, particularly in the absence of any oral evidence from the Claimant, as corroborating the obvious inference of such an offset of CER-linked assets and CER-linked liabilities.

(v) Finally Mr Wolfson refers to the tradability of the Notes, albeit limited as set out in paragraph 33(ii) above, and to the fact that in Part B of the Notes "*Reasons for the Offer*" are recited as "*including hedging arrangements*".

<u>The parties' respective arguments</u>

36. I shall set out the contentions of the parties, endeavouring to record them so that the Claimant's arguments I set out in numbered sub-paragraphs fall to be set against the counter-arguments made by the Defendant set out in similar numbered sub-paragraphs.

37. The Claimant submits as follows:

(i) The meaning for which it contends of the words "*takes any action which legally or de facto prevents or has the effect of restricting or limiting the calculation or announcement of CER or any of the values used to determine the CER*" is the natural meaning of the words: an intervention by a Government entity which causes an interference with the announcement or calculation by preventing, restricting or limiting it. So far as calculation is concerned, there is a *restriction or limitation* of the calculation (Mr Taylor does not primarily rely on *preventing*) if the calculation is not allowed to take its normal course, by being manipulated e.g. by the patch or the zero prices.

(ii) If the other sub-paragraphs (a), (b) and (c), and what I have called (d)(ii) (relating to *announcement*) deal with *availability* of the CER, (d)(i) deals with *reliability*. (d) is the only sub-paragraph which brings in specific reference to actions of Government entities, with its very wide definition so as to catch any intervention, and to the CPI (it is common ground that the CPI is what is referred to by the reference to *values* (in the two previous months) *used to determine the CER*). (d)(i) is the only sub-paragraph which addresses intervention/manipulation/*unreliability*, but it is that upon which the Claimant rests its case.

(iii) This ensures that the CER remains *reliable.* There will be a *CER Event* if the CER fails to comply with internationally accepted guidelines such as those laid down by the International Labour Organisation ("ILO").

(iv) The CER by virtue of the *Primary Actions* and/or the *Secondary Actions* became no longer representative of consumer expenditure in the GBA,

which was the commercial purpose of the Notes, as set out in paragraph 32(i) above, and hence did not record actual inflation in the GBA.

(v) Any change in methodology for calculating the CPI must be *principled*, and the 2008 Update was not *principled*, because of the *Secondary Actions* set out in paragraph 26 above.

(vi) In any event, on any basis, *the Primary Actions* were *unprincipled* and in breach of any international standards, and constituted manipulation of the CER, and hence *restricted or limited* its calculation.

(vii) A *CER Event* might involve an inaccurate CER either by causing it to be too low, as here (and thus leading to more being payable by the Defendant) or too high (leading to less being payable by the Defendant). Further, if it involves an interference with (*restriction/limitation of)* the calculation, it could have a *de minimis* effect, but Mr Taylor submitted that even if the published CER was rendered *unreliable* by a small amount, as soon as the interference has occurred the CPI would no longer be representative of consumption, and there is a *CER Event*, and it is then up to the Calculation Agent to do what he concludes to be reasonably commercial in the circumstances.

(viii) It was the evidence of Mr Goldenberg, the Claimant's expert, that the Calculation Agent must act on the basis of the information available to him at the calculation date (Day 2/123). However Mr Taylor did not appear to adopt that in his final reply submissions, and after submitting (Day 7/209) that for commercial certainty the answer would be that subsequent information could not be used if it was not possible to determine that there was a *CER Event* on the date that the Notes matured, he crystallised his submission (at Day 7/211) as rather being that a party would be entitled, if there was a dispute as to what should be paid, to bring later to a court evidence which was in existence, even though he did not have it prior to the maturity of the Notes. On the other hand, notwithstanding the discussion as to what would or could be put before the Calculation Agent, Mr Taylor was clear (Day 6/53-61) that it was not for the Calculation Agent to resolve a dispute about whether there was a *CER Event.*

(ix) There was dispute between the parties as to what were called in the course of argument *"the last five lines"* - as referred to in paragraph 24 above - being what the Calculation Agent was directed to *include* in his consideration of a determination and/or recalculation of the CER, and how they could be accommodated in Mr Taylor's case. Mr Taylor accepted and asserted that the *last five lines* did not apply to (d)(i), i.e. a situation relating to restriction or limitation of the *calculation* of the CER by virtue of its having become *unreliable*, although it would apply to (a), (b), (c) and (d)(ii). In relation to a (d)(i) situation the Calculation Agent would not consider a new calculation method by reference to a successor index or to the Government etc. securities linked to CER, since the already existing CER would be disregarded as having been manipulated.

It is really the first of these nine submissions which is the crux of Mr Taylor's case, namely that this part of sub-paragraph (d) is intended to address the very case before me, and the rest of his submissions are largely defensive, addressing the arguments raised by Mr Wolfson, to which I now turn.

38. The Defendant submits in answer to the above the following:

(i) There is a natural meaning of (d), which deals with Government interventions which prevent restrict or limit the *announcement* or *calculation* of the CER or CPI, and which relates to *availability*: i.e. if the Government restricts or limits *announcement* or *calculation* of the CER or CPI, then there will be no CER or CPI *available*, at any rate at the time when it is required. There is no call for any other meaning of (d)(i). It is no answer that this leads to duplication of result because a (d)(ii) scenario may well also fall within (a) or (c), since there is nothing offensive about duplication, and indeed (a), (c) and (d)(i) and (ii) may all be duplicative. It is an example of '*belt and braces'* drafting: see **Arbuthnott** per Bingham LJ at 1399F: "*in drafting a clause of this kind a draftsman's primary concern is not to avoid repetition . . . but at all costs to avoid leaving loopholes which an unscrupulous party might exploit, even if this does lead to repetition*."

(ii) Albeit that it was my phraseology which led to the use of the terms (d)(i) and (d)(ii), nevertheless it was based upon Mr Taylor's acceptance and submission that (d) did address two different scenarios. Mr Wolfson submits that it is wholly inappropriate to consider that (a), (b), (c) and (d)(ii) deal with *availability* and (d)(i) deals with *unreliability*. There is no explanation why (d)(i) should be what Mr Wolfson calls *sandwiched* in that way. If there really were intended to be a provision dealing with the separate issue of *reliability*, it would have been dealt with in a separate sub-paragraph, not sandwiched in among provisions dealing with *availability*.

(iii) Mr Wolfson asks, if the Claimant's construction was correct, what test is to apply to *reliability*, or compliance with international guidelines? How is the Calculation Agent (or the Court) to apply those standards? Detailed instruction is given, in Annex 1 to the Notes, as to how to approach disputes about the exchange rate, yet in what is accepted, if indeed it does deal with *reliability*, to be a bespoke provision, not found in any other market disruption clause by either expert, no method is provided for the resolution of such a dispute.

(iv) There is no rational explanation whatever for the suggestion that what the parties were intending was not to follow CER (with its plethora of CER-linked securities and liabilities) but inflation in the GBA: there is no measure of 'actual' inflation except by reference to the CER, and the GBA is of no significance except as forming the basis for the CER. The reference which Mr Taylor makes to a suggested concession in that regard in Mr Wolfson's Further Information dated 10 January 2014 at paragraph 8, is submitted (and I find) not to be so, but rather to be a statement relating to the quantum issue, with which I shall deal below, namely the Defendant's then case that in looking for a substitute index for CER, it would be to an

index of consumer prices in the Buenos Aires region, rather than indices relating to other Provinces, to which regard should be given.

(v) As for the Claimant's case in relation to the *Secondary Actions*, all of which were contained in the published 2008 Update, again the question is asked as to the test by which whether such changes were *unprincipled* is to be decided. There are bound, or at any rate likely, to be changes in methodology over a period of five years, and a change in methodology of itself cannot be sufficient. The ILO allows a wide discretion: see for example clauses 1.116-117 of the ILO Consumer Price Index Manual (2004). It is accepted (as set out in paragraph 34 above) that the continued existence of Methodology 13 is not a contractual term; the most that could be said would be that Resolution 47/2002 would be contractual, and that is not suggested to have been affected. The only Survey which is contractual in the Notes is that set out in Annex 1 in relation to calculation of the exchange rate, and resolution of disputes which the Calculation Agent might need to resolve, being the EMTA ARS Industry Survey Rate.

(vi) As for the *Primary Actions*, the instant case is obviously fact sensitive; facts cannot dictate the answer to the construction issue. The distortions are described variously as *gross* or *blatant*, and although even Ms Bevacqua in her evidence accepted that, because the detailed results were not all published, it was not easy to get at the true position, certainly enough was published in the various Reports at least to draw an inference as to the existence and continuation of these *Actions*. However, Mr Wolfson asks, what if the actions said to constitute a *CER Event* are not *blatant* and not published? There is no history at all of previous manipulation of the CER or CPI so as to justify providing against it in the Notes.

(vii) The provision whereby the amount to be paid could vary upwards or downwards from the published CER rate would create certainty for neither party to the Notes. As to the suggestion as to *de minimis*, Mr Wolfson submits that there is no justification in the language of the Notes for the Claimant's distinction between a restriction or limitation which has no effect on the CPI figure (which would not be a *CER Event*) and a restriction or limitation which has a very small effect on the CPI figure (which would be a *CER Event*, but one which was then left to the discretion of the Calculation Agent). He submits the suggested scheme to be wholly unworkable.

(viii) Mr Wolfson submits that the role of the Calculation Agent is crucial in relation to the choice between the two parties' constructions. He agrees with Mr Taylor that there is no call for the Calculation Agent to decide such a dispute as Mr Taylor postulates in relation to a CER Event, but this is because that is no part of his role. He simply has to decide on a replacement CER in the event of *unavailability* of the one which governs the Notes. On the case for the Claimant, the Calculation Agent would need to know what the *CER Event* was, what effect it had and whether it was still continuing. In this case, although for the purposes of construction neither side can rely on the facts of this case, the letters to the Calculation Agent did not provide him with sufficient information, and certainly did not refer

to the *Primary Actions* now relied upon, although Mr Taylor submitted that as the Calculation Agent was (a different office of) JPMorgan it would at least have known what Mr Werning knew. But what of another case? In any event, there is no risk of a misjudgment by the Calculation Agent in relation to CER provided for in the contractual list of "*Risk Factors*", and in contrast to the provisions in relation to exchange rate determination in Annex 1, no methodology for its determination. The 48 hours which, it is common ground, were provided for calculation by the Calculation Agent (although extendable by reference to the 30 day default period) would be apt for calculation of a replacement index, given the easy availability of the necessary figures, as is agreed between the experts, but not for the resolution of a dispute about a *CER Event.* It is not surprising that Mr Patten, who has acted regularly as a Calculation Agent, has never had to deal with such a determination.

(ix) As to the "*last five lines"*, Mr Wolfson submits that they ensure that the derivative nature of the instrument is maintained. As he submits (paragraph 83 of his Closing Submissions), the Notes are linked to the CER, performing the same economic function as a CER-linked Government bond, but the investor avoids assuming sovereign risk and obtains instead the risk of JPMorgan as its counterparty. For that reason, if the CER is *unavailable*, the Calculation Agent will naturally want to look - and is directed to look – at what is happening to other CER-linked instruments in the market: if there is a successor index to replace the CER, that is the first point of call, and if there is not, the Calculation Agent should look at what is happening to CER-linked Government bonds and Central Bank securities. The Claimant's construction, that the *last five lines* would apply to all the other scenarios but would not apply to (d)(i), is a strained and inappropriate construction, and at the very least would need an implication of "(if appropriate)".

(x) The Defendant has additional arguments. If (d)(i) has the effect attributed to it:

(a) It constitutes a risk which Mr Wolfson submits no bank would have accepted (Mr Goldenberg accepted (Day 2/181) that it must mean that the Bank either "*just missed it"* or "*completely undervalued the risk they were taking"*).

(b) It would make the Notes very difficult if not impossible to trade (and where third parties may be involved, certainty of construction is required) or to hedge (see paragraph 35(v) above).

(c) Given that it is likely if not certain (as per paragraph 35(iv) above) that the Claimant would have had substantial CER-linked liabilities, adopting the Claimant's construction in this case would give it an unwarranted windfall, in that its liabilities would remain pegged to the official CER, while its return would increase by being un-pegged from the official CER.

Conclusion

39. Notwithstanding that the construction contended for by the Claimant was arguable on the basis of the words of part of sub-paragraph (d), I have no doubt at all that in relation to each of the nine submissions of the Claimant, which I have set out above, they are trumped and answered by the counter-submissions of the Defendant, which I prefer, in each case for the reasons given by Mr Wolfson. I would also add the following.

40. If the construction for which the Claimant contends was that there had been manipulation or fabrication in relation to the CER Index, then that could have been so formulated, with a methodology for decision of such a dispute. I am influenced by the fact that the Calculation Agent is to carry out the exercise provided by the CER Calculation Provision, and, save if there is a dispute about the exchange rate, for which detailed methodology is provided in Annex 1, the Calculation Agent's task is to arrive at a substitute or replacement CER, not to decide complex questions as to whether the existing CER is flawed or was inconsistent with international standards, a dispute for which the Calculation Agent would be singularly unqualified.

41. On the other hand, if it is not to be resolved by the Calculation Agent, then there is no provision for resolution of the dispute. I am unimpressed by the changes of case in the course of argument by the Claimant referred to in paragraphs 37(viii) above. The inevitable difficulty as to whether the Claimant does or does not expect the Calculation Agent to make the decision, or whether the Calculation Agent does or does not take into account only the facts known to the Calculation Agent at the time of the calculation, or whether a court 2 to 3 years afterwards is entitled to take into account matters which were not known to the Calculation Agent, who was not it seems to make the determination anyway, despite the apparent intention of the scheme, left me clear that the whole approach was unworkable.

42. The *last five lines* are significant. In paragraph 153 of the Claimant's closing submissions Mr Taylor submitted that "*the approach of the Calculation Agent is the same, regardless of whether clause 22(a), (b), (c) or (d) has been triggered*". As appears from paragraph 37(ix) above, he did not pursue this contention in oral submissions; and he sought to meet the Defendant's case that the *last five lines* support the derivative nature of the instrument by an example whereby the Argentine Government might decide that it did not want to pay its bonds by reference to CER any longer because it was costing too much, and instead decided to pay 2% rather than CER. But this of course is no answer, given that the Calculation Agent is only required to look at other securities linked to CER.

43. I also find it significant that the CER Calculation Provision begins: "*If a CER Event has occurred and is continuing* (my underlining) *on the ARS Valuation Date*". It does not say that its effect is continuing. If it was intended to address an intervention which had distorted the CER, then the question ought to be whether its effect was continuing, so that if there had been some distortion or fabrication 2 years earlier, which had ceased, but whose effect was continuing, that ought to be a *CER Event*. But that is not what it says. On the other hand if a *CER Event* is the *unavailability* of the CER, then what would be significant would be to ask whether it was *still unavailable* as at the date, i.e. whether the *CER Event* was continuing.

44. For all the reasons given by Mr Wolfson and my reasons above, I am persuaded that these provisions were not intended to guard against the (unprecedented and unanticipated) event of fabrication or distortion of the calculations of the CPI and/or CER, nor a fortiori an *unprincipled* change of published methodology, but simply to guard against the CER's *unavailability* for any reason, including actions taken by the Government in *preventing, restricting or limiting its calculation or announcement*.

45. The Claimant's case accordingly fails.

<u>Quantum</u>

46. I turn to consider the question of quantum, in case I am wrong in my conclusions above. There were some disputes between the parties and the experts which have, with very helpful cooperation, now been resolved. In particular it is now common ground that the best approximation of what would, and could, have been reconstructed for inflation in the GBA is to be taken by reference to the figures for either 13, 14 or 15 Argentine Provinces (the dispute being as to whether 2 Provinces, Mendoza and Cordoba should be omitted). It has thus not been required (other than by a double-check, which in the light of this agreement has not really been necessary) to look either at Ms Bevacqua's BA City Index (often used by Mr Werning, or in JPMorgan and other updates or releases, some of which have been referred to in paragraphs 16 to 19 above, as a 'proxy' for the CER) or to Dr Sandleris's "*bottom-up*" calculation by reference to a collection of Buenos Aires prices: nor at any of the earlier sets of calculations, by reference to 4, 7, 9, 10 and 12 of the Provinces, and Dr Guidotti's original selection of those Provinces which seemed to him to correlate most closely to the GBA was overtaken by the agreement by both experts to address all (or almost all) Provinces.

47. All the figures have been helpfully agreed, based upon the various scenarios for my consideration. The three issues that remained are:

    (i) Whether to adopt Dr Sandleris's Linear Prediction Methodology, and if so whether it could or should in some way be '*smoothed*'.

    (ii) If not, whether to adopt a simple or weighted average when addressing the figures derived from the different Provinces.

    (iii) Whether to leave out of account one or both of the 2 Provinces referred to above.

<u>Prediction Methodology</u>

48. It was common ground that the period of *intervention* during which, on the assumption of liability in favour of the Claimant, the CER fell to be recalculated because it was no longer *reliable*, was from January 2007 to December 2010: and both experts have used INDEC's inflation figures (and the CER based on them) between February 2006 and December 2006. Dr Sandleris advocates as the best method of reconstructing an index by reference to the 13/14/15 Provinces is to use what he calls an "econometric technique", namely Linear Prediction Methodology, to calculate the best algebraic combination of the Provincial Indices. In order to arrive at the Linear Prediction Methodology he derives his figures, and hence his algebraic

calculations, from the period 1998 to 2006, which has been dubbed the "Historic Period", as opposed to the "Prediction Period" as referred to above, namely 2007-2010 which both experts are aiming to estimate. For a substantial part of that Historic Period there are no data for two of the Provinces, San Luis and Santa Fe, so Dr Sandleris has estimated them (in a manner criticised by Dr Guidotti). The rival method of calculation, put forward by Dr Guidotti, is simply to take the figures published in respect of all the 13/14/15 Provinces during the Prediction Period, and then there is the dispute referred to below as to whether to take the simple average or the weighted average of those figures.

49. The major criticism which the Claimant makes of the adoption of the Prediction Methodology is that to derive the calculations from the 9 year Historic Period is wholly inappropriate, when there were included in such period times of wholly unrepresentative economic circumstances. The period up to 2001 is referred to as the "Convertibility Period" relating to the time when the peso was equated to the dollar, and it also included a period from January to September 2002 when there were dire economic circumstances: a huge devaluation of the peso, a default by Argentina on its sovereign debt, deep recession and hyper-inflation. By virtue of Dr Sandleris's inclusion of this and the other periods, Dr Guidotti considers that the Prediction Methodology is rendered inevitably unrepresentative. Dr Sandleris however considers that it is necessary and important to include within the Prediction Period different kinds of economic circumstances. Nevertheless, although that may be the case, it seems to me that the period from January to September 2002 was extraordinarily different, and, helpfully, both experts have readdressed the calculation based on Dr Sandleris's Prediction Methodology so as to introduce a '*dummy*' in respect of that period, i.e. so as to exclude the data in respect of that hyper-inflationary period, and thus *smooth* the Prediction to that extent. If I were to adopt the Prediction Methodology, I would in any event conclude that such a *dummy* should be adopted, and I prefer Dr Guidotti's *dummy* as more accurately geared to the actual period of the "spike" between January and September 2002.

50. Nevertheless Dr Guidotti's criticism of the Prediction Methodology based on the Historic Period is maintained even without the *dummy* period, and the Claimant makes a number of other criticisms, including the following:

(i) Dr Guidotti disagrees with Dr Sandleris that the Prediction Methodology adjusts correctly for the fact that in periods of high inflation Provincial indices assign a higher weighting than GBA to food and beverages, which tend to include higher inflation items. He considers that inclusion of periods of high inflation during the Historic Period leads to inaccuracies for that very reason.

(ii) Dr Guidotti criticises the fact that Dr Sandleris's analysis produces negative coefficients in some Provinces: a negative coefficient between a Province and GBA means that there is the unrealistic result that as the index goes up in that Province it goes down in GBA and vice versa.

(iii) Data for San Luis and Santa Fe are estimated, as above.

(iv) Dr Guidotti demonstrates that the Prediction Methodology did not accurately correlate to INDEC's CPI for the 2 years prior to intervention,

when it is common ground it was reliable, whereas his tests are closely aligned with the (then undistorted) INDEC figures over a 4 year period.

51. There is a dispute between the experts, which I am unable to resolve, as to the role if any which causation or causal theory should play in such a Methodology, and there was a learned dispute between the experts and counsel, as part of that argument, about the correlation between ice cream sales and temperatures. Suffice it to say:

(i) I find some force in Dr Guidotti's criticisms set out above.

(ii) I found Dr Guidotti extremely persuasive, and my confidence in Dr Sandleris was somewhat dented by his stubborn refusal to accept the obvious, as referred to in paragraph 9 above.

(iii) The simplicity of the adoption of an average (whether weighted or simple) is of itself attractive. I am inevitably influenced by the fact that if the Calculation Agent were required to do this exercise – and on any basis that would arise in relation to the circumstances referred to in sub-paragraph (c) and (d)(ii) - the compilation of simple or weighted averages would not be a difficult task, as compared with the adoption of the econometric techniques of Dr Sandleris, with or without any *dummy*. No one, including banks, commenting at the time, when looking at other 'proxies' even considered such methodology.

52. I am persuaded that it is not appropriate to adopt the Prediction Methodology.

<u>Simple or weighted averaging</u>

53. I have to choose between adopting a simple average of the Provincial Indices (adding them all together and dividing by the number of Provinces) and adopting a weighted average, by which the Provincial Indices are weighted by reference to the share of national consumer expenditure in the relevant Province. Dr Guidotti prefers the former; but before the experts reached their common ground as to using the data for all (or almost all) the Provinces Dr Guidotti

(i) used, and approved of, a proxy based upon 7 Provinces called CENDA 7, which was based on such a weighted average: and

(ii) significantly, in carrying out his earlier calculations based upon only some Provinces, had first performed an exercise to see which Provinces most closely correlated to GBA. This obviously underlined the purpose that any proxy should endeavour to approximate to GBA so far as it could, by avoiding dissimilar Provinces. Now that all (or almost all) the Provinces are being used, I am satisfied that a method must be found to avoid too much weight being given (as it would be by simple averaging) to Provinces which are dissimilar to GBA.

54. As Dr Sandleris pointed out, the GBA is overwhelmingly the largest contributor to national consumer expenditure (58%): 9 Provinces together contributed only 18%. Equal averaging would or may lead to a few small Provinces having a

disproportionate effect on the overall calculation, and not adequately reflect information for the most economically significant Provinces.

55. I am satisfied that weighted averaging should be adopted.

Leaving out Mendoza and Cordoba

56. I deal first with Mendoza. Although there remained a dispute about the exclusion from the calculations in respect of the Prediction Period of the figures for the Mendoza Province, Mr Wolfson did not in the end put up much resistance to its exclusion. The evidence does seem to me to be clear that there was manipulation of the Mendoza CPI in the same manner as the INDEC CPI by at least September 2007. Ms Bevacqua says so, and the Garrido report concludes that a patch was being operated at least from that date in relation to that Provincial Index. A similar account is given by Gustavo Noriega in his lengthy commentary, *The Inside Story of a Swindle*, published in Argentina in 2012. It is clear that the Mendoza figures became unreliable for the majority of the Prediction Period, and are best omitted.

57. As for Cordoba, the Claimant also seeks its omission, the consequence of which would be an increase in the calculated notional replacement CER as against a calculation based on its inclusion. I am satisfied that it has not been shown that the Cordoba Index was similarly manipulated. The same suggestion of manipulation could be made, as Mr Noriega makes clear, as to all the Provinces, since he actually records Ms Paglieri as telling him that all the Provinces "*had agreed to work as in Buenos Aires*", startlingly with the exception of Mendoza (and San Luis)! The most that can be said by Mr Taylor, derived from Mr Noriega, is that Cordoba was seemingly the only Province which put on its website what he calls a "*suggestive declaration of principles*" which on its face is a declaration of independence from INDEC, though Mr Noriega suggests it carries with it an inference to the contrary. There is in my judgment insufficient to justify the exclusion of Cordoba from the figures.

Calculation

58. The consequence is that, had I found in the Claimant's favour on liability, I would have adopted a replacement CER_{FINAL} based upon a weighted average for the CPI of 14 Provinces. As set out in paragraph 46 above, it was not in the event necessary to look at the "double check" figures of (in the case of Dr Guidotti) the BA City Index, which would have produced a figure of 4.2365, or (in the case of Dr Sandleris) his *bottom-up* approach which would have resulted in 3.5207. The figure I would have arrived at, by reference to the agreed figures, would have been, instead of the official CER_{FINAL} of 2.6539, a figure of 3.7843. This would have led to judgment for an additional sum, over the FRA as paid, of US$75.20m.

59. For the reasons given above, however, I am satisfied that there should be judgment for the Defendant.