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IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
COMMERCIAL COURT  
[2018] EWHC 1189 (Comm)



No. CL-2016-000740

Royal Courts of Justice

Monday, 16 April 2018

Before:

MR JUSTICE BUTCHER

B E T W E E N :

GUNVOR SA

Claimant

- and -

SKY OIL & GAS LTD

Defendant

(Previously known as Keystone Trade Oil & Gas Group (UK) Ltd)

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MR O. CAPLIN (instructed by Hill Dickinson LLP) appeared on behalf of the Claimant.

THE DEFENDANT did not appear and was not represented.

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**J U D G M E N T**

MR JUSTICE BUTCHER:

- 1 This is a claim made by Gunvor SA (“the Claimant”) against Sky Oil and Gas Limited which was previously known as Keystone Trade Oil and Gas Group (UK) Limited (“the Defendant”). The Claimant claims as seller damages from the Defendant as buyer for breach of a contract dated 29 July 2016 for the sale CIF Hodeidah of 55,307 mt of gasoline to be delivered by a ship-to-ship (“STS”) transfer from mother vessel MT Hong Ze Hu. Today has been the hearing of the trial of this matter. However, the Defendant has not appeared or been represented. Indeed, the Defendant has not engaged with these proceedings since shortly after the first CMC in June 2007. It did file a Defence and Counterclaim but has not provided disclosure or adduced any factual or expert evidence and, as I say, it has not appeared today. The trial proceeded in the absence of the Defendant as envisaged by CPR PD39A [2.2].
- 2 I have received evidence from Monsieur Benoit Chamayou and Mr Henri Philippe Elink Schuurman. I have received a hearsay statement from Sheikh Tariq Abdullah and I have received expert evidence from Ms Catherine Jago, all on behalf of the Claimant. All of this material in written form was sent to the Defendant prior to today but there has been no response to any of it and none of this evidence has been challenged. I accordingly have been given no basis for not accepting it. I have also received both written and oral submissions from the Claimant’s counsel, Mr Oliver Caplin, and have been referred to a variety of the underlying documents. On the basis of these matters, I make findings and determinations which follow.
- 3 It is necessary to commence with a summary of the facts as I find them on the basis of the materials which have been presented to me. Mr Elink Schuurman was first introduced to the Defendant and to its CEO, Vito Mariano, by e-mail on 27 May 2016. The Defendant was interested in purchasing a cargo of gasoline that it knew the Claimant already had inside Yemen, which was on board the Hong Ze Hu off the coast of Hodeidah. The gasoline on board the vessel had been the subject of two previous sale contracts to a third party, CruGas Yemen Limited (“CruGas”). However, CruGas had failed to perform under those contracts and at this time, the Claimant was actively looking for a replacement buyer.
- 4 On 30 May 2016, the parties made their first attempt to contract. The Claimant offered to sell 60,000-odd mts of gasoline from the Hong Ze Hu for US\$43 million and various negotiations between the parties ensued. As those negotiations continued, the deal developed to embrace the sale of the cargo on board the Hong Ze Hu on an ‘as is’ basis, delivery Hodeidah, together with a series of further cargoes for delivery at Djibouti. The sale of the gasoline on the Hong Ze Hu on an ‘as is’ basis was attractive to the Claimant in that it removed the need for any re-analysis of the cargo and required the Defendant to accept the quality of the cargo whatever its condition would be on delivery.
- 5 The parties finally reached terms in relation to that deal on 16 June and it was embodied in three separate contracts spread across the gasoline already aboard the Hong Ze Hu for delivery Hodeidah, and different cargoes for delivery Djibouti.
- 6 The contract in relation to the cargo on board the Hong Ze Hu was given the notation “GS1605719” and the deal recap in relation to it was slightly amended by the parties later that day. The terms required the Defendant to make three partial pre-payments and to open a letter of credit upon which the Claimant would deliver the first instalment of the cargo. The first two pre-payments were to be in an amount of US\$5.9 million for which the Claimant issued invoices to the Defendant. At this stage, the Defendant, through Mr Mariano, indicated that it could not open the letter of credit. The Defendant instead

proposed that it pay cash to the Claimant in UAE Dirhams (“Dirhams”). As the Claimant did not want the deal to collapse it agreed and because it did not have a Dirhams account, it directed the Defendant to deposit those sums into the account of another Gunvor group company, Gunvor Middle East DMCC (“Gunvor DMCC”).

- 7 On 15 June 2016, the Claimant forwarded documents concerning the loading of the gasoline on board the Hong Ze Hu, which had taken place in two tranches in September 2015 and February 2016, including the Bureau Veritas quality certificates relating to both of the loaded parcels. The same day, the Claimant sent out a formal set of written terms for contract GS1605719 in relation to the Hong Ze Hu parcel and for the other two contracts.
- 8 On 17 June 2016, the date that the first pre-payment of US\$5.9 million was required, Mr Mariano emailed Mr Elink Schuurman stating that the payment would be delayed but that the sum of US\$11.8 million in respect of the first two payments would be made on 19 June 2016. He indicated that this payment would be made from the account of Al Masafi International General Trading LLC (“Al Masafi”) whom he explained to Mr Elink Schuurman was an affiliated company of the Defendant and which would be making the payments on the Defendant’s behalf.
- 9 The Defendant failed to make either of the two pre-payments via Al Masafi as promised or at all and, because of that, on 22 June 2016, the Claimant terminated all three of these contracts. However, and notwithstanding the failure of those contracts, the parties continued to communicate but, in light of the Defendant’s earlier default which I have just described, Mr Elink Schuurman explained to Mr Mariano that the Claimant would need further security if another deal were to be attempted.
- 10 In response, as Mr Elink Schuurman explained in his witness statements, Mr Mariano agreed to make a pre-payment of US\$11.8 million by 28 July 2016 against which the Claimant would deliver the first consignment of the cargo on the Hong Ze Hu, the terms of such sale to be negotiated. In other words, this was to be a new deal in relation to the same cargo which the defunct contract GS1605719 had involved. Mr Elink Schuurman accepted Mr Mariano’s proposal and made such prepayment a condition of the parties’ concluding a contract in relation to 55,307 mt of the gasoline on the Hong Ze Hu.
- 11 On 28 June 2016, the Defendant told the Claimant that it had deposited by cheque 5,505,000 Dirhams (US\$1.5 million) into Gunvor DMCC’s account. The cheque was made out to the Claimant and was from Al Masafi. At the time and in light of Mr Mariano’s representations on the issue, the Claimant understood that Al Masafi had made the payment on behalf of the Defendant pursuant to the intended contract.
- 12 On 29 June 2016, the parties began negotiating the terms of the deal.
- 13 On 30 June 2016, Mr Mariano reported to the Claimant that he had made a further payment in Dirhams equivalent to about US\$1 million. This cheque was also from Al Masafi, this time made out to Gunvor DMCC. Again, the evidence was that, in light of the prior representations, the Claimant assumed that this payment had been made by Al Masafi, in relation to the intended contract, on behalf of the Defendant.
- 14 On 25 July 2016, a further payment was made by cheque from Al Masafi for 12,000,000 Dirhams, equivalent to US\$3,268,000.

- 15 In total therefore, by 25 July 2016, the Claimant believed that it had received 21,175,000 Dirhams (US\$5,717,490) by way of pre-payments in anticipation of the contract that was under negotiation.
- 16 On 27 July 2016, Mr Elink Schuurman reminded Mr Mariano that they had agreed pre-payments of US\$11.8 million and proposed new recap terms as part of the negotiation which was continuing. He reattached the quality certificates in relation to the Hong Ze Hu cargo that had been sent before. The terms put forward by the Claimant included a schedule of payments including that the previously discussed pre-payment of US\$11.8 million needed to be completed before 1 August 2016.
- 17 On 29 July, the parties exchanged various emails negotiating the terms of the deal. None of these exchanges altered the requirement that the US\$11.8 million be paid before 1 August 2016. The outstanding amount, taking into account the payments already made, was some 19 million Dirhams. By the end of the day, the parties had agreed a recap, thus - as the Claimant contends - concluding the contract out of which this dispute arises. The terms of the recap, in material part, were as follows.

“- Cargo: Hong Ze Hu

- Buyer: Keystone

- Seller: Gunvor SA

- Quality: Gasoline as per Hong Ze Hu quality at loading (see attached)

- Quantity; 55’307mt +/- 5% in SO

- Parity: STS Hodeidah STS cost and equipment for Buyer’s account

- Delivery: 1-2 August

- Price: Total of 37’000’000 USD. To be paid partly as fully as prepayment

- Payment/discharge program:

- Payment of 11.8 million USD latest by August 1st

- After the above payments have cleared Gunvor’s account, Gunvor Will discharge 6’913MT into Fair Apollon (expected on August 1st)

- Then we should follow the following payment/discharge plan (Please bear in mind any new discharge has to be preceded by a payment. Cargo is sold 100% prepayment.

<b>Date</b>	<b>Payment from Keystone in USD</b>	<b>Discharge quantity in MT</b>
Before Aug		
01.aout	11’800’000	6’913
08.aout	4’356’409	6’913
15.aout	4’356’409	6’913

22.aout	4'356'409	6'913
29.aout	4'356'409	6'913
05.sept	4'356'409	6'913
12.sept	3'417'955	6'913
19.sept		6'916
<b>Total</b>	<b>37'000'000</b>	<b>55,307</b>

- Laytime: 36H +6H. Time to start counting as soon as the first sts operation starts.
- Demurrage: as per C/P rules.
- Determination of quality and quantity: Loadport of Hong Ze Hu, short tank sampling. Cost 100% on seller's account
- Law: English law, London high court
- STS costs: STS cost and equipment for Buyer's account
- Other terms: INCO TERMS Paris 2010

#### **Additional 6 cargoes of 17'000MT Ron of 92**

- Buyer: Keystone
- Seller: Gunvor SA
- Quality: as per Attached specs
- Quantity: 6 X 17'000MT +/-5% in B/O
- Parity: FOB Fujairah
- Delivery: 1 cargo per month (August to January) starting in tentatively 20-31 August, to be confirmed and mutually agreed between buyer and seller latest on august 10th
- Price: APAG - FOB Singapore (S/barrel) - Gasoline 92 unleaded RIC PGAEOO 6 plus premium of 1.2 USD/bbl
- Pricing: 5 around BL (2-1-2 or 2-0-2 in case of BL falling on holiday/weekend)
- Credit and Payment terms: Full prepayment prior loading based on Platts quotation 3 days prior first day of expected pricing. Settlement of the difference between provisional and final invoice to be paid 5 days after full pricing is known
- Laytime: 36 + 6 Hours

- Demurrage: as per CP
- Determination of quality and quantity: Load port shore tank sampling.  
Cost to be split 5050 between buyer and seller
- Law: English law, London high court
- Other terms: INCO TERMS Paris 2010.”

- 18 The terms were confirmed by Mr Mariano on the same day and I accept that, at that point, there was a concluded contract between the parties.
- 19 Despite a number of promises between 1 and 8 August 2016, the Defendant did not pay the remainder of the US\$11.8 million by 1 August 2016 or thereafter.
- 20 On 9 August 2016, in accordance with what, on the evidence, is the Claimant’s usual practice, the Claimant sent formal terms for the contract to the Defendant. Those terms included the following:

**“1. BUYER**

Keystone Trade Oil & Gas Group (UK) Limited, 14 Basil Street, London SW3 1AJ, United Kingdom.

**2. SELLER**

Gunvor SA, 80-84 Rue Du Rhone, 1204 Geneva, Switzerland.

**3. PRODUCT**

Gasoline

...

**5. QUALITY**

Gasoline meeting Aden specs and as per Hong Ze Hu quality at loading and as agreed between the traders at the time of the transaction.

The seller’s obligations with regard to the quality of the product supplied are limited solely to supplying product which corresponds with the description and any specifications set out in the contract.

All other conditions, warranties, or other terms whether express, implied or which would otherwise be imposed by statute with respect to quality, satisfactory quality, suitability or fitness for any purpose whatsoever of the product are hereby excluded.

**6. DELIVERY**

1 safe port 1 safe berth or discharging place CIF Hodeidah, Yemen ex. Seller’s delivering/mother vessel Hong Ze Hu by means of STS transfer onto buyer’s receiving/daughter vessel(s) mt TBN/sub(s) during the period August 01-02, 2016.

The seller's obligations with regard to the timing of deliver will be fulfilled provided it could have been reasonably anticipated that upon departure from the loading port the vessel would be able to reach the discharge port and give notice of readiness to deliver prior to 24:00 on the last day of the delivery period. In the event of delivery being a part cargo, seller may give nor after expiry of the delivery period as long as the vessel arrives at the delivery port within the delivery period.

...

## **8. STS/LIGHTERING OPERATIONS**

All lightering operations to be conducted consistent with OCIMF/ICS STS transfer guide and to be organised directly by buyer.

STS equipment and mooring master to be provided by buyer but always to be acceptable to the delivering vessel owners and sellers.

Receiver must supply documents stating the following for lighter vessel:

- (A) Be classed with a classification society member of IACS
- (B) Be entered with a reputable P & I club, member of the international group of P&I clubs.
- (C) Have all HFR class, trading and statutory certificates, records and surveys valid and up to date.
- (D) All lightering vessels to be ISPS approved.
- (E) Master/owner has final say on acceptance of lighter barge.

Lightering/sts costs to be 100% for buyer's account.

If any, all port charges at discharge ports/sts location are for buyer's account and will be settled directly between buyers and agents/authorities at disport.

Any delays in lightering operation due to delay in providing above information will be for buyer's account.

Buyer shall assume and be responsible for payment of any taxes, duties, imposts, fees, charges and dues in respect of the oil or vessel arising in the place of arrival or transhipment of the vessel, if any applicable.

...

## **10. PRICE/AMOUNT**

CIF Hodeida, Yemen by ship-to-ship transfer based on B/L quantity.

Total amount to be 37,000,000 USD.

## **11. PAYMENT TERMS**

Payment for the product shall be made in United States Dollars by telegraphic transfer in immediately available funds, without any deduction, offset or counter-claim, at the counters of seller's designated bank, as stated in seller's invoice.

**100% prepayment** in the amount of USD 37,000,000 for oil shall be made by buyer in US Dollars by telegraphic transfer in full net cash in immediately available funds without deductions, discount withholdings, setoff, or counterclaim upon presentation of seller's commercial proforma invoice (fax/swift/e-mail PDF invoice acceptable) based on bill of lading quantity of MT Hong Ze Hu onto seller's nominated bank account (to be advised by seller in due course).

The prepayment to be effected as follows:

- **1<sup>st</sup> payment** of 11,800,000.00 USD latest by 01<sup>st</sup> August 2016;

Once Gunvor has received the 1<sup>st</sup> prepayment amount, Gunvor will authorise discharge of 6,913 MT into buyer's daughter vessel MT Fair Apollon;

- **2<sup>nd</sup> payment** of 4,356,409.12 USD latest by 15<sup>th</sup> August 2016;

Once Gunvor has received the 2<sup>nd</sup> prepayment amount, Gunvor will authorise discharge of 7,000 MT into buyer's daughter vessel.

- **3<sup>rd</sup> payment** of 4,356,409.12 USD latest by 22<sup>nd</sup> August 2016;

Once Gunvor has received the 3<sup>rd</sup> prepayment amount, Gunvor will authorise discharge of 7,000 MT into buyer's daughter vessel.

- **4<sup>th</sup> prepayment** of 4,356,409.12 USD latest by 29<sup>th</sup> August 2016;

Once Gunvor has received the 4<sup>th</sup> prepayment amount, Gunvor will authorise discharge of 7,000 MT into buyer's daughter vessel.

- **5<sup>th</sup> prepayment** of 4,356,409.12 USD latest by 05<sup>th</sup> September 2016;

Once Gunvor has received the 5<sup>th</sup> prepayment amount, Gunvor will authorise discharge of 7,000 MT into buyer's daughter vessel.

- **6<sup>th</sup> prepayment** of 4,356,409.12 USD latest by 12<sup>th</sup> September 2016;

Once Gunvor has received the 6<sup>th</sup> prepayment amount, Gunvor will authorise discharge of 7,000 MT into buyer's daughter vessel.

- **7<sup>th</sup> prepayment** of 3, 417,954.40 USD latest by 19<sup>th</sup> September 2016;

Once Gunvor has received the 7<sup>th</sup> prepayment amount, Gunvor will authorise discharge of the balance quantity of abt 13,394 MT into buyer's daughter vessel.

Any new discharge has to be preceded by payment. Cargo is sold 100% prepayment.



The payment is deemed to be received upon the seller's bank confirmation of the receipt of funds onto seller's designated bank account.

If the buyer fails for whatever reason to procure the transfer of funds for any provisional or final invoice within the time stipulated above, the seller shall have the right to terminate the contract forthwith without in any way limiting any other remedies available to the seller.

Notwithstanding and without prejudice to the above, the seller shall have no obligation to ship/deliver the product unless or until the seller receives the funds in accordance with above and in the event of any delay by the buyer, the seller may, at its option, extend the time for performance of any of its obligations under the contract. The buyer shall be liable for any loss or delay arising as a result, which (if known at the time) shall be invoiced to the buyer and payable as part of the price.

If payment due date falls on a Saturday or a New York banking holiday other than a Monday, payment will be effected on the preceding New York banking day. If payment due falls on a Sunday or a Monday New York Banking Holiday, payment will be effected on the following New York banking day.

In the event of late payment by the buyer, where such delay has not been caused by the seller's inability to submit the required documents on time, the seller reserves the right to charge interest at the rate of LIBOR plus 4 percent per annum in effect on such date. The LIBOR will be equal to the London Interbank offered rate for U.S. Dollars, based on an interest period of 1 month, rounded upwards if necessary to the nearest 1/32 of one percent, administrated by ICE Benchmark Administration Limited (or any other person which takes over the administration of that rate as displayed on page LIBOR01 or LIBOR02 of the Reuters screen (or any replacement Reuters page which displays that rate). Should there be no such quotation on the due date, the quotation that appears on the first available preceding date shall apply. Interest will run from the due date (inclusive) until the day payment is received into the seller's account (exclusive), calculated on the basis of a 365/360 days per year, pro rata temporis, on the relevant outstanding amount(s) until payment notwithstanding the termination of the contract for any reason whatsoever.

This provision shall not be construed as an indication of any willingness on the part of the seller to provide extended credit as a matter of course and shall be without prejudice to any rights and remedies which the seller may have under the contract or otherwise.

...

## **17. LAW & JURISDICTION**

This contract shall be governed by and construed in accordance with English law. Any controversy, dispute or claim whatsoever arising out of or in connection with this contract or the breach thereof shall be subject to the exclusive jurisdiction of the High Court of Justice in London. For the avoidance of doubt, this will not prevent either party from taking

proceedings in any other jurisdiction to obtain security or ancillary relief or to enforce any order or judgement.

...

## **25. EVENTS OF DEFAULT/TERMINATION APPLICABLE IF PRE-PAYMENT**

**An event of default (“Event of Default”) shall mean any of the following:**

- (A) The failure of the buyer to make any payment under this contract in full by the due date without offset or to take full delivery in accordance with the provisions of this contract;
- (B) The failure of the buyer to provide any payment undertaking, letter of credit, standby letter of credit, parent guarantee, or credit support instrument in accordance with the terms of this contract;
- (C) The failure of the buyer to comply with its other obligations under this contract;
- (D) Any representation or warranty made by the buyer under the contract shall prove to be untrue when made in any material respect;
- (E) Any default under any letter of credit or other credit support instrument or any failure by the issuer of such letter of credit or credit support instrument to pay when required or the occurrence of any event set out in clause (F) above in respect of the issuer of such letter of credit or credit support instrument; or
- (F) the failure by the buyer to comply with any of its obligation towards the seller pursuant to any contract other than this contract.

Upon the occurrence of an Event of Default and after notification to the buyer in writing of the occurrence of such Event of Default, any and all payments due from the buyer to the seller shall become immediately due and payable and the seller may (but shall not be obliged to) in its sole discretion:

- (A) Notify the buyer of an early termination date (which shall be no earlier than the date of such notice) on which date this contract shall terminate (the ‘early termination date’);
- (B) Withhold any payments due to the buyer until such Event of Default is cured;
- (C) Suspend or postpone performance of its obligations under the agreement until such Event of Default is cured or until the seller exercises its right of termination hereunder;
- (D) Retain documents or refuse to permit the discharge of any product to the buyer; and/or

(E) Stop or arrest any product in transit, at loading or at discharge or take any other action including the sale of the product to a third party to satisfy all amounts which the buyer owes to the seller to protect the seller's rights as the seller, in its absolute discretion, deems appropriate.

If a notice of an early termination date is given under this clause, the early termination will occur on the designated date whether or not the Event of Default of the buyer is then continuing.

If an Event of Default occurs and an early termination date is established, the seller may (in its absolute discretion) treat this contract as terminated by repudiation on the part of the buyer. The seller may then (in its absolute discretion) proceed to set off any or all amounts which the buyer owes to the seller (whether under this contract, any other contract and/or any account whatsoever) against any or all amounts which the seller owes to the buyer (whether under this contract, any other contract and/or on any account whatsoever). The seller may (in its absolute discretion) declare in the early termination notice that title to the product, where title has passed to the buyer prior to that notice, shall revert to the seller. Where the seller makes such a declaration, title to the product shall revert to the seller upon sending the notice and the seller may, pursuant to (E) above, take such action in relation to the product as is necessary to protect its rights, including the sale of the product to a third party to satisfy all amounts due.

If the seller suspends the performance of its obligations in accordance with (C) above, the seller shall be under no obligation to perform at a later date an obligation the time for the performance of which has expired during the suspension.

The buyer shall indemnify and hold the seller harmless from all losses, damages, costs, and expenses including legal fees that the seller would not have incurred but for the event of default and/or the exercise by the seller of any of its remedies hereunder.

The provisions of this clause and the seller's rights hereunder shall be without prejudice to, shall be additional to and shall in no way limit or exclude any right of termination, setoff, combination of accounts, lien, or other right to which the seller is at any time otherwise entitled (whether by agreement, operation of law, contract, or otherwise)."

- 21 It is common ground that the reference in clause 4 to £50,307 plus or minus 5 percent in seller's option, was a typographical error and that the quantity should have read 55,307 mt. Mr Elink Schuurman also explained in his evidence that the inclusion of the words "Aden specs" in paragraph 5 was an error and that the agreement was that the gasoline was sold as is.
- 22 Subsequent to the provision of those terms, Mr Elink Schuurman spoke to Mr Mariano on or around 10 to 11 August 2016 about the Defendant's payment default. Mr Mariano explained that the Defendant's sub-buyer had fallen through but he had found a replacement who had already paid him 21,000,000 Dirhams, and so the remainder of the US\$11.8 million would be paid to the Claimant by 14 or 15 August 2016.

- 23 At about this point, the Claimant received notification that proceedings had been brought against it as charterer of the Hong Ze Hu in the Hodeidah Commercial Court by CruGas, to whom the cargo on board the Hong Ze Hu had originally been sold back in September 2015 and February 2016. The Claimant contends that it had terminated those sale contracts on 4 August 2016 as a result of CruGas's breaches. In the proceedings commenced by CruGas, CruGas contended that it had paid for 10,135 mt of the cargo aboard the Hong Ze Hu that had not been delivered to it.
- 24 Meanwhile, with no payment having been received from the Defendant, Mr Elink Schuurman chased Mr Mariano. On 17 August 2016 Mr Elink Schuurman agreed to send a separate email to Mr Mariano that confirmed that the master of the Hong Ze Hu was ready to discharge cargo from the vessel upon instruction to the waiting daughter vessel, the MV Fair Apollon.
- 25 Instead of responding to the Claimant's messages, what Mr Mariano did later on 17 August 2016 was to send Mr Elink Schuurman a copy of an invoice between the Claimant and CruGas dated 1 March 2016. That invoice related to the contract between CruGas and the Claimant dated 22 February 2016 for purchase and sale of the gasoline upon the Hong Ze Hu which, by this stage, had been terminated. Mr Mariano raised concerns about the price that CruGas had agreed being lower than the one the Defendant had agreed to and asked whether the CruGas contract was still in place. Mr Elink Schuurman reassured Mr Mariano that the CruGas contract had been terminated on 4 August by sending him a copy of the termination letter.
- 26 Later that same day, Mr Mariano wrote proposing amendments to the contract between the Claimant and the Defendant. He asked the Claimant to discharge 6,000 mt of the gasoline to the Defendant immediately by STS transfer to the Fair Apollon alongside a regime of further payments and discharges. The Claimant could not accommodate Mr Mariano's exact proposal, but Mr Elink Schuurman and Mr Mariano agreed in a telephone call that day that the Claimant would arrange for the discharge of 6,000 mt of cargo given the payments already made by the Defendant which exceeded the value of the cargo that would be discharged. The Defendant would then make a further payment of US\$10.5 million and would resume making the payments in accordance with the contractual schedule.
- 27 The parties exchanged emails recording the details of their telephone agreement on 18 August 2016. The Claimant proposed that: firstly, the Defendant had, or so the Claimant thought at the time, prepaid US\$5,717,490; secondly, that the Claimant would discharge 6,000 mt of cargo on 18 August 2016; and thirdly, that the Defendant would pay US\$10.5 million by 23 August 2016. Mr Mariano confirmed his agreement to this shortly thereafter.
- 28 As a consequence of Mr Mariano's agreement, the Claimant, through its chartering arm Clearlake Shipping Pte Limited ("Clearlake"), ordered the Hong Ze Hu to discharge the agreed 6,000 mt of cargo. A copy of the instructions to discharge were forwarded to Mr Mariano.
- 29 Later on 18 August 2016, the Claimant sent to the Defendant a revised version of the formal terms previously sent on 9 August 2016 recording the amendments to the contract. The Defendant did not at the time object to the formal terms which were sent on 18 August 2016 or, indeed, those sent on 9 August 2016, and did not contend that they formed no part of the parties' contract. Instead, and as I will come to, the Defendant continued to perform under the contract by accepting delivery of the 6,000 mt of cargo on 25 August, subsequent to the receipt of the (revised) formal terms.

- 30 As I have set out, it was the usual practice of the Claimant to send out such formal terms and the Defendant would have known that that was their ordinary practice from their prior dealings. Given these matters, and the fact of the Defendant's non-objection to the standard terms, and performance of the contract after their receipt, I find that those formal terms, as revised on 18 August, formed part of the contract between the parties.
- 31 Shortly after receiving Mr Mariano's confirmation of his agreement to the altered terms, as set out in paragraph 27 above, the Claimant gave instructions on 18 August 2016 for 6,000 mt of gasoline to be discharged via STS transfer from the Hong Ze Hu. On that day, however, Mr Mariano forwarded an email from the Fair Apollon's agents, Bukari Shipping, asserting that the Hong Ze Hu's owners had not yet authorised discharge. Shortly thereafter, after the Claimant had made enquiries, the instruction through Clearlake for the Hong Ze Hu to discharge was re-confirmed. The Claimant then received a message from Cameri, who were understood to be either the Defendant's or the ultimate buyer's disport agents, to the effect that the owners of the Hong Ze Hu had not completed the necessary STS transfer questionnaire in full. Clearlake responded that this would be arranged, at which point Cameri confirmed they would proceed to arrange the STS transfer.
- 32 At 16:53 on 18 August 2016, the Claimant was copied into an email from the Hong Ze Hu's owners in which it was said that they had confirmed the discharge of the 6,000 mt of gasoline but that the Fair Apollon had indicated that it was still waiting to receive fenders, hoses, and a certificate, and that it could not take delivery of the cargo. Pursuant to clause 8 of the contract, the provision of that equipment was the Defendant's responsibility. Both the Claimant and Clearlake made Mr Mariano aware of the issue.
- 33 On 19 August 2016, Bukari reported that the Fair Apollon had still not received the STS transfer equipment because the supplier was awaiting confirmation from Mr Mariano. The Claimant asked Mr Mariano to comment. During a telephone conversation, Mr Mariano told Mr Elink Schuurman that the situation had been resolved, but the Claimant received conflicting reports in that regard from Bukari who were under the impression that the equipment was being sourced from a different vessel but that the charterers of that vessel had instructed that the STS equipment was not to be removed from it.
- 34 The CruGas proceedings to which I have referred were withdrawn on 20 August 2016.
- 35 On 22 August 2016, Mr Mariano informed the Claimant that the US\$10.5 million payment that was due under the contract to be made on 23 August 2016 would be made as soon as the 6,000 mt had been discharged from the Hong Ze Hu. Mr Elink Schuurman responded that the payment was due on 23 August 2016 and that the discharge of the 6,000 mt had nothing to do with this.
- 36 The Defendant did not pay the US\$10.5 million required of it on 23 August 2016, or subsequently.
- 37 The STS equipment was finally loaded onto the Fair Apollon on 24 August 2016 and a cargo survey then took place. The discharge operation commenced at 05:10 on 25 August 2016 and was completed by 19:10. In total, 5,988.567 mt of cargo was discharged to the Fair Apollon and after it had been commenced, the Claimant chased Mr Mariano for the overdue US\$10.5 million payment.
- 38 On 27 and 29 August 2016, the Defendant sought to renegotiate downwards the contract price for the undelivered portion of the gasoline aboard the Hong Ze Hu relying, in part, on

the existence of the proceedings which CruGas had commenced which in fact, as I have said, had been withdrawn by this point.

- 39 On 30 August 2016, now with the involvement of Mr Benoit Chamayou, who is the Claimant's legal counsel and who gave evidence today, the Claimant rejected Mr Mariano's request and put the Defendant on notice that the contract would be terminated if the outstanding US\$10.5 million payment was not received by 11:59 on 1 September 2016.
- 40 The Defendant, in fact, failed to pay the US\$10.5 million by 1 September 2016 in response to the Claimant's message and has not paid it at all. Despite a final attempt from Mr Elink Schuurman to chase Mr Mariano by phone and email, nothing was heard from the Defendant. The Claimant then, through a message from Mr Chamayou to which I will return, terminated the contract by email later on 1 September 2016.
- 41 At the time of the Claimant's termination, a total of 49,318.433 mt of gasoline remained on board the Hong Ze Hu (the "Remaining Product"). As Mr Elink Schuurman explained in his evidence, the quality of the gasoline aboard the Hong Ze Hu, which was 90 RON, met Yemeni demand but not that of most other countries for which its RON was either too high or too low. Accordingly, the Claimant's options were to re-sell the cargo 'as was' in Yemen or sell it as blending stock outside Yemen. In evidence to which I will return, Mr Elink Schuurman explained that by September 2016, the Claimant had no interest in re-selling the Remaining Product into Yemen. In consequence, in the event, on or about 16 September 2016 it shipped the Remaining Product on board the Hong Ze Hu to Fujairah, that being, as the Claimant contends, the nearest market available to it. It was shipped there for use as gasoline for blend stock. The freight cost of shipping the Remaining Product to Fujairah was US\$438,750.
- 42 It is now necessary to refer to what may be called the 'Al Masafi payments issue'. As I have set out, contemporaneously and – as I find – as a result of Mr Mariano's representations to Mr Elink Schuurman, the Claimant believed that the three cheques which had been deposited by Al Masafi into the account of Gunvor DMCC in the total amount of 21,175,000 Dirhams were made by Al Masafi as a payment agent for the Defendant. The payments, it was believed, were being made in part-satisfaction of the Defendant's agreement to pre-pay US\$11.8 million before – what came to be – 1 August 2016 in anticipation of the conclusion of the contract and as pre-payment for the first parcel of gasoline to be discharged from the Hong Ze Hu in accordance with the discharge schedule advanced by the Claimant.
- 43 It has subsequently transpired that the Claimant's contemporaneous belief must be taken to have been incorrect and that Mr Mariano and the Defendant mischaracterised the nature of the Al Masafi payments. It appears, and on the basis of the materials which have been presented to me I find, that the Defendant never made a payment towards the contract, and so the 5,988.567 mt of gasoline that the Claimant discharged into the Defendant's possession on 25 August 2016 was not paid for.
- 44 The reason why I say this is that on 30 October 2016, some months after the parcel of gasoline had been discharged to the Defendant and without warning to the Claimant, Al Masafi served a judicial warning on Gunvor DMCC before the courts of the UAE. In that warning, it was alleged by Al Masafi that Gunvor DMCC was in breach of a contract with it for the delivery of a cargo of 91 RON gasoline. Al Masafi alleged that it had paid Gunvor DMCC 21,150,000 Dirhams but had not received the gasoline.

- 45 At that time, the Claimant believed, as I have said, that the monies which it or Gunvor DMCC had received from Al Masafi had been paid on behalf of the Defendant in relation to the contract and, on that basis, Gunvor DMCC responded to the judicial warning indicating that it had never contracted with Al Masafi and rejecting the allegations made against it.
- 46 On or about 17 November 2016, Al Masafi then commenced proceedings against Gunvor DMCC in the UAE courts seeking the return of the 21,175,000 Dirhams that it paid in June and July 2016 by way of the three cheques referred to above. Once again, Al Masafi argued that it had paid the monies pursuant to a contract concluded with Gunvor DMCC for 16,000 mt of gasoline and had never received those goods.
- 47 Gunvor DMCC defended the UAE proceedings at first instance on the basis that there was never a contract between it and Al Masafi, and that the Dirham sums had been paid to it by Al Masafi as payment agent for the Defendant. The court in Dubai, in its judgment dated 24 May 2017, rejected the argument that the payments had been made by Al Masafi as agent for the Defendant and instead found in Al Masafi's favour. It ordered Gunvor DMCC to repay the 21,175,000 Dirhams. The Court of Appeal in Dubai upheld the first instance court's decision on 30 August 2017. That decision was initially appealed by Gunvor DMCC but, in the end, the appeal was not pursued and there was a settlement reached between Gunvor and Al Masafi under which, as I understand it, Gunvor paid a sum of US\$4 million to Al Masafi in settlement of the obligation imposed by the Dubai court to repay the 21-odd million Dirhams which had been paid by Al Masafi. The determination of the Dubai court, namely that the Al Masafi monies were not paid on behalf of the Defendant in relation to the contract, remains binding on the parties to those proceedings.
- 48 I now turn to consider the Claimant's claim in this action. It is a claim for debt or damages, as the case may be, for:

(1) the value of the 5,988.567 mt of gasoline that was discharged from the Hong Ze Hu and for which, on the basis to which I have just referred, the Defendant never paid, namely for the sum of US\$4,006,291.44; and

(2) the market losses in relation to the Remaining Product which the Defendant wrongfully failed to pay for or take delivery of, calculated on the date the contract was terminated. That sum is claimed for in the amount of US\$11,539,527, together with the sum of US\$438,750 being the cost to the Claimant of accessing what it says was the relevant available market, namely in Fujairah not in Yemen.

The Claimant also claims interest on those sums and its costs in these proceedings.

- 49 As to liability in relation to the claim for market loss, the Claimant's claim is that pursuant to clause 11 of the contract as embodied in the formal terms to which I have referred, the Defendant was obliged to make the second prepayment of the contract price of US\$10.5 million by 23 August 2016. By failing to make that payment by the due date or at all, the Defendant was in obvious breach and that breach entitled the Claimant to terminate the contract under its express terms, it constituting an Event of Default pursuant to clause 25(A) of the contract. If necessary, the Claimant also contends that this non-payment constituted a repudiatory breach of the contract at common law on the basis that clause 11 was a condition of the contract.
- 50 On the basis of the Claimant's primary case, namely that the Defendant's conduct constituted an Event of Default under clause 25, it was entitled but not obliged to serve a notice of early termination specifying the early termination date, and then to terminate the

contract. This, the Claimant says, it did through two messages of Mr Chamayou. Firstly, on 30 August 2016, Mr Chamayou required the Defendant to perform by 11:59 am on 1 September 2016, failing which Gunvor:

“...will treat your failure to perform as a repudiation of the contract which Gunvor will accept and will terminate the contract.”

This message, the Claimant contends, constituted a clause 25 notice of early termination which detailed an early date of termination, namely 12 o'clock on 1 September 2016. Secondly, when that deadline elapsed without payment from the Defendant, Mr Chamayou sent a second message at 15:02 on 1 September 2016 which terminated the contract.

- 51 I find that the Claimant's primary case is made out. I have already set out that I find that the formal terms which were sent to the Defendant on 18 August were incorporated and, on that basis, the Defendant's conduct constituted an Event of Default under clause 25. The Defendant was entitled to give notice of an early termination date and upon that early termination, the Claimant was entitled to treat the contract as terminated by repudiation on the part of the Defendant. It did that by one or other of Mr Chamayou's two communications to which I have just referred. I do not need to determine by which it was effected as nothing turns on that point.
- 52 This therefore had the effect of discharging the parties from further performance of the primary obligations under the contract and triggering the Defendant's secondary obligations under the contract or at common law to pay damages.
- 53 The Claimant is entitled to recover both its market losses on the Remaining Product at the nearest available market and, if applicable, the freight costs it would have expended in accessing that market. In addition, as I have found, the Defendant never made the first pre-payment, or any part of it, yet nevertheless took delivery of 5,988.567 mt of the gasoline that was discharged from the Hong Ze Hu to the Fair Apollon. As a result of the Defendant's breach in that respect, the Claimant has suffered loss in the amount of the contractual value of the discharged gasoline that was delivered but not paid for.
- 54 I now turn to consider the quantum of the Claimant's loss which it can recover. In relation to the Claimant's market losses, it claims under two heads: firstly, the hypothetical contract-market differential losses the Claimant would have suffered assuming it re-sold the Remaining Product into the nearest available market on or soon after termination. Secondly, the additional losses in relation to hypothetically accessing the relevant available market (which it says was in Fujairah not Yemen).
- 55 As to the first, I have been satisfied by the evidence of Mr Elink Schuurman and of Ms Jago that there was no available market for the Remaining Product if one looks to Yemen alone (the place of delivery) at the time of termination. Mr Elink Schuurman refers in his witness statement to the paucity of participants in the market at the time, including as a result of the ongoing civil war in Yemen, and he refers to the fact that there were effectively only two potential buyers that he could think of. Each of those was unacceptable to Gunvor at the time and, one would infer, would have been unacceptable or at least suspect to other potential sellers on the basis of either a history of contractual let-downs or the difficulty of obtaining any payment from any potential buyer in Yemen. In the case of one of the potential buyers, Aden Refinery Company, there was also a history of interference from the government and highly unpredictable revenues.



- 56 Ms Jago gave evidence similarly that there were very limited local buyers and sellers in the market at the material time and her evidence recounted the difficulty in obtaining payment that sellers often encounter along with the effects of the civil war.
- 57 I find, on the basis of that evidence, that there were not sufficient buyers willing and able to perform in order for it to be said that an available market existed in Yemen at the material time. I find that conclusion to be supported by what Gunvor in the event did. It actually took the cargo to Fujairah. If there had been an available market in Yemen, then I consider that there was no obvious reason why it would not have sold there. On the other hand, Mr Elink Schuurman and Ms Jago's evidence does establish that there was an available and accessible market for the product in Fujairah, which was the closest of the nearby major blending centres.
- 58 On the basis that the relevant available market was in Fujairah, Ms Jago's expert opinion was that the market value of the Remaining Product would have been US\$435.01 per mt. This was assessed in the following way. Firstly Ms Jago took the spec of the cargo, based on the quality certificates, to be 90 RON. Because Platts does not quote a price for 90 RON in the Arab Gulf, Ms Jago has calculated a Fujairah price by extrapolating from the published prices of 92 RON basis Singapore, deducting Platts freight for the Arab Gulf to Singapore to reach a value for 92 RON basis Arab Gulf, and then determined a "per RON" figure in the Arab Gulf to reach a value for 90 RON there. She then averaged that value over three days around 1 September 2016 to reflect the usual basis upon which cargoes are priced, namely three days around the bill of lading date, to reach her opinion on the market value of the Remaining Product on 1 September 2016 in Fujairah.
- 59 I accept that evidence from Ms Jago. There is, as I have said, no contrary evidence before the court suggesting that a different approach should be taken. Specifically, I consider that Ms Jago was correct to assess the market price of the Remaining Product on 1 September 2016, which was the date of termination of the contract.
- 60 Taking a market value of US\$435.01 per mt, the contract price of US\$668.99 per mt, and the volume of the Remaining Product of 49,318,433 mt, the Claimant's market losses and hence the damages it is entitled to recover under this head amount to US\$11,539,527.
- 61 It is also necessary to take into account the hypothetical cost to the Claimant of accessing the nearest available market in order to ensure that it is properly compensated for the purposes of section 50(3) of the Sale of Goods Act 1979. In this context, that means the costs of shipping the Remaining Product from Yemen to Fujairah, and the quantum of such losses is readily assessed because the Claimant did, in fact, ship the remaining product to Fujairah. The costs of such an exercise are therefore known, namely US\$438,750.
- 62 As to the Claimant's losses in relation to the discharged but unpaid for parcel of gasoline, the agreed contract price for the gasoline was US\$668.99. The delivered product amounted to 5,988.567 mt, leading to a contractual value of US\$4,006,291.44, and I find that that constituted the loss suffered by the Claimant as a result of this breach of the contract by the Defendant.
- 63 So there will be judgment for damages in those sums.
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**This transcript has been approved by the Judge**