

Neutral Citation Number: [2024] EWHC 3163 (Comm)

Case No: CL-2021-000232

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

Rolls Building Fetter Lane London EC4A 1NL

	EC4A 1NI
Before:	
MRS JUSTICE COCKERILL DBE	
Between:	
SAHARA ENERGY RESOURCE LTD - and -	<u>Claimant</u>
SOCIÉTÉ NATIONALE DE RAFFINAGE S.A. (SONARA)	
<u>I</u>	<u>Defendant</u>
- and -	
SAHARA ENERGY RESOURCE DMCC Add	litional Party
Fimothy Young KC, Stephen Du and Joseph Rich (instructed by Reed Smith Claimant Riaz Hussain KC (instructed by Squire Patton Boggs (UK) LLP) for De	,
Hearing dates: 2,3,7,8,14 October 2024	

APPROVED JUDGMENT

This judgment was handed down remotely and in private by the judge and circulated to the parties' representatives by email. The date and time for hand-down is deemed to be Monday 9 December 2024 at 09:30am.

Mrs Justice Cockerill:

INTRODUCTION

Sahara's claim and the issues in the case

- 1. The central claims made by Sahara against Sonara are simple. They are for breach of (i) a contract dated 14 January 2013 ("the 2013 Contract") for the purchase of crude oil, (ii) various further crude oil contracts concluded in 2014, 2015 and 2016. This apparently simple case has however given rise to a raft of legal and factual issues.
- 2. The first complication is that the claims are not pursued simply, or even primarily, as claims for breach of those contracts. They are ultimately substantially based on a "Joint Report" dated 5 September 2019 following a "reconciliation meeting" between the parties. This Joint Report is said by Sahara to encapsulate an agreement settling disputes as to the various elements of the claims.
- 3. The second complication is that the claims have layers. Sahara originally claimed both principal sums and interest (including both contractual interest and what is referred to as Incremental Interest) as well as default changes and foreign exchange differential in relation to four cargoes. What remains in issue now are only the elements other than principal and contractual interest (which have been paid). There are three disputed heads of claim:
 - i) Incremental Interest: i.e. the difference between the contractual interest rate and the rate from time to time payable to Sahara's Banks where cargoes were financed by loans;
 - ii) Excess Interest and Penal Charges i.e. charges raised by the Banks for failure to make prompt payment under letters of credit, where the relevant cargoes were financed by letters of credit;
 - iii) FX losses arising from cargoes charged in Euros, which equate to the difference between the figure produced by a conversion to Euros at invoice date and the ultimate payment date (the Euro having fallen against the US dollar in the relevant period).
- 4. The reason why all these different elements arise is this: Sonara did not pay for one cargo until 2016, and the other three outstanding cargoes until 2019. Therefore, whilst Sonara was contractually obliged to pay for the cargoes in under 4 months, it in fact paid for them only after 5-6 years. Sahara's claims are therefore ones which they make to make themselves good for this extremely long delay − in essence Sahara says that because of the delay its own banks hit it with raised and ultimately penal interest charges and it lost money on the \$/€ conversion.
- 5. The fact of the delay is not in issue. Nor, really, is the contention that Sahara has suffered many of the losses it claims to have done though the exact amount of proved quantum is in issue. What is the main issue is whether these losses are recoverable under the terms of the contracts or the Joint Report and whether it is now too late for Sahara to claim them.

- 6. Sonara does not dispute that there were breaches of contract but says that those were compensated as agreed under the Contract. It says it never owed to Sahara the Incremental interest on 2013 cargoes and/or 2013 Default charges and/or or 2013 FX differential. The claim is disputed by Sonara on the basis that:
 - i) There was no settlement of the claims in the Joint Report;
 - ii) There is no entitlement to compensation for losses arising from a failure to make payment on time other than the contractual interest agreed which comprises the liquidated damages for such a breach;
 - iii) Each of the claims are time barred under s.5 of the Limitation Act 1980, this action not having been brought until 2021;
 - iv) The claims are irrecoverable either:
 - a) as "INDIRECT, UNFORESEEN OR SPECIAL LOSSES" under clause 18 of the Contract;
 - b) or on the basis that they are too remote to be recoverable as damages for breach of contract;
 - v) The quantum of the claims is not established.
- 7. It is fair to say that the parties approach the issues from opposite ends. Sahara looks to the Joint Report as cutting through the issues. Sonara prefers to commence with the contractual claims.
- 8. Whichever way one proceeds, a fairly detailed factual outline is necessary.

FACTUAL BACKGROUND

The Contracts

- 9. Sahara and Sonara entered into the "*Term Contract for the Supply of Crude Oil During 2013*" ("the 2013 Contract") dated 14 January 2013. Sonara is a substantially government-owned company in Cameroon.
- 10. Under the 2013 Contract, Sahara was required to supply crude oil ("Okwori blend crude or other crude oil grade to be mutually agreed upon") (clause 2) on a Free on Board (FOB) basis with delivery taking place in Nigeria (clause 6). There were a number of amendments agreed by the parties, including Amendment No. 3 dated 25 June 2013 (applicable to July-September deliveries of Okwori crude oil) and Amendment No. 5 (applicable to December deliveries of Okwori crude oil).
- 11. There were also contracts for 2014, 2015 and 2016 (essentially on the same form with amendments).
- 12. Various shipments were provided by Sahara, who had purchased the oils from the Nigerian National Petroleum Corporation ("NNPC") with the benefit of finance provided by three major banks, Access Bank, Ecobank and Credit Suisse.

Clause 7

13. Clause 7 (in the original version) states:

"7. PRICE

THE FINAL PRICE IN U.S. DOLLARS PER NET U.S. BARRELS SOLD FOR EACH CARGO SHALL BE THE AVERAGE OF THE 'DATED BRENT' MEAN QUOTATIONS, AS PUBLISHED IN PLATT'S DAILY CRUDE OIL MARKETWIRE EFFECTIVE FOR THE TEN (10) CONSECUTIVE QUOTATION DAYS AFTER B/L DATE (8/L DATE= 0) PLUS A PREMIUM OR A DISCOUNT TO BE AGREED.

IN THE EVENT THAT PLATT'S SUBSEQUENTLY AMEND ANY OF THE RELEVANT QUOTATIONS, ACCOUNT SHALL BE TAKEN OF THE AMENDMENT AND A REVISED INVOICE ISSUED ACCORDINGLY.

THE PRICE WILL BE ROUNDED OFF TO THREE DECIMAL PLACES WITH THE THIRD DECIMAL TO BE INCREASED TO THE UPPER DIGIT WHENEVER THE FOURTH DECIMAL PLACE IS FIVE OR GREATER THAN FIVE.

INVOICE SHALL BE BASED ON THE NET U.S. BARRELS QUANTITY DETERMINED BY TERMINAL OPERATOR, AS INSERTED IN THE BILL OF LADING OR BILLS OF LADING, IF MORE THAN ONE SET IS ISSUED.

THE ABOVE PRICE IS FIXED AND FLAT IRRESPECTIVE OF ANY HGT/API ESCALATION/DE-ESCALATION."

Clause 8

- 14. Clause 8 of Amendment No.1 of 25 June 2013; Amendment No.3 of 25 June 2013; Clause 8 of Amendment No.4 of 25 June 2013 and Clause 8 of Amendment No.5 of 20 November 2013 each set out that payment shall be made in Euros and further that a contractual rate of interest shall be paid from 120 days after the Bill of Lading Date.
- 15. This is expressed as follows taking the version in Amendment No.5:

"8. PAYMENT

PAYMENT SHALL BE MADE IN EURO FREE OF BUYER'S BANK CHARGES WITHOUT DISCOUNT, DEDUCTION, SETOFF OR COUNTERCLAIM WHATSOEVER BY TELEGRAPHIC TRANSFER OF IMMEDIATELY AVAILABLE FUNDS ("SAME DAY FUNDS") NOT LATER THAN ONE HUNDERED AND TWENTY (120) DAYS AFTER THE BILL OF LADING DATE (B/L DATE COUNTING AS DAY ZERO) TO THE BANK AND ACCOUNT SPECIFIED BY SELLER AGAINST PRESENTATION TO BUYER OF COMMERCIAL INVOICE IN FIVE COPIES

TOGETHER WITH A COPY OF THE BILL OF LADING TO BE SENT BY MAIL.

PAYMENT IN EURO:

NINETY (90) DAYS WILL BEAR INTEREST AT A RATE EQUIVALENT TO EURIBOR THREE MONTHS AS PUBLISHED BY THOMSONS REUTERS ON THE 31st DAY AFTER B/L DATE (B/L DATE = DAY 0) + 2.60 PERCENT

AND THE ACTUAL PAYMENT DUE DATE IF ACTUAL PAYMENT DATE IS BEFORE OR ON THE 120TH DAY AFTER B/L DATE (B/L DATE= DAY 0)

ANY LATE PAYMENT FROM THE 121ST DAY TO THE 150TH AFTER BILL OF LADING DATE SHALL ATTRACT INTEREST AT AN APPLICABLE RATE OF EURIBOR 1 MONTH+ 3.40 PERCENT.

ANY LATE PAYMENT FROM THE 151ST DAY AFTER THE BILL OF LADING DATE ONWARDS SHALL ATTRACT AT AN APPLICABLE RATE OF EURIBOR 1 MONTH+ 4.00 PERCENT

AN EXCHANGE COMMISSION RATE OF MAXIMUM USD 10'000 SHALL AND SUCH EXCHANGE COMMISSION VALUE SHALL BE BORNE BY THE BUYER.

ALTHOUGH THE PRICE IS TO BE CALCULATED IN U.S. DOLLARS, THE CALCULATED PRICE STIPULATED IN THE COMMERCIAL INVOICE SHALL BE CONVERTED AND PAYABLE IN EURO BY USING THE FOLLOWING MECHANISM:

THE RATE OF EXCHANGE SHALL BE THE AVERAGE OF EURO/USD PLATTS RATE OF THE PRICING PERIOD."

Clause 18

16. Clause 18 states that neither Seller nor Buyer shall in any event be liable for indirect, unforeseen or special losses of any kind.

"18. LIABILITY

NEITHER SELLER NOR BUYER SHALL IN ANY EVENT BE LIABLE, WHETHER IN TORT OR CONTRACT, FOR ANY MORE THAN THE NORMAL MEASURE OF DAMAGES PROVIDED FOR BY THE SALE OF GOODS ACT 1979 TOGETHER WITH ANY PROVEN ADDITIONAL DIRECTLY CONSEQUENTIAL LOSSES. NEITHER PARTY SHALL BE LIABLE FOR INDIRECT, UNFORESEEN OR SPECIAL LOSSES OF ANY KIND".

Clause 26

17. Clause 26 is headed "Event of Default/Termination";

"AN EVENT OF DEFAULT ('EVENT OF DEFAULT') SHALL MEAN ANY OF THE FOLLOWING:

- A. THE FAILURE OF THE BUYER TO MAKE ANY PAYMENT UNDER THE AGREEMENT IN FULL BY THE DUE DATE WITHOUT OFFSET OR TO TAKE FULL DELIVERY IN ACCORDANCE WITH THE PROVISIONS OF THIS AGREEMENT;
- 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 AGREEMENT;
- C. THE FAILURE OF THE BUYER TO COMPLY WITH ITS OTHER OBLIGATIONS UNDER THE AGREEMENT;
- D. ANY PREPRESENTATION OR WARRANTY MADE BY THE BUYER UNDER THE CONTRACT SHALL PROVE TO BE UNTRUE WHEN MADE IN ANY MATERIAL RESPECT;
- E. THE BUYER (A) MAKES AN ASSIGNENT OR ANY GENERAL ARRANGEMENT FOR THE BENEFIT CREDITORS, (B) FILES A PETITION OR OTHERWISE COMMENCES, AUTHORISES OR ACQUIESCES IN THE COMMENCEMENT OF A PROCEEDING OR CAUSE OF ACTION UNDER ANY BANKRUPTCY OR SIMILAR LAW FOR THE PROTECTION OF CREDITORS, OR HAS SUCH A PETITION FILED AGAINST IT AND SUCH PETITION IS NOT WITHDRAWN OR DISMISSED FOR 30 DAYS AFTER SUCH FILING, (C) OTHERSE BECOMES BANKRUPT OR INSOLVENT (HOWEVER EVIDENCED), (D) IS UNABLE TO PAY ITS DEBTS AS THEY FALL DUE, MAKES A COMPOSITION WITH ITS CREDITORS, COMMITS ANY ACT OF BANKRUPTCY, BECOMES SUBJECT TO AN ORDER FOR WINDING UP OR TO THE APPOINTMENT DISSOLUTION OR ADMINISTRATOR, EXAMINER, RECEIVER, CUSTODIAN, LIQUIDATOR, TRUSTEE OR OTHER SIMILAR OFFICIAL;
- F. THE SELLER HAS GOOD REASON TO DOUBT THE CONTINUING ABILITY OR WILINGNESS OF THE BUYER TO PERFORM ITS OBLIGATIONS HEREUNDER;
- G. THE OCCURRENCE OF A MATERIAL ADVERSE CHANGE IN THE FINANCIAL STANDING OR CREDITWORTHINESS OF THE BUYER WHEN COMPARED TO THE BUYER'S FINANCIAL STANDING AS AT THE DATE

OF THE CONTRACT WHICH CHANGE, IN THE OPINION OF THE SELLER, AFFECTS THE BUYER'S ABILITY TO PERFORM ITS MATERIAL OBLIGATIONS (INCLUDING WITHOUT LIMITATION ANY OF THIS PAYMENT OBLIGATIONS) IN RESPECT OF THE AGREEMENT;

- H. THE FAILURE BY THE BUYER TO COMPLY WITH ANY OF ITS OBLIGATION TOWARDS THE SELLER PURSUANT TO ANY CONTRACT OTHER THAN THIS AGREEMENT."
- 18. Then Clause 26 sets out the Seller's rights on an event of default:

"UPON THE OCCURRENCE OF AN EVENT DEFAULT AND AFTER NOTIFICATION TO THE BUYER IN WRING OF THE OCCURRENCE OF SUCH EVENT OF DEFAULT, ANY AND ALL PAYMENTS DUE FROM THE BUYER TO THE SELLER SHALL BE COME 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 THANT THE DATE OF SUCH NOTICE) ON WHICH DATE THE AGREEMENT SHALL TERMINATE (TE 'EARLY TERMINATION DATE');
- B. 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;
- C. RETAIN DOCUMENTS OR REFUSE TO PERMIT THE DISCHARGE OF ANY PRODUCT TO THE BUYER; AND/OR
- D. STOP ANY PRODUCT IN TRANSIT OR TAKE ANY OTHER ACTION TO PROTECT THE SELLER'S RIGHTS AS THE SELLER, IN ITS SOLE 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 TE 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 AGREEMENT, ANY OTHER

CONTRACT AND/OR ON ANY ACCOUNT WHATSOEVER) AGAINST ANY OR ALL AMOUNTS WHICH THE SELLER OWES TO THE BUYER (WHETHER UNDER THIS AGREEMENT, ANY OTHER CONTRACT AND/OR ON ANY ACCOUNT WHATSOEVER).

IF THE SELLER SUSPENDS THE PERFORMANCE OF ITS OBLIGATIONS IN ACCORDANCE WITH (B) 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 2013 Shipments

- 19. Four cargoes of Okwori crude oil that were loaded on board mt BLUE SKY in 2013 pursuant to the 2013 Contract as amended feature prominently in this case:
 - i) Cargo 1795-07, which was loaded on 22 July 2013;
 - ii) Cargo 1796-08, which was loaded on 17 August 2013;
 - iii) Cargo 1797-09, which was loaded on 11 September 2013;
 - iv) Cargo 1867-11, which was loaded on 4 December 2013;
 - v) The last of these cargoes were loaded under Amendment 5, the remainder under Amendment 3.
- 20. The payment terms for those cargoes were as follows:
 - i) Payment to be in Euros (clause 8 as varied by Amendment Nos. 3 and 5);
 - ii) Payment to be made within 120 days after the bill of lading date (clause 8 as varied by Amendment Nos. 3 and 5);
 - iii) As to interest:
 - a) From day 1 to day 30, no contractual interest would be payable;
 - b) From day 31 to 120, contractual interest would be payable at a rate of Euribor three months plus 2.60% (clause 8 as varied by Amendment Nos. 3 and 5);
 - c) From day 121 to 150, contractual interest would be payable at a rate of Euribor one month plus 3.40% (clause 8 as varied by Amendment Nos. 3 and 5);
 - d) From day 151, contractual interest would be payable at a rate of

Euribor one month plus 4.00% (clause 8 as varied by Amendment Nos. 3 and 5).

- 21. The prices to be paid for these cargoes were as follows:
 - i) The price for cargo 1795-07 was \$74,037,570.48. The "Balance converted at 1.3232 SD/EUR" was stated to be €55,952,653.74. Sahara issued invoice INV009745 dated 30 September 2013, which noted that the price should be paid by 19 November 2013;
 - ii) The price for cargo 1796-08 was \$77,041,615.03. The "Balance converted at 1.3319 SD/EUR" was stated to be €57,843,392.92. Sahara issued invoice INV009746 dated 30 September 2013, which noted that the price should be paid by 16 December 2013;
 - iii) The price for cargo 1797-09 was \$74,937,022.91. The "Balance converted at 1.3419 USD/EUR" was stated to be €55,843,969.68. Sahara issued invoice INV009747 dated 30 September 2013, which noted that the price should be paid by 9 January 2014;
 - iv) The price for cargo 1867-11 was \$75,209,607.08. The "Balance converted at 1.3727 USD/EUR" was stated to be €54,789,544.02. Sahara issued invoice INV010355 dated 14 January 2014, which noted that the price should be paid by 3 April 2014.
- 22. Sahara financed its own purchases using letters of credit from two Nigerian Banks Access Bank and Ecobank as follows:
 - i) Cargo 1795-07 was financed by a loan from Access Bank of \$71,477,909.03. Access Bank issued a letter of credit with reference EXPLC2013T0009;
 - ii) Cargo 1796-08 was financed by a loan from Access Bank of \$73,242,151.70. Access Bank issued a letter of credit with reference EXPLC2013T00012;
 - iii) Cargo 1797-09 was financed by a loan from Credit Suisse. Sahara is unable to provide the documents;
 - iv) Cargo 1867-11 was financed by a loan from Ecobank of \$72,163,091.12. Ecobank issued a letter of credit with reference EBX-CO-13-037.
- 23. Sahara had available a borrowing facility with Access Bank since October 2012. Shortly before cargo 1795-07 was loaded, Sahara emailed Access Bank asking what the costs would be for financing a cargo to be loaded on 21-22 July 2013, and Access Bank replied on 3 July 2013 stating that the interest would be 4%. Shortly before cargo 1796-08 was loaded in August 2013, Sahara also contacted Access Bank, and was again advised that the interest rate would be 4%.
- 24. The terms of the Ecobank loan are set out in a facility letter dated 25 November 2013. Ecobank granted Sahara a facility worth up to \$220m, with an interest rate of 8% above LIBOR. Ecobank issued a letter of credit with reference EBX-CO-13-037, allowing

NNPC to be paid for the cargo onboard mt BLUE SKY. The 25 November 2013 facility was then extended by letter dated 10 October 2014, and further extended by letter dated 23 September 2015.

The Forex Claim Cargoes

- 25. There were other cargoes delivered under the 2013 Contract and also further cargoes delivered in 2014, 2015 and 2016 under other similar contracts. They are of less relevance because the only claims made are in relation to forex differentials which were part of the "undisputed claims" in the Joint Report.
- 26. The further cargoes which are still relevant to the forex claims in this case are as follows:

B/L date	Cargo	Invoice No.
13 May 2013	1769-05	INV008962
21 Dec 2014	2117-12	INV013061
9 Jan 2015	2188-01	INV013087
27 Oct 2015	2516-10	INV017347
5 Apr 2016	2677-02	INV020361

27. Cargo 1769-05 was subject to the 2013 Contract and Amendment No. 1. Each of the other cargoes, 2117-12, 2188-01, 2516-10 and 2677-02, had individual contracts; they are dated 26 August 2014, 2 December 2014, 5 October 2015, and 20 November 2015 respectively.

Payment for the 2013 Cargoes

- 28. By paragraph 16 of the Re-Re-Amended Defence and Counterclaim Sonara has admitted breaching those contracts by successive non-payments and/or very significantly late payments.
- 29. They may be summarized by reference to the payments made for each cargo as follows.
 - i) For cargo 1795-07, Sonara ultimately made payments as set out below:

iv)

For

set

Date	Amount Paid
17/03/2015	€24,373,258.60
01/03/2016	€7,610,613.60
05/04/2016	€8,060,250.00
22/04/2016	€1,750,928.68
04/05/2016	€6,865,687.00
23/05/2016	€5,492,549.28
21/07/2016	€1,799,366.58
Total	€55,952,653.74

ii) For cargo 1796-08, Sonara ultimately made payments as set out below:

Date	Amount Paid
28/08/2015	€3,811,225.43
28/12/2015	€7,355,605.17
30/12/2015	€2,761,113.68
15/01/2016	€1,162,800.26
18/07/2016	€19,774,861.17
21/07/2016	€5,199,567.80
09/11/2016	€6,709,646.00
15/09/2017	€1,072,334.29
01/04/2018	€7,951,118.04
06/05/2019	€2,045,120.54
Total	€57,843,392.92

iii) For cargo 1797-09, Sonara ultimately made payments as set out below:

	Date	Amount Paid	
	17/03/2015	€26,170,190.41	
	18/11/2016	€11,094,400.00	
	22/03/2017	€4,743,107.00	
	19/04/2017	€2,235,986.00	cargo 1867-11, Sonara
	10/05/2017	04 404 646 44	ultimately made payments as
out	17/07/2017		below:
	12/06/2019	€5,503,491.00	
	22/08/2019	€4,300,281.75	
	Total	€55,843,969.68	

Page 12

Date	Amount Paid
30/03/2015	€28,202.19
28/07/2016	€2,389,860.00
25/08/2016	€3,913,002.15
25/08/2016	€5,367,717.00
06/05/2019	€2,088,279.46
03/08/2019	€4,523,748.78
22/08/2019*	€4,503,870.11
Total	€54,789,544.02

v) Most of the payments were made by bank transfer from Sonara to Sahara in the usual way. However, the two payments marked with an asterisk, which total around €8.8m were said to be paid by way of set-off.

Events in 2014- early 2019

- 30. Between 2014 and early in 2019, there were two streams of relevant events. The first relates to Sahara's position *vis a vis* the banks. The second concerns the numerous exchanges and meetings between the parties regarding absence of or delays to payment.
- 31. The key point relating to the Banks is the increase in the interest which underpins the Incremental Interest claim. There are some disputes as to the precise interest rates raised by Sonara's expert Mr Good, but for present purposes they are not material. Access Bank raised its interest rate slightly from 4% to 5% in February 2015. However on 26 November 2014 Access Bank's interest rate was unilaterally increased to 7.5%, in large part for reasons specific to the Nigerian economy which was aiming to preserve its external reserves which had been under pressure from declining oil revenues and dollar receipts. On 17 February 2015 that rate was raised again to 9.5%. A further increase to 11.5% followed in July 2015 and to 12% from October 2015.
- 32. The position regarding Ecobank is less marked, as the initial interest rate was 8% over LIBOR. However that too increased to 9% over LIBOR from July 2015 and then to 9.5% and 12.5% over LIBR from 23 September 2015 and 1 May 2016.
- 33. Of the many items of correspondence and meetings in the chronological run of events, three can probably be regarded as central.

February 2017 Meeting

34. The first was a meeting in Dubai on 12-13 February 2017 between Sahara and Sonara to discuss various issues, including the 2013 crude supplies. Sahara presented its claims. The outcome of the meeting is documented in a letter from Sonara dated 20 March 2017, which stated that Sonara "rejected in block" Sahara's claims. As to foreign exchange exposure, Sonara appeared to reject the claim because Sahara should "respect the commercial contract governing each operation". As to "penal charges", Sonara's position was that "claim not justified". As to "interest charges", Sonara did not appear to reject the claim outright but stated "Parties shall proceed with interest reconciliation until a compromise is reached." Minutes of the meeting show that the parties discussed the relevant invoices in some detail looking into such matters as late

LC charges, LIBOR rate applied, value dates of SWIFT payments and Euro conversion rates.

35. The minutes also make clear that the dispute was at that point proceeding on similar lines to those deployed before me (contractual interest versus clause 26 – though this appears to be the first mention of clause 26):

"Sahara has presented a letter and breakdown of Penal Charges accrued from 2013 to 2016 as a result of delayed payments on Crude Products supplied.

Sonara responded saying their interest claims are restricted to just contractual interest.

Sahara made it clear to Sonara that clause 26 in each contract states clearly that Sonara is liable for not just interest charges but all charges due to delayed payments.

Sonara is to analyze documents that were presented to them and revert with feedback from management."

36. Following the meeting, on 23 March 2017, Sahara wrote to Sonara setting out its case as to why it considered various charges to be recoverable. It stated:

"Sonara's material long term deviation from the terms of the commercial contract and in settling invoices is the sole reason foreign exchange losses were incurred and such losses must be passed on to Sonara for repayment.

Our claim for foreign exchanges loss reflects actual losses incurred and we have been candid and shared both bank documents and access to our bankers with you. Sahara therefore seeks to be made whole for actual losses suffered. The timing and predictability of payments were fundamental in the transaction and our expectation was that Sonara would remain consistent with what was agreed."

September 2017 Meeting

- 37. Following a further meeting in May there was another meeting relied on by the Defendants of 18-22 September 2017. The Agenda highlighted items of reconciliation of principal sums, contractual and late payment interest, exchange rate commission, late LC penalty and conversion differences.
- 38. There was some dispute as to the detailed calculation of contractual interest. Sahara reiterated reliance on Clause 26. In respect of 2015 and 2016 cargoes, there was some discussion of forex differentials. Unlike the 2013 cargoes where Sahara had suffered forex losses, it was Sonara who had suffered forex losses for 2015 (€329,256.65 claimed by Sonara, €46,229 calculated by Sahara) and 2016 (€73.18 claimed by Sonara). In respect of the 2013 cargoes, there was a dispute as to whether Sahara was in principle entitled to claim for forex differentials, certain interest, and penal charges. In any event, Sonara asked Sahara "to make best endeavours to provide all justification documents from their banks". The minutes also note "Sonara and Sahara shall work together to ensure that all claims are verified within 30 days from the date of receipt of justification of the claims."

- 39. At this meeting and at a further meeting at the start of January 2018 Sonara's representatives disputed the incremental interest and forex elements of the claim. For example the notes to the January 2018 meeting state: "SONARA-Legal expressed serious concerns on the extra charges not stated in the binding contract like the forex differentials, and that SONARA cannot pay extra charges without a court judgment according to Cameroon Law." The note went on to say "this figure represents Sonara's position for 2013 done on the basis of contractual interest rate. This position was however rejected by Sahara as not entirely representative of contractual terms and conditions." These notes were signed by all attendees.
- 40. Discussions continued in correspondence in 2018. On 4 May 2018 Sahara sent a letter plainly calling for a resolution: "a committed plan to extinguish the long overdue receivables. Our financiers are at the point of initiating legal proceedings against Sahara and Sonara for non-performance."

January 2019 Meeting

- 41. A further reconciliation meeting was scheduled for January 2019 aiming for a final position to be taken on the Sonara outstandings. Sahara made clear that they expected to see a proposed outline schedule of payments as well as follow up on points previously discussed. Following the arrival of Mr Olagbami as part of the Sahara team a comprehensive Excel workbook was produced which set out the calculations for the sums that Sahara was claiming from Sonara. It became knowns as the "Reconciliation Spreadsheet". Sahara and Sonara went through the figures in the Reconciliation Spreadsheet in great detail, explaining the basis of the calculations
- 42. However early on it was noted that the points on the outstandings should be moved to a meeting when Sonara's General Manager ("GM") at the time, Mr Ibrahim Talba Malla was able to be present. In discussion of the outstandings Sonara clarified their position:
 - "SONARA-Legal expressed serious concerns on the extra charges not stated in the binding contract like the forex differentials, and that SONARA cannot pay extra charges without a court judgment according to Cameroon Law."
- 43. Sahara for its part reiterated reliance on clause 26 and explained in detail the calculations for the claims submitted, listing the documents supplied already (essentially spreadsheets with the various calculations). The notes appear to show an intention to iron out the figures and refer to the Government of Cameroon:
 - "SONARA and SAHARA shall work together to ensure that all claims are verified within 30 days from the date of the receipt of justification of the claims.
 - Once all the above claims are verified by SONARA the outcome shall be put on the table with the government of Cameroon due to the late payment of subsidies in 2013 for possible solutions."
- 44. In March 2019, against the background of continued correspondence, Sonara said "We have done a keen analysis of your claim and arrived at a conclusion that your claim on accruing penal interest and forex losses on the 2013 crude oil delivery transactions are not acceptable. Our decision is based on interpretation of our Term commercial

- contract of 14th January 2013 on its articles 8 —payment and 26 —events of default/termination." Sahara responded that the delays and defaults were so extreme that they effectively render the terms of the contract null and void.
- 45. On 1 May 2019 Sahara wrote to Sonara, setting out its claim and providing its supporting documentation (as requested by Sonara in January 2019). The letter was accompanied by a substantial set of documents, split into 12 sections. The entire letter was 146 pages long. A substantial portion of the attachments were based on the Reconciliation Spreadsheet but there were also various other supporting documents including (i) letters exchanged with Access Bank and Ecobank /Ecobank's lawyers (ii) an Access Bank statement setting out the interest and charges that had been incurred with that bank (iii) an Ecobank statement at (iv) printouts of USD:EUR exchange rates from Bloomberg.

The facts leading to Sonara's Counterclaim

46. Sonara has made a Counterclaim against Sahara and the Third Party, Sahara Energy Resource DMCC ("Sahara DMCC"), a company incorporated under the laws of United Arab Emirates.

January 2019 purchase of Bonny Light Crude Oil

- 47. In January 2019 Sonara purchased approximately 650,000 barrels of Bonny Light Crude Oil (the "Crude Oil") from Sahara DMCC. The purchase was made pursuant to a term agreement entered into by Sonara and Sahara DMCC on 27 February 2017, as amended on 17 December 2018 (the "Term Contract").
- 48. Three bills of lading were issued in connection with Sahara DMCC's obligation under the Term Contract to deliver the Crude Oil to Sonara. As stated therein, delivery of the Crude Oil was completed by the ship MT CS ZEPHYR on 4 June 2019. Sahara issued a pro forma invoice in respect of the delivery of the Crude Oil, pursuant to which Sonara was required to pay USD 47,492,122.33.
- 49. In accordance with Annexure 2 of the Term Contract, payment for the Crude Oil was to be made by way of an irrevocable letter of credit to be issued at the request of Sonara. Following correspondence with Standard Chartered Bank by Sahara and Sonara an irrevocable letter of credit was issued by Standard Chartered Bank in favour of Sahara on 17 July 2019 for an amount of USD 47,492,122.33 (the "Standard Chartered L/C") as payment for the Crude Oil.
- 50. On 31 May 2019 at 21:55, an explosion, followed by a fire, occurred at Sonara's refinery at B.P. 365 Limbe, Cameroon, damaging Sonara's refinery unit and causing it to shut down. Consequently, the Crude Oil that Sonara had purchased and received from Sahara DMCC could not be unloaded from the MT CS ZEPHYR, as Sonara had nowhere to store and refine it. Sonara informed Sahara DMCC of these events by way of a letter dated 1 June 2019 and declared this a "Force Majeure" event under the Term Contract.
- 51. In light of the "Force Majeure" event declared by Sonara, Sahara DMCC and Sonara entered into a contract to swap the Crude Oil for refined products (the "Swap Agreement", dated 26 June 2019 and signed on 27 June 2019). The terms and

- conditions of the Swap Agreement were recorded in an agreement entered into by Sahara as the "Seller" and Sonara as the "Buyer" of refined products dated 5 July 2019 (the "Swap T&Cs").
- 52. Under these arrangements: (i) Sahara bought back the ZEPHYR cargo of Bonny crude; (ii) the letter of credit in respect of the cargo was nevertheless issued for drawdown by Sahara; and (iii) in exchange, Sahara agreed to deliver certain refined products.
- 53. Sahara DMCC (here referred to as the "Buyer") and Sonara (here referred to as the "Seller") also entered into a Deed of Agreement with the charterer of the MT CS ZEPHYR, DSC- Marine Services S.A. (the "Charterer"), dated 26 July 2019 (the "Deed of Agreement"). Pursuant to the Deed of Agreement, Sahara DMCC agreed to pay off certain debts owed by (i) Sonara to the Charterer, and (ii) the Charterer to the owner of ZEPHYR, in order to ensure that the "matters may proceed and the Parties discharge their obligations under the [Swap] Agreement..." This is recorded in Recital (v) of the Deed of Agreement, which, in addition, provided that Sonara would accept such payments by Sahara DMCC "in deduction of the Buyer's payment obligations under the [Swap] Agreement..."
- 54. As described in Clause 5 of the Swap T&Cs, Sahara's obligations extended to supplying (a) 20,000-40,000 MT of Jet A1 product, (b) 20,000-40,000 MT of Gasoil product and (c) 30,000-40,000 MT of Gasoline product. Subsequently, and pursuant to this clause, Sonara agreed to receive (a) 20,000 MT of Jet A1 product, (b) 20,000 MT of Gasoil product and (c) 30,000 MT of Gasoline product (together, the "Refined Products").
- 55. Recital (I) of the Swap Agreement records Sonara's agreement to purchase Crude Oil in January 2019. It states that "SONARA ENTERED INTO AN AGREEMENT TO PURCHASE FROM SAHARA ENERGY 693 272 BARRELS OF BONNY LIGHT CRUDE OIL DELIVERED VIA MT CS ZEPHYR WITH A BILL OF LADING DATED 04/06/2019 AND MATERIALIZED BY PROFORMA INVOICE 21052019 ISSUED BY SAHARA ENERGY ON THE 21/06/2019. PAYMENT TO BE SECURED BY IRREVOCABLE LETTER OF CREDIT TO BE ISSUED BY STANDARD CHARTERED BANK IN FAVOUR OF SAHARA ENERGY". This was referred to as "TRANSACTION ONE".
- 56. Recital (II) of the Swap Agreement refers to the Crude Oil versus Refined Products swap and the undertaking made by Sahara DMCC to supply Refined Products to Sonara for a value equivalent to that of the Standard Chartered L/C. It states that "THE PARTIES AGREE TO ENTER INTO A CONTRACT FOR A CRUDE VERSUS REFINED PRODUCT SWAP WHEREBY SAHARA SHALL SUPPLY REFINED PRODUCTS TO SONARA FOR A VALUE EQUIVALENT TO THAT OF THE LETTER OF CREDIT ISSUED IN "TRANSACTION ONE" [referring to the Standard Chartered L/C]. Sahara DMCC thereby agreed to supply Refined Products to Sonara for a value equivalent to the Standard Chartered L/C (i.e. USD 47,492,122.33). This was referred to as "TRANSACTION TWO".
- 57. Clause 7 of the Swap T&Cs stipulated that delivery of the Refined Products was to take place "DURING ESTIMATED PERIOD 01 TO 26 AUGUST 2019 (BOTH DATES INCLUSIVE) TO BE NARROWED TO THREE DAYS FROM THE SELLER AFTER COMPLETION OF LOADING".

- 58. Clause 9 of the Swap T&C's states that the payment for the Refined Products is made "BY OFFSET WITH THE VALUE OF THE LETTER OF CREDIT ISSUED BY STANDARD CHARTERED BANK OF ABOUT USD 47 492 122.33." This reflects the fact that payment for the Refined Products was to be made by way of the Standard Chartered L/C
- 59. This was opened in favour of Sahara on 17 July 2019. Thus, Sonara paid for the full amount of Refined Products on 17 July 2019. It is agreed that Sonara made payment of US\$47,492,122.33.

Non-delivery of Refined Products

- 60. It is agreed that Sonara only received 15,840 MT of JET A1 refined product. The amount of undelivered Refined Products totals 54,060 MT.
- 61. Sonara's case is that the failure to make full delivery is a breach of contract which entitles Sonara to damages. Sahara and Sahara DMCC's case is that the remainder of US\$47,492,122.33 was used to exhaust payments allegedly owed by Sonara and that this was a lawful set off, and/or that this was agreed in section 5 of the Joint Report (in respect of USD 23,081,927.45) and pursuant to subsequent correspondence (in respect of the remaining balance). This is a matter of disagreement between the Parties.

The September 2019 Meeting

- 62. It was against this background that senior representatives of the parties met on 4/5 September 2019. It was this meeting which resulted in the "Joint Report of reconciliation meeting between Sonara and Sahara Energy held on 4th 5th September 2019 at the Sonara Refinery Cameroon" ("the Joint Report") whose status is a key issue in the trial.
- 63. On 6 August Sahara had written to Sonara "to bring to your attention the urgency on the prompt settlement of the outstanding amounts ... It has become imperative that we receive a prompt settlement/payment of these amounts with an official correspondence from Sonara advising the payment date and swift."
- 64. In mid-August Sonara reverted indicating a willingness to meet, and an understanding of the position on principal and contractual interest, but reiterating its stance on penal interest and FX.
- 65. On 28 August 2019, Sahara proposed a financial reconciliation meeting on 4 September 2019. It expressed the growing urgency of the situation since its banks were becoming more pressing and threatening. Sonara was willing to meet. The relevance of the Government of Cameroon had by now increased because of Sonara's catastrophic loss in relation to the Limbe refinery and its consequent dependence on the Government of Cameroon for support.
- 66. On the morning of 3 September 2019 (the day before the meeting), Sahara emailed Sonara a document entitled "Sonara Recon Master 02-09-2019.xlsx". It was a more developed version of the Reconciliation Spreadsheet deployed in January of that year. Further documents were also emailed to Sonara ahead of the meeting.

- 67. The spreadsheet, through which I was taken with great care by Mr Du, possessed various tabs reflecting the different categories of claims:
 - i) Global Summary. As the name suggests, it summarises all of Sahara's claims.
 - ii) Outstanding Principal.
 - iii) Interest Costs. These deal with Sahara's claim for contractual interest and incremental interest.
 - iv) Excess Interest and Charges. These deal with Sahara's claims for excess interest and penal charges.
 - v) Forex. The final group of tabs starts with "Forex Recon" and contains the calculations for Sahara's forex differential claim.
- 68. Given the position of Sonara in January 2019 it had been regarded as important for the GM of Sonara to be present. While not listed as an attendee it was common ground that he did attend. He signed off on the Report. Attendees also included members of Sonara's legal department Sonara's witness Ms Nsoh and all those from Sahara from whom I heard in evidence.
- 69. On 4 and 5 September 2019, the meeting took place. The meeting was attended by eight senior representatives of Sonara and the Joint Report was signed by nine including Sonara's head of legal (Severin Tagne) and Sonara's then Director General, Jean-Paul Simo Njonou.
- 70. So far as the meeting is concerned, it was apparent that it was a long and detailed meeting. The witnesses' recollections were necessarily very fragmentary as regards exactly what happened. While I consider below the effect of the witnesses evidence, what is manifest is that their evidence cannot come close to capturing the full effect of the meeting, were it admissible or relevant.
- 71. A first draft of the Joint Report was sent by Sahara on the morning of Day 1. This appears to be intended as a framework for discussion and agreement since it included spaces for attendees' signatures. It divided the items into the following headings: "1. 2013 Outstanding on Principal; 2. Undisputed and Reconciled (covering contractual interest, late payment interest, Incremental Interest and Forex losses); 3. Disputed (Penal Charges); 4. 700 KB Bonny Crude Products Swap Agreement'. In respect of the latter there were comments:
 - "• These figures were presented by SAHARA backed by supporting documents and SONARA acknowledged receipt.
 - SONARA communicated her understanding of SAHARA'S position and rejected the claims of the Penal charges,
 - Parties agreed to jointly contest the Penal Charges with the banks."
- 72. The incremental interest and Forex sums were annotated thus:

"These figures were presented by SAHARA backed by supporting documents and SONARA acknowledged receipt.

After extensive deliberations, SONARA communicated her understanding of SAHARA'S position (which is to be paid the Incremental Interest amount in full).

Parties would thereafter meet on a date to be agreed to discuss flexible payment terms to facilitate SONARA's payment of the Incremental Interest."

- 73. Immediately after the table for the Bonny Crude swap and before the space for signatures came a single bullet point: "THIS AGREEMENT WILL BE SUBMITTED TO SAHARA'S BANKING AND LEGAL PARTNERS FOR VALIDATION"
- 74. At the end of the first day, an updated spreadsheet was produced, entitled "Sonara Recon Master (Updated till August 22 2019) V3 (Page turn with Sonara).xlsx". The revised spreadsheet was sent by Mr Olagbami to Mr Omofolarin at 20:37. Comparison of the spreadsheets had made some adjustments to principal and contractual interest claims
- 75. Ms Nsoh produced a redline version. It had a number of differences to the original:
 - i) Item 2 "Undisputed and Reconciled" was limited to Contractual and Late Payment Interest. Each head was annotated "These figures were reconciled and agreed on by both Sonara and Sahara";
 - ii) Incremental Interest and FX differential were moved to a separate table under "Disputed Items" annotated to note that Sahara had provided supporting documents, that Sonara would deliberate internally on and the parties would agree a date to meet to continue negotiations;
 - iii) The Disputed Items were annotated:
 - a) Incremental Interest/Forex: "After extensive deliberations, SONARA agreed to deliberate on the claim internally. Parties would thereafter meet on a date to be agreed to continue with the negotiations and possible flexible payment terms if an agreement is arrived at";
 - b) Penal Charges: "Sonara rejected in full the claims of the Penal Charges".
- 76. There was a second day of negotiations on 5 September 2019.

The Joint Report

- 77. Following the meeting, those who attended the meeting on behalf of the parties signed The Joint Report.
- 78. It was a further version of the same document plainly discussed between the parties. Its further developments were these:
 - i) Item 2 became "Reconciled Claims" and the annotations were removed;

- ii) Incremental Interest and Forex became a new Item 3: "Undisputed claims" with no annotations;
- iii) Penal Charges remained categorised as "Disputed Claims". The middle annotation became: "SONARA communicated her understanding of SAHARA'S position and rejected the claims of the Penal charges";
- iv) There were four "Resolutions" (whose genesis from the annotations is evident) as follows:
 - "• All relevant supporting documents for the claims have been submitted by SAHARA and duly acknowledged by SONARA.
 - SONARA would review and collate the documents for submission to the Government of Cameroon.
 - SONARA completely rejects all Penal charges and requests for a waiver of same.
 - SONARA will communicate a date within two (2) weeks to for parties to reconvene, SONARA to propose potential flexible payment terms, schedule and further negotiations on the undisputed claims."
- v) The bullet points after the section on the Bonny cargo were followed by a further bullet point (in bold): "THIS AGREEMENT WILL BE SUBMITTED TO SAHARA'S BANKING AND LEGAL PARTNERS FOR VALIDATION";
- vi) Immediately after this came the parties' signatures.
- 79. The Joint Report identified the following items:
 - i) At item 1, it set out the remaining "Outstanding on principal" which had been reduced to €8,803,819.72;
 - ii) At item 2, it set out "Reconciled Claims" in respect of contractual interest amounting to €27,278,197.62 and \$4,973,474.32;
 - iii) At item 3, it set out "Undisputed Claims" amounting to \$76,967,673.97; these related to incremental interest (\$20,288,194.63) and FX differential (\$56,679,479.34);
 - iv) At item 4, it set out "Disputed Claims" amounting to \$50,760,089.41 related to "Penal Charges".

The Joint Report and the Counterclaim

80. The Joint Report included section 5 entitled "700KB BONNY CRUDE-PRODUCTS SWAP AGREEMENT (\$47,492,122.33)". Section 5 began with the following table:

Description	Currency	Amount (USD)

M/T CS ZEPHYR DIRECT PAYMENT	USD	630,302.45
DSC MARINE PAYMENT	USD	2,249,697.55
M/T SYDNEY SPIRIT DEMURRAGE	USD	10,705,328.18
15,904MT JET AI SUPPLY (KYRNIKOS)	USD	10,705,328.18
M/T KYRNIKOS DEMURRAGE	USD	61,400.00
2013 PRINCIPAL (EURO-DOLLAR @ ECB RATE 22/08/2019)	USD	9,757,641.51
02-03-2019 42,000MT VGO CREDIT	USD	(557,163.13)
TOTAL EXPENDITURE	USD	23,081,927.45
BALANCE	USD	24,410,194.88

- 81. The table was followed by five bullet points. The fourth bullet point read: "Product supply schedule: 25K Gasoil & 15K Jet A1 15th September 15th October 2019 subject to resolution of all pending legal issues with SAHARA's financiers" with a number of deductions being recorded:
 - i) Sahara's discharge of Sonara's debt of \$2,880,000 by paying Al Giorgis Oil Trading Limited ("Al Giorgis") \$630,302.45 and DSC-Marine Services SA ("DSC-Marine") \$2,249,697.55;
 - ii) The demurrage of \$234,713.89 for the loading of the Sydney Spirit (used for the Ship to Ship ("STS") transfer of the Bonny crude which was bought back);
 - iii) The small demurrage claim of \$61,400 for the Kyrnikos, which was used to deliver a cargo of refined product to Sonara. The Joint Report recorded that "*M/T Kyrnikos demurrage claims have been received and subject to validation*";
 - iv) Sonara had agreed to allow Sahara to set off the outstanding principal for the 2013 cargoes, €8,803,819.72 or \$9,757,641.51; and
 - v) In Sonara's favour, there was a credit of \$557,156.13 in respect of 42,000mt of Vacuum Gas Oil ("VGO") dated 2 March 2019. Sahara had purchased a cargo of VGO from Sonara, which was loaded onboard MT Minerva Zen on 2 March 2019.

82. The only dispute under this appeared to be in relation to the Sydney Spirit demurrage claim, and therefore to whether the balance in favour of Sonara was \$24,410,194.88 (as Sahara admitted) or \$24,644,912.77 (as Sonara asserted).

Events after the Meeting

- 83. On 7 September 2019 Sahara produced a report on the meeting noting in particular:
 - "With regards to the undisputed position (Incremental Interest & FX differential), SONARA expressed their reluctance from a Legal perspective...
 - 8. Sahara maintained position that the Incremental Interest & FX differential were real costs being serviced and borne by Sahara while citing Legal reasons why these claims were valid as a result of SONARA's long term payment default and numerous documented non-fulfilled payment undertakings
 - 9. SONARA then accepted the undisputed claims (Incremental Interest & FX differential) and requested time to study and internally reconcile their position using supporting documents submitted by Sahara"
- 84. By 16 September 2019, the signatures of all relevant representatives had been added (including initialling on each page) and the Joint Report had been stamped with the corporate seals of both parties. Sonara on that date sent an original copy of the Joint Report to Sahara under cover of a letter signed by its then GM Mr Njonou.
- 85. On 19 September 2019, Sahara sent a letter to Sonara divided into four sections: (i) "Offset Financial balance on the SAHARA-SONARA Crude and Petroleum Products Swap Deal"; (ii) "SONARA's Proposed Payment Plan on all other Long Overdue Financial Outstanding's", which stated inter alia that "we have ... sought a two (2) months' timeline for SONARA to revert with a firm payment schedule"; (iii) "Disputed Claims" stating "SONARA's stance on disputing the Penal Charges (USD 50,0760,089.41) associated with the 2013 long overdue financial outstandings as applied by the banks was jointly reiterated following the negotiation meeting"; and (iv) "Petroleum Products Supply to SONARA & Cameroon".
- 86. Section 1 on Offset stated: "the financial reconciliation documents are signed by both parties were submitted to Sahara's banking and legal partners in a bid to halt the severe ongoing legal actions the banks have demanded an immediate offset on the financial balance on the Sahara—Sonara crude and petroleum products swap deal dated 26 June... The offset has been applied against a portion of the agreed and reconciled claim which are part of the long overdue financial outstandings to Sahara". The letter concluded "In conclusion we wish to state that we want nothing more than to promptly resolve these long overdue pending financial and legal issues in order to continue to work with SONARA and provide mutually beneficial solutions to fulfil its mandate to The Republic of Cameroon."
- 87. On 30 September 2019 Sahara sent a further letter which was identical to the letter of 19 September 2019 save that Sahara revised the figures stated in the second section.
- 88. On 3 October 2019, Sonara replied to Sahara, Sonara stated that:

"With reference to your letter dated 19th September 2019 regarding the above subject matter wherein you are referring to 'Our recently concluded financial reconciliation meetings on the 04th- 05th September 2019 in Limbe, Cameroon in a bid to address pertinent and long overdue financial and legal issues with our banks...we kindly draw your attention to the fact that [the September 2019 Meeting] was inconclusive and it was unanimously agreed that:

- SONARA will communicate a date within two weeks from the 05th September 2019 for another meeting in order to reconcile and finalize and also for SONARA to propose potential flexible terms, schedule and further negotiations on the undisputed claims;
- SONARA totally rejects all Penal charges and requests for a waiver of same;
- SONARA will review and collate the documents for submission to the Government of Cameroon;
- Documents concerning forex losses and incremental interest sent to SONARA will be reviewed and we shall revert during the final reconciliation meeting."
- 89. The letter then listed three numbered points. The first point entitled "Offset-financial balance on the SAHARA-SONARA Crude and petroleum products SWAP deal." concerned the financial balance on the Swap Agreements. Sonara stated that it was still expecting to receive the "remaining cargoes after the first one of 15 940 MT of JET A1". The second point was entitled "SONARA's proposed payment plan on the financial outstanding." Sonara stated that it would revert after "proper consultations with the Government of Cameroon". The third numbered point entitled "Disputed Claims" dealt with the disputed claims and asserted that Sonara "shall not negotiate any Penal charges. Not being a party to your financial contracts with the banks, we think the charges are exorbitant and we are being pushed to the wall, so have decided to seek expertise from our lawyers in order to put things right.... While looking forward to holding the second reconciliation meeting to provide a positive conclusion".
- 90. On 4 October 2019, Sahara wrote regarding the three numbered points in Sonara's letter. The letter concluded by asking Sonara to confirm the required payment schedule and subsequent meeting.
- 91. On 12 December 2019, the Cameroonian Minister of Finance ordered a working group responsible for the restructuring of Sonara.
- 92. On 13 January 2020 Mr Motajo prepared, but apparently did not send, a letter which commenced thus: "We hereby present a summary folder which clearly details the material events with supporting verifiable documentation showing SONARA's defaults in payments which have led to the total amounts for our claims and invoices as submitted.... The contents of this folder include ... ". It goes on to list the FX loss invoice with supporting documents, the interest and default charges invoice with supporting documents. It continues: "We believe that that simplified breakdown with supporting documentation for each segment will further facilitate the verification and prompt settlement of our claims."

- 93. In this letter, Sonara wrote to Sahara asking for Sahara to set out the outstanding debt as of 31 December 2019. On 17 January 2020, Sonara wrote to Sahara requesting that Sahara send "our assets and liabilities in your ledgers as at 31 December 2019."
- 94. On 21 January 2020, Sahara responded with a table that mirrored the Joint Report, save that the 2013 late payment interest had been reduced by EUR 22,052,471 to EUR 3,153,825.23. This deduction had been proposed in Sahara's letter of 30 September 2019, being the Euro conversion of the amount outstanding under the Standard Chartered L/C pursuant to section (5) of the Joint Report (\$24,410,194.88) in relation to the Bonny Light Crude arrangement.
- 95. Sonara sent its response on 13 February 2020. In a letter signed and affixed with the company seal from its Managing Director to Sahara's Managing Director of 13 February 2020, it stated:

"We acknowledge receipt of your letter dated January 21, 2020 and thank you for it.

Following this, we remind you that only contractual and moratory interest on the 2013 debt will be taken into account in the restructuring of SONARA.

After unilateral deduction of said interest on the letter of credit issued in your favour by STANDARD CHARTERED BANK, the balance of said interest amounts to

DESCRIPTIONS	AMOUNTS	
	EURO	USD
CONTRACTUA L INTEREST 2013	1 953 290.95	529 957.33
MORATORY INTEREST 2013	3 153 825.23	2 826 363.95
TOTAL	5 107 116.18	3 356 594.28

- ,
- 96. This was followed by another letter of response by Sahara dated 25 February 2020.
- 97. There were further exchanges between the parties and United Bank For Africa ("UBA") Cameroon on 8 June, 26 June, 12 August, 26 August, 31 August, and 17 September 2020. These letters largely reiterated the parties' existing positions.
- 98. On 8 October 2020, Sonara wrote to Sahara stating that "After review of the supporting documents you presented to SONARA for your claim on FOREX LOSES [sic], INCREMENTAL INTEREST and PENAL CHARGES... it is obvious these documents are inadequate to justify that such loses [sic] were incurred due to SONARA." Sonara's letter then went on to ask for (a) correspondences between Sahara and its banks; (b)

- statements of account; and (c) signed authorisation permitting Sonara and/or the government of Cameroon to verify claims with the financing banks.
- 99. Sahara wrote to Sonara on 9 October 2020, protesting against the letter.
- 100. There were a series of video conferences on 23 and 30 October, and 4 November 2020.
- 101. On 27 October 2020 (after the first meeting), Sahara wrote to Sonara supplying amongst others, "ECOBANK CORRESPONDENCES ON SONARA-SAHARA DEBT OUTSTANDING" and various further letters from Kunle Ogunba & Associates, solicitors acting on behalf of Ecobank.
- 102. On 6 November 2020 (after the third meeting), Sonara wrote to Sahara again regarding the Disputed Claims.
- 103. On 9 November 2020, a further letter was sent by Sahara reiterating its position.

Settlements with the Banks

- 104. On 27 August 2020 Sahara settled its dispute with one of the Banks, Ecobank, for US\$11.5 million. The principal amount borrowed by Sahara for the Sonara cargo was \$72,163,091.12; after deducting for the Ivory Coast trade, this meant Sahara paid a total of \$19,155,479.50 in interest and charges to Ecobank.
- 105. Sahara reached a resolution with Access Bank without any formal settlement agreement. The position is said to be reflected in a spreadsheet attached to an email of 1 December 2020. Sahara had made payments to Access Bank from 2020 and continued to do so until 2022. The principal amount borrowed by Sahara for this business was \$144,720,060.73; Sahara paid a total of \$52,044,699.53 in interest and charges to Access Bank.

Present Proceedings

- 106. The current Claim Form in the Commercial Court was issued on 21 April 2021.
- 107. On 31 May 2022, Sonara served its Defence and Counterclaim.
- 108. Sonara made various payments on the following dates:
 - i) On 4 and 8 February 2021, EUR 42,250.56 and USD 682,816.00;
 - ii) On 12 April 2022, EUR 2,591,553.82 and USD 3,164,046.63;
 - iii) On 17 June 2022, EUR 2,591,862.23 and USD 1,124,611.99. This was said to be by way of final settlement.
- 109. The CMC was held on 10 February 2023. The trial was originally listed for 10 days, commencing 11 March 2024. That trial did not occur.
- 110. Until 26 January 2024, Sonara was represented by Latham & Watkins (London) LLP ("L&W"). On 26 January 2024, the Court ordered that L&W be removed from the court record pursuant to an application under CPR42.3. Sonara did not appoint

replacement solicitors at that stage. On 27 February 2024, at the Pre Trial Review, the Court ordered that Sonara provide an address for service pursuant to CPR6.23 by 4pm on 5 March 2024. Sonara did not comply with this deadline. On 6 March 2024, Sonara sent an email providing the address of L&W as its address for service, but also confirming that L&W was not representing Sonara.

- 111. On 7 March 2024, the Court ordered that Sonara file and serve a fully particularised skeleton for trial by no later than 1pm on 8 March 2024, failing which the statements of claim would be struck out and Sonara be debarred from participating at trial. Sonara did not comply with this deadline. On 8 March 2024, Sonara emailed an application notice seeking relief from sanctions and permission to participate at the trial, to vacate the existing trial dates, and for a CMC to take place.
- 112. On 11 March 2024 at 08:53, Squire Patton Boggs (UK) LLP ("SPB") served a Notice of Change of Legal Representative, advising that it now represented Sonara. On the same day at 09:29, SPB served a witness statement by Jones McGregor Achu, the Cameroon local legal counsel for Sonara.
- 113. At the hearing on the same day, the Court ordered that the hearing be adjourned until 1 October 2024. The Court also ordered that Sonara pay into court by no later than 4pm on 22 April 2024 the sum of US\$4.75m on account of (i) US\$500,000 as costs allegedly thrown away by the adjournment and (ii) US\$4.25m as an estimate of the interest that would be awarded on the sums claimed between the date of the order and 1 October 2024 assuming Sahara's claim succeeded in full.
- 114. On 18 April 2024, Sonara issued an application for an extension of time until 7 May 2024 to comply with the Court's order on 11 March 2024. Sonara's application was supported by a witness statement from SPB's Timi Balogun. Sonara made payment to the Court on 22 April 2024. At 16:16, SPB received confirmation from Lloyd's Bank (where SPB's client account was held) that the funds had been remitted to the Court Funds Office.

THE TRIAL

- 115. The adjourned trial date was effective. Despite the difficulties earlier in the timeline the parties managed a reasonable amount of sensible co-operation in the run up to and during the hearing.
- 116. Sahara relied upon the evidence of:
 - i) Temitope Olagbami (at the relevant times Head of Corporate Finance)
 - ii) Omofolarin Mosunmade (then Business Development Manager)
 - iii) Tolulope Fadipe, from 2019 Sahara's Legal Manager
 - iv) Kola Motajo., the General Manager of Sahara's Geneva Office
 - v) Alex Cole, Sahara's Head of Business Development

- 117. Sonara called Erica Nsoh, their Commercial Manager and Mr Nicholas Good, their financial expert.
- 118. The witnesses' evidence is evaluated, to the extent necessary, in context below. It was not suggested that any of them were doing other than their best. As already noted for the factual witnesses this required them to endeavour to recall some very detailed discussions, and it is unrealistic to expect full or even fully accurate recall.

WAS THERE AN AGREEMENT IN THE JOINT REPORT?

- 119. This is the central factual issue in the case. It was to this that most of the witness evidence was directed. The Parties disagree as to the meaning and effect (if any) of the Joint Report. In particular, it is disagreed whether the document comprises an agreement by Sonara to pay for the matters that are still contentious in these proceedings.
- 120. The parties' arguments were in essence as follows. For Sahara it was contended that based on the admissible material (i.e. taking into account the pressure from bankers on one side and the Swap finances on the other but ignoring negotiations and subjective interpretations) the language of the Joint Report leads to a conclusion that there was a binding agreement, and that it extended to the items labelled "undisputed". Sahara says the Agreement is an agreement a contract, and that the parties' label of "Undisputed" is clear and unambiguous.
- 121. Sonara's position on this was not entirely consistent. Its pleaded case at paragraph 19 of its defence is that it "...recorded certain agreements... specifically the agreements that SONARA would pay to Sahara the sums identified at paragraphs 11(c) to 11(g). However, it is denied that the Joint Report constitutes a contract or agreement and/or that it contains or gives rise to any contractual obligations and/or agreements". In closing however it accepted that the reasonable objective interpretation of the document was that as regards "Reconciled Claims" Sonara would pay them.
- 122. So far as the contentious matters are concerned, Sonara says that the Joint Report document does not refer to any of the three extant claims as being agreed. It does not include them under "Reconciled" claims (which is how the claims for contractual interest are separately recorded in the same document). Rather it records (i) that the "undisputed claims" (the claims for incremental interest and FX claims) are to be the subject of continued negotiation and (ii) that Sahara completely rejects all Penal Charges. Accordingly Sonara contends that Sahara's primary case that there is a binding agreement to pay the sums claimed for incremental interest and FX claims is fanciful and must fail.
- 123. As to negotiations Sonara does place more emphasis on these (both before and at the September Meeting). In particular Sonara place emphasis on the drafts of the Joint Report and specifically how the FX and Incremental Interest claims had been moved into "Disputed Items". It contends that it is settled law that in deciding whether negotiations have led to a binding settlement agreement the Court will look at the full negotiations which of course includes evidence of the meetings leading to the Joint Report and the documents exchanged between the Parties. It says that against this fuller

- background I should scrutinise the suggestion of an agreement with particular care as running against the tide of the previous correspondence.
- 124. There was therefore technically a debate on the admissibility of the evidence from the negotiations (and the parties' actions after the Joint Report was signed). That debate hinged on the question of whether one was considering a question of whether an agreement was concluded, in which case the materials would be admissible, or whether the issue was one of construction
- 125. Certainly as regarded the negotiations, the debate as to admissibility was not entered into very wholeheartedly, because both parties found material they wished to rely on within the negotiations. As I will endeavour to explain below in fact adopting either approach leads to the same conclusion.

Analysis

- 126. The starting point is the Joint Report and the words in which it is expressed, iterated against admissible background.
- 127. There are indications that the Joint Report either encapsulates or at least contains an agreement which is intended to have legal effect. First that is the impression it gives simply as a document. The effect of the signatures on a preprepared signature grid and of the careful initialling of every page of the document is suggestive. The inclusion of these features if no legal effect were intended would be a little surprising.
- 128. Second, read cold, that the parties intended to enter into a binding agreement appears to be the effect of the final bullet point in bold ("THIS AGREEMENT WILL BE SUBMITTED TO SAHARA'S BANKING AND LEGAL PARTNERS FOR VALIDATION"). Interposing the iterative stage in relation to this point here, that initial impression is reinforced, not contradicted, if one follows through the drafting history: the bullet point was put in originally to record what Sahara hoped would be a final binding agreement on all points except the Penal Charges.
- 129. Further the use of the word Agreement, and the wording of this bullet point (submission to banking and legal partners) has some significance given that part of the admissible context is that, while this was not a "lawyered" document, the parties had legally qualified attendees at the meeting.
- 130. Thirdly, looking at the boxes only (i.e. ignoring the Resolutions) the impression given by the bald statements of figures (countersigned by attendees) and the titles of the sections (Reconciled/Undisputed/Disputed) the impression is that the document encapsulates an agreement in relation to everything except penal charges albeit with a query about the difference between "reconciled" and "undisputed".
- 131. However that initial impression has to be synthesised (and the query has to be attempted to be resolved) with the wording of the resolutions within the document. Even absent the admissible background a considerable doubt as to agreement on the "undisputed claims" is raised by the wording of Resolution 4 ("SONARA will communicate a date ... for parties to reconvene, ... and further negotiations on the undisputed claims"), accompanied by a query as to the involvement of the Government

of Cameroon, which is specifically referenced in Resolution 2 as an entity to which documents must be submitted.

- 132. Once the unarguably admissible background is brought into play, the position as to an agreement on the "undisputed" claims becomes more difficult for Sahara. The submission that the reference to "This AGREEMENT" in the very final bullet point is determinative because there is no language confining it to parts of the Joint Report cannot stand when (i) as noted, this is not a formally lawyered document (ii) on any analysis the agreement could only ever extend to parts of the claims (ie. not the disputed claims) and (iii) the parties (despite having lawyers present) did not call the entire document Agreement, or Settlement Agreement. When it came to titles, they called it a Joint Report.
- 133. Nor do I accept the submission that "Undisputed" means only one thing. Stripped of all context, it does indeed suggest a purely binary answer. But in a context where (i) there were two categories ahead of the "disputed" items (ii) both of those different categories suggest agreement, and yet are not taken together and (iii) there had been two areas of discussion over the years, one as to the maths and one as to liability, "undisputed" could very obviously mean undisputed as to liability, undisputed as to quantum, or both. In context specifically given the content of that section it appears clear that of the two categories the parties intended "Reconciled" to refer to "undisputed as to both". That simply as a matter of logic suggested the parties intended "Undisputed" to cover either undisputed as to liability (but disputed as to quantum) or undisputed as to quantum (but disputed as to liability). Sahara's case as to the extent of agreement is not therefore as strong as it might appear.
- 134. Nor however does Sonara's case as to the meaning sit happily with the document, even against the context. The pleaded case for Sonara is that:
 - ""Undisputed Claims" was a phrase used by Sahara to signify that the claims in question concerned sums which Sahara accepted that it owed to its banks, whereas the phrase "Disputed Claims" was used by Sahara to signify claims in respect of which it did not accept any liability to its banks for the sums in question. That is why, at page 3 of the Joint Report, it was recorded that the "Parties agreed to jointly contest the Penal Charges with the banks."."

It is right, as Sahara submitted, that there is not a hint that "undisputed" could naturally mean or come to mean "not disputed between Sahara and its banks but disputed between Sonara and Sahara".

- 135. Neither of these approaches therefore is an answer at which one can arrive by objectively construing the words used in their ordinary sense; and there remain issues even bearing in mind the background.
- 136. What matters in terms of objective construction is the ambivalence created by the categories, the logical possibilities as to "undisputed" and the word "negotiations" in used in relation to "undisputed" in Resolution 4. While Sahara's case on this was extremely well put both in writing and orally in my judgment it gave too much weight to the simple word "undisputed" and insufficient weight to the natural meaning of "negotiations". While the natural meaning of "negotiations" could conceivably be read

down if "undisputed" could really have only one meaning, where that is not the case, "negotiations" has to be given its natural meaning if that is possible. As Sonara contended, the clear resolution that "the Parties will reconvene for ... further negotiations on the Undisputed Claims" is at least extremely difficult for Sahara's case. On an objective reading of the whole document the use of the word "undisputed claims" does not comprise an acceptance that Sonara agrees to pay the Incremental Interest or FX Losses in the sums claimed or in any sums.

- 137. Nor is it right to say that the sentence of Resolution 4 presumes agreement on Sonara's liability, on the basis that there would otherwise be no point in flexible payment terms; Resolution 4 perfectly sensibly covers both the fully agreed elements (principal and "reconciled") and the "undisputed" elements. In context it makes perfect sense for it to be read thus: "for parties to reconvene, SONARA to propose potential flexible payment terms, schedule [agreed: principal/reconciled] and further negotiations on the undisputed claims. [undisputed]".
- 138. This then dovetails with the further admissible background including the position of the Government of Cameroon. It is agreed that there had been a long-outstanding issue which the parties had been trying to resolve by now for years. There had been a number of reconciliation meetings in which Sahara had pressed for payment and where Sonara had made clear that they were not persuaded that the claims fell within the boundaries of their contractual liability. There is the unlikelihood of Sonara, in the financial position it was in, agreeing any liability that was not clearly established.
- 139. At the same time there were a number of "bigger picture" issues. First, the parties had co-operated and wanted to put themselves in a position where the relationship could continue. Secondly Sahara had made clear that the issue was very pressing and that it wanted to reach a position where it could expect payment and it had something to give to its by now fractious banks. Then there is the fact that the parties knew that Cameroon Government agreement would be needed for anything not demonstrably due from Sonara, particularly in light of the financial crisis at Sonara caused by the refinery fire in 2019. Sonara was dependent on the Government of Cameroon for support.
- 140. Even on the basis of the most basic contextual evidence, I would conclude that the parties reached a limited agreement only in the Joint Report and that that agreement related only to principal and contractual interest. It is common ground that no agreement was reached on the Disputed Claims. I would therefore conclude that Sahara has not proved on the balance of probabilities that an agreement was concluded as regards the Undisputed Claims.
- 141. On a purely objective basis and without more than the minimum context it is not possible to agree with Sonara's case; that is because of the distance which it travels from the wording of the document. Having said that, what Sonara were contending for (which does depend for its precise formulation on what is said to have been said at the meeting) may in essence equate to the possibility floated above of "Undisputed as to quantum", at least as regards the interest elements. The reason for this is that since interest is a necessary incident of bank borrowing, the quantum of the charges would be the main basis upon which Sahara could dispute the charges with their bank. If Sahara had agreed quantum with the banks, it was in a position to verify the amount it was seeking to claim from Sonara at which point there would be no issue between Sahara and Sonara that Sahara had a liability in x amount, but liability might remain in issue as

between them. I also note that Sonara's precise characterisation obviously cannot apply to the forex claims which were not charges imposed by banks.

- 142. There is also sense in positing "Undisputed" as potentially applying to quantum or at least calculation of quantum in circumstances where, when one amplifies context somewhat it is apparent that what the meeting had apparently done was to go through the figures and attempt to reconcile them (see the title given to the meeting, Mr Motajo's evidence "primarily what was being discussed was numbers" and Ms Nsoh's acceptance that the detailed documentation was to be submitted to the Government of Cameroon), and where it is clear from the genesis of the spreadsheets that (i) they formed a continuum in which figures had been provided some time before in spreadsheet form with a variety of underlying documents which might be expected to go to quantum verification and (ii) one thing which the meeting did demonstrably achieve was some tweaks to the figures. In other words, during the course of the meeting the parties had agreed that that some of the figures originally put forward were not quite right and that the new figures were right.
- 143. If one does have regard either to the wider context of negotiations, the oral evidence (not all of which was strictly admissible) and the post meeting correspondence the conclusion that no agreement was reached on this element becomes clearer. Here a number of elements dovetail with the contextual points already outlined.
- 144. So far as the (necessarily fragmentary) recollections of the meeting were concerned noone seemed to recall a debate on the Clause 26 issue; and yet on Sahara's account Sonara had during the course of the meeting either seen the light or at least ceded a long held position. The same can be said in reverse for Sonara's characterisation, which involved an implausible definitional statement from Sahara. I reject Ms Nsoh's evidence on this point, which resonated with hindsight and wishful thinking. As noted, what did happen, as best one can tell, was a fairly thorough thrashing through of figures.
- 145. There is also the re-working of the spreadsheet by Ms Nsoh, which involved moving the Incremental Interest and FX charges from the section called "Undisputed and Reconciled" into a "Disputed Claims" section a section which was then relabelled but remained in the final presentation separate both from "Reconciled" (ie agreed) claims and the plainly disputed "Disputed Claims" of the Penal Charges and Excess Interest. There is the fact that the document was never drafted or signed off on as a Settlement Agreement; nor was there any internal report at Sahara of agreement. There is the emphasis on continued trade and approval of the Government of Cameroon with Sonara's GM saying at the beginning of the meeting that he wanted a "...quick resolution in a bid to allow Sahara to resume petroleum product supplies to Sonara" combined with the wording for onward submission. There is the fact that after the Joint Report had been signed off Sonara reverted to the approach they had taken before and were not met with shouts of outrage, on the basis that they had agreed liability for Incremental Interest and FX.
- 146. The narrow and wider approaches both point in the same direction: that there was a limited agreement on principal and contractual interest. There was agreement to disagree on penal charges. And there was an "agreement" that Sahara had become liable for Incremental Interest and FX in amounts which looked right, to put the matter before the Government of Cameroon (which might take a pragmatic view) and then to

come back to negotiate if there was no agreement by the Government to pay or to support payment. On that basis the "agreement" as to the "Undisputed Claims" was no contractual agreement; it was at best an agreement to agree.

THE CONTRACTUAL SCHEME FOR COMPENSATION FOR LATE PAYMENT

- 147. If there was no agreement in the Joint Report, the question of what Sonara's liability was under the contracts becomes significant. The contracts in question were each contracts which (in the usual way) have a number of provisions which might overlap or clash and which do not sit together perfectly or obviously. Thus:
 - i) Clause 8: concerns payment and as such deals with interest (whether by way of liquidated damages or not) for late payment;
 - ii) Clause 18: avowedly deals with liability and the measure of damages available; and
 - iii) Clause 26: is called "events of default/Termination Clause" but has as a part of the clause the indemnity wording relied upon by Sahara.
- 148. Each of the parties has taken a somewhat narrow view of the question. Both seek to persuade me that a single clause trumps the others. Sonara contends Clause 8 is an exhaustive code. Sahara contends that Clause 26 is engaged and overrides the other clauses. The starting point is a degree of scepticism for both views. With three clauses, all of which can on their face have relevance one should expect to find a scheme in which each plays a part. As set out below this scepticism is justified when, having considered each clause separately in turn, one returns to put them back together.

Clause 8: Exhaustive liquidated damages code?

- 149. The contention that Clause 8 was an exhaustive code ousting other clauses was floated in the negotiations, but it had not been pursued in this litigation until shortly before the start of the hearing. Some suggestion was made that the point could not be pursued because it had not been pleaded. This was sensibly not maintained at trial. Although there are variations on the argument which might require to be pleaded because they would require factual evidence, the point as it was actually advanced is a point of law.
- 150. The contention advanced is that Clause 8 comprises the agreed damages for a failure to make payment on time and is a binding liquidated damages provision such that it is not open to Sahara to claim its (alleged) actual interest (the Incremental Interest Claims) or the alleged damage said to be suffered as a result of the delayed payment (the FX claims and Penal Charges claims). The basis upon which Sonara advances this case is a broad one; it says that as a matter of principle default interest clauses are liquidated damages provisions. It relies upon two textbook citations (Benjamin's *Sale of Goods* 12th Edition at 13-035 and *Petroleum Contracts*, Roberts 2nd Edition at 20-013); but more substantially upon the argument that it is apparent from a list of cases where the question of whether a default interest clause is a penalty have been considered, that default interest provisions i.e. payment of interest for delayed payment on non-payment (which is a breach of contract) are by nature liquidated damages clauses. So Sonara says, because those cases say that the clauses in question were liquidated damages

clause, this clause is also a liquidated damages clause. The cases in question were: Lordvale Finance plc v Bank of Zambia [1996] QB 752 at 763-764; Jeancharm Ltd (t/a Beaver International) v Barnet Football Club Ltd [2003] EWCA Civ 58 at [9]-[19]; First Personnel Services Ltd v Halfords Ltd [2016] EWHC 3220 (Ch) at [161]¬[163]; Biosol Renewables UK Ltd v Lovering & Anor (t/a R & A Properties (A Partnership) [2021] EWHC 71 (Comm) at [310]-[316]; Ahuja Investments Ltd v Victorygame Ltd & Anor [2021] EWHC 2382 (Ch) at [131]-[145]; Hossein and Ors v London Credit Ltd and Another [2024] EWCA Civ 721 at [32]-[57].

- 151. There is however a problem with this approach. As observed in the hearing these authorities cannot dictate the answer on this iteration of the argument. None of them is a case which purports to lay down (as ratio) any proposition that all default interest clauses are liquidated damages clauses. In the cases cited the fact that the clauses were liquidated damages clauses is revealed by the fact that arguments as to penalty (the dark side of liquidated damages) were in play. But that does not mean that all contractual interest clauses are liquidated damages clauses.
- 152. Nor can the textbooks make good the point. Benjamin does no more than explain what a liquidated damages clause does, without making any assertion about what clauses are and are not liquidated damages clauses. Roberts does on its face go further, saying:

"Interest Charges:

The payee could be entitled to charge interest on late payments, at a rate specified in the GSA. The rate of this default interest due on payment failure should be set at a level which is sufficiently high to compensate the payee for the payor's failure to pay and to discourage the payor from using non-payment under the GSA as a revenue-generating exercise by depositing the required payments in an account which earns interest at a rate greater than the payment default interest rate under the GSA. On the other hand, the payee should resist the temptation to insert an unconscionably high rate of interest in the GSA on the basis that such a rate could be declared unenforceable,"

- 153. However not only does this not encapsulate any statement of principle, or refer to any authority, but it is plainly also intended as drafting advice to those seeking to create an enforceable liquidated damages clause. Sahara's dismissal of the textbooks as anodyne was entirely fair.
- 154. As Sahara pointed out in closing, one premise inherent in Sonara's argument is that there is only ever a binary choice between penal and liquidated damages. That is a false dichotomy as stated Lord Hodge at [246] of *Makdessi*, and by Mance LJ in *Cine Bes Filmcilik ve Yapimcilik v United International Pictures* [2004] 1 CLC 401 [15] "I have also found valuable Colman J's further observation[s] in Lordsvale at pp 763g-764a, which indicate that a dichotomy between a genuine pre-estimate of damages and a penalty does not necessarily cover all the possibilities. There are clauses which may operate on breach, but which fall into neither category, and they may be commercially perfectly justifiable."
- 155. The reality is that default interest clauses may be liquidated damages clause or they may not, just as liquidated damages may not be penal even when they are not a genuine

pre-estimate of loss. Much depends upon circumstances as well as the drafting of the clause.

- 156. In resisting this approach, naturally much emphasis was placed by Sonara on *K-Line Pte Limited v Priminds Shipping (HK) Co Ltd ("The Eternal Bliss")* [2021] EWCA Civ 1712 [2022] 1 Lloyd's Rep 22. In that case the Court of Appeal considered whether a demurrage clause covered all losses arising from breach of an obligation to load or discharge within laytime or whether it was restricted to the particular loss of running costs in the period of delay and the loss of opportunity to earn freight on other voyages. In that case the shipowner argued that it should be entitled to recover costs of settling claims with the cargo owners in addition to the demurrage.
- 157. In a somewhat controversial judgment¹ the Court of Appeal made clear that a demurrage clause will need to clearly state if it does not cover all losses arising from a breach:
 - "52. In circumstances where the cases do not provide a decisive answer and there is no clear consensus in the textbooks, we approach the issue as one of principle. Our conclusion is that, in the absence of any contrary indication in a particular charterparty, demurrage liquidates the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime and not merely some of them. Accordingly, if a shipowner seeks to recover damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation. Our reasons are as follows.
 - 53. First, while it is possible for contracting parties to agree that a liquidated damages clause should liquidate only some of the damages arising from a particular breach, that strikes us as an unusual and surprising agreement for commercial people to make which, if intended, ought to be clearly stated. Such an agreement forfeits many of the benefits of a liquidated damages clause which, in general, provides valuable certainty and avoids dispute. There is nothing in the charterparty or in the standard definitions of demurrage (including that from Scrutton which we have quoted above) to suggest that the parties in this case had such an intention. ..."
- 158. However regardless of the outcome in that particular case, the *Eternal Bliss* is of limited assistance for present purposes. It is a case dealing with a very particular issue in a very particular context demurrage in voyage charterparties. Whatever controversy there may in the past have been about the nature of demurrage, by the time of the *Eternal Bliss* it was well established, and the case proceeded on the basis that, a demurrage clause is a clause liquidating damages for a particular breach namely failure to load or discharge a vessel within the laytime. The controversy with which it grappled was the question of whether it liquidated all losses, or whether there was scope for other losses to be claimed but that was a question which arose against that very specialist background and coming from a premise that everybody involved would know

Permission was given very expeditiously by the Supreme Court but the case settled ahead of the hearing there. The view of Professor Edwin Peel writing in the LQR ("The Scope of a demurrage Clause" LQR 2022 348-353) was that "the decision of Andrew Baker J is to be preferred". That view also aligned with the view of the editors of Scrutton on Charterparties (as noted at [48] in the Court of Appeal's judgment).

that the clause was a liquidated damages clause. The Court of Appeal did not consider liquidated damages clauses more generally – and it is notable that the authorities to which they were referred were ones which related to this particular field, not general authorities as to liquidated damages.

- 159. Against that background I would regard it as wrong to read too much into the fairly general way in which the Court dealt with the subject of the ambit of a liquidated damages clause. Doubtless the Court is right that once a liquidated damages clause is found to exist the question of commerciality will have considerable influence in evaluating whether on the facts of that case the parties intended that that specific liquidated damages clause should liquidate only some of the damages arising from a particular breach. But that does not mean that a different answer might not result in a different context where the presence of a liquidated damages clause is not a given.
- 160. In this case one therefore has to start from the prior question of whether Clause 8 is a liquidated damages clause at all. On this question there are powerful indications that it is not.
- 161. The first point is that, even without considering the content of the other "damages" clauses in any detail, Clause 8 does not stand alone. It is plainly a part of a scheme. Secondly it does not say it is a liquidated damages clause. The relevant part is not even a clause on its own, or a clause directed to breach; but rather it is a part of a longer clause on payment.
- 162. Thirdly and very importantly it applies, and interest is payable, even where there is no breach of contract. Clause 8 requires payment to be made "not later than one hundred and twenty (120) days after the bill of lading date". It follows that Sonara will not be in breach if it makes payment within 120 days of the bill of lading. Nevertheless, interest runs from 31 days after the bill of lading onwards pursuant to the same clause: "Ninety (90) days will bear interest at a rate equivalent to Euribor three months as published by Thomsons Reuters on the 31st day after b/l date (b/l date = day 0) + 2.60 percent". The obligation to pay interest is thus not triggered by or contingent on breach. Although a higher rate of interest is payable after 120 days (and it would therefore be conceptually possible for this interest to be liquidated damages) there is nothing in clause 8 which marks this interest out as different in kind to the interest which goes before.
- 163. Sonara also contended that an approach which concluded that Clause 8 was not a complete code was an outrage or an enormity. This is an argument which failed to gain any traction at all, particularly in circumstances where there was absolutely no evidence to suggest that the contractual interest rate was calculated (as the citation from *Petroleum Contracts* suggested) by reference to all the various losses which would be likely to eventuate arising out of late payment: and in this context loss of use of the money, incremental or penal interest charges, loss of credit rating arising out of reciprocal late payment are merely some possibilities which spring to mind. It could be perfectly possible for Clause 8 interest to represent an approximation to loss of use of money, without ever aiming to scratch the surface of other potential losses. The conclusion that Clause 8 is not a complete code of liquidated damages is only conceivably an enormity if one can conclude that it represents a genuine pre-estimate of all the losses to be covered. Yet that was not the nature of the case advanced and that was a case which would have had to be pleaded so that evidence could be adduced.

164. Sonara's case on Clause 8 as a complete code can therefore be rejected.

Clause 18: Remoteness

165. The clause is the obvious place to look for a statement as to the scope of contractual liability for damages. It is entitled "Liability". It states:

"Neither seller nor buyer shall in any event be liable, whether in tort or contract, for any more than the normal measure of damages provided for by the Sale of Goods Act 1979 together with any proven additional directly consequential losses. Neither party shall be liable for indirect, unforeseen or special losses of any kind."

- 166. The fight here is as to the ambit of what is covered. Sonara contends that each of the claims in issue are excluded under Clause 18. The thrust of its argument (an initial argument via *Transfield Shipping Inc v Mercator Shipping Inc ("The Achilleas"*) [2009] 1 A.C. 61 having been tacitly abandoned in oral argument) is that on the preponderance of the authorities the wording "Indirect" losses is understood to mean losses falling outside the first limb of *Hadley v Baxendale* and do not flow naturally from the delayed payment. It is also contended that the losses claimed were not in the reasonable contemplation of the parties at the time of contract.
- 167. Sahara contends that Sonara's case misunderstands the law, and that in the context of exemption clauses, "consequential" losses are generally understood to be losses falling within the second limb of *Hadley v Baxendale*, i.e. losses which do not arise naturally (or in the usual course of things) from the breach but which would have been in contemplation of the parties as the probable result of breach on the basis of particular circumstances known to the parties. At the same time such losses are frequently characterised as "indirect": Sahara cites Lewison *The Interpretation of Contracts* (8th edn) at 12.133-4. The wording in question here of "directly consequential losses" is at odds with the meanings generally attributed to those words in the context of damages. In the circumstances, Sahara contends that the proper interpretation of "directly consequential losses" is as a reference to losses which (i) have a causal connection to the relevant breach and (ii) would have been reasonably contemplated when the contract was made. On that basis it says that the contentious claims fall within Clause 18.
- 168. So far as this part of the argument is concerned in my judgment Sahara is substantially correct. To the extent that the *Achilleas* approach was pursued this is not one of those relatively rare cases referred to by Hamblen J in *The Sylvia* [2010] 2 Lloyd's Rep 10 [81] where the assumption of responsibility approach is necessary.
- 169. Moving on from there this is also not a clause whose wording falls neatly into the lines set out in *Hadley v Baxendale* and the cases following. Having said that, the applicable law of the contract taken alone points to recovery for limb 1 of *Hadley v Baxendale*. That rule is worth restating for easy reference. What is recoverable is losses:

"either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

- 170. The wording of "directly consequential losses" although not orthodox is not inapt to cover limb 1 losses; "arising naturally from" is not a great distance from "directly consequential". See Lewison paragraph 12.133: "Damage occurring naturally or directly is said to be within the first limb of the rule". Further I accept the submission that the meaning to be ascertained for the recoverable losses covered by that phrase can properly be tested against the concept of "indirect, unforeseen or special losses of any kind. which are said by the clause to be irrecoverable. Doing that, the mention of indirect and special losses provides a nod in the direction of what is understood via Victoria Laundry to be limb two's "special circumstances" and the frequent approximation of that limb as "indirect" losses as noted in Lewison at 12.134.
- 171. In fact Sonara's own arguments essentially aligned with this approach. Reference was made to the judgment of O'Farrell J in 2 Entertain Video Ltd v Sony DADC Europe Limited [2020] EWHC 972 (TCC), a case where the relevant clause of the agreement between the parties excluded liability for "indirect or consequential loss". While the judge's conclusion at [239] was that "indirect or consequential" damages are those in the second limb of Hadley v Baxendale (there being no counter-indication in the contract to indicate a wider meaning) (i) that was a clause which juxtaposed indirect and consequential, rather than direct and consequential and (ii) it is clear that the judge regarded the position is being one where the meaning was dependent on what was (and was not) in the contract.
- 172. One might add to this that Sonara's approach would involve an internal contradiction within the clause, as it would involve two indicia of limb two of *Hadley v Baxendale* in different portions of the clause.
- 173. One therefore comes back to viewing the facts of the case on the basis of something which is essentially the same as or proximate to the common law test.
- 174. On that basis the evidence did assist Sahara. Although Sonara contended that such a result was too good for Sahara to be true, the evidence of its witnesses did not align with that submission. This was not a "special circumstances" case.
- 175. On interest, Ms Nsoh's own evidence was that she would have thought that Sahara would have used financing to purchase the relevant cargoes. Sonara knew Sahara would have financing and it is well known that banks have terms which increase charges as borrowing risks increase. Further Sonara's own counterclaim is in part premised upon an assertion that Sahara would contemplate that Sonara would suffer default interest. The fact that Sonara actually knew about the financing and who the financing banks actually were in that they gave undertakings to them does not change the fact that this was what was expected as natural.
- 176. Against this background such losses as incremental interest and excess interest/default charges fall squarely within the ambit of losses naturally flowing from breach and hence as not excluded by the clause.
- 177. I am not however persuaded that the same can be said for the foreign exchange losses. Sahara says that in circumstances where payment was to be made in EUR based on a conversion from USD (and where the Claimant's business was conducted in USD), FX losses also bear a close connection with and would have been in the reasonable contemplation of the parties as a probable result of late payment citing Dicey, Morris &

- Collins on the *Conflict of Laws* (16th edn) at 37-059 and Donaldson J's decision in *Ozalid v African Continental Bank* [1979] 2 Lloyd's Rep 231.
- 178. However *Ozalid* was a case where it was held that "it is clear that the plaintiffs loss was incurred in sterling and that this was foreseeable by the defendants". That was in 1979. But matters have moved on and here the evidence rather indicated that hedging of such risk is ubiquitous and hence would be expected. As Mr Motajo said:

"The trade finance team decided that, basis the contract and the agreed terms of repayment and inflow of dollars at the expected time, that this [the EUR payment] was acceptable to Sahara because, when there's a difference in currency in international transaction, we hedge, such that at the time when the currency arrives from the buyer, we're able to make settlements in the required currency such that the debt is extinguished and there's no undue exposure on either party's case"

- 179. That evidence was supported by the fact that such hedging did take place to some extent, in that hedging gains are offered to be offset against the losses claimed.
- 180. Accordingly the claims other than the FX claims would be recoverable under Clause 18.

Clause 26

- 181. For Sahara Clause 26 lies at the heart of the case on the basis that Sahara sees it as trumping arguments that Clause 8 is a liquidated damages clause or that losses are too remote or excluded by Clause 18. In addition, Clause 26 may offer a route past arguments of limitation.
- 182. Sahra notes that Clause 26 contains expansive language. It provides that at a failure to make payment under the agreement in full by the due date would be regarded as an "Event of Default" and it continues:

"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."

- 183. Sahara says the analysis is simple: Sahara did incur losses, damages, costs and expenses which it would not have incurred but for Sonara's defaults. They are recoverable by virtue of this Clause. That indeed was the basis of its arguments at the September Meeting and in the correspondence which preceded it.
- 184. Sonara has focussed upon cases dealing with indemnities in letters of indemnity or charterparties, where they form a fairly central part of the contractual scheme. Sonara's contention is that one can see from these cases that an indemnity does not necessarily bypass the normal rules as to remoteness. It points to *Total Transport Corp v Arcadia Petroleum Ltd* (The "Eurus") [1998] C.L.C 90 where the issue was whether the relevant clause, clause 36, permitted recovery of damage that was not within the reasonable contemplation of the parties. There Staughton LJ rejected the position that clause 36 should be construed as allowing recovery for loss that was not in the reasonable

contemplation of the Parties because otherwise there would be surplusage in the wording of clause 36 concluding:

"I remain of the view that it was not the intention of the parties to provide, by cl. 36, that a particular kind of breach of contract by the owners should attract liability even for unforeseeable consequences, whilst in the case of all other breaches of contract the ordinary rule of remoteness would apply. I cannot extract that from the wording of the clause; and even if it were arguably there, we are now enjoined to have regard to the purpose or aim of contractual provisions as well as to the actual words used"

- 185. Reference was also made to the judgment of HHJ Pelling KC in *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd* [2022] 2 C.L.C 530 where he likewise held that the wording of the clause before him did not extend to cover losses outside the reasonable contemplation of the Parties or lead to a different approach to assessment of damages than would arise in a claim for damages for breach of contract.
- 186. In my judgment none of this really assists Sonara. The cases relied upon are cases on their own facts. They are not purporting to lay down any generally applicable principle.
- 187. To some extent the focus on the interrelationship with remoteness puts the cart before the horse. The first issue is really to ask what this indemnity clause is doing as part of the overall contractual scheme. This is a point more nearly approached in Sonara's Responsive Note, where it is submitted that the relevant paragraph within Clause 26 is aimed at the "loss, damage, costs and expenses including legal fees" that would arise from the exercise of remedies under Clause 26 (which include of course suspension and termination). Sonara also urges caution about a conclusion which would have Clause 26 as an overriding provision which takes out both Clause 8 and Clause 18.
- 188. There is force in this argument. This is not a case where Clause 26 stands alone as a scheme for recoupment of damage or loss caused by breach. The parties have agreed three clauses: a contractual interest clause, a damages clause and a (part) of a default clause. Simply structurally the Clause 26 indemnity does not look like an overriding provision: it is buried within Clause 26, with no signposting to it, and no cross references to the other clauses which it might affect.
- 189. Sahara is right that the wording of the clause is wide and that it is on its face apt to cover the matters claimed, even if they are not recoverable via the other clauses. However at the same time not only is the wording of the indemnity wide, but the gateway to it is at least equally wide. This is not a case of a generous remedy being available in limited circumstances. Events of default on the wording of the Contract cover not just material misrepresentations or insolvency but also (i) all failures to pay (however small the delay is) (ii) every other breach of contract (however minor) and even (iii) "the seller has good reason to doubt the continuing ability or willingness of the buyer to perform its obligations hereunder". In other words, in this contract there can be an event of default even where there is no breach at all.
- 190. It follows that if a generous reading is given to the application or breadth of the indemnity wording the result would truly cut across the contractual scheme. I am consequently persuaded that the submission of Sonara that the wording in question is not an overriding indemnity provision but rather a specific indemnity aimed at the

"loss, damage, costs and expenses including legal fees" that would arise from the exercise of remedies under Clause 26 is correct. That conclusion arises from looking at the wording in the round, including: (i) the role of Clause 26 overall in the contract, (ii) the structure of Clause 26 (iii) the positioning of this wording in the text, which follows on from the remedies of the seller and is placed subsidiary to a paragraph which deals with the effects of one of those remedies (suspension) and (iv) the specific reference to exercise of remedies. Essentially this wording appears to be designed to mop up losses and costs incurred in the event an event of default is declared and/or if any steps are taken under it. That is further consistent with the reference to legal costs.

191. It follows that Sahara's live claim arises under Clause 18, not Clause 26, and the limitation arguments referable only to Clause 26 do not arise.

LIMITATION

- 192. The present Claim Form was issued on 21 April 2021, and relevant causes of action accruing before 21 April 2015 would *prima facie* be time-barred.
- 193. Sonara's case is that the limitation period started running for each cargo when the payment fell due (i.e. 120 days after the bill of lading date). Thus, it argues, all relevant causes of action were time-barred.
- 194. Sahara's reply is that it can evade that case on limitation because:
 - i) By the Joint Report, Sonara acknowledged Sahara's claims so as to bring the case within s.29(5) of the Limitation Act 1980 ("s.29(5) LA 1980");
 - ii) Alternatively, Sahara's claim is for an indemnity under Clause 26, which imposed on Sonara a duty to pay Sahara as and when Sahara incurred a loss. The limitation period started running only when each loss occurred and most of the losses claimed were suffered only after 21 April 2015;
 - iii) In the further alternative, there was an implied agreement, arising as a matter of the true interpretation of the Joint Report or as an obvious but unexpressed intention, to suspend the limitation period while the parties jointly contested the bank charges with the banks.
- 195. Sonara argues that none of these points can avail Sahara because:
 - i) Even if the Joint Report were an agreement, S. 29(5) LA 1980 is not applicable;
 - ii) Time runs for any Clause 26 claim from the same date as it would for a damages claim;
 - iii) Estoppel or implied agreement to suspend the limitation period is an argument which will only succeed in the rarest of cases, and this is not that case.

Joint Report: S.29(5) LA 1980

196. S. 29(5) LA 1980 reads:

- "...where any right of action has accrued to recover any debt or other liquidated pecuniary claim... and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it, the right shall be treated as having accrued on and not before the date of the acknowledgment or payment".
- 197. Two questions arise: (i) whether the action in respect of the Disputed Claims is a right of action to recover "any debt or other liquidated pecuniary claim"; and (ii) whether the Joint Report constitutes an acknowledgement of Sahara's claims within the meaning of the section.
- 198. These can sensibly be taken in reverse order. The problem here for Sahara is that it is clear on the authorities that the paying party must acknowledge both his indebtedness and his legal liability to pay the claim in question: *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 1 WLR 565, 575D-E. In characteristically elegant prose Kerr J explained thus:

"taking the debtor's statement as a whole, as it must be, he can only be held to have acknowledged the claim if he has in effect admitted his legal liability to pay that which the plaintiff seeks to recover. If he has denied liability ... then his statement does not amount to an acknowledgment of the creditor's claim."

- 199. Sahara delicately acknowledged the hurdle which it faces here, saying in writing that this is a question of interpretation; and orally that this point was "nuanced". In this case and on the facts outlined above it is simply not possible for Sahara to overcome this hurdle. There was, on the facts, no acknowledgement of liability – even if there was (contrary to my conclusion above) an agreement to pay. Sahara obviously points to the agreement to contest the penal charges, asking "why would the parties do that if Sonara did not acknowledge liability?". Against the background of the relationship and ongoing attempts to co-operate there could be all sorts of reasons – including (if there was an agreement – contrary to my primary finding) a settlement of a disputed claim for commercial reasons or (if there was no agreement) the hope that by the joint approach the claim could be got down to a point where Sahara was less impacted, or to a point where a settlement of a disputed liability could be reached. But the important point is that even though Sonara did agree to jointly contest the penal charges, it did make clear before, during and after the meeting that there was no agreement on liability. The inference from the joint approach is by some way less compelling than the clear words of Sonara.
- 200. The Joint Report would, of course have served perfectly well as an acknowledgement for the purposes of this section as regards the principal and contractual interest which also would have been debts. However since those have been paid this does not assist Sahara.
- 201. That is however not the only problem for Sahara. Although a very ingenious argument was advanced by reference to Lagos v Grunwaldt [1910] 1 KB 41, the and Phillips & Co v Bath Housing Co-operative Ltd [2013] 1 WLR 1479 that the sums sought were technically capable of being classified as indebitatus counts, that an indebitatus count included counts for money paid and that a count for money paid is where "a person pays money which another should have paid" and hence fell within the required "any

- debt or other liquidated pecuniary claim" wording; it is an argument which smells of the lamp.
- 202. Taken into the light of day, the reality is clear. The non-contractual interest claim is not a debt. None of the contentious claims are for "a debt or other liquidated pecuniary sum". They are claims for unliquidated damages for breach of contract (namely a failure to make payment promptly as per the Contract).

The indemnity argument

- 203. Sahara's alternative case, which assumes (i) that there was no acknowledgement via the Joint Report and (ii) that there is a claim under Clause 26, is to say that that indemnity claim is not time barred because of the way that limitation works in this context.
- 204. The starting point is the basic rule that the right of action in contract accrues as soon as there is a breach of contract: *Limitation Periods* (9th edn), at 10.002. It follows from that that for a claim under an express indemnity, the extent of the indemnity and the time at which the cause of action arises will depend on the construction of the contract: *Cape Distribution Ltd v Cape Intermediate Holdings* plc (No 2) [2017] Lloyd's IR Rep 1 at [85].
- 205. Here it is said that as a matter of construction, each time that Sahara incurred a loss (whether by the imposition of default charges or the incurring of further interest) under the 2013 contracts, there was a separate breach of clause 26 by Sonara not indemnifying Sahara, with the result that on each occasion a separate cause of action accrued under Clause 26 and a separate limitation period began in respect of that particular loss.
- 206. Sahara meets the instinctive revulsion against such an analysis by a citation from Contractual Indemnities (1st edn) at 5-46:
 - "Multiple losses. Assume that there several consecutive and distinct losses, L1, L2, L3 and so on, all of which are within the scope of the indemnity. An issue that has occasionally arisen is whether there is one breach of the indemnity with several losses, or several breaches of the indemnity, each breach corresponding to the occurrence of a loss. The latter view is correct, at least where each loss is discrete."
- 207. Reliance was also placed on *Ex p Wiseman; re Kelson Tritton & Co* (1871) LR 7 Ch App 35. In that case a promise of indemnity was given by Kelson, Tritton & Co to the drawers of bills of exchange (Wiseman) promising to "save and keep them harmless and indemnified of, from, and against all claims and demands which might be made on them, or any of them, for the said bills, or the proceeds thereof, and all loss, costs, charges, damages and expenses [that they might suffer in consequence of handing over the bills]". Mellish LJ held as follows at 43:
 - "...we think that every time that Kelson, Tritton & Co [the indemnifiers] allowed Wiseman to contract a debt with his own attorney, or to advance money in payment of his own costs of the action, the contract was broken. The contract therefore appears to us not to be a contract to be performed once for all on the happening of a single contingency, but to be a contract which was liable to be broken repeatedly at different times upon the

- happening of various contingencies, whilst separate damages could be recovered under each such breach."
- 208. Sahara then cited the decision in *Parr's Banking Company Limited v Yates* [1898] 2 QB 460, where the Court of Appeal held that interest, commission and banking charges falling within the scope of the guarantee in question were recoverable notwithstanding that a claim for the principal sums advanced by the bank was time barred.
- 209. In oral argument submissions concentrated rather on *Telfair Shipping Corporation v Inersea Carriers SA* ("The Caroline P") a case where the right to an indemnity under an implied indemnity in a charterparty was not time-barred since it was the ascertainment of the receivers' liability which crystallised the non-indemnification and hence established the time at which time started to run.
- 210. It is argued that in the present case, the terms of the clause militate in favour of the approach taken in these cases and that as in both of *Wiseman* and *Parr*, the indemnity is in broad terms ("all losses...") and covers a range of forms of loss ("losses, damages, costs and expenses") that might arise out of default. Sahara argues that it would be contrary to the purpose of the clause if failure to pay in respect of one loss or form of loss started time running in respect of another loss which might not manifest until later.
- 211. Given my earlier conclusion as to Clause 26 this does not arise. Were it to do so the arguments addressed to the point by Sonara did not really engage with the point in any detail by reference to the authorities.
- 212. However the points which Sonara makes are in my judgment sound. Sonara contends that the losses are losses stemming from breaches of single obligations to make payment, which occurred on the 120th day after delivery. Effectively it says that it is artificial to fragment the losses in the way suggested just because (on this hypothesis) they are pursued via an indemnity rather than as damages. Or to put it another way, fragmentation is illegitimate.
- 213. Both in terms of a comparison to the authorities and on the facts this is a good point. This is not a case like *Wiseman* where there are truly separate breaches and separate losses (and indeed this line of argument was not pursued orally). Nor is this a case like *The Caroline P* where there essentially was no liability until judgment in the proceedings, which also quantified the liability. Again none of the cases cited is purporting to lay down a principle which is generally applicable.
- 214. In their essence the losses claimed in this case are not distinct losses at all; the losses after April 2015 are not in any way different losses from those before. Certainly when it comes to interest the essential one-ness of the claim can be seen by an examination of how the various heads of loss were separated out. In particular (i) the Incremental Interest figure is calculated by comparing the interest rate paid with the interest rate payable, and applying that to the overdue balance and (ii) it was apparent that the taking of 150 days as the start point was essentially an arbitrary post 120 day date.
- 215. But even beyond interest charges, the losses are in reality the same loss derived from one single breach whether it be interest rates or bank charges or FX fluctuations. The extremely clear and helpful division of losses at Schedule 2 of the Sahara Skeleton although necessary for me to understand the case ultimately serves to highlight the

artificiality of this argument. For example as to Ecobank default charges: "This is the proportion of the total Ecobank charges and interest (pre-settlement) attributable to 21 April 2015 onwards as shown at H42 of the "Summary & Time Bars" tab (i.e. 67%), multiplied by the sum claimed in respect of default charges and excess interest as pleaded..."

216. It follows that Sahara cannot evade the running of time via this route.

Implied agreement

- 217. Sahara's final limitation argument is that limitation was suspended by implied agreement.
- 218. The basis for this argument is that in the Joint Report, it was agreed that (a) the "figures were presented by SAHARA backed by supporting documents and SONARA acknowledged receipt"; (b) "SONARA communicated her understanding of SAHARA's position and rejected the claims of the Penal charges"; and (c) "Parties agree to jointly contest the Penal Charges with the banks."
- 219. Sahara submits that it was always going to be the case when Sonara signed the Joint Report in September 2019, that any negotiations would take months and conclude after the expiry of at least some of the limitation periods and that this arrangement would make no sense if, during the period when Sahara and Sonara were supposed jointly to contest the bank charges, the limitation period would tick away and result in what Sonara contends to be a complete defence to all claims made by Sahara.
- 220. Sahara also points out that at no point after the Joint Report was signed, but before formal proceedings were commenced, did Sonara indicate that it would be relying on a limitation defence. It refers to *London Borough of Hillingdon v ARC Limited (No.2)* [2001] CP Rep 33 (CA), where the Court of Appeal held at [63] that a limitation defence would be available if the defendant gave notice and the claimant did not commence proceedings within a reasonable time.
- 221. Sahara contends that a similar approach should be taken here, that no such notice was given in this case, and that time should not be held to run against it.
- 222. This argument is hopeless.
- 223. As Sonara noted, the *Hillingdon* case itself explains why.
 - ".. a party may waive the right to rely on a limitation defence and that parties may enter into an agreement to waive the limitation defence.... The courts will enforce any such waiver or agreement duly made. A party may also be estopped in an appropriate case from relying on a limitation defence. However no authority has been cited to us, apart from the decision of the judge in this case, whereby a party has been held disentitled from relying on a limitation defence merely because he has continued to negotiate with another party about the claim after the limitation period had expired and without anything being agreed about the manner in which the claim was to be resolved if negotiations broke down.....

- 62. A shared assumption is not on the authorities sufficient to establish an estoppel unless it is communicated. It follows that if in this case there was no shared assumption to the effect that ARC had a valid claim that was not time—barred, there could be no communication by LBH that it was making any such assumption. It also follows from what we have said above that the communication required would in any event be not simply that ARC had a valid claim but also that LBH would not take any defence that might be open to it on the basis of a statutory limitation period."
- 224. The citation of Limitation Periods 9th Ed. at [21.027] is also salient: "establishing estoppel in relation to the Limitation Act is likely to be a formidable task and one which can be accomplished only in the most exceptional cases". This is not that exceptional case.
- 225. The final nail in the coffin is provided by the fact that on 3 October 2019 Sonara again made clear that there was no agreement as to the Undisputed Claims or Disputed Claims (let alone any agreement to suspend limitation). Sahara could not have reasonably relied on any misunderstanding to not commence an action from this date onwards.
- 226. It follows that Sahara's claims are time barred.

COUNTERCLAIM

- 227. The Counterclaim concerns the Swap Agreements entered into on 26 June 2019 and 5 July 2019 following the fire at Sonara's refinery on 31 May 2019.
- 228. As outlined above, by those agreements and a separate unwritten buyback contract, Sahara agreed (in essence) (i) to take back Bonny Light crude that it had delivered to Sonara but which Sonara was unable to refine as a result of the fire, and (ii) to provide refined products (namely 20-40,000 MT of Jet A1, 30-40,000 MT of Gasoil and 20-40,000 MT of Gasoline) in place of that Bonny Light crude. Payment was to be by offset against the outstanding value of the Standard Chartered letter of credit issued in respect of the original Bonny Light transaction ("the Standard Chartered L/C"). The sum to be drawn under the Standard Chartered L/C was \$47,492,122.33.
- 229. As described above, Sahara drew down the Standard Chartered L/C but did not provide the full quantity of refined products stipulated under the Swap Agreements. Sahara delivered a total of 15,940 MT of Jet A1 with a value of \$10,705,328.18. The remaining balance of \$36,786,794 under the L/C was exhausted by its application to liabilities owed by Sonara.
- 230. Sonara alleges that Sahara IOM and/or Sahara DMCC are in breach of the Swap Agreements by delivering only 15,940 MT of the 70,000 MT of refined products that Sonara claims to have been due under the Swap Agreements.
- 231. Sonara claims to have suffered the following losses:
 - i) \$40,442,255.38, being the cost of purchasing alternative refined products from Vitol, Addax and La Chorale to replace the undelivered refined product,

- including related demurrage charges. Sonara admits that the prices paid and claimed under this limb were higher than the prevailing market price;
- ii) \$5,438,977, being the loss of profit suffered by reason of Sonara being unable to "sell as much refined products to the Cameroonian national market as it had anticipated selling"; and
- iii) \$607,004.68, being the default/interest charges levied by Standard Chartered Bank as a result of Sonara not receiving the full amount of refined products.
- 232. Sonara has also pleaded a claim (in the alternative) for the market price in relation to the quantities of refined products that were not delivered to it.
- 233. In the further alternative, Sonara claims that Sahara has been unjustly enriched at the expense of Sonara because Sahara has received payments for quantities of refined products that Sahara has failed to deliver. Sonara also alleges a total failure of consideration in respect of the Gasoil and Gasoline. Sonara claims \$36,156,491.70 in respect of these claims.
- 234. Sahara contends that the counterclaim must fail.
 - i) The principal argument is that by agreement between the parties the outstanding sums under the Standard Chartered L/C have been offset against sums owed by Sonara to Sahara and liabilities discharged by Sahara on behalf of Sonara. As a result, Sonara has suffered no loss and/or has released Sahara from its obligations;
 - ii) Even if Sonara had suffered loss, all of Sonara's claims except for those seeking restitution of sums paid under the Swap Agreements would be irrecoverable by virtue of clause 15 of the Swap T&Cs which restricts recovery to the difference between the price paid and the market price; and
 - iii) Sonara's claim in unjust enrichment/failure of basis is flawed in multiple respects pertaining to the requirements and limits of unjust enrichment.
- 235. While the Counterclaim was not formally conceded it is fair to say that it was not pursued in any detail. Arguments as to the absence of any agreement at all and as to unjust enrichment were (wisely) not pursued orally. Sonara maintained that if claims are not established there is a counterclaim, that clause 15 does not require proof of "objective market price" but rather the alternative supplies price and contends that there is some limited evidence of market price.

236. The reality of the situation is:

- i) While the result of the analysis above is that there is no live claim on the part of Sahara, there was, prior to the limitation date and at the time of the relevant events, a live claim. Accordingly there were claims which could be set off against sums paid;
- ii) On a fair reading of the relevant documents there was an agreement for set off. This was via (i) the Joint Report (as to an initial amount of \$23,081,927.45) and

- (ii) the exchange of letters in February 2020 (as to the remaining balance of \$24,410,194.88).
- a) The agreement in the Joint Report can be seen in the agenda item, the table in section (5) and the terms of the product supply schedule;
- b) The 2020 letters are outlined in the factual narrative above. By that exchange Sonara confirmed that the remaining balance of the letter of credit had been offset against the 2013 late payment interest. In particular, the letter of 13 February 2020 records Sonara's agreement to the proposal to offset the remaining balance of the letter of credit against the reconciled claims. Although the discharge of Sahara's obligation is not explicitly spelled out in those letters, no other plausible construction can be given to the agreement to offset the remaining balance of the letter of credit. Sonara's suggestion that the reference is to some different (unidentified) Standard Chartered Bank letter of credit is not credible where the match for this transaction is so precise;
- iii) That agreement was executed at a time when the Swap Agreements were still in existence; and
- iv) In any event, on a fair reading Clause 15 is requiring proof of market price, and Sonara have adduced only evidence of "distressed purchase price" at what is accepted to be above objective market value. Thus only nominal damages could be recoverable.
- 237. It follows that Sonara's counterclaim fails.

QUANTUM

238. In the circumstances the issues of quantum do not arise and the claim regarding FX losses is doubly contingent. The issues as to quantum can therefore (with all respect for the detailed consideration of the issues on the part, in particular, of Mr Du) be dealt with very briefly.

Incremental interest

- 239. There was no issue as to the methodology of calculation of incremental interest (ie. using the difference between the banks' interest rates and the clause 8 interest rate).
- 240. Sonara's main issue on this head appears to be in relation to the Credit Suisse cargo, and in particular the lack of the facility agreement for that cargo. However, I accept Sahara's submission that in this respect the Reconciliation Spreadsheet itself is evidence of the rates charged by Credit Suisse. As explained by Mr Olagbami during cross-examination, the base documents used to produce the Reconciliation Spreadsheet was "a combination of bank statement documents as well as bank correspondences... from the banks at the time". The Reconciliation Spreadsheet is therefore derived from the original base information.

Excess interest and penal charges

- 241. With this head also methodology was not really in issue.
- 242. The main outstanding issue was whether Sahara paid the sum to Access Bank as alleged. Sahara's case is that it paid \$196,764,760.26 to Access Bank, and after various deductions the excess interest and penal charges is \$21,879,529.41. Mr Good's written opinion was that, out of the \$196.8 million said to have been paid to Access Bank, Sahara has provided bank statement evidence of only \$64m in relation to payments from 2019 onwards. This was a point to which repeated reference was made orally at trial and submissions were made in closing by reference to the Sahara witnesses' (predictable) evidence that they would have expected there to be bank statements. However, there is a difference between there having been bank statements and there being bank statements now. Further Mr Good did not seem to be opining that he had serious concerns about this, or considered there was no evidence at all. He characterised it in evidence as a "slight reservation". Of the remaining \$133m paid during 2013-2018, Mr Good accepted in cross-examination that he was "confident" in the inflows from Sahara (or at least the \$104m paid during 2013-2016). I consider that this is sufficient to establish that Sahara paid \$196.8 million to Access Bank.
- 243. As for Ecobank, there was a question during cross-examination about the Projecteur Ventures report dated 17 June 2019 opining on potential overcharging by Ecobank. However, what matters is what Sahara eventually paid Ecobank as a result of a final compromise settlement being made in August 2020. Sonara did not suggest in evidence the eventual Ecobank settlement was unreasonable and, in any event, this would have been an implausible suggestion to make.

Forex differential

- 244. This item is doubly contingent. While Mr Du made the calculation of the claim as clear as it was possible for it to be, questions remained over the claim at a higher level.
- 245. Sonara pointed out the absence of factual witness evidence as to the basic underpinning of the claim: the need to convert the Euro payments to USD and if so when and at what rates. In this context a spreadsheet, however thorough, is not a substitute for underlying evidence. It is qualitatively different to the materials which were available to verify the other aspects of the claim. Then there was the question as to the impact of hedging. As to this, the November 2016 report identified some hedging gains for three relevant cargoes: 1795-07 with the comment "hedge fully expired in September 2014"; 1796-08 with the comment "hedge done and rolled up to 29 July 2016", and 1797-09 with the comment "Hedge done but rolled for the full amount of the cargo only up to November 12th, 2014 and then for 60% of the cargo up to March 27th 2015." There is no document which suggests further hedging carried out after 2016, and the case was closed on the basis of an undertaking to credit for "any" hedging; nor is there evidence as to how the existing transactions fit within a strategy, or why there should be only three such transactions when, as noted in the earlier sections, wider hedging was to be expected. All in all, the questions are such that I would have concluded that this element of the losses was not made out.

Conclusion on Quantum

246. Accordingly, if, contrary to my primary conclusions, the quantum of Sahara's claim were to arise, I would conclude that Sahara succeeded in its claim only to the extent of:

Cargo	Invoice	Bank	Incremental	Excess/Penal
1795-07	INV009745	Access	3,272,096.93	21,879,529.41
1796-08	INV009746	Access	8,528,471.85	
1797-09	INV009747	CS	1,423,894.74	
1867-11	INV010355	Ecobank	7,063,731.12	2,216,151.65
Total			20,288,194.63	24,095,681.06