

**Neutral Citation Number: [2022] EWHC 1812 (Comm)**

**Claim No: LM 2021-000176**

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

Rolls Building  
Fetter Lane  
London  
EC4Y 1NL

Date: 22 July 2022

**Before:**

**Ms Lesley Anderson QC sitting as a Deputy Judge of the High Court**  
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**Between:**

**VITOL SA**

**Claimant**

**and**

**GENSER ENERGY GHANA LIMITED**

**Defendant**

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**Siddharth Dhar and Felix Wardle** (instructed by **Holman Fenwick Willan LLP**, 65 Crutched Friars, London EC3N 2AE, for the Claimant)

**Simon Mills and Alexander Kingston-Splatt** (instructed by **Addleshaw Goddard LLP**, One St Peter's Square, Manchester M2 3DE, for the Defendant)

**Hearing dates: 13, 14, 15 and 20 June 2022**

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**JUDGMENT**



## **Introduction**

1. The Claimant, Vitol SA (“Vitol”), is an energy and commodities company incorporated in Switzerland. Amongst other things, it trades in propane. The Defendant, Genser Energy Ghana Limited (“Genser”), is an energy company incorporated under the laws of Ghana. Genser operates power plants in Ghana and sources energy, and the natural resources which are required to make it, from various suppliers as well as supplying some of the energy which it generates to third parties for the operation of their power plants. Genser is subject to Ghanaian law and regulation.
2. Vitol and Genser started to trade with each other in 2016. The present proceedings concern a contract between the parties for the sale by Vitol and the purchase by Genser of propane. During this period, Vitol was the sole supplier from which Genser purchased propane. Vitol’s principal claim is for USD 3,582,365.95 which is the unpaid balance of a settlement sum calculated by it under the terms of the relevant contract. I will refer to that as the Settlement Amount Claim. If that claim fails, Vitol claims USD 559,281.16 in respect of various unpaid invoices. I will refer to that as the Unpaid Invoices Claim.
3. I have been assisted by detailed written skeleton arguments and helpful written and oral submissions from Counsel for both parties. I am grateful to them.

## **The SPA**

4. The main contractual document between the parties is a Sale and Purchase Agreement dated 15 March 2018 (“the Original SPA”). It is common ground that the Original SPA was then amended by a series of Addenda (although Genser denies that Addendum 7 was agreed or performed and so that is in issue before me).
5. The Original SPA contains the following material terms set out in unnumbered paragraphs:
  - 5.1. The Product was propane.
  - 5.2. The Term Period was 1 April 2018 to 30 April 2018 but would be extended to 15 November 2018 unless Genser wished to assign the agreement to Gold Fields Ghana Limited (“Gold Fields”), a mining concession to which Genser supplied power. Genser was to pay a fee of USD 108,000 as terminal fee for the contract ending on 30 April 2018 (“the Termination Fee”).

- 5.3. Genser was to purchase a minimum of 9,000 MT (+/- 5% at Vitol's option) of propane on a take-or-pay basis ("the Quantity Clause"). Take or pay contracts are common in the commodity trading industry. It is not in issue that the buyer is required to pay for the minimum agreed tonnage of the commodity whether it opts to take delivery of the same or not.
- 5.4. Delivery was to be DAP one safe port, one safe berth at Takoradi, Ghana on board a vessel to be nominated by Vitol and accepted by Genser. DAP means Delivered at Place and it is not in issue that this meant Vitol was only obliged to deliver the propane to Takoradi. The seller in such arrangements bears all the risk in bringing the goods to the named place, here Takoradi. It was then for Genser as buyer to obtain at its own risk and expense any import licence or authorisation to clear the Product for import.
- 5.5. The price in US dollars basis DAP Takoradi was to be "Opis non TET MB Propane" plus a premium of USD 54 per m/t ("the Price Clause"). It is not in issue that Opis non TET MB is an industry term which means "Mont Belvieu" pricing, which is a list of prices for propane published by OPIS.
- 5.6. Genser was to pay to Vitol USD 12,000 per day pro rata during the term of the agreement towards the cost of the floating storage unit ("Floating Storage Unit" or "FSU") and bunkering ("the Floating Storage Clause"). The Floating Storage Unit costs were to be invoiced and paid in advance on a monthly basis, before the start of each monthly hire period.
- 5.7. The quantity of Product sold under the Agreement was to be the vessel discharge figures determined at the discharge terminal by an independent inspector ("the Determination of Quality and Quantity Clause"). If the minimum quantity of 9,000 m/t was not discharged, it would be considered the delivered quantity under the Take or Pay agreement.
- 5.8. Prepayments were to be in line with a Prepayment Schedule and Genser was to make bi-monthly payments of USD 2,500,000 each month ("the Pre-Payment Clause"). Prepayments were to be assigned to cover product and floating storage fees unless Genser chose to pay the floating storage fee separately. Vitol as Seller was not under any obligation to discharge the Product if the prepayment schedules were not fulfilled by Genser.
- 5.9. Where any of the parties detected an inconsistency in the quality, quantity, invoices, prices and any other issue arising under the Agreement, it was

immediately but not later than three (3) working days to notify the other party of such dispute (“the Cure Clause”). Upon receipt of notice of the dispute, the other party was to take steps to remedy the issue within seven (7) days. The parties might then come to an agreement to resolve the same in accordance with the dispute resolution mechanism.

- 5.10. Risk in the Product delivered under the Agreement was to pass from Vitol to Genser as the Product passed the vessel’s permanent flange at the discharge point but not before full prepayment had been received. As will be seen, the commercial basis of the agreement later changed but at this point the net effect was that Vitol was not exposed to any credit risk.
- 5.11. If the Payment Due Date was a Saturday or New York Federal Reserve bank holiday other than Monday, payment was due on the previous New York Federal Reserve banking day. In the event that the Payment Due Date was a Sunday or a Monday New York Federal Reserve banking holiday, payment was due on the following New York Federal Reserve banking day.
- 5.12. Neither Vitol or Genser was to be liable for damages or otherwise for a failure, delay, hindrance, reduction in, interference with, curtailment or prevention of performance of its obligations under the agreement insofar as that party proved that the failure was due to an impediment beyond its control including but not limited to any compliance with any law, regulation or ordinance, or with any order, demand or request of an international, national, port, transportation, local or other authority or agency (including the International Energy Agency) or of any body or person purporting to be or to act for any such authority or agency or any corporation directly or indirectly controlled by any of them (“the Force Majeure Clause”). Such a Force Majeure Event was not to include any delay, hindrance, interference with, curtailment or prevention of a party’s accrued obligation to make payment under the agreement whether in respect of price, despatch, demurrage or to provide any instrument for payment or payment security or any other financial obligation whatsoever. The Force Majeure Clause goes on to make express provision for the parties’ obligations to give effect to it.
- 5.13. Where any applicable general terms and conditions did not provide any relevant time limite, Genser was to notify Vitol of any complaint relating to Vitol’s failure to deliver Product meeting the contractual description and/or condition and/or quality and/or quantity no later than the 45<sup>th</sup> day following completion of

discharge and in no event was either party to be liable in respect of any claim or dispute where legal proceedings in respect of that claim or dispute had not been commenced within one year of the date of delivery of the Product, or in the case of total loss, within one year of the date on which the Product should have been delivered. If notice was not given and/or legal proceedings not commenced in respect of any complaint, claim or dispute within the time limits specified, such claim was to be time barred and any liability of the other party in respect of that complaint, claim or dispute was to be finally extinguished (“the Time Bar Clause”).

- 5.14. The Agreement was governed by and to be construed in accordance with English law (“the Jurisdiction Clause”).
- 5.15. Otherwise, and where not in conflict with the terms of the Agreement, Incoterms 2010 were to apply. Nothing turns on this save that Vitol contends that Genser was in breach of Incoterms 2010, B4, when it failed to take deliveries of propane in mid-May 2019.
- 5.16. The parties agreed and undertook to one another that in connection with the Agreement they would each respectively comply with and act in a manner consistent with all applicable laws, rules, regulations, decrees and/or official government orders (“the Lawful Conduct Clause”).
- 5.17. Any notice or other communication given to a party under or in connection with the Agreement was to be in writing and in English and, in the case of a notice sent by email to Genser concerning “Contracts/Pricing/Notification”, to Baafour Asiamah-Adjei at [baafour.asiamiah-adjei@genserafrica.com](mailto:baafour.asiamiah-adjei@genserafrica.com); Daniella Akowuah at [Daniella.akowuah@genserghana.com](mailto:Daniella.akowuah@genserghana.com) and [FUEL@genserghana.com](mailto:FUEL@genserghana.com), which is a generic email address (“the Notice Clause”). Any notice or communication by email is deemed to have been effective when delivered in each case unless delivered on a non-Business Day or after 5.00pm (local time at the location of the recipient party) on a Business Day, in which case it was deemed to have been delivered on the next Business Day. Business Day for these purposes meant a calendar day other than a Saturday, Sunday or a public holiday in the country and region in which the receiving party had its main place of business.
- 5.18. No variation or modification of the agreement was to be effective unless it was in writing and agreed by the parties (or their authorised representatives) (“the No Variation Clause”).

5.19. Under the heading “Buyer’s Responsibilities” it was provided that, for the avoidance of doubt and in respect of every type of sale (except DDP), Vitol would not be the importer of record but to the extent documentation was issued by the authorities of the country in which the loading port was situated and was required by Genser, Vitol was to use all reasonable efforts to obtain such documentation, provided all conditions for obtaining such documentation have been met. All duties and taxes that arise in respect of such custom and excise were, subject to paragraph (k), for Genser’s account.

### **The First Addendum**

6. The first addendum is dated 17 April 2018 (“the First Addendum”). It extended the Term Period from 30 April 2018 to 31 May 2018. It is signed by Mr Asiamah-Adjei (“Mr Asiamah-Adjei”) on behalf of Genser and by Gerard Delsad on behalf of Vitol.

### **The Second Addendum**

7. The second addendum is dated 23 May 2018 (“the Second Addendum”). It extended the Term Period from 31 May 2018 to 15 November 2018. It is signed by Mr Asiamah-Adjei on behalf of Genser and by an unidentified representative on behalf of Vitol.

### **The Third Addendum**

8. The third addendum is dated 15 November 2018 (“the Third Addendum”). It is signed by Mr Asiamah-Adjei on behalf of Genser and by David Fransen (“Mr Fransen”) on behalf of Vitol. This extended the Term Period from 15 November 2018 to 31 December 2019. However, there were also changes to the commercial basis of the SPA. As I have already explained, up to this point the commercial arrangement had been a pre-payment one with all of the credit risk on Genser. The effect of the Third Addendum was to move the parties from a pre-payment arrangement to 90-day credit terms, backed by a commercial guarantee from a third party Al Koot Insurance and Reinsurance Company S.A.Q. (“Al Koot”).

9. On quantity, as amended, Genser was to purchase all of its propane requirements exclusively from Vitol during the Term Period such that from 1 April 2018 to 28 February 2019, Genser was to purchase a minimum of 9,000 m/t of Product per month on a Take or Pay basis, but Genser could request Vitol to supply total monthly

deliveries to meet all its propane requirements, which might exceed 9,000 m/t. From 1 March 2019 until 31 December 2019, Genser was to purchase a minimum of 9,000 m/t of Product per month, which was not to be on a Take or Pay basis, but Genser might request Vitol to supply total monthly deliveries to meet all its Propane requirements, which might exceed 12,000 m/t. In the event that Genser wished to reduce the minimum quantity which it was required to purchase per month at any time after 1 March 2019, then the proposed reduction was to be discussed and mutually agreed, it being understood that it would be a condition of any such agreed reduction that Genser would make a one-off payment of liquidated damages to Vitol of at least USD 108,000 to reflect the reduced business and the floating storage charge would need to be increased to a level to be agreed.

10. On Price, the price in US dollars basis DAP Takoradi from 1 April 2018 to 31 December 2018 was to be OPIS non TET MB Propane plus a premium of USD 54 m/t and from 1 January 2019 to 31 December 2019, was to be OPIS non TET Propane plus a premium of USD 72 m/t.
11. The Floating Storage Unit charge was amended to provide that Genser would pay to Vitol: from 1 April 2018 to 31 December 2018, USD 12,000 per day pro rata towards the cost of the FSU and bunkering and from 1 January 2019 to 31 December 2019, USD 13,000 per day pro rata towards the cost of FSU and bunkering.
12. The Quantity Clause was amended to provide that if, in any month in the period 1 April 2018 to 28 February 2019, Genser did not take delivery of the 9,000 m/t monthly quantity, then it would nevertheless be liable to pay Vitol for a total of 9,000 m/t of Product for that month as if the full quantity had been discharged.
13. It became a condition of the agreement that Genser would provide to Vitol or procure the provision to it of a Guarantee and Undertaking from Al Koot (“the Guarantee Clause”).
14. A new Guaranteed Payment clause was inserted which provided that during that part of the contract term in which the Guarantee and Undertaking remained valid and enforceable by Vitol, then in place of the requirement of Genser to pre-pay for Product in accordance with any Prepayment Schedule and/or the Prepayment clause, Vitol’s payment terms were to be as follows: FSU monthly costs to be invoiced by Vitol in advance on the 1<sup>st</sup> day of the month and to be paid by Genser not later than 90 days after invoicing date and product monthly value was to be invoiced on the last business day of the month, to be paid not later than 90 days after invoicing date.

15. Provision was made for Genser to request to fix the Price for up to the 9,000 m/t Take or Pay monthly quantity for up to 3 months at the OPIS non TET MB Propane price plus agreed premium at the time of execution.
16. Provision was made for Vitol to request security if it, in its sole and unfettered discretion considered Genser or its Guarantor had become financially impaired.
17. A new provision was made for a default of the agreement to be deemed to occur if, amongst other things, either party failed to make any payment due under the agreement or any specified agreement that was not cured within two (2) banking days' notice to the defaulting party to make the payment ("the Events of Default Clause"). If a Default occurred, then the party other than the defaulting party (the "non-defaulting party") had the right, exercisable in its sole discretion immediately and at any time(s) on notice to the defaulting party, to take any or all of the following actions: (1) suspend its performance under the agreement; (2) terminate the agreement or (3) terminate and/or liquidate the agreement ("the Liquidation Clause"). Where the non-defaulting party elected to terminate and liquidate the agreement, then a settlement amount was to be calculated by the non-defaulting party in a commercially reasonable manner, of which notice was to be given in writing to the defaulting party within 5 business days of notice of termination and liquidation being given. The single liquidated amount was to be due and payable by one party to the other 3 business days after notice of such liquidated amount had been given by the non-defaulting party. Settlement amount was to mean, with respect to the agreement and the non-defaulting party, any amounts payable or which would become payable by either party but for the termination or liquidation, together with the losses and costs (or gains), which the non-defaulting party incurred or would incur as a result of the liquidation, including losses and costs (or gains) based upon the then current replacement value of such agreement together with, at the non-defaulting party's election but without duplication or limitation, all losses and costs which such party incurred or would incur as a result of maintaining, terminating, obtaining or re-establishing any hedge or related trade position.

#### **The Fourth, Fifth and Sixth Addenda**

18. The fourth addendum is dated 21 November 2018 ("the Fourth Addendum"). It is signed by Mr Asiamah-Adjei on behalf of Genser and by Mr Fransen on behalf of Vitol. It fixed the prices for Product for certain periods and is not directly relevant to the dispute between the parties.

19. The fifth addendum is dated 20 December 2018 (“the Fifth Addendum”). It is signed by Mr Asiamah-Adjei on behalf of Genser, by Mr Fransen on behalf of Vitol and by Chene Brobbey on behalf of Dome Energy. It made provision for certain cargoes to be discharged to Dome and is not relevant to the dispute between the parties.
20. The sixth addendum is dated 4 March 2019 (“the Sixth Addendum”). The version in the bundle is not signed but it is not in dispute that it was signed on behalf of both parties. It fixed the price for Product for certain periods and is not directly relevant to the dispute between the parties.

### **The Seventh Addendum**

21. The seventh addendum is dated 21 March 2019 (“the Seventh Addendum”). It is addressed to Genser. Although it provides for signatures to be added in the same way as the other Addenda no signed copy has been produced, whether on disclosure or otherwise, and there is nothing in the evidence about how it may have come to be signed. I proceed on the basis that it was not signed.
22. In view of its importance, I set out its principal terms in full (with one minor amendment to the date which was clearly intended to be “2018”):

#### **“ADDENDUM No.7 Dated 21<sup>st</sup> March 2019**

With reference to the contract concluded between us on the 15<sup>th</sup> March 2018 (“Contract”), we hereby confirm subsequent agreement with respect to below clauses and terms, which shall be incorporated into the Contract with effect from the date of the Addendum no. 3 (15.11.20[1]8). To the extent that if there is any conflict between the terms of this Addendum and the terms of the Contract, then the terms of this Addendum shall prevail.

#### **LATE PAYMENT INTEREST**

In the event that payment is not made on the Due Date, the Buyer will be charged on the outstanding balance from the Due Date until the date payment is made at 8% above LIBOR. LIBOR means the rate for one month deposits in USD which appears on the relevant Reuters page (or any successor page) after 12:00 London time on the Due Date or, in the event that such rate is unavailable, the mean average of the rates at which USD rates are quoted by the principal offices of three banks nominated by Seller in the London interbank market. If the LIBOR rate is less than zero, it shall be deemed to be zero. Such interest shall be payable to Seller on demand and shall accrue until payment

notwithstanding the termination of this Agreement for any reason whatsoever. This provision shall not be construed as an indication of any willingness on the part of the Seller to provide extended credit as a matter of course and shall be without prejudice to any rights and remedies which Seller may have under the Agreement or otherwise. Such rate shall also apply to any other late payments made by Buyer to Seller under the Agreement.

All other terms and conditions to remain as per contract dated 15<sup>th</sup> March 2018.”

### **The Eighth Addendum**

23. The eighth addendum is dated 27 March 2019 (“the Eighth Addendum”). It is addressed to Genser and, as with the Seventh Addendum, makes provision for it to be signed on behalf of the parties. As with the Seventh Addendum, the version before me is not signed.
24. Although Genser had at one point also challenged whether the Eighth Addendum had been agreed, by the time of the trial its position was that it accepted that, as its terms had been performed, it must have been agreed. It was of a different character from the other Addenda because it was designed to reflect specific operational difficulties which had been encountered.
25. Again, it is important to record the precise terms of the Eighth Addendum:  
**“The parties agree on below:**
  1. The 1613.96 Mt shortfall of Dec TOP to be net off from overloads (above 9kt) achieved in Jan and Mar (Vitol S.A will not charge TOP on the Feb shortfall).
  2. This 1613.96 Mt will be sold to Genser at the agreed TOP Dec fix price.

For invoicing purposes:

\* Dec TOP invoice shall be amended from 9kt to 7,386.041 mt but shall be paid by Genser in line with the date of the initial invoice;

\* The 508.52 Mt invoiced in Jan over the TOP shall be at the Dec fix price, to be paid by Genser in line with the date of the initial invoice;

\* March TOP invoice shall be amended to 9kt at Mar fix price + 1105.14 Mt at Dec fix price regardless if that extra volume is actually discharged or not. Any volume loaded on top of 9kt + 1105.14 Mt in Mar shall be at the normal agreed floating price. This is to be paid by Genser in line with the date of the initial invoice

\* Interest due to the 1613.96 MT shortfall being paid later shall be invoiced and paid in line with the Jan TOP invoice (due date 01-05.2019)".

### **The Issues**

26. During the proceedings, and especially in the immediate run up to the trial, Genser has abandoned several of its pleaded issues.
27. Amongst other things, Genser had sought to argue: that (a) the parties had agreed (either formally or through a convention adopted between them) to carry out a reconciliation process in relation to invoices; (b) the obligation in the Third Addendum to take a minimum of 9,000 m/t of Product per month was unenforceable as an unlawful penalty and (c) the SPA had been frustrated by the imposition by new regulations by the regulatory authorities in Ghana. None of these arguments were pursued at the trial before me although it was still necessary to consider some of the facts relevant to the frustration argument when considering Genser's case on force majeure.
28. Genser had also argued at one point that the Notice of Termination dated 4 June 2019 relied on by Vitol had not been validly served in accordance with the SPA; that there had been a short delivery of Product on 22 June 2018 for which it should not pay; that Vitol had overcharged it on 3 invoices and challenged some parts of the Settlement Amount insofar as they related to future costs. These arguments are also no longer pursued.
29. On the first morning of the trial, Mr Mills for Genser clarified for the Court that its case at trial had indeed narrowed and was now encapsulated in the Re-Amended Defence for which I gave limited permission to amend.
30. In relation to the Settlement Amount, Mr Mills confirmed that Genser's case was that: (a) the Default Notice was not a valid notice on its terms and had not been validly served (paragraph 21 of the Re-Amended Defence) and (b) the Settlement Amount was not due and payable.
31. In relation to the Unpaid Invoice Claims, Genser had challenged five invoices (summarised by then in paragraph 33 of the Re-Amended Defence and Counterclaim and its revised Schedule A):
  - 31.1. The outstanding balance on Invoice S1818478 ("the June 2018 Cargo Invoice") in a sum of USD 83,262.71 on the ground that Vitol's claim was now barred as a

- result of the Time-Bar Clause (paragraphs 30, 30A and 33(1) of the Re-Amended Defence).
- 31.2. Invoice S19907748 (“the April Floating Storage Invoice”) in a sum of USD 13,000 on the ground that the floating storage vessel, the Innovator, was not available for one day in April 2019 (paragraph 33(2) of the Re-Amended Defence).
  - 31.3. Invoice S1910289 (“the May Floating Storage Invoice”) in a sum of USD 78,000 on the ground that the floating storage vessel was not available for 6 days in May 2019 by reason of Vitol’s declaration of force majeure on 29 April 2019 (paragraph 33(3) of the Re-Amended Defence).
  - 31.4. Invoice S1913404 (“the Late Payment Interest Invoice”) on the ground that it was not contractually obliged to pay late payment interest (paragraphs 27 and 33(4) of the Re-Amended Defence).
  - 31.5. The balance of Invoice S1914040 (“the June 2019 Floating Storage Charge Invoice”) in the sum of USD 52,000 on the ground that Genser had declared force majeure on 27 June 2019 and so is not liable to pay floating storage charges for the period 27 June 2019 to 30 June 2019 (paragraphs 33(5) and 48 to 50 of the Re-Amended Defence).
32. Although not part of any formally pleaded counterclaim, in its Amended Schedule A to the Re-Amended Defence and Counterclaim, Genser also contended that it had overpaid on two further invoices in respect of which it should be given credit:
    - 32.1. Invoice S1905189 (“the March 2019 Floating Storage Invoice”) which it says has been overpaid by USD 21,829.60;
    - 32.2. Invoice S1910163 (“the March/April Cargo Invoice”) which it says has been overpaid by USD 4,188.05.
  33. However, by the time of the written closing submissions the Invoices Claim had narrowed further because:
    - 33.1. While Vitol continued to assert that, according to the terms of the Original SPA, it was not required to give credit for the two periods of one and six days during which to the Floating Storage Unit had not been available, it was prepared to proceed on the basis that Genser was entitled to credit in respect of the April Floating Storage Charge Invoice and the May Floating Storage Charge Invoice. This has the effect that Vitol’s claim in respect of unpaid invoices reduced by a further USD 91,000.

- 33.2. Genser accepted that it had already had credit for the overpayments in respect of the March 2019 Floating Storage Invoice and the March/April Cargo Invoices. This has the effect that Genser's claims for credits in a total sum of USD 26,017.65 fails.
34. The net effect of all of this is that on the Unpaid Invoices Claim, it is necessary for me to deal in this Judgment with only three unpaid invoices: the June 2018 Cargo Invoice; the Late Payment Interest Invoice and the June 2019 Floating Storage Charge Invoice.

### **The Witnesses**

35. I heard evidence on behalf of Vitol from Thibery Darribere ("Mr Darribere") and Andre Maximo ("Mr Maximo").
36. Mr Darribere is employed by Vitol Broking Limited as a broker. Brokers employed by Vitol Broking Limited trade on behalf of Vitol SA. He trades principally in liquified petroleum gas ("LPG"). Although Mr Darribere did his best to assist the Court, there were some aspects of his evidence that I found to be unsatisfactory, especially concerning the circumstances in which Vitol contends Genser agreed to pay interest on late payments. At times, his measured approach to answers to questions verged into evasiveness and he was very vague about the circumstances in which the alleged agreement had been made. In oral evidence he appeared to be suggesting, for the first time, that Genser had agreed to pay late interest in or about November 2018, at the time of the Third Addendum. It is extremely unlikely that such an important discussion would not have featured in his witness statement, and I accept the submissions made by Mr Mills, that it is inconsistent with the contemporaneous emails, inherently improbable and inconsistent with the evidence of Mr Maximo. I formed a clear view that, whilst inclusion of provision for interest to be paid on late payments was an obvious commercial adjunct to the move to 90 day credit terms and so highly desirable, it had simply been overlooked. As I explain further below, he was also cross-examined at some length and with considerable care by Mr Mills, about his witness statement at [30] where he had stated: "*Whilst I cannot be sure whether Addendum 7 was actually signed, there can be no doubt that it was performed by Genser. For example, in an email from Genser on 21 May 2019 at 14:31, Genser attached a fuel reconciliation showing that the agreed late payment interest rate had applied*". Mr Darribere seemed reluctant to accept that, viewed in their specific context, the email trails could be consistent with the much narrower agreement advanced by Genser. Whilst I do not

consider that he was seeking to mislead the Court in any respect, on the particular topic of late payment interest, I consider myself more assisted by the contemporaneous emails and documents than his oral testimony.

37. Mr Maximo is the LPG Operations Team Leader in Vitol's Rotterdam branch. He is responsible for his own trades and for supervising a small operations team of three operators (including him). His main activity is to control the financial documentation relating to trades and deals including issuing documents such as contracts, amendments and invoices. I consider Mr Maximo to have been an honest and straightforward witness who did his best to assist. He was less closely involved in the circumstances in which the SPA came to be terminated, but he made appropriate concessions, including as to the type of default or delay event which generally gave rise to Vitol issuing credit notes and that the emails leading to Genser's agreement to pay late interest on the December 2018 cargo shortfall (of 1613 m/t) contained nothing to indicate they were being paid pursuant to some earlier agreement between the parties.
38. I heard evidence on behalf of Genser from Haruna Abdulai ("Mr Abdulai") and Mr Asiamah-Adjei.
39. Mr Abdulai is a Chartered Accountant, ACCA qualified, who has been in finance for almost 20 years. He is responsible for Genser's finance function from "end to end" including strategy, analysis, and validations of all payments going out of the company. Although willing to assist the Court, I have some significant reservations about some aspects of Mr Abdulai's evidence, especially about the due date for payments of Vitol's invoices. I found his account of when invoices fell due for payment and as to how the due date was treated internally within Genser's financial systems tortuous and confusing and it took a lot longer than it should have done for him to give coherent answers to the questions being posed, than I might have expected from someone in his position. However, in large part this seems to reflect his somewhat casual approach to the strict niceties of invoicing, due date and legal technicalities such as whether they gave rise to any breach of contract. This was to some extent corroborated by Mr Asiamah-Adjei who testified to a more relaxed business culture in Ghana. However, I accept Mr Abdulai's evidence that throughout the short contractual relationship between Vitol and Genser, the latter was often in cash flow difficulties and that his main focus was on that, especially in ensuring that customers like Gold Fields paid on time, so that Genser was able to pay its suppliers, such as Vitol. He was at the sharp end of those difficulties and on the occasions when he was less than frank as a witness,

I sensed it was due to some overall embarrassment on his part. As with Mr Darribere, I consider myself more far more assisted by the contemporaneous emails and documents than his oral testimony, especially as I consider my conclusions on matters of due date of invoices to be matters of law and proper construction, rather than witness testimony.

40. Mr Asiamah-Adjei is the Chief Executive Officer and President of the Board of Genser. Mr Asiamah-Adjei was a genial and calm witness and, in the main, I consider him to have given his evidence in a genuine and straightforward manner. In particular, I found his evidence that Genser would still be in the market for propane even if its LPG pipeline came on stream and on the discussions with the National Petroleum Authority (which I deal with more full below) to be generally credible. However, as I set out below, I am unable to accept some parts of his evidence.
41. Although they were not in the end called to give evidence, I have also read the witness statement of Daniella Akowuah Coffie-Menyah (“Ms Menyah”) dated 25 February 2022 and the witness statement of Issah Mohammed (“Mr Mohammed”) dated 25 February 2022. Ms Menyah is responsible for the supply of equipment and consumables for the operation of Genser’s power plants and other projects and is involved in the signing of contracts, including negotiation of terms and conditions including prices Mr Mohammed was the Operations Manager of Genser at the relevant time.
42. Although they did not in the end attend remotely at the trial for cross-examination, I read the expert reports of Korieh Duodu, General Counsel at Equality Law (for Genser) dated 22 March 2022 and 11 May 2022 and those of Paa Kwesi Morrison, a partner at ENSAfrica, dated 22 April 2022 and 11 May 2022, for Vitol as well as the Joint Expert Report dated 6 May 2022. At the conclusion of the factual evidence, I agreed with Counsel that, in light of the narrowing of the issues between the parties, and that the expert evidence went to an issue which by then valued at only USD 52,000, it was not proportionate to spend a day cross-examining the experts. I am, however, grateful to the experts for their assistance.
43. It is convenient at this point to mention other relevant people who, although not witnesses, featured in the evidence. Mr Asiamah-Adjei said that his main contacts at Vitol were based in Rotterdam in the Netherlands including Anthony Baranello (LPG Manager). After Mr Baranello left Vitol, he dealt with Sebastien Peine (LPG Broker in London). Mitch van Vliet was part of the Vitol team in Rotterdam. Matt Tozzi is Vitol’s in-house Legal Counsel. Jerrod Kotter is or was an LPG Broker in Houston.

Neil Jago was involved in Vitol's physical operations team and Aidan Kelly was in finance. Mr Evans Adanya is or was a financial analyst with Genser.

44. Mr Moses Asaga was the Chief Executive of the National Petroleum Authority in Accra, Ghana ("the NPA") during the period which the National Democratic Congress Party ("NDC") were in power in Ghana. Upon the election of the New Patriotic Party ("NPP"), Mr Hassan Tampuli became the Chief Executive of the NPA.

### **Performance of the SPA**

45. Much of the factual account of the performance of the SPA is not in issue. In narrating some of the events, it is necessary to refer to certain emails by date and time. In some instances, there is a discrepancy, presumably because of the one-hour time difference between sender and recipient, but nothing turns on this. Insofar as these matters are not agreed, these are also my relevant findings as to those facts.
46. In operational terms, there was broad agreement between Mr Darribere and Mr Asiamah-Adjei that performance of the SPA involved the Product being brought on large vessels from outside West Africa. The principal suppliers' terminals are in Bioko (an island in Equatorial Guinea), Angola, Algeria and Brazil. Genser preferred suppliers who used the Bioko terminal because shorter distances were likely to give more consistency of supply. The Product is then off-loaded onto a floating storage vessel via ship-to-ship transfer (a "STS"), in this case usually the Prins Maurits, then discharged to Genser which would offload it onto trucks at the berth at Takoradi port. The discharge operations at Takoradi could take up to 5 days depending on the number of trucks made available by Genser so there might be periods when the vessel was at berth but not discharging Product. However, as it is neither possible nor economical to do an STS transfer at Takoradi port the floating storage vessel would leave Takoradi and travel to Lomé in Togo (the main STS location in West Africa) where the Product would be loaded via STS from the vessels. The floating storage vessel would then return to Takoradi. The round trip for the floating storage vessel to travel from Takoradi to Lomé, where it would stock up, and then back to Takoradi would take on average 4 to 5 days.
47. So far as invoicing is concerned, the monthly invoices for cargo ("Cargo Invoices") were generally sent soon after the month of supply. The Floating Storage Unit invoices ("Floating Storage Invoices") were payable in advance. For example, the invoice for cargo delivered in December 2018 (S1902752) is dated 31 December 2018 and the due

date is shown as 29 March 2019. The invoice for the floating storage for January 2019 (S1902760) is dated 1 January 2019 and the due date is shown as 1 April 2019.

48. Gold Fields is a mining company with a mining concession at a gold mine in Tarkwa. Abosso Goldfields Limited (“Abosso”) runs a gold mine at Damang. Gold Fields and Abosso are important customers of Genser. Gold Fields and Genser had entered into a Power Purchase Agreement dated 13 December 2013 (“the PPA”).
49. Dome Energy Resources Limited (“Dome Energy”) is a licensed bulk distribution company (“BDC”) in Ghana. By a written Licence User Agreement dated 1 December 2017 (“the Dome BDC Licence”), Dome Energy agreed to support Genser’s use of propane for power generation at its power plants in Chirano, Tarkwa, Damang and the Unilever plant and authorised Genser’s use of its BDC licence to deliver and store propane at a bonded warehouse of Genser’s choice.
50. As early as mid-2018, Genser was late in making some of its payments meaning it had run out of pre-payment credit. Mr Asiamah-Adjei attributes difficulties in this period to Vitol having “logistics” issues but explains how Genser would deal with supply issues by prioritising its power plants by cutting off some to keep others running or by changing the blend between propane and butane. It is not necessary for me to decide who was at fault. However, I accept Mr Darribere’s evidence that the late payment of invoices became a matter of increasing concern for Vitol’s management which was reluctant to extend Genser’s credit without security. This provides context for the Third Addendum which, as I have already noted, was agreed in November 2018, and changed the commercial basis from pre-payment to being 90 day credit backed by a guarantee.
51. As I have also already noted, one of the disputed invoices in the Invoices Claim concerns the June 2018 cargo. This relates to a delivery of propane in June 2018 in respect of which Genser disputed that 1,566.507 m/t of Product had been delivered. On 23 June 2018, Intertek Ghana Limited lodged letters of protest with the Master of the Gremio. On 3 July 2018 at 16:49, Ms Menyah told Mr Maximo that Genser did not agree the figures for 22 June 2018. Mr Jago responded at 16:06 to say that Vitol was relying on the quantity verified by the independent expert. At 17:08, Ms Menyah acknowledged that the inspector had protested to the Master of the relevant vessel but maintained Genser’s position that it would not pay for the fuel. The protest was maintained in Ms Menyah’s email to Mr Maximo sent on 17 July 2018 at 15:42. Genser has refused to pay the balance of USD 83,262.71 on the June 2018 Cargo Invoice and,

as set out above, now seeks to rely on the Time-Bar Clause to extinguish that sum.

Genser continued to maintain its position in subsequent correspondence (so for example it was still being referred to by Mr Maximo in an email to Mr Evans Adanya and Mr Abdulai on 13 March 2019).

52. In early 2019, an issue arose between the parties because Vitol had invoiced Genser for cargo deliveries made in December 2018 without rolling the balance of the unused take or pay volume into January 2019. Following a conversation which took place over the weekend of 23-24 March 2019 and an exchange of emails, culminating in an email from Mr Darribere to Mr Adjei on 25 March 2019 at 13:12, an agreement was reached that the December shortfall on the TOP would be netted off against the overloads (ie. above 9,000 m/t) taken in January and March 2019. This was eventually reflected in the Eighth Addendum.
53. On 11 March 2019, Vitol had issued its invoice (\$18905188) in the sum of USD 4,241,880.00 for the February cargo. The due date is stated to be 29 May 2019. Pursuant to the agreement reflected in the Eighth Addendum, on 4 April 2019, Vitol sent a revised invoice (\$1907772) for the February cargo. The covering email from Mr Maximo to Mr Asiamah-Adjei and Mr Abdulai states: *“Please find attached the revised and new invoices as per agreement ... Revised February cargo – \$190772 – due date 29-05”*. 29 May 2019 is the date which appears on the original invoice raised on 11 March 2019.
54. I have already noted that one of the agreed provisions in the Eighth Addendum provides for interest to be paid on the December shortfall of 1613.96 m/t. It is distinct from the issue of whether the Seventh Addendum (which purportedly provides generally for Genser to pay interest on late payments and is backdated to 15 November 2018, the date of the Third Addendum) was agreed. I heard quite a lot of the evidence and I was referred to a number of emails on the point. The due date for November cargos was 28 February 2019 and the due date for the December floating charge was 4 March 2019. The starting point is Mr Maximo’s emails to Mr Asiamah-Adjei on 6 March 2019 at 12:04 in which he chased for payment *“in order to not stop discharge”* and said that if the monies were not received by close of business the following day Vitol would have no option but to cash in the Guarantee and Mr Asiamah-Adjei’s response at 12:07 acknowledging that he would deal with it the following day as it was a holiday in Ghana.

55. On the same day, there was an exchange of emails internally within Vitol between Mr Darribere and Mr Maximo (copied to Mr Jago and Mr Peine) in which Mr Darribere queried: *“As per our contract, do they need to pay interest of late payment?”* to which Mr Maximo replied: *“Nope, their contract was basis a PP, we haven’t added the late payment clause in the Original contract. Thinking after, should have been added in the addendum 03, when terms were changed from PP to OC. Better to issue an amendment for that”*. The reference OC is, in context, a reference to it being open credit. Mr Darribere plainly perceived the significance of the omission because he replied: *“Shit. After [t]his we will need to add yes”*.
56. Although Genser paid USD 1,051,594 against the November cargo invoice on 7 March 2019, this was late and, as at 12 March 2019 at 10:08, a balance of USD 108,531.52 was outstanding for the November cargo and USD 372,000 was outstanding for the December floating storage charge.
57. In his email to Mr Abdulai and Mr Evans Adanya (copied to Mr Adjei) at 10:08 on 12 March 2019, Mr Maximo referred to *“as agreement between Vitol and Genser an interest invoice will be issued regarding the late payment interest”*. His email the next day at 08:39 states: *“Due to the fact that Genser has open credit now (under Guarantee) and late payments are subject to an interest rate, we kindly request Genser to pay in full to avoid any problem with Credit, until final agreement is reached”*. On 13 March 2019, a telephone call took place between Mr Peine and Mr Asiamah-Adjei following which Mr Asiamah-Adjei in an email sent at 10:37 said: *“We admit to our error in delayed payment and accept the interest rate payments. We are making full payment of all due amounts today on the reconciled amounts”*.
58. Although at times Mr Asiamah-Adjei seemed to be backtracking on this part of Genser’s case, it does not seem to me to be in any doubt that Genser agreed to pay late payment interest on the November cargo and on the December floating storage invoice and insofar as he sought to say either that this had not been agreed at all or that it was not really “interest” but some form of “make-up payment” (his term), I reject his evidence. Although I accept in a general sense his evidence that he would not necessarily be astute to take in every invoicing email, there is no doubt that he saw at least some of this email trail because he responded to it in an email on 13 March 2019 at 09:15 stating *“We cannot be bullied into a settlement”*. Vitol raised Invoice S1907776 for 9 days late payment interest (USD 974.92) on the December floating storage on 4 April 2019 which was paid (and so accepted) by Genser on 8 May 2019.

59. I am also satisfied that Genser agreed to pay for 33 days interest on the shortfall in December 2018 (1613 m/t) in respect of which Vitol had agreed to the shortfall being carried forward to January and March 2019. Vitol raised Invoice S19107774 in the sum of USD 7,028.72 which was also paid by Genser on 8 May 2019.
60. I also reject Mr Asiamah-Adjei's evidence that once Genser had been moved from a pre-payment arrangement to 90 day credit with a guarantee, Vitol was adequately protected and there was no commercial need for it to be paid interest on late payments. I am satisfied that this part of his evidence was not just wrong but deliberately obtuse and evasive. Self-evidently, the fact that Vitol might be able to call on a guarantor, does not alter that it is being kept out of its money if it is paid late.
61. Returning to the chronology in relation to the Seventh Addendum, on 1 April 2019 Mr Maximo sent to Mr Asiamah-Adjei (copied to Mr Abdulai, Mr Peine, Mr Jago and Mr Darribere) a copy of the proposed Seventh Addendum noting that "*it is in line with what was requested by Vitol Credit team*" and asking "*Please kindly revert with signed copy*". The draft identified the interest rate applicable to late payments as being 8% above LIBOR. Mr Asiamah-Adjei responded later the same day to say that he was travelling in San Diego and so would attend to it by Wednesday. However, as I have already noted, the Seventh Addendum was never signed.
62. Vitol's case is that either: (a) the Seventh Addendum was performed and/or that an agreement in the same terms as the Seventh Addendum was reached. Although Mr Dhar was right to point to events after the SPA was terminated and to say that Genser did not ever dispute that it was liable to pay interest on late payments (including for example when it was sent the Settlement Amount Notice and when analysing Vitol's claims in its Report dated 30 December 2019), it seems to me that these are forensic not substantive points. I have already indicated that the evidence of Mr Darribere as to when and how any agreement in relation to the late payment of interest generally was made was unsatisfactory. Although Mr Dhar sought to argue that Genser's payments of the late payment interest invoices raised on 4 April 2019 (which specified interest rate as LIBOR plus 8%) were consistent only with the rate in the Seventh Addendum, I reject this. It seems to me that the overall thrust of Mr Asiamah-Adjei's evidence, which I accept because it is consistent with the careful analysis of the emails and documents which Mr Mills went through with Mr Darribere, was that interest at such a high rate had been agreed only in relation to some invoices and in respect of relatively modest amounts.

63. Accordingly, I am satisfied that the Seventh Addendum itself was never agreed or performed and I reject that there was any separate or different agreement for the payment of interest on late invoices. In my judgment, Mr Mills is correct to say that Genser agreed to pay interest only pursuant to the two specific agreements made on 13 March 2019 and 27 March 2019 which I have identified above.
64. By mid-May 2019, it is Vitol's case that Genser had implemented a change in its business model and switched from using propane to using liquid natural gas ("LNG") to power its plants. This, it suggested, explained why Genser, without any explanation and despite being chased by Vitol, stopped unloading from the Prins Maurits despite this vessel having arrived in Takoradi on 16 May 2019 and being available to unload from 17 May 2019 to 4 June 2019 (save for 23 May 2019 when Prins Maurits was ordered to shift to anchorage to enable another vessel to berth). Mr Asiamah-Adjei was cross-examined on this and denied it strongly. On this point, it seems to me that his evidence had force and I accept it.

### **Termination of the SPA**

65. It is not in dispute that Genser did not pay the revised March invoice (S1907772) in the sum of USD 4,174,546.76 by the stated due date of 29 May 2019. Although Mr Abdulai sought in his evidence to suggest that due date meant something different from that stated on the face of the invoices and in the various emails, I have already said that I found this part of his evidence to be muddled, contradictory and unsatisfactory. Ultimately, it seems to me he accepted in cross-examination that even if Genser's internal systems might be adjusted if an invoice came in later than expected, this did not affect the due date for payment to Vitol. It seemed to me that whilst both he and Mr Asiamah-Adjei attested to a degree of wishful thinking that the regime with Vitol was more flexible and understanding, they did not ultimately demur from the general picture that Genser was often late with payments and that the late payments were a deliberate device to manage its cashflow problems (in particular, that it was dependent on Gold Fields and other customers to pay it for the fuel it was delivering to them). Whilst I can well understand Mr Asiamah-Adjei wishing that business had been conducted more informally and with greater flexibility, that was not the regime he had signed up to.
66. On 30 May 2019 at 10:08, Mr van Vliet sent an email to Mr Adjei and Mr Abdulai, copied to Mr Peine, Mr Jago, Mr Evans Adanya, Mr Darribere and Mr Maximo. This

is the default notice relied on by Vitol as triggering its entitlement to terminate the SPA (“the Default Notice”). The subject heading was “*RE: \$25m Payment Guarantee Bond to Vitol S.A*”:

*“Dear All*

*Please be advised that we have not yet received the funds related to the attached invoice S1907772 – February 2019 deliveries.*

*Please pay the amount stated in the above referenced invoice immediately.”*

67. On 31 May 2019 at 13:36, Mr Abdulai responded to the Default Notice (copying in Ms Akowuah) stating that:

*“1. The delay of the May 2019 payment is due to massive Liquidated Damages (LD) deduction from Goldfields (GFGL) for the non-supply of power (resulting from Vitol Force Majeure)*

*2. Repayment of all amounts due Vitol will be completed at Finance Close of our Syndicated Loan Facility in June 2019”.*

68. It is not in dispute that Genser did not settle the revised March invoice within 2 days of the Default Notice. On 4 June 2019, Vitol sent Genser a hard copy notice of termination (“the Notice of Termination”) which was received by Genser on 6 June 2018 at 13:18. Its material terms indicate that Vitol was exercising its contractual right to terminate and liquidate the SPA with immediate effect because, in breach of the SPA Genser had failed to pay Vitol the sum of USD 4,174,546.76 on the due date of 29 May 2019 pursuant to invoice number S1907772 and that Vitol had notified Genser of its failure to pay by an email dated 30 May 2019. It went on to say that this constituted an event of default and that Vitol intended to calculate a settlement amount in a commercially reasonable manner in accordance with the terms of the SPA.

69. On 6 June 2019 at 12:02, Vitol sent a soft copy of the Notice of Termination to Mr Asiamah-Adjei and Ms Menyah and a soft copy notice of demand explaining that Vitol had calculated a settlement amount (“the Notice of Demand”). The email had the following rubric in bold, red print: LEGAL NOTICE OF CONTRACTUAL TERMINATION AND CALCULATION OF SETTLEMENT AMOUNT. The Notice of Demand stated that the settlement amount had been calculated in a commercially reasonable manner to equal USD 17,560,514.02 (defined as “the Settlement Amount”) which had been calculated as follows and demanded payment in full by no later than three business days from receipt of the letter:

**“Loss**

**Amount (USD)**

Invoices (due and payable)	14,337,429.23
Loss: May and June Supply Cargoes	1,059,310.04
Loss: Floating Storage	1,963,774.75
<b>Total</b>	<b>17,560.514.02”</b>

70. Vitol attached a more detailed spreadsheet showing how the Settlement Amount had been calculated (“the Vitol Spreadsheet”). Amongst other things, the Vitol Spreadsheet indicates that a total of USD 19,654.11 interest is included in the Settlement Amount comprising USD 17,885.17 for interest on the January 2019 cargo, USD 974.92 on the December 2018 floating storage and USD 1,768.94 on the February 2019 floating storage. The Settlement Amount had been calculated by Mr Darribere. At the CMC before Mr Justice Picken, Genser confirmed that it had no pleaded case that the Settlement Amount had not been calculated in a commercially reasonable manner and the Approved List of Common Ground and Issues at [25] expressly records that it is not in issue. On Day One of the trial, Genser sought to re-amend its Defence and Counterclaim to plead that Vitol was in breach of an implied term in the SPA that the discretion was not to be exercised in a way that no reasonable person, acting reasonably, would act. I refused permission to Vitol to extend its case in that way for the reasons given in my short judgment.
71. On 6 June 2019, Mr Darribere sent an email to Mr Asiamah-Adjei (copied to Ms Menyah, Mr Peine and Mr Jago). Although it was marked “Without Prejudice” it is common ground that no such privilege attaches to it. In it, Mr Darribere stated: “*As you are aware our legal team terminated our agreement today and you are now required to make payment of the settlement sum within a short period of time*” and “*as long as you make payment of the settlement sum as set out in our legal team’s email, we remain open to continuing our commercial relationship with you in relation to the butane business*”. In his reply sent the following morning, Mr Asiamah-Adjei said: “*Following the letter of termination from Vitol, we will make payment of the Settlement Amount right away*”.
72. On 17 June 2019, at 13:32 Matt Tozzi, Vitol’s in-house Legal Counsel, served a demand on Al Koot pursuant to the guarantee which it had provided to Vitol dated 19 November 2018 (“the Guarantee”).
73. At 14:28 that day, Mr Peine recorded in an internal email to his colleagues in Vitol that he had just received a “very gentle” call from Mr Asiamah-Adjei who did not

understand what Vitol was doing and that he wanted to pay Vitol the 14m directly, not through the guarantee as that would be very disruptive of his business but needed to spread the payments over time and would pay “interests” (sic). The email records that Mr Asiamah-Adjei does not necessarily agree to the 3m+ which Vitol had charged on top.

74. This was followed by a more detailed email from Mr Asiamah-Adjei to Mr Peine, copied to Mr Abdulai, at 14:32. The email subject heading was different and it seems that he has used a different email trail. However, it is clear that it included Mr Maximo’s email sent at 18:25 on 4 April 2019. The email set out their thoughts as follows:
- “A. \$14m – Genser would like to repay this amount over 90 days and most certainly by close of the Syndicated Facility. As Haruna mentioned in his email, we suffered massive LDs from the client when the Vitol Force Majeure was triggered. We hope you can understand our situation and give us the 90 days (plus interest) to repay this amount.*
- B. \$3.0m -Genser believes this is unfair as it was stopped from continuing the agreement through a Force Majeure. The Force Majeure was triggered by a withdrawal of an authorization to purchase fuel directly. Genser, as an IPP, operated under the Development Agreement of Gold Fields with approval from NPA. After the Vitol FM, Gold Fields withdrew their Development Agreement authorization from Genser. This made the NPA suspend our ability to purchase fuel directly except through BDCs and OMCs”.*
75. On 4 September 2019, Genser paid Vitol the sum of USD 7,875,114.90.
76. On 30 December 2019, Genser sent a detailed letter described as a Report on Vitol’s account with Genser (“the Report”). The Report set out in narrative and table form Genser’s objections to the Settlement Amount and set out Genser’s case justifying the sum which had been paid on 4 September 2019. Although the table refers to two invoices for late payment interest, the ground of objection relates to force majeure. Vitol points to the absence of any objection on the ground that late payment interest had not been agreed to be paid at all.
77. On 9 January 2020, Onesimos Barimah Osei, Genser’s Legal and Compliance Manager, emailed Vitol with Genser’s response to the proposed outstanding balance by Vitol. Mr Abdulai accepted that the accompanying letter was drafted and signed by him. Vitol’s claim for the Settlement Amount was disputed on force majeure grounds.

78. On 27 March 2020, the present proceedings were issued.
79. On 16 March 2021, Genser paid the sum of USD 6,103,033.17.
80. On 8 June 2022, shortly before the commencement of the trial, Genser paid a further sum of USD 287,346.69 to Vitol to reflect the further concessions made by it in its revised Skeleton Argument.

### **The Settlement Amount Claim**

81. Following the amendments to Genser's case which I have already highlighted, it will be apparent that the first issue for determination is Vitol's claim for the Settlement Amount. If Genser is liable to pay the Settlement Amount, Vitol's alternative claim under the Unpaid Invoice Claim does not arise.
82. The issues for my determination are:
  - 82.1. What is the invoice due date for the revised March Invoice and/or is Genser estopped from denying that the due date for the revised March Invoice was 29 May 2019? I will refer to this as the Invoice Due Date Issue.
  - 82.2. Was the Default Notice a valid notice demanding payment within the meaning of the Event of Default Clause? I will refer to this as the Default Notice Issue.
  - 82.3. Was the Default Notice validly served on Genser and/or is Genser estopped from denying that the 30 May 2019 email was validly served. I will refer to this as the Service Issue.
83. The ingredients for an estoppel by convention have been recently restated by the Supreme Court in *Tinkler v HMRC* [2021] 3 WLR 697 at [42] to [53]. First, there must be a common assumption of fact or law (made clear by words or conduct that have "crossed the line"). Secondly, the estopped party must have assumed an element of responsibility for the other party's reliance on the common assumption. Thirdly, there must have been reliance on that common assumption. Fourthly, the relying party must have suffered sufficient detriment to make it unconscionable for the estopped party to assert the true position.

### ***The Invoice Due Date Issue***

84. As to the Invoice Due Date Issue, Genser's case is that it did not become payable until either 9 June 2019 (which is 90 days after the date the March invoice was initially issued on 11 March 2019) or 30 July 2019 (which is 90 days after it was re-issued by Mr Maximo on 4 April 2019). Genser submits that this is the natural and ordinary

meaning of the words “invoicing date”. In either event, it is submitted that the revised March Invoice was not due and payable on 30 May 2019, when the Default Notice relied upon by Vitol was sent. In their closing submissions, Genser advanced a further alternative case that the correct invoicing date was the first business day following the last business day of the month. So, in respect of the February cargoes, the invoicing date would be 1 March 2019 giving a due date of 30 May 2019 but on the proper construction of the SPA, Genser had until midnight that day to effect payment. This arose because Mr Abdulai’s evidence before me was that, on Genser’s system, the 90 day credit period would run from the first day of the month following delivery, rather than the last day of the previous month. In my view, nothing turns on this in light of my findings below.

85. Vitol’s position is that the invoice was due and payable 90 days after the “invoicing date” which means the last business day of the month in which the deliveries were made. It also submitted that even if that is not the correct interpretation of the SPA, the parties either expressly agreed that the revised March Invoice was due and payable on 29 May 2019 or that Genser is estopped from denying that the due date was 29 May.
86. In my judgment, the proper construction of the Guaranteed Payment Clause in the Third Addendum, is that product was to be invoiced on the last business day of the month in which the deliveries were made. That is the natural and obvious meaning of the clause. The term “invoicing date” refers back to the product monthly value which is “to be invoiced on the last business day of the month”. So, for product delivered in February, the relevant invoicing date was 28 February. This means that Genser was required to pay the invoice within 90 days after the last business day of the month that the propane was delivered. This has the obvious benefit of commercial certainty which would simply not exist if, as Genser contended, the invoicing date would vary depending on the actual date of delivery of the invoice. The entire thrust and purpose of the Third Addendum was to reflect the change in commercial basis from pre-payments to 90 days credit albeit backed by guarantee and, in that context, the Guarantee Payment Clause was an important one.
87. Mr Mills urged on me that Genser’s construction was necessary to accommodate the situation in which loading commenced in the month but was not completed until after midnight on the final day of the given month (see the reference to cross month truck loading in Price Clause in the Third Addendum). I am not persuaded that this rather rare situation undermines my view as to the proper construction of the Guaranteed

Payment Clause. If there were cross month truck deliveries in any given month, it could easily be dealt with by issuing a revised invoice or by that invoice being issued late.

88. In any event, in my judgment Vitol is correct to say that the parties expressly agreed that the revised March Invoice was due and payable by 29 May 2019. The context was, as I have already explained, the agreement reached in late March 2019 that Vitol would invoice for the actual quantity taken by Genser in February 2019, rather than the TOP amount. In his email sent on 27 March 2019, Mr Darribere asked Mr Asiamah-Adjei to confirm that the re-issued invoices would be paid “*in line with the date of the original invoice*”. Mr Asiamah-Adjei replied the same day at 17:09 with the words “*Glad we could understand each other*” and a smiley emoji. This evidences that the parties had reached consensus on the contents of the email including that the date for the revised invoices was to be the date of the original invoice. It is perhaps not surprising then that Mr Abdulai accepted that invoices were indeed due and payable 90 days after the end of the month on which the deliveries were made (or at the latest by the first day of the following month) and that by not settling the revised March Invoice by 29 (or 30) May, Genser was in breach.
89. In light of the analysis undertaken by Genser’s counsel at Annex A to their written closings, I would not have been persuaded by Vitol’s further argument that there was a shared assumption and/or a clear and consistent course of dealing whereby invoices were treated as being due 90 days after the end of the relevant business month. However, in light of my findings as to the true and proper construction of the SPA and the agreement that I have found to exist between the parties, this is not a necessary finding.

### ***The Default Notice Issue***

90. Genser’s case is that the 30 May 2019 email was not an effective default notice because it should, in terms, have put Genser on notice that, unless it rectified its failure to pay the revised March Invoice within two banking days, Vitol would have the right to terminate (and liquidate) the SPA. To be effective as a notice, it was submitted that Vitol was required to communicate: (a) that Genser was required to make payment within two banking days and (b) that failing which, Vitol would exercise its rights under the Default Provision. Alternatively, at the very least, Vitol was required to communicate that Genser was required to make payment within two banking days.

91. Mr Mills makes a number of points in support of the argument that the 30 May 2019 email was deficient. It was part of a string of emails with the subject heading “\$25M Payment Guarantee Bond to Vitol SA” and no different in style and content from routine correspondence demanding payment. He pointed to the absence of any use of the term “Notice” and the absence of any words of the Default Provision. He drew a distinction between the Default Notice and the Notice of Termination and covering email which, in contradistinction, had the obvious look and feel and status of formal documents. He submitted that the fact that the email was sent to Mr Asiamah-Adjei and Mr Abdulai but not to Ms Menyah or to the general FUEL email address was suggestive of a routine communication not something with the potentially serious consequences for which Vitol now contends. In summary, Genser’s position was that the email was not sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when it was intended to operate.
92. For Vitol, it is submitted that in order for a Default to have occurred within the meaning of the Events of Default Clause all that is required is that: (i) a party has failed to make a payment when it is due and (ii) the non-defaulting party has given notice to the defaulting party to make the payment. It points to the lateness of Genser’s new case on the point to say that it is a bad point.
93. Although I was referred to a number of authorities on the service of contractual notices (including examples where the Courts have treated notices of the right to terminate strictly), it seems to me that this is a matter of construction of the particular clause in this case. A considerable body of authority has built up around the use of anti-technicality clauses in shipping charters (see for example the decision in *Schelde Delta Shipping BV v Astarte Shipping BV (The Pamela)* [1995] 2 Lloyds Rep 249 which I was referred to by Counsel for Genser). However, this is not a case of an express anti-technicality clause, and I would be slow to apply that line of jurisprudence to the different context of an SPA which has been individually negotiated between commercial parties, with the benefit of legal advisers on each side. Further and in any event, the anti-technicality line of authorities simply reinforces the more general point that a notice clause must be clear, definite and unambiguous and that the starting point is the contractual clause itself (see for example the observations in *Western Bulk Carriers K/S v Li Hai Maritime Inc (“The Li Hai”)* at [86] and [87]).
94. I have not found this point to be an easy one. It is too easy to start from the superficial stance that the 30 May 2019 email left much to be desired as a notice of default, when

viewed with hindsight, and could have been improved without much difficulty, for example, by referring to it as a Default Notice and by relating the alleged failure and consequences to the specific provisions in the SPA.

95. However, that is not the correct approach. Genser knew or ought to have known that if it failed to make a payment due under the SPA, that upon Vitol serving a notice requiring payment, it had two banking days to make payment or Vitol had the contractual right to terminate and liquidate the SPA. In my judgment, there is no basis to read into the default regime a further requirement that a notice of default must specify that Genser was required to make payment within two days or that, in default, Vitol would exercise its rights under the Events of Default Clause. That requires a significant re-writing of the clause and if the parties had intended that a notice of default needed to set out the **consequences** of default as well as the **trigger** for it (here the non-payment) and the **cure** (payment within two banking days), they would have said so. The clause requires: “*notice to the defaulting party to make the payment*”. If not cured by making payment within 2 working days, a default is deemed to occur. Here, Genser concedes that the email was a demand for payment and in my view that is sufficient.

### ***The Service Issue***

96. I have set out above the Notice Clause in full. It requires that a notice “*shall be in writing*” and in the case of notices sent to Genser differentiates between the appropriate recipients depending on whether the notice concerns: “*Fuel Operational*” (in which case the addressees for notice was Mr Mohammed and the generic FUEL address); “*Financial Contact*” (in which case, it was Mr Abdulai and the generic FUEL address) and “*Contracts/Pricing/Notification*” (in which it was the addresses for Mr Asiamah-Adjei, Ms Menyah and the generic FUEL address). In fact, the Default Notice was sent to Mr Asiamah-Adjei and Mr Abdulai, but not to Ms Menyah or the generic FUEL address.
97. Genser’s case is that the 30 May 2019 email sent by Mr van Vliet was not validly served in accordance with the Notice Clause in the SPA. Its case is that the clause is prescriptive not permissive and that it was a condition precedent to the validity of the Default Notice that it be served on each of the three addressees. Although it no longer advances a construction of the Notice Clause whereby it would be deemed served, whether or not seen by the recipient, it does contend that the deeming aspect of the

clause is significant because the time at which the notice is served is of critical importance where, as here, the defaulting party has only two banking days to remedy the default. It submits, that whereas Vitol was content that all notices by email should be sent to its generic email address, Genser sought to reduce the risk of non-receipt (or the risk that a recipient did not read it) by stipulating service on the email addresses of two individuals (as well as the generic FUEL address). This, it submits, reflects the fact that “notifications” were likely to relate to the more important, contractual matters. Vitol has, it says, made a mistake (albeit a costly one) and the Court should not shy from the conclusion that, on the proper construction of the Original SPA, the failure to serve the Default Notice on all three addresses is fatal. The underlying reason, Mr Mills, submits is the need in any system of commercial law for there to be certainty as to the parties’ rights and duties and predictability of dispute resolution. In this regard, he referred me to the observations of Steyn LJ in *Novorisik Shipping Co v Neopetro Co Ltd (the Ulyanovsk)* [1990] 1 Lloyd’s Rep 425 at 40; of Lord Bingham in *Homburg Houtimport B.V. v Agrosin Private Ltd (The Starsin)* [2004] 1 A.C. 715 at [13] and to the example of that strict approach in the decision of the Court of Appeal in *Von Essen Hotels 5 Ltd v Vaughan* [2007] EWCA Civ 1349. He also referred to the law on unilateral notices in the seminal decision in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749.

98. Vitol’s case is that, on its proper construction, the Events of Default Clause does not itself provide that strict compliance with the Notice Clause is a condition precedent to validity of the Default Notice and that its primary purpose was simply to make a party that has failed to pay in accordance with the terms of the contract, aware of that failure. The Notice Clause itself is not framed in the language of a condition precedent and, it submits, there is nothing to suggest that the parties might lose their rights in the event of something which falls short of strict compliance. In particular, it submits that the Notice Clause does not make clear whether service on one addressee is sufficient or whether it requires the communication to be sent to each contact. Mr Dhar for Vitol referred me to the caution in *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2016] 1 All ER (Comm) 536 at [207] that: “... the word “shall” does not say or imply anything about what the consequence is intended to be of failing to perform those obligations” and to the absence of any use of the term such as “shall” in the Events of Default Clause here.

99. In my judgment, for the reasons submitted by Vitol, as a matter of the proper construction of the Notice Clause and Events of Default Clause there is nothing to support Genser's case that strict compliance with the Notice Clause was necessary or that compliance with it is a condition precedent to its validity. Secondly, in my judgment, objectively construed the service of the Default Notice cannot be viewed as exclusively concerned with "*Contract/Notification/Pricing*" but was also a "*Financial*" matter such that service on Mr Abdulai was permitted. However, and in any event, in my judgment on the proper construction of the Notice Clause, Vitol was not required to serve both or all four addressees. It was in my judgment sufficient to serve only one address. There is plainly force in the submission made on Genser's behalf that someone who assiduously applied themselves to the task of serving a notice, if they had the Original SPA alongside them, would not have chosen to take the risk of serving only one of the four addresses. However, that to my mind is not the correct inquiry. Any reasonable commercial party reading the express terms of the Original SPA would have concluded that if Genser had intended that both or all four addressees were to be served, it would have said so. Although there was some evidence before me that Mr Asiamah-Adjei did not generally concern himself with invoicing matters, there is nothing to suggest that was part of the factual matrix at the time of entry into the Original SPA or the Third Addendum. Any reasonable person would conclude that service of a notice on Mr Asiamah-Adjei (Chief Executive and President) and Mr Abdulai (Financial Controller) would be sufficient to bring such a notice to the attention of Genser.
100. This is sufficient to dispose of the Service Issue.
101. In my judgment, for all of these reasons, the Default Notice was a valid notice within the meaning of the SPA.

### ***Estoppel***

102. In light of the fact that I was addressed on the point in some length, if I had concluded otherwise that the Default Notice was not a valid Default Notice because it was not in proper form or because it had not been validly served on Genser, I would have concluded, having regard to the principles as established in the *Tinkler* case, that Genser was estopped by estoppel from convention from denying that it was valid and had been validly served for the following reasons.

103. As to the relevant common assumption that the Default Notice was in valid form and validly served, the former point was taken for the first time on the eve of the trial. However, of greater significance is that Genser did not at any time contest the validity of the Default Notice. On the contrary, in his email message on 31 May 2019, Mr Abdulai sought to excuse Genser's delay in payment and did not contend that the notice was invalid *per se* and Mr Asiamah-Adjei's email sent on 7 June 2019 (sent after the Notice of Termination had been served on Genser) did not contend that there was any defect in the Default Notice relied upon and said that "the Settlement Amount" would be paid "*right away*". The capitalisation is significant and is consistent with Mr Asiamah-Adjei understanding that the bulk of the sum outstanding invoices for the March, April and May cargoes had been accelerated owing to Vitol's claimed termination of the SPA. When, on 17 June 2019, Mr Asiamah-Adjei agreed to pay the outstanding invoices, they included those invoices even though they would, but for the termination, not have been due on their face until 29 June 2019, 29 July 2019 and 29 August 2019. Although Mr Dhar is correct also to point to the absence of any challenge to the technical validity of the Default Notice in either Genser's report dated 30 December 2019 and its letter to Vitol dated 9 January 2020, I don't place significant weight on these factors given that the parties were by then effectively in dispute with one another.
104. As to whether Genser bears some responsibility for Vitol relying on that common assumption, in my judgment it does. For the reasons just set out, in the communications which followed service of the Default Notice and the Termination Notice, Genser was impliedly if not expressly representing to Vitol that the SPA had been validly terminated and was trying, understandably, to mitigate the situation for its benefit, including by seeking further time to pay the sums alleged to be due.
105. I am satisfied that if Genser had said at the time that the Default Notice was not valid, Vitol would have taken steps to protect itself (for example, by serving a default notice without prejudice to its position on the validity of the earlier notice) and that Vitol suffered a detriment which makes it unconscionable now for Genser say, on purely technical grounds, that the Default Notice was not valid, that Vitol was not entitled to terminate the SPA and that the Settlement Amount is not due. That, as Mr Dhar submitted, is precisely the territory in which estoppel by convention operates.
106. It follows from my conclusions above, that Genser's principal challenges to the Settlement Amount fails.

107. In light of that conclusion, it is not strictly necessary for me to consider Vitol's alternative Unpaid Invoices Claim. However, in view of the fact that the points were fully argued before me, and in case this matters elsewhere, I will set out my conclusions on those alternative claims.

### **The June 2018 Cargo Invoice**

108. By way of reminder, the June 2018 Cargo Invoice S1818478 is for USD 83,262.71 and was for 1,566.507 m/t propane delivered on 23 June 2018 by the Gremio. It is dated 10 July 2018 and was sent to Genser the same day. As I have already set out, a dispute arose between the parties because there was a discrepancy between the vessel's discharge figures and the shore quantity. I have already set out the emails by which Ms Menyah gave notice of the dispute to Vitol and I have been referred by Counsel for Genser to the emails showing that the dispute continued well into 2019. Genser's case is that time started to run against Vitol under the Time Bar Clause and that by the time the claim form was issued on 18 February 2020, its claim had become time barred and extinguished.
109. Vitol on the other hand contends that the Determination of Quality and Quantity Clause which provides that "*(t)he quantity of Product sold under this Agreement shall be the vessel discharge figures determined at the discharge terminal by an independent inspector*" is conclusive. I have been shown the relevant certificate from Intertek dated 25 June 2018 and it can be seen that the vessel discharge figures were determined at the relevant time to be 1566 m/t.
110. The issue is one of construction as to the interrelationship of the Determination of Quality and Quantity Clause with the Time Bar Clause. There is nothing in the Determination of Quality and Quantity Clause to suggest that the independent inspector's figure is conclusive for all purposes. Moreover, the Time Bar Clause expressly contemplates that there may be a dispute as to the Seller's failure to deliver Product meeting "*the contractual description and/or condition and/or quality and/or quantity*".
111. It seems to me that on the proper construction of these clauses, the figure provided by the independent inspector is to be determinative unless and until challenged within the 45 days following completion of discharge.
112. Here, I am satisfied for the reasons I have set out that Genser did challenge the quantity and that the Time Bar Clause was operative. I agree with the submissions made on

behalf of Genser that the claim has now been extinguished. Given that, as I have already noted, this dispute had rumbled on well into 2019, it is not clear to me why Vitol did not take any steps to bring a claim but, in my judgment, it is now too late to do so. Time bars in commercial contracts play an important role in encouraging early resolution of disputes and in ensuring that disputes are played out promptly when the parties' recollection of matters are not stale.

### **The Late Payment Interest Invoice**

113. The Late Payment Interest Invoice S1913404 is an "Interest Invoice" in the sum of USD 19,654.11. It claims the sum of USD 17,885.17 in relation to: (a) 7 days delay on USD 2,000,000 and (b) 19 days delay on USD 2,495,712.81 in relation to the January cargo and the sum of USD 1,768.94 is claimed in relation to 18 days delay on the February Floating Storage Unit.
114. It is common ground that this invoice is only due if Vitol is correct to say that the parties generally agreed to pay interest on late payments.
115. For the reasons already set out by me in this judgment, I am not satisfied that there was any general agreement to pay interest on late payments, as opposed to the two specific occasions where Genser agreed to pay interest on specific cargoes or invoices.
116. In my judgment, Genser is not obliged to pay the Late Payment Interest Invoice.

### **The June 2019 Cargo Invoice**

117. The June 2019 Invoice S1914040 is in the sum of USD 390,000 and relates to the provision of the Floating Storage Unit between 08:00 on 31 May 2019 to 08:00 on 30 June 2019. The due date for the June 2019 Invoice is 1 July 2019. Genser disputes the liability to pay USD 52,000 of the June 2019 Cargo Invoice relating to the 4 days between 27 June 2019 and 30 June 2019 because, it says, Genser terminated the SPA by declaring force majeure. Considering my conclusions on the Settlement Amount, strictly speaking it is not necessary for me to deal with this issue but, given that I heard detailed argument, I will set out my conclusion. It is first necessary to set out some more of the factual background.
118. The supply of oil is highly regulated in Ghana and elsewhere. In Ghana, the importation of petroleum products was limited to either Bulk Distribution Companies ("BDCs") or Oil Trading Companies ("OTCs"). In November 2015, Genser had applied for its own OTC licence but it was declined by the NPA (acting by Mr Asaga)

in July 2016 because Genser, as an Independent Power Producing Company (“IPPC”) was classified by the NPA as a bulk consumer of petroleum products and bulk consumers were not allowed to import petroleum for their own consumption. This was said by the NPA to be to avoid the fragmentation of Petroleum Service Providers (“PSPs”) and to streamline and monitor all activities in the downstream industry and BDCs and OTCs were authorised to supply power generation companies such as Genser.

119. Mr Asiamah-Adjei’s evidence in his second witness statement was that the political scene in Ghana was not very predictable and that upon Mr Asaga being replaced by Mr Tampuli as Chief Executive of the NPA, the political mood music changed such that Genser was warned that the existing concessions (whereby Genser was importing using Dome Energy’s BDC licence and utilising Gold Fields’ tax exemption) might be withdrawn. I accept that evidence because it seems to be consistent with what followed.
120. On 17 May 2019, Mr Tampuli for the NPA sent a letter or notice to Genser for the attention of Mr Asiamah-Adjei (“the NPA Letter”). Mr Asiamah-Adjei’s evidence was that he received it on 21 or 22 May 2019. Under the heading IMPORTATION OF BULK PROPANE the letter goes on to state:
- “The National Petroleum Authority (NPA) wishes to inform Genser Energy Ghana Limited (Genser) that licences in the petroleum downstream industry have been restructured to enable the NPA effectively [to] monitor all activities within the sector. As a result, importation of petroleum products is limited to Bulk Distribution Companies (BDCs). Additionally, bulk consumers are required to be supplied their fuel needs by licensed Oil Marketing Companies (OMCs). The above notwithstanding, Bulk Consumers that require fuel for power generation may be granted approval to purchase their fuel directly from BDCs. In this regard, Genser is directed to purchase propane from any licensed BDC for power generation”.*
121. On 28 June 2019, Addleshaw Goddard LLP, as solicitors to Genser, sent to Vitol a notice described as “Notice of Discharge of Agreement” and dated 27 June 2019 (“Genser’s Notice of Discharge”). This purported to give notice that the SPA had been or was thereby discharged on the grounds of frustration because by a letter dated 17 May 2019 from the NPA, Genser had been informed that licences in the petroleum downstream industry had been restructured to enable the NPA effectively to monitor all

activities within the sector as a result of which Genser had been directed or ordered to purchase propane only from any licenced Bulk Distribution Company for power generation. In the alternative, Genser's Notice of Discharge notified Vitol that the NPA's direction or ordinance that it could purchase propane only from a licensed Bulk Distribution Company constituted a Force Majeure event that renders impossible performance of its purchase obligations under the SPA.

122. Genser relies on the NPA letter as a force majeure event for 4 days between 27 June 2019 and 30 June 2019, because it says the NPA's decision to restructure the licensing regime in the downstream petroleum industry was catastrophic such it was unable to purchase propane (see the Amended Defence and Counterclaim at paragraphs 45 to 49). As Mr Mills put it in closing, the consequence of the NPA's decision was that Genser could not perform its obligation to take delivery of the propane because it could no longer use Dome Energy's licence, and that was due to an impediment beyond its control.
123. The effect of my conclusions on the Default Notice is that Vitol had validly terminated the SPA on 6 June 2019. On that ground alone, it seems to me that it was not open to Genser to declare force majeure later in June 2019. Further, on the proper construction of the NPA Letter, Genser was being directed to purchase their fuel needs from BDCs or from OMCs. The NPA Letter does not contain any specific timescale or suggest that it was intended to take effect forthwith. It is not clear to me why the NPA Letter prevented Genser from continuing to take Product from Vitol using Dome Energy (a BDC). Mr Asiamah-Adjei may well be correct that the NPA Letter was ultimately driven by the Ghanaian Revenue Authority, which regarded Genser as an "*easy target*", but the withdrawal of the concession would not in itself prevent performance, as opposed to making it more expensive for Genser. The burden is on Genser on this point, and in my view it has not done sufficient to establish that the NPA Letter prevented performance which is relevant to this invoice, which was for Floating Storage Unit charges. The June 2019 Floating Storage Invoice was due on 1 July 2019 and there was a specific exemption from a material force majeure event in relation to "*prevention of a party's accrued obligation to make payment under the Agreement*". I am unable to see how the NPA Letter prevented performance of that obligation.

## **Statutory Interest**

124. In light of my conclusion on the Seventh Addendum, namely that it was not agreed, binding or otherwise performed, there was no contractual basis for Genser to pay interest at 8% above LIBOR on all outstanding debts from 2019 (including in relation to the Settlement Amount).
125. However, the issue then arises as to whether Genser is liable to pay interest under the Late Payment of Commercial Debts (Interest) Act 1998 (“the 1998 Act”). Article 4 of the Late Payment Payment of Commercial Debts (Rate of Interest) (No 3 Order 2002 (SI 2002/1675) provides for a rate of 8% over the Bank of England base rate.
126. Although it did not take issue with the claim for statutory interest in the Amended Defence and Counterclaim, Genser’s position in its Skeleton Argument and now is that Vitol is not entitled to interest because section 12 of the 1998 Act precludes it.
127. Section 12 of the 1998 Act is in the following terms:  
*“This Act does not have effect in relation a contract governed by a law of a part of the United Kingdom by choice of the parties if:*  
*(a) there is no significant connection between the contract and that part of the United Kingdom; and*  
*(b) but for that choice, the applicable law would be a foreign law”.*
128. The Jurisdiction Clause provides that the governing law of the SPA chosen by the parties is England. Genser submits that the SPA does not have any, let alone any significant connection with England and that, but for the choice of the parties, the SPA would have been governed by the law of Switzerland, the place of Vitol’s central administration or that, if the SPA was manifestly more closely connected with another country, it would be Ghana not England. For this purpose, it submits it is still relevant to apply European law. In the case of a contract entered into after 17 December 2009 and prior to 31 December 2020 (the end of the Brexit transition period), it submits this means Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I”). Where, as here, the parties have selected no governing law of the contract, article 4(1)(a) provides that in a contract for the sale of goods, the law of the country where the seller has its habitual residence will prevail. Article 19 of Rome I provides that a company’s habitual residence is generally the location of its central administration. However, pursuant to article 4(3) this may give way to another country where the circumstances of the case make it clear that the contract is manifestly more closely connected with a country other than that assigned by article 4(1).
129. Vitol maintains its claim for interest under the 1998 Act.

130. It is common ground that the issue for determination by me is whether the SPA has a significant connection with England and the parties were agreed, and I agree, that the relevant legal guidance is set out by Popplewell J in *Martrade Shipping & Transport GmbH v United Enterprises Corpn* [2014] EWHC 1884 (Comm).
131. At [11] and [12], the Judge explained the policy behind the 1998 Act noting that the interest rate is not intended to be compensatory as it exceeds the rate at which most commercial creditors would be likely to have to borrow whilst being kept out of their money. Rather it is properly to be regarded as a penal rate which is intended to act as a deterrent and to promote the purposes of the 1998 Act reflected in section 6 namely, (a) the need to protect commercial suppliers whose financial position makes them particularly vulnerable if their debts are paid late and (b) the general deterrence of late payment of commercial debts. He notes that it is not discretionary, save to the extent that the conduct of the parties may justify its disapplication in whole or in part under section 5. The 1998 Act gives effect to domestic socio-economic policy and seeks to promote the benefit of prompt payment of debts on the economic life of the United Kingdom.
132. At [14] to [16] of the Judgment, dealing with the reasoning behind the requirements in section 12 of the Act, Popplewell J. explains why it is not of itself sufficient for parties to a contract with an international dimension to have chosen English law to govern the contract. First, he notes that the 1998 Act reflects policy considerations which are not necessarily apposite to contracts with an international dimension. This is why an “additional connection” with England and the relevant contract is required. Secondly, he notes the considerable economic value to this country that international parties, including those notably involved in shipping, regularly choose English law and jurisdiction to govern their contracts.
133. He says at [16]:
- “Section 12 recognises that subjecting parties to a penal rate of interest on debts might be a discouragement to those who would otherwise choose English law to govern contracts arising in the course of international trade, and accordingly does not make such consequences automatic”.*
134. And at [17]:
- “In my judgment factors which are capable of fulfilling the section 12(1)(a) criterion of “significant connection” must connect the substantive transaction itself to England. Whether they provide a significant connection, singly or cumulatively, will be a*

*question of fact and degree in each case, but they must be of a kind and a significance which makes them capable of justifying the application of a domestic policy of imposing penal rates of interest on a party to an international commercial contract. They must provide a real connection between the contract and the effect of prompt payment of debts on the economic life of the United Kingdom”.*

135. At [18] he sets out a non-exhaustive list of the relevant factors:

*“(1) Where the place of performance of obligations under the contract is in England. This will especially be so where the relevant debt falls to be paid in England. But it may also be where other obligations fall to be performed in England or other rights exercised in England. If some obligations might give rise to debts payable in England, the policy considerations underlying the 1998 Act are applicable to those debts; and if some debts under the contract are to carry interest at a penal rate, it might be regarded as fair and equitable that all debts arising in favour of either party under the contract should do so.*

*(2) Where the nationality of the parties or one of them is English. If it is contemplated that debts may be payable by an English national under the contract, the policy reasons for imposing penal rates of interest may be engaged; and if only one party is English, fairness may again decree that the other party shall be on an equal footing in relation to interest whether he is the payer or payee.*

*(3) Where the parties are carrying on some relevant part of their business in England. It may be thought that persons or companies who carry on business in England should be encouraged to pay their debts on time and not use delayed payment as a business tool even in relation to transactions which fall to be performed elsewhere. Moreover, a supplier carrying on business in England may fall within the category identified in section 6(2)(a) of those whose financial position makes them particularly vulnerable to late payment of their debts, although these are not the only commercial suppliers for whose benefit the 1998 Act is intended to apply. The policy of the 1998 Act may be engaged in the protection of suppliers carrying on business in England, whether financially vulnerable or not, even where the particular debts in question fall to be paid by a foreign national abroad.*

*(4) Where the economic consequences of a delay in payment of debts may be felt in the United Kingdom. This may engage consideration of related contracts, related parties, insurance arrangements or the tax consequences of transactions”.*

136. Finally, at [19] Popplewell J. makes clear that an English jurisdiction clause cannot be a relevant connecting factor for the purposes of section 12(1)(a) because that does not in itself connect the substantive transaction itself to England and because choice of forum governs procedural rights and remedies, not the substantive obligations.
137. What then are the factors, if any, in this case which mean that the SPA has a sufficient connection with England to justify the application of the policy on penal interest on late payment of debts in the 1998 Act?
138. Vitol relies on three factors. The first is that the numerous invoices specify payment to be made to Vitol in London. Taking as one example only, invoice S1907772 for the February 2019 cargo specifies:
- PAYMENT**  
IN USD BY ELECTRONIC FUND TRANSFER  
DUE DATE :29 MAY 2019  
TO :JPMORGAN CHASE BANK NEW YORK (SWIFT:  
CHASU33)  
IN FAVOUR OF :JPMORGANCHASE BANK LONDON  
(SWIFT:CHASGB2L)”
139. I take this to mean that the ultimate beneficiary is Vitol in London.
140. Secondly, Vitol relies on the evidence of Mr Abdulai that payments under the SPA were made to Vitol in London and that this was where Vitol wanted payments to be sent and were in fact sent.
141. Thirdly, Vitol relies on the evidence of Mr Maximo that critical decisions in relation to the SPA were taken in, and the key commercial decision makers, were all based in London.
142. Mr Mills for Genser submitted that the invoices were not a permissible aid to construction of the payment obligations in the SPA and that there was no requirement in the SPA for Genser to make payment to Vitol through that bank. The usual obligation would be for the debtor to seek out the creditor which, in the case of Vitol, was Switzerland. He submitted that the initial payment instruction was to JP Morgan in New York and that the provision in the SPA that the “Payment Due Date” was to be determined by reference to New York Federal Reserve banking days, meant that the proper construction was that the payment obligation was in the USA.
143. In my judgment, Vitol is right to point to: (a) the ultimate payment obligation being payment of the debts in England and (b) the fact that Vitol was carrying on relevant

parts of the commercial business in London as conferring a sufficient connection between the UK and the SPA for the purposes of the 1998 Act.

144. Finally, if I had not been so persuaded, it seems to me that Vitol would have been entitled to statutory interest under section 35 of the Senior Courts Act 1981. I can see no reason not to exercise my discretion here to award interest and in relation to a debt payable in dollars, the rate would usually be based on the US prime rate, plus 1%.

### **Disposal**

145. I invite the parties to agree, if possible, the terms of an Order which reflects my judgment and to deal with matters consequential on the judgment. If matters cannot be agreed, I will deal with them at formal hand down.