Neutral Citation Number: [2023] EWHC 1609 (Comm)

IN THE HIGH COURT OF JUSTICE **Claim No: LM-2022-000140**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

Rolls Building
Fetter Lane
London, EC4A 1NL
4 July 2023

B e f o r e:

DAVID ELVIN KC

(Sitting as a Deputy High Court Judge)

BETWEEN:

ADDAX ENERGY SA

Claimant

and

PETRO TRADE INC

Defendant

- -

JASON ROBINSON (instructed by Hill Dickinson LLP) appeared on behalf of the Claimant.
The Defendant did not appear and was not represented.

- -

Hearing date: 28 March 2023

- -

J U D G M E N T
(As approved by the Court)

This judgment was handed down remotely at 10 am on 4 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

DAVID ELVIN KC (Sitting as a Deputy Judge of the High Court)

Introduction

1. The Claimant, Addax Energy SA ("Addax"), claims US$2,761,408.78 from the Defendant, Petro Trade Inc. ("PT") together with contractual interest in respect of four unpaid invoices for petroleum products delivered to PT in Liberia, namely:

    (1) One invoice under a gasoil sales contract dated 25 August 2016 ("the Gasoil Contract") for the balance due in respect of gasoil held at China Union since 2016, totalling US$532,506.86 [G/3381]; and

    (2) Three invoices under the Term Agreement dated 3 January 2018, and put into writing on 20 November 2018 ("the Term Agreement"), totalling US$2,228,901.92 which fell due for payment on 4 December 2020.

2. Addax is a Swiss company that trades a variety of oil products (refined and unrefined) and PT, in the words of its CEO Marwan Hindawi, is "*one of the main importers of petroleum and derivative products into the Liberian market. It also owns and operates a number of gas stations over Liberia*" (first witness statement, para. 8). The petroleum products that give rise to the claim here are mogas (motor gasoline) and gasoil (diesel fuel).

3. Addax issued its claim on 14 April 2021 in the Commercial Court and PT acknowledged service on 18 March 2021 and indicated that it intended to challenge the Court's jurisdiction. It did not file a defence until 31 March 2022 in response to which Addax filed a reply on 24 April 2022.

4. In its application challenging jurisdiction issued on 16 June 2021, PT did not dispute the Court's jurisdiction to determine the dispute regarding invoice 17415813 under the 25 August 2016 Gasoil Contract (see below) but only disputed jurisdiction regarding the Term Agreement claim (invoices 17409472, 17409473 & 17409474, see below) principally on the footing that the Term Agreement had not, in fact, been agreed and therefore there was no exclusive jurisdiction clause in favour of the Courts of England and Wales.

5. Cockerill J. heard the application on 14 January 2022 and dismissed it ([2022] EWHC 237 (Comm)), concluding on the evidence then available that:

> "39. Taking matters all together, whether there is a course of dealing depends on the facts. It depends upon looking at all of the facts against the relevant background. This is not a full trial. However, looking at all of these facts against the relevant background I conclude that an argument that there is a course of dealing does have a plausible evidential basis in the light of all these matters.

> 40. Further, and one might say adding somewhat to this background, it certainly looks that Addax at least subjectively thought that papering up any Term Agreement amounted to adopting the spot contract terms and that it did so not because those terms were discussed orally, but because those were the terms the parties used, i.e., there was a course of dealing. Thus, the cover email under which the written Term Agreement was sent read: "Please find on this message the agreement between Ayesa and Petro Trade." The subject of that email read: "Petro Trade - Term Contract 2018 to 2019 Gasoil Mogas". Addax was not suggesting the document, which was on essentially the same terms as the individual spot contracts, was a draft. It was purporting to send an agreed document. Addax also makes the point that this communication did not provoke howls of outrage, or even any statement of disagreement, either as to the conclusion of the contract or as to the terms contained within it. Nor was there any attempt to negotiate terms or to suggest that it contained terms which were not expected. One argument which will inevitably be deployed is that had they had such an issue Petro Trade would have challenged it immediately and that they did not do so because they knew it to be accurate.
>
> 41. As I say, these later matters only add somewhat to a conclusion which I would already reach on the basis of the other facts which I have outlined. However, taking all these matters together, I conclude that there is a plausible evidential basis both for the conclusion of a Term Agreement and for the inclusion in that agreement of a jurisdiction clause. Indeed, to the extent that I need to, I would conclude that Addax's case is the more plausible.
>
> 42. I therefore conclude that despite all the excellent points which have been made on behalf of Petro Trade, the defendant's application fails."

6. The issue of the Term Agreement and the course of dealing are matters I will have to deal with in the light of the full evidence now before the Court. However, it appears to me that the expanded evidence as it now stands at trial provides clear support for Cockerill J's decision reached on a "plausible evidential basis".

7. Subsequent to the dismissal of its jurisdictional challenge PT de-instructed its lawyers, Dentons, and has not taken part in the proceedings since. On 30 June 2022 the Court ordered that Dentons had ceased to act and orders by HH Judge Pelling KC dated 4 July 2022 (amended by me on 13 March 2023), 18 August 2022 and 22 January 2023 all proceed on the basis that PT would not participate in the proceedings and directed the mode of service of the documents on PT in its absence. PT has not provided disclosure or filed evidence and was not present or represented before me. It does not appear to have communicated with the Court since Dentons came off the record.

8. However, PT had set out its case against the claim with the assistance of experienced solicitors and counsel before it ceased to participate in these proceedings in not only its defence but in its skeleton argument and oral submissions before Cockerill J. on 14 January 2022 when it challenged jurisdiction. In connection with that application, two witness statements were filed by Marwan Hindawi on behalf of PT who was primarily the

representative of PT with whom Addax's representative, Francois Torre, negotiated and agreed the various trades of petroleum products. Mr Hindawi, is a director and CEO of PT.

9. I gratefully adopt the summary of the core principles applicable procedure where one party is unrepresented given by the Deputy High Court Judge (Simon Rainey QC) in ***Hirbodan Management Co v Cummins Power Generation Ltd*** [2021] EWHC 3315 (Comm) at [15]:

> "15. The core principles are as follows. First, where one party does not attend a hearing at trial, the participating party (here, the Defendant) is required to bring to the attention of the non-participating party what has happened. The Defendant has plainly brought all the elements relied upon, including the skeleton argument, to the attention of the Claimants. Second, the participating party is under an obligation to present the case fairly. This is not the same as a duty of full and frank disclosure on without notice applications, but an obligation to present the facts and arguments fairly. Thirdly, that involves drawing to the attention of the court facts and legal points which might be made by the non-participating party or which might be beneficial to the non-participating party. Fourthly, as part of that duty, the participating party must bring to the attention of the court any points which the non-participating had made whilst it was still represented or appearing, and points which had not been made but which might have been taken had it decided to attend."

10. Mr Robinson for Addax has admirably fulfilled those requirements including addressing in full written submissions (nonetheless titled "skeleton argument"), which he supplemented orally in Court, the possible points that PT might have made, having regard to the points made in PT's pleaded defence, in Mr Hindawi's witness statements and the submissions made to Cockerill J. by counsel for PT on 14 January 2022.

11. Addax's case was set out in a substantial trial bundle and was supported by the oral evidence of Francois Torre who, at the relevant times, was employed by Addax as trader on its West African desk and was personally responsible for agreeing the various trades with PT, generally with Mr Hindawi. He produced three witness statements, the first two dealing with issues on the jurisdictional challenge and the third which sets out a more complete picture, drawing together some of the factual material from the first two statements.

12. I refer where necessary to documents by reference to the Bundle volumes A-G and their pagination.

13. In essence, the disputes are centred on responsibility, and payment, for products left in nominated storage tanks in Monrovia and in respect of which Addax issued release notices and invoices. These focus on:

(1) Whether a binding Term Agreement was reached at all;

(2) The terms of the agreements between Addax and PT and, in particular, whether the Term Agreement said to have been agreed verbally on 3 January 2018 and evidenced by a written document sent on 20 November 2018 -

(a) passed the risk for the products to PT once the products were unloaded beyond the flange valve connecting the delivery hose and the port hose; and

(b) whether the issuing of release notes by Addax obliged PT to pay for the products stated in those release notes and pursuant to 4 invoices gave rise to liability by PT for the quantities of product and amounts claimed in them.

(3) In addition to disputing the contractual terms, and whether the Term Agreement had in fact been agreed, PT also argues that at some stage in 2016 or 2017 gasoil product was appropriated and, in early 2020 further product claimed under the Term Agreement was appropriated, since risk did not pass, it cannot therefore be responsible for it or for paying for a non-existent product. It pleads variously that it cannot be responsible for payment whether due to the application of the agreements that were reached, to estoppel, as a result of s. 7 of the Sale of Goods Act or frustration. It alternatively pleads that there was breach of a duty of care as pledgee of the products and that it is liable for the negligence of its contractor ACE in releasing the products. I deal with the detailed allegations below.

Dealings between Addax and PT

14. Mr Torre explained in his third witness statement (which I will generally refer to as "the statement" unless reference to the individual witness statements is required) at paras. 6-9 how Addax and PT began trading with each other in 2015 and how they traded. In the witness box Mr Torre said:

> "We got introduced to Petro Trade late in 2015. We first met in Monrovia -- that is how we were introduced -- by another customer we were supplying in the same country, in Liberia, which was called NP Liberia Limited. The first meeting went well and Petro Trade was supplied by another trading house, Total actually, and NP told them, "Look, it would be good, you know, to work as well with Addax, we trust them they are pretty good so try to work with them if possible as well". So Mr. Hindawi, the CO from Petro Trade visited us a few days later in Geneva and we checked the possibility to work together and we gave it a try. So the first deal that happened was a spot contract to which we agreed all the terms and which payment was covered at that stage still by a letter

of credit for the full quantity which was discharged in Monrovia."

15. With regard to the first trade, there was an exchange of emails between Mr Torre and Mr Hindawi on 9 November 2015 [G/1-5] which included Mr Hindawi's confirmation:

> "Dear Francois
>
> Offer is accepted taking into consideration the following points:
>
> 1. Buyer will be Model Trade or Petrotrade.
>
> 2. We agree on the DAP bases
>
> 3. Payment is 90 days from COD, as agreed in Geneva and as we are already buying from other suppliers
>
> 4. You need to send us the LC draft for DAP because we only receive the CIF bases LC
>
> Regards;
>
> Marwan Hindawi
>
> Chief Executive Officer
>
> Petrotrade Inc"

16. Mr Torre then sent out an email confirmation of the terms referred to (as in subsequent trades) as a "recap" on 10 November 2015 [G/6]:

> "**Subject:** Recap AESA/Petrotrade-Model Trade 2kt GO DAP Monrovia 13/16 November
>
> Dear Marwan,
>
> Following to our various discussions and communications, please find hereunder our recap for our next delivery of Gasoil to Monrovia:
>
> **Seller: Addax Energy SA**
>
> **Buyer: Petrotrade or Model Trade (the entity used for this deal to be confirmed asap by buyer)**
>
> **Product: Gasoil as per Liberian Spees with max 0.3pct Sulphur**
>
> **Quantity: 2000 MT +/-1 0cpt seller option**
>
> **Delivery: DAP Monrovia by MT Guyenne/sub during 13/16 November 2015**
>
> **Price : Platts Fob Med Gasoil 0.1 pet +USD 68.00/MT**
>
> **Pricing : Trigger basis with pricing to take place latest on December 15th if not mutually agreed before**
>
> **Payment: at 90 days from COD from delivering vessel covered by a LC issued or confirmed by a first class bank acceptable to seller**
>
> **Laytime : 18 hours**
>
> **Demurrage: as per delivering vessel charter party**
>
> **Others: as per latest lncoterms**
>
> We thank you very much for this new business opportunity, and will make sure all goes smoothly.

> New LC draft is under preparation, ans will be sent to you in a couple of minutes together with proforma invoices.
>
> Best Regards
>
> Francois Torre
>
> Addax Energy SA".

17. Mr Hindawi then emailed his acceptance within about 10 minutes [G/7].

18. A further recap was then sent for mogas on 13 November [G/30]:

> "**Subject:** Recap AESA/Petrotrade 2kt Mogas DAP Monrovia 19/22 November 2015
>
> Dear Marwan,
>
> Following to our various discussions and communications, please find hereunder our recap for our next delivery of Mogas to Monrovia:
>
> **Seller: Addax Energy SA**
>
> **Buyer: Petrotrade**
>
> **Product: Gasoline as per Liberian Spees**
>
> **Quantity: 2000 MT +/-1 0cpt seller option**
>
> **Delivery: DAP Monrovia by MT Guyenne/sub during 19/22 November 2015**
>
> **Price: USD 542.75/MT Fixed and Flat**
>
> **Pricing : n/a**
>
> **Payment: at 90 days from COD from delivering vessel covered by a LC issued or confirmed by a first class bank acceptable to seller**
>
> **Laytime : 18 hours**
>
> **Demurrage: as per delivering vessel charter party**
>
> **Others: as per latest lncoterms**
>
> We thank you very much for this new business opportunity, and will make sure all goes smoothly.
>
> Best Regards
>
> Francois Torre
>
> Addax Energy SA"

19. DAP under Incoterms signifies "delivered at place" and in respect of which is meant the seller delivers the good and transfers the risk to the buyer at the destination or agreed point within that place. The precise point was set out in cl. 13 of the spot contract forms used by Addax.

20. Spot contracts were issued following the recaps and their acceptance. The spot contracts were prepared and emailed to Mr Hindawi by Audrey Dervain of Addax, inserting the terms set out in the recaps, and this procedure was followed in subsequent trades.

21. The spot contract for the first gasoil trade (7006581) was issued on 13 November 2012, and sent by email at 15:14 [G/36-50] and in a format repeated throughout the 5-year trading relationship between Addax and PT started with:

> "THIS IS TO CONFIRM THE AGREEMENT REACHED BETWEEN THE SELLER AND THE BUYER ON 10/11/2015 MADE BETWEEN FRANCOIS TORRE FOR ADDAX ENERGY SA AND MARWAN HINDAWI FOR PETROTRADE."

22. The spot contract contained the terms agreed as to price, quantity and delivery set out in the recap which included the following in respect of delivery and payment (including some email merge codes which were not replaced):

> "7. DELIVERY
>
> DAP IN ONE CARGO LOT, ONE SAFE PORT / ONE SAFE BERTH BASIS MONROVIA, LIBERIA PER M/T GUYENNE/SUB ALREADY ACCEPTED BY BUYER DURING THE TENTATIVE DATE RANGE FOR ARRIVAL AT DISCHARGE PORT FROM 12-15 NOVEMBER 2015, WHICH ALWAYS TO BE CONSISTENT WITH DELIVERY DATE RANGE AT LOADING PORT AND SUBJECT TO WEATHER AND SAFE NAVIGATION PERMITTING.
>
> …
>
> 10. PAYMENT & TERMS OF CREDIT (LC)
>
> I. SELLER'S INVOICE SHALL BE BASED ON THE PRICE CALCULATION IN CLAUSE 9 AND THE QUANTITY IN METRIC TONS VAC AS EVIDENCED BY THE CERTIFICATE OF QUANTITY PURSUANT TO CLAUSE [REF_REF236025090 \R \H * MERGEFORMAT].
>
> II. PAYMENT SHALL BE MADE IN U.S. DOLLARS IN FULL, WITHOUT ANY OFFSET OR COUNTERCLAIM WHATSOEVER AND FREE OF CHARGES VIA A FULLY OPERATIVE DOCUMENTARY CREDIT ON THE PAYMENT DUE DATE BEING NINETY [90] CALENDAR DAYS FROM THE DELIVERING VESSEL COMPLETION OF DISCHARGE (COD DATE TO COUNT AS DAY 0), AGAINST PRESENTATION OF:
>
> A. SELLER'S COMMERCIAL INVOICE.
>
> B. COPY OF CERTIFICATE OF QUALITY REFERRED TO IN CLAUSE [REF _REF236025090 \R \H * MERGEFORMAT].
>
> C. COPY OF CERTIFICATE OF QUANTITY REFERRED TO IN CLAUSE 6.
>
> IN THE EVENT THAT CERTIFICATE OF QUALITY AND CERTIFICATE OF QUANTITY ARE NOT AVAILABLE BY PAYMENT DUE DATE THEN PAYMENT WILL BE EFFECTED AGAINST SELLER'S COMMERCIAL INVOICE AND SELLER'S LETTER OF INDEMNITY ACCEPTABLE TO BUYER (TELEX, FAX, ELECTRONIC TRANSMISSION ACCEPTABLE)
>
> THE ABOVE MENTIONED DOCUMENTS ARE ACCEPTABLE TO BUYER IN ANY OF THE FOLLOWING FORMATS: TELEX, FAX OR

> ELECTRONIC COPIES.
>
> BUYER SHALL BE RESPONSIBLE FOR ANY DELAYS TO THE DELIVERY, INCLUDING ANY COSTS ASSOCIATED WITH SUCH DELAYS, SUCH AS BUT NOT LIMITED TO DEMURRAGE AND/OR STORAGE COSTS, INCURRED AS A RESULT OF LATE OPENING OF SUCH DOCUMENTARY CREDIT.
>
> BUYER WILL REMAIN RESPONSIBLE AND LIABLE FOR FULL PAYMENT IN THE EVENT THAT PAYMENT IS NOT MADE UNDER THE DOCUMENTARY CREDIT FOR ANY REASON.
>
> III. IF PAYMENT DUE DATE FALLS ON A SATURDAY OR ANY NEW YORK BANK HOLIDAY OTHER THAN A MONDAY, PAYMENT WILL BE EFFECTED ON THE FIRST PRECEDING NEW YORK BANKING DAY. IF PAYMENT DUE DATE FALLS ON A SUNDAY OR A MONDAY NEW YORK BANK HOLIDAY, PAYMENT WILL BE EFFECTED ON THE FIRST FOLLOWING NEW YORK BANKING DAY.
>
> BUYER SHALL PAY AN INTEREST CHARGE ON LATE PAYMENTS FROM THE DUE DATE UNTIL SELLER RECEIVES PAYMENT, AT A RATE OF ACTUAL COST OF FUNDING AS ADVISED BY THE FINANCING BANK PLUS A MARGIN OF EIGHT PERCENT (8.0 PCT) PER ANNUM PRORATA, THE INTERESTS BEARING INTEREST."

23. Consistent with the agreement for the trade to be DAP, cl. 13 stated:

> "13. TITLE AND RISK
>
> TITLE AND RISK OF THE PRODUCT SHALL PASS FROM SELLER TO BUYER WHEN THE PRODUCT PASSES THE FLANGE CONNECTION BETWEEN VESSELS' PERMANENT CARGO DISCHARGE MANIFOLD AND THE DELIVERY HOSE(S) AT DISCHARGE PORT.
>
> FROM THIS POINT, ANY OBLIGATION OF THE SELLER AS TO THE CONDITION AND QUALITY OF THE PRODUCT SHALL CEASE AND THE SELLER SHALL HAVE NO LIABILITY FOR ANY DETERIORATION IN THE CONDITION AND/OR QUALITY OF THE PRODUCT FOR ANY REASON WHATSOVER, INCLUDING INHERENT VICE."

24. There were a series of other provisions dealing with matters such as the applicable law and jurisdiction (cl. 15, England and the English Courts), determination of quantity and quality, the nominated vessel, laytime, demurrage, duty, force majeure and default/termination - comprising 32 clauses in all.

25. The spot contract for the mogas (7006588) was issued on 16 November 2015 [G79-93] and contained materially similar provisions to those in the gasoil spot contract, above, and in the same format. The merge codes in this contract had been applied and in cl. 10 referred to cl. 6 where they had appeared in the gasoil contract. In particular clauses 7, 10, 13 and 15 were in the same or very similar terms.

26. Emails acknowledging receipt and acceptance of the terms of the spot contract for gasoil was sent by Mr Hindawi at 16:09 on 13 November 2015 [G/66] and in respect of that for the mogas at 15:57 on 16 November 2015 [G/94].

27. The next trade was for 5,000 tonnes of mogas and 5,000 tonnes of gasoil DAP Monrovia per M/T Winter Oak set out in a recap email dated 26 November 2015 [G/97] in respect of which the delivery date in early December 2015 was adjusted slightly and agreed by Mr Hamdan for PT. These were recorded in spot contracts 7006543 (mogas) and 7006643 (gasoil) sent on 27 November 2015 by Marc Mesgny of Addax [G/116-141].

28. Those spot contracts were in similar terms and format to those sent on 13 and 16 November, although cl. 10 in both had the incomplete merge codes as in the spot contract of 13 November and which, presumably, should be referred to cl. 6.

29. In my judgment, these early trades and the agreed terms recorded in the spot contracts set the framework and terms for the following 4-5 years of trading between Addax and PT (see the Annex to this judgment) where the main terms which were varied were those relating to price, quantity, and delivery dates and vessel. I will return below to such differences as did arise.

30. In oral evidence, Mr Torre explained the general approach between Addax and PT:

> "Q. So on a step-by-step basis, could you explain to his Lordship how you and Mr. Hindawi would agree to any particular trade?
>
> A. A lot of things were -- I mean everything was done orally with Mr. Hindawi. So first he would check when he needed products as per his local consumption and of course as per the ullage that could be found in the tanks because all products were there segregated. He would tell us, "Look, François, is it possible to have 2,000 tonnes delivered in about two to three weeks from now", which I would look at with my team and answer him, yes, it would be possible to discharge within that timeframe. So he would at that stage block the ullage, get the confirmation from LPRC, which was the entity running the term in Monrovia, and then we would simply from our side buy the product, fix the cargo -- sorry, fix a vessel, in order to ship the product to Monrovia. At that stage we would make the vessel nomination, send the vessel nomination to Petro Trade and, again with Marwan, talk on the premium.
>
> Q. The process you have just described, was this always the process that was followed when agreeing a trade, or were different trades agreed in different ways?
>
> A. No, it was always the process that we followed, you know. A pretty easy one and a usual one, I would say, for business so.
>
> Q. So when and you Mr. Hindawi discussed a particular trade, what did you discuss?
>
> A. We would discuss first the delivery period, the quantity and later on just the premium which will be added to the Platts, so the price of the product.

> Q. Between December 2015 and January 2018, how would you describe the nature of the trading relationship between Addax and Petro Trade?
>
> A. A very good one. There was a lot of confidence, a lot of trust between us two and everything was very usual, you know. He would call me, "Look François, I have managed to get some ullage in two weeks, can you be fast in supplying gas oil because we can have a larger part of the ullage there in the LPRC". I would confirm him that and then send the cargo and just after we would check and agree together on the last point which was always the premium to be applied."

31. It appears that the parties were already contemplating a longer term arrangement since, in late November 2015, PT requested Addax to agree term contracts for both PT and its sister company Model Trade. Although a draft for gasoil was sent by Addax on 27 November, and this was subject to one request for amendments, it did not proceed to a conclusion.

32. However, on about 1 or 2 December 2015 a tripartite contract was entered into described as a Secured Distribution Agreement ("SDA") [G/212-267]. The parties to this were Addax, PT and ACE Global Depository DMCC ("ACE"). Under the SDA, Addax was the "Supplier", PT was the "Buyer" and ACE was referred to as "ACE Global".

33. Mr Torre described in his statement the circumstances in which the SDA was agreed (omitting references):

> "10 … Under the SDA Addax would supply goods to Petro Trade under separate sale agreements which would be stored at approved third party storage facilities in Liberia subject to monitoring and collateral management by ACE.
>
> 11 The SDA was Petro Trade's idea and it was necessary for two reasons. First, Petro Trade did not have the financial resources to pay for and/or issue letters of credit for whole parcels of products ordered for delivery to Liberia. A typical shipment was between 5kt and 7kt. Most buyers will pre-pay for the entire parcel but, in Petro Trade's case, the goods were released to and paid for in smaller lots of around 500MT or 1000MT. It would not have been feasible to ship the products to Petro Trade in lots as small as 500MT or 1000MT as the freight costs (and accordingly the price premium that Addax would have to charge Petro Trade) would have been disproportionate.
>
> 12 The second reason is that in Liberia a trader cannot discharge products in its own name without a licence issued by Liberian Petroleum Refining Company ("LPRC"). LPRC is a Liberian state-owned company which, as well as having its own storage facilities, has the exclusive right to grant import licences for petroleum products. Licences are issued only to Liberian companies. Petro Trade had a licence and Addax did not.
>
> 13 The SDA was amended by addenda dated 28 December 2015 and 2 March 2016… The first addendum amended the schedule of approved products. The second addendum reflected the addition of the China Union facility to the SDA by increasing the quantity of gasoil in the schedule of approved products and adding tank 2 at the China Union facility to the list of approved storage facilities, (see 35 below).

> 14 The products supplied under the SDA were discharged from the vessels in Monrovia and stored in LPRC's tanks (and, sometimes China Union's tanks) in Petro Trade's name, as can be seen from the ACE Global stock reports. Operations usually sent Petro Trade a copy of the bill of lading endorsed to Petro Trade (for example, New Ranger). The products were commingled in the tanks with products belonging to other importers. Petro Trade paid the storage charges and all taxes and duties based on the full quantity discharged by the vessel after discharge of the products from the vessel.
>
> 15 Petro Trade or Model Trade (a Lebanese company associated with Petro Trade) on Petro Trade's behalf would open letters of credit for lots of around 500MT to 1000MT. The lots were priced as explained in paragraph 30 below. Once a letter of credit was confirmed, Addax's LC department would give the go ahead for operations to instruct ACE to release the product to Petro Trade. This was usually documented in a release order agreement …
>
> 16 The SDA envisaged that there would be separate sale contracts between Addax and Petro Trade. The Methodology of Release dated 2 December 2015 which is attached to the SDA refers specifically to a supply contract dated 3 December 2015."

34. The recitals in clause 1 of the SDA, "Preliminary" also set out its purpose:

> "A. The Supplier is the owner of Petroleum Products as more particularly described in this Agreement and Annex VIII (herein generally referred to as "'Products"), and the holder of the security interest in the Products constituting the collateral, which the Buyer is desirous of purchasing from the Supplier.
>
> B. The Supplier does not have the requisite infrastructure or skills to monitor and manage the risks associated with the storage and release of the Products, hence it has been agreed between the Buyer and the Supplier that the Products shall be delivered and stored with the Buyer or a third party contracted by the Buyer, who has facilities equipped for the purposes of storing such Products. The Buyer desires in order to furnish security for the payment of the Products or any part thereof, that the Supplier shall have a security interest in the said Products.
>
> C. In respect of such Products, the Supplier has requested and the Buyer has agreed that ACE Global shall be engaged to provide Secured Distribution Services as described in Annex II hereto attached, for the account of the Supplier, and ACE Global has agreed to do so upon the terms and subject to the conditions mentioned hereinafter.
>
> D. This Agreement is subject to ACE Global's Warehousing and Inspection General Terms and Conditions attached hereto as Annex I and Annex I BIS.
>
> E. To the extent that there is a conflict between the provisions of this Agreement and any provision of Annex I and Annex I BIS, or any other annex or schedule hereto, the provisions of this Agreement shall prevail, notwithstanding any provision contained in such annex or schedule, to the effect that any terms of such annex or schedule is intended to take precedence."

35. As Mr Torre explained, there were two subsequent addenda to the SDA [G/362-364; G/531-556] one of which, as he stated, included an additional storage tank at the China

Union facility. Under the SDA, PT confirmed that it would procure space in designated tanks for storage in respect which ACE had exclusive use and control ACE was jointly appointed (clauses 3.4 and 6) to monitor and collaterally manage the stored products at the designated facilities by both Addax and PT, and PT undertook to procure ACE's services as set out in Annex II. ACE therefore owed duties to both Addax and PT as an independent contractor (see clause 6.4 which also provided that the relationship with ACE was not one of agency, partnership or employment) though liability was restricted by clause 8. Under clause 6.4 no complaints, or causes of action, were to be raised against ACE by PT unless Addax accepted that they were justified.

36. The SDA amongst its terms provided that:

> "**3. RECORDAL**
>
> 3.1. The Supplier will from time to time supply the Consignment of Goods to the Buyer, which will then be stored within the designated Storage Facilities equipped for the purpose of storing such Goods.
>
> 3.2. The Supplier does not have the requisite infrastructure or skills to monitor and manage the risks associated with the storage of the Petroleum Produces at the designated Storage Facilities;
>
> 3.3 The Buyer confirms that it has or shall procure space within the Storage Facilities owned and controlled by the Warehouse/Tank/Silos Owner, such as designated tanks pursuant to its arrangement with the Warehouse/Tank/Silos Owner and the consent thereof, and/or other relevant premises and shall ensure that ACE GLOBAL is granted exclusive use and supervision and control over the Facilities via a tripartite Licence and Access Arrangement for the entire duration of the Agreement and till such time that the custody of the Goods is to be maintained by ACE GLOBAL on behalf of the Supplier. The Storage Facilities must be located and constructed as to adequately secure the safety of the Goods to be managed by ACE GLOBAL at the designated Storage Facilities and to secure the safety of all persons working in or about the Storage Facilities, including providing adequate safety devices and suitable working conditions.
>
> 3.4. The Supplier and the Buyer have jointly requested ACE Global to monitor the Goods and collaterally manage them during storage at the designated Storage Facilities under and pursuant to the terms and subject to the conditions of this Agreement. ACE Global shall also provide inspection services of the Goods for the account of the Supplier according to the terms and subject to the conditions hereinafter described and the ACE Global General Warehousing and Inspection Terms and Conditions attached hereto as Annex I and Annex I BIS.
>
> 3.5 The Buyer has undertaken to procure ACE Global's services as described in Annex II, in respect of Goods which shall be placed under ACE GLOBAL's custody and supervision subject to the express authorization of the Warehouse/Tank/Silos Owner, all under and pursuant to the terms of this Agreement.
>
> 3.6. ACE Global shall be the possessor of the Goods and ACE Global and the Buyer each hereby declares and acknowledges that the ownership and full legal and beneficial title of the Goods is in, and shall remain in, the name of the

> Supplier until payment of the deferred amounts in accordance with the Sale Agreements signed between the Supplier and the Buyer and the Goods shall not be Released to the Buyer until the payment by the Buyer to the Supplier of the amounts corresponding to the Goods:"

37. The duration of the SDA was to be for an initial term of 6 months expiring on 30 June 2016, subject to extension although the fact that a Second Addendum was entered into on 2 March 2016, setting out a new tripartite licence agreement including Srimex Oil and Gas Company, and a new list of storage facilities in Monrovia, including China Union facilities, suggests it was seen as a continuing arrangement which is also supported by the continued use of storage facilities for the petroleum products for the next 4 years.

38. Under clause 7, ACE's obligations included general duty to exercise and reasonable care and skill as a professional body providing inspections, monitoring and providing Secured Distribution Services as described in Annex II and required ACE to act "faithfully" on behalf of Addax and PT. Under clause 7.7 ACE was required not to allow release of any good without prior written instructions from Addax in form contained in Annex IX ("Release Order Form") and at 7.12 to provide the services described in Annex II. Those services in Annex II included monitoring stock quantities and in the case of commingled product, to ensure that sufficient stock would be kept in the tank to cover the remaining quantity financed by Addax:

> "**STORAGE AGREEMENT**
>
> ACE Services relate specifically to the storage of the product, physical and legal control of the commodities on behalf of the financier. ACE controls the acceptance, storage, monitoring, security and release of the stock.
>
> Where Product are commingled, ACE shall ensure that only the Goods financed by the Supplier will be under its control and released in accordance with the instruction of the Supplier meaning also that sufficient stock will always be kept in the tank in order to cover the remaining quantity financed by the Supplier. Goods from other sources will be freely released in the presence of all parties in accordance with the records maintained by ACE, if commingled Product will be allowed. If at any time the quantity under pledge is tried to be touched or manipulated ACE will immediately inform the parries, issue relevant protest letters to the storer and process any legal or any other kind of action the Supplier will ask for in such scenario".

39. The SDA also contained the following relevant provisions:

    (1) Under clause 4.4, one of the conditions precedent to which the SDA is subject is the receipt by ACE of "*the sale/purchase invoice(s) and of the sale/purchase contract(s)*";

    (2) Under clause 9.3, PT agreed to take delivery of the goods from LPRC tanks within 24 hours of delivery order;

(3) Clause 9.15 provided that ACE had no liability in respect of stock released by Addax but not collected by PT;

(4) Pursuant to Clause 9.19, PT agreed to indemnify Addax and ACE against any loss, claim, demand, action (etc.) arising out of or in connection with the SDA [G/226];

(5) Clause 10.2 contained a warranty by Addax that goods deposited under the SDA were its exclusive property and unencumbered by any pledge, claim or demand repeating the substance of clause 9.11;

(6) Clauses 12.1 to 12.5 contained provisions requiring Addax to procure, at its own cost, insurance for the goods while stored at LPRC;

(7) Clause 15 provided for the SDA to be construed under English law with disputes to be resolved by English arbitration;

(8) Clause 17.2 stated that no relaxation or indulgence by any party should constitute a waiver and shall not prejudice that party's rights;

(9) Annex IV contained a list of approved storage facilities at Monrovia. As noted above, this was updated by the Second Addendum to include China Union tanks;

(10) Annex IX contained a sample form of release order (see above);

(11) Annex X contained a specimen "Methodology of Release" form (a signed version of which is in the Bundle) which assumes the existence of other sales agreements between Addax and PT because, as explained by Mr Torre, it referred to the supply contract for 6KT of gasoil to be supplied per M/T WINTER OAK *"... in keeping with the ... Supply contract between PETROTRADE INC and ADDAX ENERGY SA, dated the 03 of December, 2015 ...*".

40. I respectfully agree with Cockerill J.'s characterisation of the SDA and its accompanying documents at [5] in her judgment:

> "The 2015 SDA is not a contract for the sale of goods between the parties. It does not identify a particular type or quantity of goods to be supplied on any particular date or at any certain prices. What it is is a tri-partite agreement between Addax, Petro Trade and a company called ACE Global Depository DMCC ("ACE"). It anticipates that Addax and Petro Trade will enter into subsequent sale contracts. In substance and effect, the SDA is a storage and release agreement. It provides a regime by which the claimant could deliver petroleum into a third-party's tanks in Monrovia, Liberia from which the

> defendant could obtain that petroleum. So Addax would deliver petroleum product in storage tanks owned by the state-owned company Liberian Petroleum Refining Company and managed by ACE and from those tanks Petro Trade could then stem product pursuant to separate sales contracts with Addax. The SDA was, I am told, necessary because Addax did not have the requisite infrastructure in Liberia to effect petroleum supplies. It did not have a licence to discharge products in its own name, whereas Petro Trade did. Petro Trade, in turn, did not have the financial resources to pay for or issue letters of credit for whole parcels of products for delivery to Liberia.".

41. Anticipating one of the alternative grounds in the Defence, therefore, it does not appear to me that, under the SDA and its addenda, ACE acted simply at the direction of Addax or as Addax's agent. It was an independent contractor (see clause 6) and Addax would not be responsible for the actions of ACE which was itself a party to the SDA, contracted to supply the services set out in clause 6 and Annex II. Clause 6.4 provided that both Addax and PT had to agree that a complaint or cause of action against ACE was justified before it could be made or brought.

42. Following entry into the SDA, including pursuant to the Methodology of Release at Annex X of the SDA, there were further trades. Mr Torre's explains in his statement:

> "16 The SDA envisaged that there would be separate sale contracts between Addax and Petro Trade. The Methodology of Release dated 2 December 2015 which is attached to the SDA refers specifically to a supply contract dated 3 December 2015.
>
> 17 The supply contract referred to in the Methodology of Release was a contract for the sale of 6KT of gasoil per M/T Winter Oak. Following a call with Marwan Hindawi I confirmed the terms of this trade in a recap dated 26 November 2015 which was at that stage for two parcels: 5000MT gasoil and 5000MT mogas... Marc Mesgny of operations sent a contract to Mr Hindawi on 27 November 2015 for 5000MT gasoil per M/T Winter Oak. Although I do not now recall, this quantity must have been subsequently amended to 6000MT gasoil. Audrey Dervain sent an amended spot contract for 6000MT gasoil dated 3 December 2015 by email to Petro Trade on 7 December 2015. Mr Hindawi replied the following day (with copy to me) confirming Petro Trade's agreement to all terms of the spot contract apart from field 10, B II relating to the time by which the letter of credit should be issued (45 days from completion of discharge from vessel instead of 30 days). I do not remember whether the spot contract was amended again.
>
> 18 The supply contract dated 3 December 2015 was for the first delivery that Addax made to Petro Trade under the SDA. Unusually, Petro Trade had prepaid for some of the product which is why clause 13 of the Supply Contract provides that title and risk in 2000MT of the product passed to the buyer on discharge from the vessel."

43. The way in which the trades following the entry into the SDA came about is described by Mr Torre in his statement at paras. 20 to 25:

> "20 After entering into the SDA, Addax and Petro Trade over a number of trades established a consistent course of dealing. Petro Trade would from time to time check their local stocks and estimate when they required their next delivery of gasoil or gasoline as the case may be. After checking with me, Petro Trade would book a delivery window with LPRC which was workable for Addax. This is referred to as ullage approval.
>
> 21 At about the time that Addax nominated a vessel, Mr Hindawi and I would discuss price over the telephone (product, quantity and delivery having already been agreed). The discussions concerning price were about the price that Petro Trade would pay for the products basis DAP Monrovia. The agreement on price was usually (but not always) reached (and recaps sent) before discharge of the product from the vessel.
>
> 22 The price had two components: a variable value based on a Platts index and a premium. The premium and Platts index were set out in the recaps. Our discussions about price were concerned only with the premium payable in addition to the variable element (based on the Platts index) and these discussions were frequently long and drawn out.
>
> 23 After reaching agreement with Mr Hindawi over the phone, the usual procedure was that that I would send an email recap to Petro Trade. Operations, West Africa (usually Audrey Dervain) would follow up with the corresponding written spot contract.
>
> 24 Audrey would prepare the spot contract by taking details such as product, quantity, premium and vessel name from the recap and entering them into the standard form. The important point is that the deal was always done on the phone and the recaps and spot contracts merely confirmed what had already been agreed. The preamble to the spot contracts all stated that they were confirming an agreement made between me and Marwan Hindawi. This way of working is common in the industry in my experience and was how Petro Trade and Addax did business.
>
> 25 In the spot contracts which followed the Supply Contract, the payment date was linked to the release date under the SDA and the release date was to take place at latest a certain number of days (often 90) after COD. Marwan and I discussed the release date in relation to some of the trades (for example M/T Marida Magnolia) and I did try to reduce the time for release/payment from time to time. As I explain in paragraph 62 below, I had to price the cost of finance into the premium that we asked Petro Trade to pay. Petro Trade are wrong to suggest in paragraph 7.4 of their Defence that Addax and Petro Trade dealt on the basis that products could be left in storage indefinitely. We did not deal on that basis and the entire arrangement would have been unworkable if we had. Apart from the financial considerations, limited storage capacity in Monrovia ruled out long-term stock holding. I am aware that in In West Africa, it is common for storage charges to increase to discourage blocking."

44. I include as an annex to this judgment a schedule of the individual trades between the parties which also refers to the spot contracts entered into in respect of each trade, or states where there was no spot contract. I am grateful to Mr Robinson for compiling the first version of this Schedule which I have modified.

45. Mr Hindawi's first witness statement for the jurisdiction application is broadly consistent with Mr Torre's account (which he verified and spoke to in the witness box) though he does not deal with the issue of recap emails which are in evidence and which were a regular feature of all trades until November 2018 when the Term Agreement was sent (see the Annex to this Judgment). Mr Torre's first witness statement corrected Mr Hindawi's account at paras. 18-25 and Mr Hindawi responded in his second witness statement at paras. 4 to 8. Moreover, Mr Hindawi has not given oral evidence and his evidence has not been tested and he has not responded in the light of disclosure and the documentation now available either generally or in response to Mr Torre's statement for the purposes of trial. I have no reason, particularly in the light of the additional documentation which has come to light since the jurisdiction application, to doubt Mr Torre's explanation of the factual circumstances of the trades, given the existence of recaps (including amended recaps) for all trades and of spot contracts prior to November 2018 in the case of all but 4 trades (see the Annex). I accept Mr Torre's evidence.

46. The position as at the hearing before Cockerill J. with regard to the individual trades and the existence of known spot contracts was described by her at [8]:

> "The sending of the spot contract and the frequency with which this was done is a contentious issue between the parties. Of the 15 transactions in the evidence before the parties, which relates only to the period 2017/2018, the document was received in one-third of the cases, that is 5 out of 15. It was, on that basis, not a more often than not occurrence, and the occasions on which it did occur are patchy; they are more consistent in the early period than in the later period. The spot contract contained more extensive written terms, including an English governing law clause and an English jurisdiction clause. The claimant prepared them by having an employee insert the terms from the recap email into the claimant's template spot contract."

47. In fact, following further investigation and disclosure, it is now established that 11, not 5, of the 15 transactions prior to the Term Agreement discussion in January 2018 was followed up with a spot contract which set out more extensive terms than had been discussed and recorded in the recaps and repeated provisions as to the application of English law and jurisdiction and of the transfer of risk to PT on discharge from the vessel. See Mr Torre's statement at paras. 26 to 31 and the Annex to this Judgment.

48. In all but 5 cases (Annex, transaction nos. 4, 6, 12, 15, 27) the provision of the spot contract was followed by an email on behalf of PT confirming acceptance of the terms or at least acknowledging its receipt (without disputing it). With one exception, there were no spot contracts following what Addax considered to be the conclusion of a binding Term Agreement in January 2018. Mr Torre explained this exception in his statement at paras 55-56 as follows:

> "55 Following receipt of the Term Agreement, Petro Trade continued to do

> business with Addax. However, business did not continue exactly as before the issue of the Term Agreement. As the Term Agreement had been issued, there was no need for Audrey to issue spot contracts and she no longer issued them. I also stopped sending recaps for gasoil and mogas for the same reason.
>
> 56 I have found one exception to this which is a recap dated 16 April 2019 for a delivery of fuel oil. It was necessary to issue a recap in that case because fuel oil was outside the Term Agreement which applied only to deliveries of gasoil and mogas. Petro Trade did not dispute or question the fact that recaps were not being sent anymore."

49. Subject to dealing with the specific issues raised by PT, it appears to me that there was a consistent course of dealing at least from the SDA, and possibly before, to the ending of the relationship with PT following a similar procedure of oral agreement, recap email and in most cases a spot contract which embodied the terms set out in the recaps and the standard terms on which the parties had been dealing since 2015. In a number of cases, the recaps were amended and amended spot contracts were then issued (Annex transaction nos. 3, 5, 13, 14, 28). The agreement of an amendment and issue of an amended spot contract in my judgment reinforces the existence of a course of dealing where generally spot contracts were issued which the parties regarded as embodying the terms of their trades.

50. Other than the obviously variable matters of price, delivery date, vessel and quantity, the principal differences that have arisen in the transactions summarised in the Annex related to title and risk. While risk consistently was stated by clause 13 to pass to PT on delivery of the product, specifically "*when the product passes the flange connection between vessels' permanent cargo discharge manifold and the delivery hose(s) at discharge port*", the passing of title appears to have varied. The initial 4 spot contracts had in clause 13 the passing of both title and risk on delivery whereas, from February 2016 the spot contracts at clause 13 passed risk but reserved title in terms that -

> "TITLE WILL REMAIN WITH SELLER UNTIL PAYMENT AND/OR LC ACCEPTABLE BY SELLER REACHES SELLER AND SELLER INSTRUCTS TO ACE THE RELEASE OF THE FULL PARCEL FOR PETROTRADE"

51. The format of clause 13 varied slightly on occasion, e.g. the spot contract dated 23 May 2017 comprised 2 orders and clause 13 referred to risk and title "for each product" (refs. 7010216 and 7010219) but in the same terms.

52. The other point that varied was the reference in clause 10 to the payment date from the release date which was frequently 90 days but was varied from time to time.

Claim and issues raised by the Defendant.

53. I propose to deal with the claim and the issues raised by PT on the pleadings and other

documents and in Mr Hindawi's witness statements in two parts:

(1) The claim in respect of the Gasoil Contract and invoice 17415813; and

(2) The claim under the Term Agreement and invoices 17409472, 17409473 and 17409474.

Gasoil Contract claim

54. This trade (ref. 7008356) related to the delivery of gasoil on board the M/T Torm Tevere in September 2016. The inspection outturn report dated 15 September 2016 states that discharge was completed by 10 am on 6 September 2016 of 14,184.842 tonnes as against 14,200 in the bill of lading. The same figure for gasoil appears in ACE's stock report of 15 September 2016 held in the China Union facility.

55. Prior to July 2018 the China Union tanks were operated by Srimex Oil & Gas but on 19 July 2018, LPRC (the state-owned Liberia Petroleum Refining Company) sent written notification to PT that:

> "LPRC has assumed full control of all operations of the China Union/Srimex facilities on the Bushrod Island. The activities include but not limited to vessel receipts and discharge daily lifting and inventory control."

56. From December 2016 to 4 May 2018 some 12,500 tonnes of the gasoil were paid for by PT, released by Addax and collected by PT in 17 tranches. This appears from ACE's "Weekly Stock Report – Releases" dated 15 May 2018 which shows the remaining quantity of gasoil from this delivery as 1,723.385 tonnes "theoretical stock" i.e. actual stock of 1,723.701 tonnes less likely wastage.

57. This stock report for May 2018 does not change over the following two years and the same figures appear in the ACE stock report dated 30 October 2020, there have been no further releases since May 2018.

58. Mr Torre explained that by late 2018 he was under pressure from Addax to deal with the gasoil since it had been in the tanks for over two years and there had been no releases since 4 May 2018. In his statement he said:

> "67 By the end of 2018, I was coming under some pressure from Addax's Finance Dept concerning the stock of gasoil at China Union. I told Marwan that Addax would not release gasoil from LPRC until we had sorted out the China Union stock.
>
> 68 Marwan Hindawi told me that Petro Trade had some local problems and that they would be responsible for the stock and pay for it in full. I did not dig any deeper about the "local problems" mentioned by him. Petro Trade agreed to make regular on-account payments for the China Union stock, starting with

> a transfer of USD $40,000 on about 28 January 2019 and subsequent monthly payments of USD $30,000 towards the end of each month up to and including March 2020 by which time Petro Trade had paid a total of US$460,000. Addax issued provisional invoices for this purpose. [4479,4480 and 5198,5199]"

59. By the end of March 2020, PT had paid Addax US$460,000 for unreleased gasoil in the China Union facility which is evidenced (or at least the majority is) by a series of emails from PT toward the end of each month or the beginning of the next in regular payments of US$30,000 from 27 February 2019 on each occasion after payment of the initial US$40,000 on 28 January 2019.

60. However, having not received any further payment for the balance of the gasoil, and over 4 years having elapsed since delivery, Addax issued a release order to ACE on 4 December 2020 for the balance of the gasoil in the China Union tanks, i.e. the 1,723.385 tonnes shown in the ACE stock reports as remaining in storage.

61. Invoice no. 17415813 dated 14 December 2020 was issued by Addax to PT for the balance of US$532,506.86 being the total amount of $992,506.86 for the remaining gasoil less the $460,000 already paid on account. (The invoice quantity was split into three parts, based on quantities PT had requested but not used, but this makes no difference to the claim).

62. The sum claimed in the invoice was on the basis of a premium of US$53 per tonne but this has been reduced to the earlier agreed premium of $43 per tonne. This is explained by Mr Torre in his statement at paras. 84 and 85. The claim has been adjusted to reflect this.

63. While Addax submits it is entitled to interest at the higher rate set out in cl. 10 of the spot contract ("*at a rate of actual cost of funding as advised by the financing bank plus a margin of eight percent (8.0 pct) per annum pro rata, the interests bearing interest*") it seeks only interest at 8% per annum and, although the invoice states it is payable "at sight" interest is only charges on the basis of the 90 day period referred to in cl. 10(II). Addax therefore submits that it claims the price and the interest on a basis favourable to PT compared to Addax's strict entitlement.

64. PT has disputed the claim on a number of grounds, although the trade is admitted (Defence, para. 8) as is the sending of the spot contract to PT (Defence, para. 9.1):

    (1) The trade was concluded orally and the spot contract post-dated the agreement and did not form part of it, thus clause 10 was not part of the agreement. It is admitted that the contract was varied by email on 5 September 2016 to a delivery of 14,200 tonnes;

    (2) It is admitted that the relevant quantity of gasoil was delivered by the M/T

Torm Tevere on 5 September 2016 though not pursuant to a spot contract (Defence, para. 11);

(3) It is also admitted that quantities of gasoil were released and paid for up to May 2018 (Defence, para. 12) though not pursuant to a spot contract but "consistently with the practice" contended by PT;

(4) Whilst payment of the US$460,000 is admitted (Defence, para. 19) PT denies that they were made on account of any liability under the Gasoil Contract. No positive case is advanced as to why the payments were made;

(5) PT alleges at para. 13 of its Defence (expanded at para. 49) that Addax was a pledgee of the goods and owed a non-delegable duty of care to PT and "at *some point between November 2016 and February 2017, approximately 1,723.375MT of the gasoil ex M/T Torm Tevere was removed from China Union's tanks. ACE permitted a third party, Srimex Oil & Gas, to remove that gasoil. ACE was not authorised to release that gasoil, or any gasoil, to Srimex. ACE was negligent and in breach of the SDA in permitting Srimex to remove the gasoil*." A set-off is pleaded;

(6) It is also alleged that as a result of claimed abstraction of the gasoil "*there was no further gasoil in the China Union tanks ex M/T Torm Tevere*". Para. 25 of PT's skeleton argument for the jurisdiction challenge before Cockerill J. alleges that "*a third party broke into the tanks and stole the petroleum products. As such there was none for D to take"*;

(7) There is an alternative claim that PT could not maintain an action for the price of the gasoil because property and/or risk remained with Addax and/or the goods had perished, and the contract should be avoided under s. 7 of the Sale of Goods Act 1979 or was frustrated (Defence paras. 42 and 48);

(8) A further defence is that even if the gasoil remains in the China Union tanks, PT has not accepted those goods and Addax is not entitled to the price and its damages are limited to damages for non-acceptance under s. 50 of the 1979 Act (Defence, paras. 43 and 50);

(9) It is also alleged in the alternative that Addax waived or is estopped from relying on the strict terms of cl. 10(II) on the basis that the parties conducted themselves on the common assumption that PT would supply letters of credit as and when it wished to take delivery of a lot and PT relied on such an assumption so that it would not be unfair for Addax to resile from it.

65. Since jurisdiction in respect of the claim over the Gasoil Contract was not disputed,

nothing was added in Mr Hindawi's witness statements that explained the above pleaded defences. There is notably no explanation why PT paid US$460,000 to Addax from January 2019 to May 2018 since it received no gasoil and it alleges none was left. No counterclaim has been made by PT for the return of the $460,000.

Whether the Gasoil Contract was on written terms

66. The principal issue with regard to the contract itself raised by the Defence is that it was oral only and the spot contract was not part of the agreement: see paras. 8 to 10 of the Defence.

67. I note that the existence of the agreement, and the existence of the English jurisdiction clause, was not challenged by PT in the application before Cockerill J.: see Mr Hindawi's first witness statement at para. 7 and para. 4 of PT's skeleton argument. The only means by which the jurisdiction clause could apply was either through the spot contract or a course of dealing.

68. Addax submits that the procedure for agreeing the trade following the standard practice I have already referred to of oral discussion of key variable terms (quantity, price, delivery etc), followed by a recap email and then a spot contract.

69. The recap email was sent on 25 August 2016 at 09:16 and set out the agreed terms:

> "Seller: Addax Energy SA
>
> Buyer: Petrotrade
>
> Product: Gasoil as per Liberian Specs
>
> Quantity: 16 000 MT +/-10 pct seller option
>
> Delivery: DAP Monrovia one safe port, one safe berth by MT TBN/sub during 2/6 September 2016
>
> Price: Fob Med Gasoil 0.1 pct + USD 43/MT
>
> Pricing : Trigger option with pricing to be mutually agreed by latest December 20th 2016.
>
> Payment: at 90 days from Release Date under SDA with release to take place latest 90 days from COD of delivering vessel covered by a LC issued or confirmed by a first class bank acceptable to seller with invoice based on ship discharged figures.
>
> laytime: 36 hours
>
> Demurrage: as per delivering vessel charter party
>
> Others: as per latest Incoterms; the Gasoil under this DAP delivery in the China Union tanks will be placed under a SDA(Secured Distributions Agreement) run by ACE, with release of product only on seller's instruction."

70. The spot contract was emailed by Charlotte Guian to Mr Ibrahim and Mr Hindawi on the same day at 16:18:

> "Kindly find attached contract for our sale of 16kt +/-1 Opet of gasoil DAP Monrovia in the dates 02-06 September 2016."

71. The spot contract began in familiar form:

> "THIS IS TO CONFIRM THE AGREEMENT REACHED BETWEEN THE SELLER AND THE BUYER ON 25/08/2016 MADE BETWEEN MR FRANCOIS TORRE FOR ADDAX ENERGY SA AND MARWAN HINDAWI FOR PETROTRADE."

72. Mr Ibrahim replied at 17:31:

> "Thanks and will review and revert to you shortly, Kindly advise on the Vessel nomination"

73. PT was told the nomination would be provided the next day and this was acknowledged by Mr Ibrahim.

74. The spot contract contained the following provisions:

(1) Under cl. 10, payment was required by PT 90 calendar days after release of the product to Petro Trade under the SDA;

(2) Under cl. 13, risk in the product passed from Addax to PT "*when the product passes the flange connection between vessels' permanent cargo discharge manifold and the delivery hose(s) at discharge port*", but title remained with Addax until payment and the release by Addax of the product. The version in some of the earlier trades passed title on delivery but the practice changed after the SDA (see above);

(3) Under cl. 13, a letter of credit was required to reach Addax within 90 days of the vessel's discharge of the product, failing which another US$4/MT would be added to the price;

(4) Interest was due on any late payment at the "actual cost of funding" rate plus 8%.

75. While PT did not come back as mentioned in the email it is notable that it did not dispute the spot contract at the time or contest the jurisdiction of this Court. It could only have accepted jurisdiction if it considered that the jurisdiction clause in the spot contract was part of the agreement, or that the oral agreement incorporated the terms on which the parties usually operated in their course of dealing since 2015, which amount to 10 trades, 7 since the SDA. That course of dealing was consistently on the basis of the jurisdiction of the English Courts.

76. The principles that apply for an agreement to incorporate standard terms which arise from a course of dealing between the parties have been considered by the courts on a number of occasions. In ***Transformer & Rectifiers Ltd. Needs Ltd***. [2015] EWHC 269 (TCC) Edwards-Stuart J. considered a number of authorities and summarised the principles at [42]:

> "From my rather brief review of some of the relevant authorities, I consider that in cases of this sort the following principles apply:
>
> i) Where A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, the correct analysis, assuming that each party's conditions have been reasonably drawn to the attention of the other, is that there is a contract on B's conditions: see *Tekdata*[1].
>
> ii) Where there is reliance on a previous course of dealing it does not have to be extensive. Three or four occasions over a relatively short period may suffice: see *Balmoral*[2] at [356] and *Capes (Hatherden)*[3].
>
> iii) The course of dealing by the party contending that its terms and conditions are incorporated has to be consistent and unequivocal: see *Sterling Hydraulics*[4].
>
> iv) Where trade or industry standard terms exist for the type of transaction in question, it will usually be easier for a party contending for those conditions to persuade the court that they should be incorporated, provided that reasonable notice of the application of the terms has been given: see *Circle Freight*[5].
>
> v) A party's standard terms and conditions will not be incorporated unless that party has given the other party reasonable notice of those terms and conditions: see *Circle Freight*.
>
> vi) It is not always necessary for a party's terms and conditions to be included or referred to in the documents forming the contract; it may be sufficient if they are clearly contained in or referred to in invoices sent subsequently: see *Balmoral* at [352], [356].
>
> vii) By contrast, an invoice following a concluded contract effected by a clear offer on standard terms which are accepted, even if only by delivery, will or may be too late: see *Balmoral* at [356]."

77. Chitty on Contracts (34th ed., 2021) summarises the position at 15-015:

> "**Course of dealing**
>
> 15-015 Conditions will not necessarily be incorporated into a contract by reason of the fact that the parties have, on previous occasions, dealt with each other subject to those conditions. But they may be incorporated by a "course of dealing" between the parties where each party has led the other reasonably to believe that they intended that their rights and liabilities should be ascertained by reference to the terms of a document which had been consistently used by

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[1] ***Tekdata Interconnections Ltd v Amphenol Ltd*** [2010] 1 Lloyd's Rep. 357.
[2] ***Balmoral Group v Borealis (UK)*** [2006] EWHC 1900 (Comm).
[3] ***Capes (Hatherden)Ltd v Western Arable Services Ltd*** [2010] 1 Lloyd's Rep 477.
[4] ***Sterling Hydraulics Ltd v Dichtomatik Ltd*** [2007] 1 Lloyd's Rep 8.
[5] ***Circle Freight International Ltd v Medeast Gulf Exports Ltd*** [1988] 2 Lloyd's Rep 427.

> them in previous transactions. Whether this test is satisfied or not depends on the facts of the case. Conditions usual in a particular trade may be incorporated where both parties are in the trade and are aware that conditions are habitually imposed and of the substance of those conditions, even if they are not referred to at the time of contracting."

78. This is not a case where the party to whom the terms were addressed needed to refer to some other document, or external reference, but was, on each occasion, emailed the spot contract on very largely standard terms. Except where spot contracts were not sent, notice was given to PT in each case prior to performance of the agreed trade. By the time the Gasoil Contract was agreed 10 spot contracts had been supplied in respect of 10 trades, 7 of which followed the SDA and reserved title until payment and of those 10, 8 of which were expressly acknowledged by PT.

79. In dismissing the jurisdiction challenge, Cockerill J. considered this issue (albeit on a more limited basis):

> "29. It is certainly the case that in the *Transformers* case the answer to which the learned judge came was that there was no course for dealing. However, that was a rather different case. It was a battle of the forms case on rather particular facts, including issues as to transmission by fax, where what was on the reverse of the documents which were sometimes sent by post was therefore not visible when what was sent was sent by fax. All in all, there was a rather complicated situation from which I do not feel it is possible to draw any clear parallel.
>
> …
>
> 31. What do I take away from those limited authorities? It is clear from the authorities that the course of dealing does not need to be extensive. It does not, either, need to be entirely consistent. What matters is whether there is sufficient consistency for that test set out in Chitty to be satisfied. That will be a question on the facts of the case.
>
> 32. This is the kind of case where it is important to step back and review the facts against both the type of relationship and the type of transaction which is occurring. This is, as Mr Robinson notes, an alleged contract which occurs in the context of a series of contracts occurring withing the petroleum industry where, as anyone familiar with the work of this court will be aware, parties often agree supply contracts informally. Here, it is common ground that we see exactly that. It is common ground that throughout these parties traded informally, substantially over the telephone, talking about the commercial essentials only, with confirmations of agreed trades following in the form of written recaps sometimes accompanied by spot contracts."

80. I will return to this judgment when considering the issue of course of dealing in the context of the Term Agreement.

81. In this case, it seems to me that the dealings between the parties involved the recording of nearly all of the trades in a written form on generally standard terms from the outset and that PT had reasonable notice of them, sometimes sought to renegotiate them (e.g. the

days for payment under cl. 10) but at no stage challenged them or disputed the spot contracts when they were provided. PT did not advance any rival standard terms or seek to justify them and chose not to come to court to supports it case with evidence or submissions. I also agree with Mr Robinson's submission that in the circumstances it was implausible that the parties did not proceed on the written terms recording the trades particularly in view of the actual acceptances of the spot contracts, the SDA and the request as early as November 2015 for a term agreement.

82. Moreover, the Gasoil Contract was performed as set out in the spot contract. This included the following:

(1) On 29 August 2016 Addax nominated a third party, REO International Monrovia, to perform the independent inspection for ship/shore quantities of product delivered, consistent with clause 6 of the Gasoil Contract terms ("*The quantity inspection shall be witnessed and/or certified by independent inspectors appointed by [Addax] and acceptable to [Petro Trade] and shall be set out in certificate(s) of quantity*");

(2) REO International produced "*Shore Tank(s) Outturn Report*" on 15 September 2016 (ref. REONJ/315/16), referring to the client reference "7008356" (the reference for the spot contract), and identifying the consignee to be "Petro Trade" together with a full report running to 22 pages plus Annexes. This -

(a) used the spot contract reference number;

(b) contained a Certificate of Quantity (in compliance with clause 6 of the contract); and

(c) included a Statement of Events, which gave a gross/net time to discharge of 21 hours and 18 minutes which would not have been necessary but for the terms concerning laytime and demurrage in Clauses 11 and 12 of the Gasoil Contract.

83. With regard to the passing of risk and the provisions for payment, other than the issue in some instances of whether the standard 90 days applied for payment (in which case it was agreed in much the same manner as quantity, price and delivery), the terms of payment were established and repeated in the various spot contracts and risk passed on delivery. The general 90 days for payment under cl. 10(II) was modified in most of the spot contracts from March 2016 (ex MT Torm Timothy) to provide for a maximum release period (Annex, trade no. 6) generally 60 or 90 days and set out in the recaps:

"II. PAYMENT SHALL BE MADE IN U.S. DOLLARS IN FULL, WITHOUT

> ANY OFFSET OR COUNTERCLAIM WHATSOEVER AND FREE OF CHARGES VIA A FULLY OPERATIVE DOCUMENTARY CREDIT ON THE PAYMENT DUE DATE BEING NINETY [90] CALENDAR DAYS FROM THE OFFICIAL RELEASE DATE UNDER THE SDA, WHICH SHOULD TAKE PLACE LATEST 60 DAYS FROM COD OF DELIVERING VESSEL"

84. Prior to March 2016 a latest official release date was included in November 2015 (ex Winter Oak) as an amendment to 30 days specifically by reference to the written spot contract. See Mr Hindawi's email of 8 December 2015 to Audrey Dervain:

> "We have agreed with Francois that on Field# 10, B, II (page#5) to amend the 30 days to be 45 days from COD of delivering vessel.
>
> We confirm that all other terms are accepted".

85. The passing or risk on delivery was to be expected in any event since from the outset the parties agreed the trades would be DAP and the spot contracts specified the point at which delivery would take place. Cl. 3.2 of the SDA explained Addax' reason for wanting to transfer risk. Consistently throughout the trades, risk passed on the passing of the product through the flange valve from the hose from the vessel connecting with the delivery hose at the receiving port. While title initially passed, after the first group of trades, title was reserved until payment.

86. In the majority of cases, the spot contracts were acknowledged if not specifically accepted and it appears to me that on the facts in this case, the terms of the spot contracts did represent the agreement reached by the parties for the individual trades. The procedure the parties followed was an informal one and followed a clear and consistent pattern with the written terms only being provided as the final stage in the negotiation. The key differences between the trades were those agreed orally and incorporated into the recap emails or amendments.

87. Additionally, the terms of the Gasoil Contract were amended on 5 September 2016 by a series of emails to vary the quantity of product to be delivered to 14,200 MT on gasoil and the gasoil was delivered on the same day. The amendments appear to me to reinforce the course of dealing on the terms set out in the spot contracts.

88. Having regard to the facts as they now appear and in the light of the principles set out above, I consider that there was a course of dealing sufficient to conclude that the written terms of the spot contract for the Gasoil Contract did form part of the binding agreement between Addax and PT.

89. On that basis, I conclude that the contract included terms as to payment and interest in cl. 10 (payment to be "*via a fully operative documentary credit on the payment due date being ninety [90] calendar days from the official release date under the SDA, which*

should take place latest 90 days from COD of delivering vessel") and as to risk and title in cl. 13, as set out in the spot contract.

90. I therefore reject those grounds of defence based on the lack of incorporation of the spot contract into the Gasoil Contract, namely:

(1) The non-incorporation of the payment provisions of cl. 10;

(2) The alternative case as to the terms of the agreements at para. 7 of the Defence;

(3) The contentions as to the passing of risk and title at para. 42 of the Defence which are contrary to clause 13 of the spot contract as well as to the basis of the trade being DAP;

(4) Liability for the price turned on the operation of cl. 10 and not upon PT's acceptance of the product. S. 50 of the 1979 Act is inapplicable.

91. In view of the provisions for delivery DAP and the specific provisions of clause 13 as to when risk passes, as well as the independent status of ACE as set out in the SDA (with which the Defence appears inconsistent). I also reject the contentions that:

(1) Any liability rests or could rest with Addax for the acts or omissions of ACE with respect to its duties toward the storage of the gasoil. If any genuine claim existed with regard to the appropriation of the gasoil, PT would have to bring a separate claim against ACE, which is not a party to these proceedings;

(2) No liability exists as pledgee even if title remained in Addax until release. Risk passed to PT on delivery in September 2016 and it was entitled to, and able, to take the product from that time;

(3) Similarly, there can be no claim for frustration since the gasoil was delivered in accordance with the terms of the trade and responsibility for its uptake and the risk of its storage thereafter rested with PT. If and to the extent that there was anything in the claim of appropriation, it was stored at the risk of PT under terms which it had sought and agreed. In any event, for reasons set out below, I reject the claim of appropriation since the duly authenticated evidence before the Court is that the gasoil remained in the China Union tanks;

(4) S. 7 of the 1979 Act, which deals with the perishing of goods before risk passes, is inapplicable since risk had already passed to the buyer on delivery

> on 5 September 2016 under clause 13 of the spot contract even if the goods had subsequently perished between November 2016 and February 2017.

92. It follows that I accept the claim that the agreement of quantities, price, delivery and payment for gasoil released were made pursuant to the terms recorded in the spot contract.

93. It also find that the payments made totalling US$460,000 in 2019 and 2020 were made on account of the gasoil not already released. No explanation other than that found in Mr Torre's statement has been advanced and it is consistent with the documents in the trial bundle. For example, PT's letter of 3 February 2020 referred to below appears to me to accept the obligation to pay on account of the remaining gasoil as well as general responsibility for the gasoil not yet drawn down. The terms of that letter are wholly inconsistent for those parts of the Defence claiming no responsibility for the remaining gasoil after the releases up to May 2018. Indeed, the fact of the continued payments is inconsistent with PT's case that the gasoil had been appropriated by a third party and was not the responsibility of PT.

94. In my judgment, the payment of those sums demonstrates PT's acceptance of risk and specifically liability for the gasoil given that the Gasoil Contract required payment to be on -

> "THE PAYMENT DUE DATE BEING NINETY [90] CALENDAR DAYS FROM THE OFFICIAL RELEASE DATE UNDER THE SDA, WHICH SHOULD TAKE PLACE LATEST 90 DAYS FROM COD OF DELIVERING VESSEL"

95. Although there was correspondence regarding problems in Liberia with the release of petroleum products which is summarised in detail at paras. 128-136 of Addax's skeleton argument. Other than the matters set out below, I do not need to rehearse the course of events in detail in my judgment and accept the terms of Addax' submissions in this respect, given that the matters there set out are supported by substantial documentation in the trial bundle.

96. On 31 January 2020 Addax wrote to PT (a similar letter was sent to ACE):

> "We are writing to you concerning the stocks of Mogas supplied by Addax Energy SA in Liberia.
>
> We were informed today by the media that the Minister of Commerce, Wilson Tarpeh, has told Reuters the below:
>
> Quote
>
> **Liberia running low on gasoline after reserves go missing**
>
> Lines to the petrol pump snaked across Liberia's capital Monrovia on Thursday after it emerged that the West African country was unexpectedly down to its last few days' worth of gasoline. An error in the accounting of fuel supplies in state-

> run tanks left Liberia with 1.1 million gallons of fuel this week, a fraction of the 4.4 million that the government thought it had, Minister of Commerce and Industry, Wilson Tarpeh, told Reuters.
>
> Unquote
>
> We are very surprised at this news as according to our accounting stocks of today in MT, the below stocks should be available at LPRC:
>
> | | | | |
> |---|---|---|---|
> | Petrotrade | GO | PMS | FO |
> | | 4131.905 | 2178.81 | 1825.718 |
>
> We hereby request that you clarify the situation and confirm the precise amount of the stocks as of today.
>
> Addax Energy SA holds Petrotrade INC fully responsible for any losses or damages to the stocks and/or for any breach of contractual obligations including but not limited to release of any products without following the required procedures in relation to the stocks included in the contracts between the parties."

97. In reply, on 3 February 2020 PT wrote to Addax (copied to ACE) in a letter signed by both Mr Hindawi as CEO and Abraham Kaydea as CCO and emailed to Addax on 4 February:

> "Based on the Minister's announcement we contacted LPRC and inquired about the missing Mogas stocks, and LPRC informed us that they are fully responsible for all products stored at LPRC terminal, therefore we in PT hereby confirm that the products in the below table as at January 31, 2020 are the responsibility of PT and we confirm and maintain all our obligations stated in the Secured Distribution Agreement signed by PT, ACE Global & Addax dated December 01, 2015:
>
> [The table included in the list of products stored, "China Union Terminal Confirmed"]
>
> Pursuant to Addax and PT agreed stipulation in respect of the monthly payment for GO, which is stored within the China Union Terminal, PT has paid the total amount of Four Hundred Thousand United States (US$400,000.00) as at January 31, 2019.
>
> Finally, and in addition to the foregoing clarification, PT hereby affirms and reaffirms its contractual obligation to ADDAX in respect of all products supplied by ADDAX and, in so doing, accepts responsibility for all the stocks of petroleum products it received from Addax, as confirmed and specified hereinabove."

98. It follows that in response to the political statement, the assurances sought by Addax, and after the period in which it was claimed the gasoil was appropriated, PT not only affirmed their own responsibility "*for all the stocks of petroleum products it received from Addax*" (1,723.39 tonnes) but also confirmed their obligations and that it had paid $400,000 by that date.

99. On 7 February 2020 ACE responded and confirmed the remaining quantity in the China

Union facility ("*Gasoil China Union: 1723.39 MT (minus equivalent of the amount paid)*") and added:

> "From our information on ground, the above mentioned quantities are available within tank farm in Monrovia as part of a general stock under comingling scenario."

100. Although there was some suggestion that the letter of 3 February 2020 was made "*under duress and the extreme pressure exercised by Addax*" (Farran Law Firm, 5 February 2021), rejected by Hill Dickinson on 17 February 2021, that allegation was not explained or evidenced and, in any event, was not pleaded and I have seen no evidence in these proceedings to support such an allegation.

101. In my judgment, the letter of 3 February 2020 was a voluntary response to Addax' understandably concerned letter of 31 January 2020 given that, by then, it had been over 3 years since the gasoil had been delivered. PT could have denied responsibility and liability for the balance of the gasoil at that stage, and it is notable that it only did so after the letter of 3 February.

102. On 10 March 2020, ACE wrote further with regard to problems with LPRC:

> "LPRC inventory management functions on a global comingling basis are under criticism and deep analysis at the moment.
>
> Hence beyond our will we are not in a position to fully guarantee the state of your stocks from now on; we deeply regret to inform you that we will continue to suspend our standard reporting, while keep on investigating further into what will be the position of LPRC on the current stocks and their decision regarding the sharing of the quantities, once they have completed the audit they said they would undertake.
>
> In the meantime we put pressure on the various parties for securing better your interests in this somehow unusual scenario. We are requesting Petrotrade and NP Liberia to be on top of LPRC for keeping the pressure, the control and the vision on your stocks as LPRC is holding the products under their respective import licences. As importers, they are the ones who have to make sure your stocks are duly recognized by the authority; this is something ACE Global unfortunately has little leverage on.
>
> As a reminder, Government of Liberia made it clear that LPRC would guarantee the quantities supposed to be held for those importer having stocks duly recognized within the global one and this is where our action also remains absolutely necessary; in this respect our services should remain within the new prevailing situation subject to current invoicing."

103. PT also raised similar issues at around the same time and, for example, on 6 August Mr Hamdan of PT (who had suggested settlement of the issue of liability for the remaining product) emailed Addax:

> "Due to unfortunate situations in Liberia, some of the delivered products were missing from the LPRC tanks (and LPRC expressed their responsibility for any loss related thereto, but unfortunately as of today date nothing is done and we don't know when it will be done, and similar to what happened in China Union Terminal nothing is recovered yet), and the business of Petro Trade in Liberia was affected by the non-delivery of Addax of the further products. This has incurred troubles into the relationship between Petro Trade and Addax.
>
> Several attempts were made by Petro Trade and Addax to resolve these issues by emails and over the phone Nevertheless, without prejudice to the legal rights of Petro Trade, we suggest that both Petro Trade and Addax make more efforts by agreeing on a fair settlement arrangement and to hold a face to face meeting to discuss and reach an amicable settlement at an agreeable time and place (whenever travel resumes after the novel coronavirus (COVID-19) pandemic or through a video-conference should travel be difficult)."

104. However, when considering the correspondence and the suggested difficulties with LPRC, it is relevant for the purposes of my judgment that Addax has consistently obtained stock reports for the gasoil remaining at the China Union facility showing the quantity of gasoil which is the subject of the claim. I have already referred to the Stock Report for 15 May 2018 and the fact that the reports do not change over the following two years in terms of the record of quantity taken and the quantity remaining. The same figures appear in the ACE stock reports dated 3 June 2020 and 30 October 2020.

105. LPRC had taken over the China Union tanks from Srimex in July 2018 and were the only authority able to declare authoritatively the quantities held. Moreover, despite the email of 6 August, and the earlier reported issues with LPRC, the stock report of 3 June 2020 was stamped by ACE, LPRC and countersigned by Mr Mario Hoff, the new operations manager for LPRC, and shows the same quantity in the China Union facility as the earlier reports, namely 1,723.385 tonnes of gasoil. Whatever the earlier issues, LPRC and ACE confirmed therefore the remaining product at that time.

106. Moreover, the letter of 3 February 2020 from PT also accepted the quantity of gasoil remaining and its responsibility for that product, disregarding the unsupported allegation of duress.

107. When Addax issued the release order for the gasoil and emailed it on 4 December 2020 to ACE and PT, there was no protest at that time that there was no gasoil available. The invoice followed on 14 December 2020.

108. My attention has also been drawn by Addax to the fact that the consultants Gray Page were asked to investigate the allegations by Addax's insurer and sent an interim report on 10 February 2022 [G/3384-3442]. This is no more than the opinion of those consultants based on untested and incomplete hearsay evidence, and not subject to oral evidence, and is therefore of limited evidential value. There was no hearsay notice served by PT

pursuant to the Order of HH Judge Pelling KC dated 4 July 2022. However, in view of the lack of appearance by PT, I have considered it *de bene esse* in the context of Addax seeking to act fairly in respect of the defence.

109. In that report Gray Page noted:

> "Gray Page has not been able to visit Monrovia during this investigation due to the global Covid-19 pandemic, and the resulting reticence of sources to meet face-to-face. However, we had already visited Monrovia back in October 2019 and hence were very familiar with the market, which Petro Trade operates, and the way in which Liberia's particular fuel market is regulated."

110. It appears therefore, as Mr Robinson submitted, this was a desk study based on documents only and on such further inquiries as Gray Page had been able to make, as mentioned in the report. The report concluded at para. 202 that Addax had "*undoubtedly lost this cargo*" which I find difficult to follow since it is clear from paras. 188 and 200 that the documentation available to it was far from complete.

111. At para. 188 it appears that Gray Page had not even seen the stock reports for the China Union tanks. Para. 200 also shows that Gray Page had not seen documents such as the spot contract for the Gasoil Contract nor the Statement of Facts (in the REO International "*Shore Tank(s) Outturn Report*" referred to earlier).

112. Earlier, at the beginning of its conclusions, the interim report stated:

> "193. Our investigation has identified that Addax has been one of a number of commodity traders who have faced significant issues with regards to the loss of fuel that was supposed to be held in storage in Liberia, under stock management agreements held with Ace Global Depositories DMCC.
>
> 194. Petro Trade, Addax's long-term customer can be clearly seen to have taken the stock from the last two shipments, as the LPRC stock reports show that all of the stock under their name had been exhausted by October 2019. However, the loss from the initial shipment does appear more complex.
>
> 195. At present, given the contractual transfer of title and risk of the goods upon arrival in Liberia to Petro Trade, this loss would appear to have been shifted from a physical cargo loss to one of a credit exposure. However, we believe there is no doubt that Addax is entitled to recover the loss through the pursuit of both its counterparty, who remain active and successful company in Liberia, or through a credit risk policy. We also believe that they should follow another trader's lead in the pursuit of AGDD for their gross failure in keeping Addax appraised of the true situation at LPRC and at China Union, the latter of which was not even a storage location included in the agreement."

113. Mr Robinson made a number of criticisms of the Gray Page report at 135.1 to 135.6 and I agree that in a number of respects it is unsatisfactory and unreliable:

    (1) In addition to the lack of basic information noted above, there are factual

errors, for example the suggestion at para. 195 that the China Union tanks were not within the SDA when, clearly, they were added by the Second Addendum to the SDA;

(2) The graphs at paras. 186 and 188 showing zero stocks of gasoil and mogas at LPRC Q4 2019 and Q1 2020 are not consistent with the fact that PT was collecting product from LPRC during that time (part of the product which concerns the Term Agreement part of the claim) in mainly 500 tonne tranches (8 of gasoil, 11 of mogas) as appears from the ACE and LPRC stamped and signed weekly stock reports for 3 June 2020;

(3) A reference at para. 14 to Srimex being "*implicated in the misappropriation of fuel*" does not demonstrate that gasoil was taken from the China Union facility by Srimex and like a lot of views expressed in the Report is not well-supported and does not sit easily with the point made at para. 79 that –

"With regards to stock held at China Union, this remains slightly different, as the tanks are not under LPRC's direct control. However, we do understand that LPRC has staff regularly attend these tanks as well to monitor stock levels."

(4) Para. 182 suggests -

"182. This stock was allegedly misappropriated by Srimex, who was managing the China Union tank farm back in 2016. Petro Trade advised that it told Addax about this issue back in 2018 when it first discovered the loss. Petro Trade reportedly have documentary evidence of this correspondence with Francis Torre that supports this claim. However, due to the commenced legal proceedings he feels he cannot share the documents with us."

However, there appear to be no such documents nor that PT informed Addax in 2018 of the issue. Indeed, it is also inconsistent with PT's own letter of 3 February 2020. There is also no explanation why, if this was known to PT in 2018, that it did not raise the issue until after 3 February 2020. Further, in the minutes of a meeting between Addax and PT on 1 February 2018, emailed by Mr Hamdan of PT on 6 February 2018 the contrary position was stated at para. 3 -

"Subject: Overview for year 2017 business relationship and upcoming years:

1. Attendees share thanks for the successful ongoing business relationship between the two companies for the past years which they considered as a solid foundation for a fruitful long-lasting business partnership.

…

3. The balance Gasoil at China Union Terminal will be lifted effecting the

second half of February and in the tone of 500 MT/ Month".

(5) The conclusions are inconsistent with the stamped stock reports which while Gray Page notes the claim the signatures are fake, doubts the allegation noting at para. 162 that the signature "*matches very closely*" that on letters in their possession in Annex 29 and that in the case of the first of the letters "*details that Adrian Mario Hoff has been specifically asked about* [ACE] *presenting similar papers to him for signature*" and noted that "*Please note that this letter came directly from Mr. Mario Hoff*." No such allegations were made by PT in the proceedings. Still further doubt is cast on the claims by PT at para 183 -

> "183. Petro Trade also advised that LPRC offered to cover some of the losses from the stocks missing. This offer has been made in writing to Petro Trade. However, as this offer was made around the time of the breakdown in the relationship with Addax, he did confirm that he has never sent a copy of the letter to Addax. This offer of payment from LPRC was to have been netted off against outstanding and future storage charges. We asked for a copy of this letter, which also details a denial that the LPRC stamps on the Ace Global stock reports were officially sanctioned by LPRC's management. However, this has never been forthcoming. LPRC was well aware by that time that all of the stocks on LPRC's tanks was no longer present at that time and hence we cannot see why they would have agreed to stamp documents that would be completely fictitious."

114. I do not therefore consider that the Gray Page Report, which is unsatisfactory in several respects, and generally no more than untested opinion, provides a reliable basis for supporting claims made by PT in its Defence.

115. PT itself has not provided any evidence to establish its contention that the gasoil was appropriated in late 2016/early 2017 and this is directly contradicted by the authenticated stock reports in 2020. I have explained why I do not consider the Gray Page Report to alter this conclusion. Whether or not some product had been appropriated, the stocks were commingled in the tanks and there is no reason to suppose that the amount of gasoil stated to be present in the China Union facility was not available to PT.

116. Finally, I reject the alternative defence of waiver or estoppel by convention at para. 17 of the Defence since it is unclear how and in what form PT alleges the common understanding arose given the frequent issue of spot contracts in very similar form, or how it relied on the common understanding notwithstanding the clear terms of clause 10(II). Moreover, the failure by PT to comply with the terms on a number of occasions would not of itself establish an estoppel. I also note the terms of the Reply at para. 13. In the absence of evidence from PT in support of the claim, this defence fails.

117. I therefore conclude that:

(1) The quantity of gasoil for which the price is now claimed remained in the China Union facility as set out in the weekly stock reports but in any event did so at the risk of PT;

(2) PT became liable to pay for the remaining gasoil following the release order given by Addax in December 2020 and in accordance with the invoice issued, which remains unpaid (subject to the correction referred to earlier);

(3) Addax is entitled to the sums claimed by way of unpaid price and for interest. I will return to the sums and the interest after I have dealt with the other aspect of the claim;

(4) The points raised by PT in defence of this aspect of the claim (and other points identified from the documents) are not sound and I reject them for the reasons I have given.

Term Agreement claim

118. This aspect of the claim concerns liability arising from three invoices issued on 7 August 2020 in respect of balances of gasoil and mogas ex M/T Ance and M/T STI Beryl which had been released by Addax in 2019 and 2020 (invoices 17409472, 17409473 and 17409474).

119. In respect of this the central issue is whether a binding Term Agreement had been concluded in 2018 based on the previous course of dealing between the parties such that PT is liable for the price claimed in the invoices.

120. Cockerill J. helpfully summarised the common ground between the parties in her judgment in 2022:

> "[9] It is common ground that on or around 3 January 2018, Mr Hindawi and Mr Torre had a telephone call about the parties concluding a long-term contract for the sale of petroleum. That is a contract to cover multiple rather than single shipments. …
>
> [19] … Any contract formed on 3 January 2018 must necessarily have been an oral agreement. That is common ground between the parties. …
>
> [32] This is the kind of case where it is important to step back and review the facts against both the type of relationship and the type of transaction which is occurring. This is, as Mr Robinson notes, an alleged contract which occurs in the context of a series of contract occurring within the petroleum industry where, as anyone familiar with the work of this court will be aware, parties often agree supply contracts informally. Here it is common ground that we see exactly that. It is common ground that throughout these parties traded informally, substantially over the telephone, talking about the commercial essentials only, with the confirmations of agreed trades following in the form of written recaps

sometimes accompanied by spot contracts …"

121. It is also common ground that, after Addax sent written terms to PT on the 20 November 2018, which reflected the Term Agreement reached orally on 3 January 2018, no other recaps or spot contracts were sent. Addax' case is simply that they were not sent since they were no longer required given the Term Agreement. In his statement, Mr Torre says:

> "55 Following receipt of the Term Agreement, Petro Trade continued to do business with Addax. However, business did not continue exactly as before the issue of the Term Agreement. As the Term Agreement had been issued, there was no need for Audrey to issue spot contracts and she no longer issued them. I also stopped sending recaps for gasoil and mogas for the same reason.
>
> 56 I have found one exception to this which is a recap dated 16 April 2019 for a delivery of fuel oil. It was necessary to issue a recap in that case because fuel oil was outside the Term Agreement which applied only to deliveries of gasoil and mogas. Petro Trade did not dispute or question the fact that recaps were not being sent anymore."

122. Addax' claim arises as follows:

(1) On 3 January 2018, Mr. Torre and Mr. Hindawi agreed the Term Agreement orally over the telephone;

(2) The Term Agreement reached on 3 January 2018 incorporated terms that had become standard between the parties by virtue of a sufficiently consistent course of dealing between them. See the Amended Particulars of Claim ("APOC") at para. 12A;

(3) After some delay, the provisions of the Term Agreement were later evidenced in writing on 20 November 2018 The preamble to the agreement was in a form used previously in spot contracts -

> "This is to confirm the agreement reached between the Seller and the Buyer on 03/01/2018 made between Francois Torre for Addax Energy SA and Marwan Hindawi / Ibrahim Hamdam for Petrotrade."

(4) Under the written document, payment was due 90 days after release of each product (Clause 10) **[**G/2398]. This was the same as the Gasoil Contract;

(5) Under the written document, both title and risk passed from Addax to Petro Trade upon delivery "DAP Monrovia", pursuant to Clause 13 (APOC para. 13d). But, of course, it does not matter for Addax's purposes whether both title and risk passed, or whether only risk passed pursuant to the parties' course of dealing – as Petro Trade might argue (addressed below) – because the trigger for the payment obligation was Addax's release of the products

(Clause 10) (see above in the context of the Gasoil Contract);

(6) On 9 to 10 September 2019, 7,021.458MT of mogas ex M/T ANCE was discharged at Monrovia and placed into LPRC tanks (APOC para. 14a) (see [G/2765]);

(7) On 1 to 2 October 2019, 5,987.606MT of gasoil ex M/T STI BERYL was discharged at Monrovia and placed into LPRC tanks (APOC para. 14b) and see [G/2860]);

(8) Between 13 November 2019 and 20 February 2020, 5,342.648MT of mogas (ex M/T ANCE) and 4,091.48MT gasoil (ex M/T STI BERYL) were released to Petro Trade, leaving balances in LPRC's tanks of: (1) 1,678.81MT mogas[6] and (2) 1,896.13MT gasoil[7] (APOC para. 15);

(9) On 6 August 2020, Addax instructed ACE to release those balances (APOC para. 16). See [G/3339-3340] and [G/3341-3342];

(10) On 7 August 2020, Addax issued three invoices to PT in respect of the release of those balances (APOC para. 18) -

(a) Invoice 17409472 **[G/3334]** for US$1,062,602.79, regarding 1,678.81 mogas ex M/T ANCE;

(b) Invoice 17409473 **[G/3333]** for US$627,725, regarding 1,000MT gasoil ex M/T STI BERYL;

(c) Invoice 17409474 **[G/3332]** for US$538,574.13, regarding 896.13MT gasoil ex M/T STI BERYL;

(11) Payment under the above invoices fell due on 4 December 2020 (APOC para. 19) although strictly under the Term Agreement it fell due on 4 November 2020. No payment was made.

123. Mr Torre explained the circumstances in his statement (which incorporated his responses to Mr Hindawi's evidence on the application before Cockerill J.):

> "39 By the time of the Term Agreement, Addax and Petro Trade had been trading successfully for about two years. During a telephone conversation on 3 January 2018, Marwan Hindawi and I discussed a proposal by Petro Trade for a long term agreement. In my first witness statement, I said that I was not sure

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[6] See **[G/3241]**, **[G/3242]**, **[G/3243]**, **[G/3246-3247]**, **[G/3249]**, **[G/3283]**, **[G/3316]**, **[G/3339]**, **[G/3340]**, and **[G/3345]** (weekly stock report).
[7] See **[G/3316]**, **[G/3323]**, **[G/3328]**, **[G/3341]**, **[G/3342]**, and **[G/3344]** (weekly stock report).

whether the call took place on 3 January 2018 but the exchange of emails on that day [3129] leads me to believe that it probably did. Although I do not recall the precise words used, I do have a clear recollection of the points discussed. During the call, Mr Hindawi requested a long term contract with Addax, explaining that it would be helpful to Petro Trade. Even though he did not say so, it was plain that he wanted a long term contract with Addax so that Petro Trade could demonstrate the strength of its business to third parties and, in particular, the banks.

40 During that call, we agreed that the term of the agreement would be two years over the calendar years 2018 and 2019. We also agreed that it would cover gasoil and mogas and we agreed the quantities (a monthly average of 4KT and an overall quantity of 100KT) based on Petro Trade's assessment of what was realistic for them. These were terms requested by Marwan which I was happy to agree.

41 I did not say that I would provide a draft contract as "a starting point of a negotiation" as Mr Hindawi claims in paragraph 33 of his first witness statement. Mr Hindawi asked me to send written contracts for both Petro Trade and Model Trade. It was clear to me that we had reached an agreement during that call and that I was to follow up with a written contract, just as I did with the spot contracts. The written contract would just confirm what we had already agreed.

42 Petro Trade raised the Term Agreement again in a meeting which I attended with Mr Hindawi and Ibrahim Hamdan at Petro Trade's head office in Monrovia on 1 February 2018. The purpose of that meeting was to review the business relationship for the year 2017 and to look at future business. The discussion about the Term Agreement was brief. Mr Hindawi asked me if it was possible to go with a fixed premium. Doing so would have meant amending our agreement. I replied that a fixed premium was not feasible at that stage due to the high volatility of mogas premiums and he did not press the point. In the previous 12 months the premiums had ranged from US$40 to US$53 per metric tonne. The Term Agreement therefore remained the same, as had been agreed in early January 2018.

43 Mr Hindawi did not ask for an exclusivity provision in relation to Addax's imports into Liberia (as he suggests in paragraph 33 of his first witness statement), either during our call in early January or in the meeting in February. Mr Hindawi was well aware that Addax also supplied NP in Liberia (see paragraph 6 above) and he knew that Addax could not agree to exclusivity.

44 Mr Hamdan sent me an email dated 6 February 2018 containing brief minutes of the meeting [3248]. The minutes do not refer to the agreement (I assume because it was only a brief discussion) but the agreement is mentioned by Mr Hamdan in a follow-up email he sent me on 27 February 2018 [3314]. In that email, Mr Hamdan said that Petro Trade were awaiting an acknowledgment of the minutes and he also said, "we did not receive the sales contract as we need this contract to include it in our financial documents".

45 To me, Mr Hamdan's email indicated that Petro Trade considered that a contract had already been concluded and that was certainly how it seemed to me at the time. Mr Hamdan simply needed a copy of it for Petro Trade's records, as I understood it. In my reply dated 28 February 2018 [3322], I

acknowledged that I had to prepare a written copy of the agreement, "which would also help you locally", and that I hoped to send it later that day. In his response, Mr Hamdan thanked me for my message and said he looked forward "to bless communication", which I took to mean he was looking forward to hearing from me with a copy of the long-term contract [3312].

46 So, during the telephone call on 3 January 2018, we agreed that Addax would issue a simple term contract as a global framework for the deliveries of products to Monrovia. It was good for Addax because we had a guarantee that a major local marketer would stay with us for two years, and it was good for Petro Trade because their supply was locked-in with a major supplier of the West African Coast.

47 Following our meeting of 1 February 2018 and my exchange of emails with Mr Handam later that month, Mr Hindawi chased me again for the Term Agreement several times over the telephone although I cannot now recall the dates of those conversations.

48 By email dated 24 August 2018 [3925], Audrey sent me a template which she used to prepare the spot contracts with Petro Trade. (3296). The metadata for this document [screenshot at Exhibit FT1 to my first witness statement , page 146] record that it was created on 27 November 2015. This template must have been created in order to prepare the Supply Contract dated 3 December 2015 mentioned in paragraphs 17 above. The author is Adriaan Vandoorn who was head of operations when he left Addax in 2008, which indicates that the Petro Trade template was adapted from a generic sales contract prepared some years before.

49 I then prepared the Term Agreement from the Petro Trade template sent by Audrey. In most of the spot contracts, risk passed to the buyer on discharge of the goods from the vesseI and title passed upon payment. In others, both risk and title passed to the buyer on discharge from the vessel. The Supply Contract is an example of both. The Term Agreement is of the second type.

50 I simply made such amendments as were necessary to reflect the fact that it was a framework agreement and to reflect what had already been agreed in early January 2018. None of the other terms (ie the terms that did not require amendment) were controversial because they had all been agreed several times before. They had become the standard terms on which Addax and Petro Trade traded. Apart from amendments to reflect premium or quantity (which were not relevant to the Term Agreement), Petro Trade had never raised any issue with written contracts Addax had sent in the past.

51 On 20 November 2018, I sent Petro Trade the written agreement [4241 and 4242] that they had requested in our telephone call in early January 2018 and at the meeting in February. I do not wish to make excuses for the delay. I was very busy and was away on business a lot during this period; and for Addax, the written form of the agreement was not a priority. Addax and Petro Trade had already made the agreement in January; we were just documenting it thereafter. I was relieved to have sent the written contract and embarrassed about the delay in doing so.

52 I disagree strongly with Mr Hindawi when he says in his first witness statement (paragraphs 33 and 35) that the document I sent in November was a draft for discussion. Had the document been a draft for discussion as suggested

> by Mr Hindawi, I would not have bothered preparing and sending a separate document for Model Trade as requested, because then we would have needed to amend two documents simultaneously as negotiations progressed.
>
> 53 I made Addax's understanding as to the status of the two agreements very clear in the covering emails in which I described them as "the agreement between AESA and Petro Trade" and "the agreement issued between AESA and Model Trade" [4243 and 4244].
>
> 54 Mr Hindawi did not reply to me to say these had not been agreed, or to ask why I referred to them as agreements rather than drafts. Mr Hindawi did not revert to me with any comments on the Term Agreement or request any amendments and I did not expect him to. The allegation in paragraph 13 of Mr Hindawi's second witness statement, that he told me in a call a few days after 20 November 2018, that the agreement was being reviewed by Petro Trade's lawyers, is untrue."

124. PT resists the claim in its Defence on the following basis:

(1) While it is common ground that Mr. Hindawi and Mr. Torre spoke on 3 January 2018 but Mr Hindawi contends that no binding contract was concluded (Defence, para. 20.1), and so the document sent on 20 November 2018 was not evidence of terms agreed on 3 January 2018 (Defence, para. 20.2).

(2) There was "*no certain agreement as to price*" on 3 January 2018 and so no binding agreement came into existence (Defence, para. 20.3). Also, the fact that Clause 9 of the written terms stated that the price would include a premium to be mutually agreed was an unenforceable agreement to agree (Defence, para. 33.3).

(3) There was no course of dealing by which the terms of the earlier written spot contracts were incorporated into any of the parties' trades (Defence, para. 22.3).

(4) Different spot contracts were sent between December 2015 and May 2017 which contained different terms, including "*as to quality, the passing of title, the passing of risk, payment terms (including the period by which letters of credit were to be provided) and laytime allowances*" (Defence, para. 23).

Mr Robinson noted that no particulars are given as to what contracts were different and in precisely what way. The plea at para. 32 of the Defence did not plead that terms as to passing of title and risk were different as between the 20 November 2018 terms and the terms of the preceding trades.

(5) Deliveries were not made in accordance with Clause 7 of the Term Agreement which is evidence that it was not agreed (Defence, para. 33.2).

(6) The Term Agreement on its face contained a qualified passing of risk provision, i.e., that only risk as to condition or quality of the product passed on delivery (Defence, para. 33.4).

(7) PT admits that the relevant products under the Term Agreement were delivered to Monrovia and that it collected the portions alleged by Addax, but Petro Trade pleads in para. 37 of the Defence that "*On or around January / February 2020, unknown and unauthorised parties removed the remaining gasoil ex M/T STI Beryl and mogas ex M/T Ance from the LPRC tanks*". It is therefore contended that, because the Term Agreement was not agreed, and title and/or risk remained with Addax pursuant to the SDA, the Balances in the LPRC tanks perished before risk passed to PT, such that PT is not liable to pay Addax (Defence, para. 42). I note that this is the same argument I have considered and rejected in the context of the Gasoil Contract.

(8) PT denies that it accepted the Balance and pleads that Addax is not entitled to sue for the price, and only has a claim for damages under s.5 0 of the SGA (Defence, para. 43). Again, this is the same argument I have considered and rejected in the context of the Gasoil Contract and do not need to consider further in this context.

125. Mr Hindawi gave evidence on this issue in the two witness statements he provided in support of the jurisdiction challenge in which, to summarise he:

(1) Disputed the basis on which the products were traded;

(2) Disagreed that a concluded agreement had been reached in January 2018 for a Term Agreement, or at any time, but that the terms were only discussed in outline, and contended that a draft was to be sent to be negotiated but no draft was received until November 2018, but this did not represent a concluded agreement but was no more than a draft. There was no agreement e.g. as to jurisdiction. He also contended it did not include terms as to a fixed premium for the term which he says was part of the discussion.

See, in particular his first statement at paras. 33-40 and his second at paras. 11-14.

126. In his second witness statement, Mr Hindawi disputed Mr Torre's account:

> "11. I dispute Francois' assertion (at paragraph 30 of Torre 1) that we reached a concluded agreement during our telephone call that took place on or around 3 January 2018. As far as I was concerned nothing had been agreed. The type of agreement that I had proposed during that call, a long term contract with the

> regular supply of petroleum product, was a very different type of agreement to those that Francois and I usually concluded over the telephone when Petrotrade would purchase certain quantities of products on identified vessels. I specifically asked for a draft contract so that I could study and check the terms.
>
> 12. Addressing the email which he sent me on 20 November 2018, Francois states (at para 41 of Torre 1) that "If I had sent what Mr Hindawi believed was a draft subject to negotiation, I do not know why Petro Trade did not respond and attempt to negotiate the document". It isnot correct that there was no response.
>
> 13 I spoke to Francois on the telephone a few days after he had sent that email. The call was primarily about something else, but I said towards the end of this call that the draft was being reviewed by Petrotrade's lawyers. Francois was therefore aware that I believed the document was a draft. Ultimately, the idea of a term contract was not taken forward by either party.
>
> 14. Francois states (at paragraph 35 of Torre 1) that "Addax and Petrotrade had never before negotiated the drafting of a written contract''. That is wrong. Addax and Petrotrade had negotiated the SDA (which I described in my first statement) and the various other agreements annexed to it. Various drafts were exchanged before the parties signed it."

127. Mr Torre's second and third statements strongly dispute Mr Hindawi's evidence: see above.

128. In rejecting PT's challenge to jurisdiction, Cockerill J. considered the dispute regarding the existence of the Term Agreement since it was only through the Term Agreement (or a course of dealing) that there could have been an agreement as to the jurisdiction of the English Courts. As I have noted previously, the evidence before her was not as full as that now available at trial. Nonetheless, she held:

> "33. Against this background and the agreement that there was a conversation, looking firstly at the question of the term agreement, it seems to be perfectly plausible that a term agreement was reached. I express no view, of course, as to the right answer, which will depend on witness evidence on that point. However, plausibility as to the agreement of the term agreement, was rightly not seriously disputed. It seems to me that it would be particularly hard to do so when one can see exchanges between the parties early in 2018, which both suggest a rationale for the long-term contract and also demonstrate Petro Trade chasing Addax for a copy of a written confirmation for its own records. That chasing took place not on the basis that an agreement was outstanding or because it wanted to negotiate, but because "we did not receive the sales contract as we need this contract to include it in our financial documents". So we have a background of trading over some time. We have a background where I proceed on the basis that it is perfectly plausible that a term agreement was reached. The question is as to the course of dealing.
>
> 34. As I have already indicated, I do not consider that absolute consistency is always necessary to establish a course of dealing; all will depend on the facts. It is clear that in this case there were numerous contracts on terms which

contained an English jurisdiction clause before the posited Term Agreement. It is also clear that, to the extent that spot contracts were produced, they were produced on very substantially identical forms, though it appears there were two iterations as to the passing of risk. In the past, there was no issue about the terms on which the parties were dealing in any respect. Addax only invited Petro Trade to acknowledge or confirm receipt of written recaps or spot contracts; and Petro Trade only ever acknowledged or confirmed receipt of the same, as opposed to treating the written documents as a basis on which to commence negotiations. The correspondence is replete with phrases like "kindly confirm safe receipt" and "noted with thanks" or "acknowledged with thanks".

35. The terms of the spot contract, which are key in the sense that they contained the jurisdiction clause, are terms which were effectively contemplated between the parties when they did negotiate their one definite long-term contract, the SDA, in 2015. That agreement contemplates the first trade on these terms and the first trade we do have includes the relevant terms. There is limited evidence that we have, in that most of the evidence for 2016 appears to be missing. There is, on the evidence we have, consistent delivery in the early days against terms, though that comes with a powerful rider that there is no evidence for more than the December 2015 agreement and the Gasoil Agreement across 2015 and 2016. There is, however, evidence that when the parties sent spot contracts they seem to have treated them as containing the full terms. There is no suggestion of another competing set of terms, though it may be fair to say that no further terms would be necessary. It appears that the Gasoil Agreement was concluded in the same way. While it is not common ground how it was concluded, jurisdiction has not been denied in relation to the Gasoil Contract where the relevant terms, including the jurisdiction clause, were sent.

36. There is, so far as one can see, a period of time at the beginning of 2017 where there was a degree of consistency in sending the spot contract terms; there was then a lull. By the time the lull had occurred, the parties had been trading for over 18 months. There is no suggestion that when terms were not sent anybody argued that there was no contract. Obviously, there was no dispute as to a jurisdiction clause because there were no disputes. There seems to have been no dispute that the other terms which were included within the spot contract would apply, though it is fair to say there is no evidence of any dispute in relation to any of those either. No written supply or spot contracts were issued after November 2018, when the wording for the Term Agreement was circulated. The parties continued to trade after 2018, without any such documents being sent. That does, on its face, appear to suggest that they were trading with the wording of the Term Agreement in mind.

37. There was also a change in relation to practice in relation to recaps; only one recap was sent by Addax to Petro Trade after November 2018 - that was on 16 April 2019 - but that was for a different type of fuel which was not captured by any hypothetical Term Agreement. It is fair to say that Petro Trade never questioned why recaps stopped being sent after November 2018. That appears to be suggestive that they knew that it was unnecessary because there was a Term Agreement. The absence of such recaps also leaves the question, unless the parties were proceeding on the basis of these terms, including the terms in

> the spot contract, on what terms were the parties contracting?
>
> 38. As for the question as to this being a long-term contract, it was, on any analysis, a long term contract which was effectively designed to replace the individual contracts, so I do not regard that as a roadblock in the way of establishing a plausible evidential basis. The contract posited, the Term Agreement is therefore not fundamentally different to an individual supply contact. It is not a different sort of contract like the SDA. It is, one might say, effectively a "lumping together" of a number of individual trades.
>
> 39. Taking matters all together, whether there is a course of dealing depends on the facts. It depends upon looking at all of the facts against the relevant background. This is not a full trial. However, looking at all of these facts against the relevant background I conclude that an argument that there is a course of dealing does have a plausible evidential basis in the light of all these matters."

129. In my judgment, her conclusions based on a plausible evidential basis are reinforced by the evidence now available including the greater number of recaps and spot contracts which were available at trial to demonstrate the course of dealing between the parties which I have already considered in the context of the Gasoil Contract:

(1) The existence of the Term Agreement is not disputed (see Cockerill J. paras. 9 and 19) and a written document was chased several times by PT. Mr Hindawi's protestations that PT does not know how the contract was formed appears inconsistent with this and also with the fact that it was clearly explained by Mr Torre and was consistent with the constant process that had been followed since 2015 when the written contract reflecting terms followed the verbal agreement;

(2) When the written terms were produced in November 2018, they did not purport to be draft but to record the terms of the oral agreement, in much the same way as found in the spot contracts for individual trades;

(3) Two term agreements were produced in November 2018, as Mr Hindawi's evidence accepted (first witness statement para. 37), including one in similar terms for Model Trade, PT's sister company. There would have been little point in producing two written agreements given their similarity if only draft terms for negotiation had been required;

(4) The claim that "*a few days after*" the Term Agreement was sent on 20 November the agreements were being reviewed by PT's lawyers and that Mr Handwi's second witness statement at para. 13 alleges a conversation with Mr Torre to this effect, is inconsistent with Mr Hindawi's own first statement at para. 36 where he states that there was no further reference to the Term Agreement document after 20 November until 22 January 2021.

Moreover, his later version of events is rejected by Mr Torre at para. 3 of his second statement –

> "This is untrue: I am absolutely certain that no such conversation took place."

First, I accept Mr Torre's evidence given at trial to support Addax's case, whereas Mr Hindawi did not appear and, secondly, I find the unexplained inconsistencies in Mr Hindawi's own evidence further to undermine PT's case in this respect;

(5) On receipt of the two agreements, for PTR and Model Trade, PT did not query them or dispute that they represented the concluded agreement. Although in his second statement at para. 13 Mr Hindawi claimed to have said at the end of a telephone call a few days after the Term Agreement was emailed, made to discuss another issue, that the drafts were being reviewed. I have rejected that evidence in the previous paragraph;

(6) Moreover, Mr Hindawi's claim that some key points which he said had been agreed verbally were not present in the written version, it is inherently implausible that PT would not have responded to Addax reasonably promptly. No response was made until after some months after relations between the parties had broken down in mid 2020. In the light of PT's letter of 3 February 2020 which have set out above in the context of the Gasoil Contract, the claims made by Mr Hindawi lack the ring of truth and, I suspect, may result from the breakdown in the relationship with Addax;

(7) Mr Hindawi is wrong to suggest (para. 36 of his first witness statement) that the trades between Addax and PT carried on as they had done previously since, as I have already mentioned, the use of recap emails and spot contracts, which became redundant with the conclusion of the Term Agreement, ceased with the exception explained by Mr Torre. That of itself provides support for the existence of the Term Agreement and the change from the previous course of dealing;

(8) PT's contention that there was no certain agreement over the fundamental of price, with respect in particular to the premium to be paid, is inconsistent with the previous course of dealing which proceeded on the basis that the fixed element of the price was found in Platt's Index and the premium was agreed between Mr Hindawi and Mr Torre for any particular trade (Defence, para. 7.2, Mr Torre' statement at para. 22). Mr Torre explained in his statement that Addax had been unable to agree to a fixed premium as

suggested by Mr Hindawi on 1 February 2018 because "*a fixed premium was not feasible at that stage due to the high volatility of mogas premiums and he did not press the point. In the previous 12 months the premiums had ranged from US$40 to US$53 per metric tonne. The Term Agreement therefore remained the same, as had been agreed in early January 2018*";

This course of dealing and oral agreement was reflected in cl. 9 of the Term Agreement –

> "9. PRICE
>
> The unit price for the product exclusive of any taxes, duties and fees, will be calculated as follows:
>
> Platt's European Market Scan for "gasoil 0 .1 pct" and " prem unl l0ppm" under the heading "FOB Med (Italy)" plus a premium to be mutually agreed for each delivery, with trigger option for the pricing as detailed in the recap of each delivery sent by seller to buyer.
>
> There is no escalation/de-escalation for density to be applied to this price."

I reject the contention that the failure to determine the premium is sufficient to make the Term Agreement uncertain since it reflects the settled practice between the parties, only relates to one element of the price and sets out the mechanism by which the price will be determined, in the context that the parties had discussed on 1 February 2018 the range in premiums that had been agreed to date. See Hobhouse J in ***Didymi Corp v Atlantic Lines & Navigation Co, Inc.*** [1987] 2 Lloyd's Rep 166 by analogy (where hire charges in charterparty were subject to adjustment for performance "*by an amount to be mutually agreed*");

(9) I also bear in mind that the Court should be reluctant to hold an agreement void for uncertainty where the parties clearly intended to enter into a binding agreement and have performed it at least in part: ***Pagnan SpA v Feed Products Limited*** [1987] 2 Lloyd's Rep. 601 at 619 (agreeing with Bingham J's approach), approved by the Supreme Court in ***RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)*** [2010] 1 WLR 753 at [48]-[49] and see Lewison, *The Interpretation of Contracts* (7th ed.), Chapter 8, Section 17. Here, there was in my judgment, an intention to enter into a legally binding agreement, which was partly performed, and the premium was intended to be agreed on a basis that reflected volatility in the market on the basis of a well-established practice;

(10) The suggestion at para. 33.2 of the Defence that deliveries did not take place in accordance with cl. 7 of the Term Agreement is said to support PT's case

that no agreement was concluded is not further explained or evidenced. Moreover, it is inconsistent with the following –

(a) It is common ground that Addax delivered and PT collected product in Monrovia after 3 January 2018, and 20 November 2018;

(b) Cl. 7 stipulates only that deliveries were "*DAP in multiple cargoes lots, one safe port/one safe berth basis Monrovia, Liberia during January 2018 to December 2019*", with delivery windows and quantities to be agreed, which is what the parties did; and

(c) PT in any event ignores cl. 24 of the Term Agreement (there were similar provisions in the spot contracts before 3 January 2018), which is an entire agreement provision and provided that -

> "Any waiver of any breach of any provision of the agreement by either party shall not be considered to be waiver of any subsequent or continuing breach of that provision.
>
> No waiver by either party of any breach of any provision of the agreement shall release, discharge or prejudice the right of the waiving party to require strict performance by the other party of any other of the provisions of the agreement."

Accordingly, even if there had been a failure to comply strictly with cl. 7 on one or more occasions it would not follow that there was no Term Agreement at all.

130. For all the above reasons, and finding Mr Torre's evidence to be credible and to be supported by his appearance and evidence at trial, I reject the various defences advanced by PT in the pleadings and in Mr Hindawi's evidence, which did not address the entirety of the evidence now available and, moreover, was unsupported by attendance at trial. I accordingly find that the Term Agreement in the form produced to Cockerill J. and at trial [G/2396-2407] was agreed in January 2018 and put into written form on 20 November 2018 and was therefore a binding agreement between Addax and PT.

131. Further contentions were advanced by PT:

(1) There was no sufficient course of dealing. I reject that for the reasons already given;

(2) There were inconsistent terms as to passing of risk prior to the Term Agreement. I reject this and the suggestion (Defence para. 33.5) that inconsistency with the SDA was relevant to the formulation of the Term Agreement. Further, it is important to bear in mind cl. 3.2 of the SDA, which

explained why Addax required risk to pass;

(3) Only risk as to condition or quality of products passed to PT under the Term Agreement (Defence, para. 33.4). Cl. 13 of the Term Agreement stated –

> "Title and risk of the product shall pass from seller to buyer when the product passes the flange connection between vessels' permanent cargo discharge manifold and the delivery hose(s) at discharge port.
>
> From this point, any obligation of the seller as to the condition and quality of the product shall cease and the seller shall have no liability for any deterioration in the condition and/or quality of the product for any reason whatsoever, including inherent vice."

I am not satisfied that cl.13 did limit the passing of risk as PT alleges, given the clear terms of the first part of cl. 23 and cl. 3.2 of the SDA;

(4) In any event, PT was under an obligation to pay under cl. 10 within 90 days from each release of product –

> "payment due date being ninety [90] calendar days from each release of product (products are discharged basis DAP Monrovia at the name of buyer, stored in Monrovia under a SMA supervised by ACE, and then released by lots of about 1000 MT to buyer."

(5) PT was thus required to pay invoices 17409472 [G/3334], 17409473 [G/3333] and 17409474 [G/3332] in respect of the release of products which was due under those invoices within 90 days of release. In fact, Addax allowed PT more than the contractual 90 days to pay, and did so on the basis of 120 days, and has calculated interest on a 120 day basis from 4 December 2020 not from 90 days of release.

132. Para. 37 of the Defence, as with the Gasoil Contract claim, alleges the unauthorised removal or theft of the balance of product – here in about January or February 2020 (Defence, para. 37). I have rejected that claim so far as the Gasoil Contract is concerned, for the reasons given earlier. As with the Gasoil contentions, there is wholly insufficient evidence to support this claim which does not identify the parties said to be responsible, how the product was removed or at what precise date. The claim is also inconsistent, as with the Gasoil Contract defence, with the requests made for stock reports and the information they contain confirming that the balances of the product remained in the tanks. See my discussion of these matters in the context of the Gasoil Contract, above. I note with regard to the Term Agreement contentions:

(1) The correspondence from January and February 2020 with regard to confirmation of stocks considered above;

(2) My rejection of the contentions set out in the Gray Page Report;

(3) A stock report of 3.6.20 [G/3282] signed and stamped by ACE, LPRC and LPRC's Operations Manager, Mr Hoff, for the product delivered by M/T ANCE shows the final discharge taking place on 20 February 2020 [G/3339-03340] leaving the balance Addax states it then released i.e. 1,678.810MT. It is implausible, therefore, that the stock was stolen at some date in January or February.

133. I note also the submissions made out of caution by Mr Robinson, given the non-appearance of the Defendant, in paras. 194-196 of his Skeleton Argument. Although they do not add anything to my overall conclusions, I accept them.

134. I reject the pleaded contention by PT that the stock released by Addax was removed from the tanks and that the product was not delivered to PT or that it was otherwise able to establish non-acceptance or avoid liability for payment under the Term Agreement in respect of the invoices.

General conclusions and relief

135. For the reasons given, I accept Addax's contentions with regard to its claims and reject the various defences advanced in the pleadings and in the evidence adduced by PT in the interim application before Cockerill J., but not supported at trial.

136. I therefore find that PT is liable to Addax as follows (sums in US Dollars):

(1) $2,744,174.93 comprising –

(a) $515,273.01 under the Gasoil Contract (see Mr Torre' statement at para. 85 reducing the premium claimed from the invoice); and

(b) $2,228,901.92 under the Term Agreement;

(2) Interest on unpaid sums until the date of payment.

(3) Costs.

Interest

137. Addax accepts that with regard to interest it limits its claim, to PT's benefit, as follows:

(1) Instead of pursuing the "actual cost of funding" basis under cl. 10 of both agreements it limits its claim to the rate of 8% per annum as pleaded in the APOC;

(2) The start date for the sums due under the Gasoil Contract is 90 days after release (90 days after 4 December 2020) which rather than payment being "on sight" (as in the invoice) it will seek interest only from 4 March 2021; and

(3) The start date for the sum due under the Term Agreement, rather than 90 days after release on 6 August 2020, which would be 4 November 2020 since the invoices demanded payment by 4 December 2020, it claims interest from that later date.

138. In accordance with the interest calculation submitted to me prior to handing down of this judgment, the award of interest to judgment is as follows (sums in US Dollars):

(1) **Gasoil contract**

Principal	$515,273.01
At 8% pa	$41,221.84/365
Daily rate	$112.93
Interest 05/03/2021 to 13/04/2021 (claim form)	
40 days (at $112.93)	$4,157.20
Interest 14/04/2021 to 04/07/2023	
812 days (at $112.93)	$91,699.16
TOTAL	**$95,856.36**

(2) **Term Agreement**

Principal	$2,228,901.92
At 8% pa	$178,312.15/365
Daily rate	$488.52
Interest 5/12/2020 to 13/04/2021 (claim form)	
130 days (at $488.52)	$63,507.60
Interest 14/04/2021 to 28/03/2023	
812 days (at $488.52)	$396,678.24
TOTAL	**$460,185.84**

ANNEX TO JUDGMENT

SCHEDULE OF INDIVIDUAL TRADES BETWEEN CLAIMANT & DEFENDANT

References in brackets are to pages in Trial Bundle G

	DATE	VESSEL	RECAP EMAIL	SPOT CONTRACT (SC)
1.	November 2015	MT Guyenne	10 November 2015 [6]	SC [39], [54]. Sent 13 November 2015 [36], [51]
2.	November 2015	MT Guyenne	13 November 2015 [30]	SC [82]. Sent 16 November 2015 [79]
3.	November 2015	Winter Oak	26 November 2015 [97]	SC [130] Sent 27 November 2015 [129] Amended version sent 7 December 2015 [303], SC at [304]
4.	December 2015	MT Guyenne	14 December 2015 [320]	SC [324] Sent 21 December 2015 [319]
5.	February 2016	MT Marida Magnolia	10 February 2016 [404]	SC t [422] 18 February 2016 [421] Amended version sent 19 February 2016 [448], SC [450]
6.	March 2016	MT Torm Timothy	12 February 2016 [418]	SC [496] Sent 2 March 2016 [495]
7.	March 2016	MT Guyenne	14 March 2016 [557]	SC [566] Sent 14 March 2016 [565]
8.	April 2016	MT Winter Oak	27 April 2016 [580]	SC [598] Sent 27 April 2016 [596]
9.	May 2016	MT Eships Agamid	13 May 2016 [622]	SC [625] Sent 13 May 2016 [623]
10.	August 2016	MT New Ranger	12 August 2016 [640] Amended 12 August 2016 [641]	SC [723] Sent 14 September 2016 [720]
11.	August 2016 ("Gasoil Contract")	MT Torm Tevere	25 August 2016 [654]	SC [656] Sent 25 August 2016 [655]
12.	October 2016	MT Pantalena	5 October 2016 [798]	SC [813] Sent 10 October 2016 [810]
13.	October – November 2016 (HFO) (Outside the terms of the SDA)			SC [840] Sent 11 October 2016 [835] Amended 12 October 2016 [863], SC at [864]
14.	October 2016	MT Westminster	19 October 2016 [923] Amended 21 October 2016 [981]	SC [952] Sent 20 October 2016 [951] Amended version sent 21 October 2016 [984], SC [986]

15.	December 2016	MT Eships Agamid	13 December 2016 [1054]	SC [1059] Sent 19 October 2016 [1057]
16.	February 2017	MT Sawtooth	17 February 2016 [1143]	SC [1156] Sent 22 February 2016 [1155]
17.	March 2017	MT Maria E	9 March 2017 [1236] Amended 9 March 2017 [1239]	SC [1245] Sent 9 March 2017 [1243]
18.	May 2017	MT Guyenne	16 May 2017 [1372]	SC [1395] Sent 23 May 2017 [1393]
19.	May 2017	MT Golden Oak	19 May 2017 [1375]	SC [1418] Sent 24 May 2017 [1415]
20.	July 2017	MT Brent	24 July 2017 [1489] Corrected 25 July 2017 [1490]	No SC
21.	July 2017	MT Pantalena	24 July 2017 [1489] Corrected 25 July 2017 [1490]	No SC
22.	September 2017	MT Belisaire {transferred to MT Arnham when MT Belisaire broke down}	15 September 2017 [1575]	No SC
23.	November 2017	MT Pantalena	1 December 2017 [1786]	No SC
24.	9 January 2018	MT Sanmar Songbird	9 January 2018 [1817]	No SC
25.	March 2018	MT Kestrel	9 March 2018 [1894]	No SC
26.	April 2018	MT Torm Timothy	9 April 2018 [1940]	No SC
27.	August 2018	MT Pantelis	No recap	SC [2191] Sent 29 August 2018 [2190]
28.	September 2018	MT STI Saint Charles	21 September 2018 [2230]	SC [2232] Sent 26 September 2018 [2231] Amended on 1 November 2018 [2367], SC [2369]
29.	November 2018	MT Leblon	6 November 2018 [2376]	No SC
30.	November 2018	MT STI Galata [2415]	No recap	No SC
31.	April 2019 {Fuel Oil}	MT San Beato	16 April 2019 [2597]	Outside the scope of the Term Agreement
32.	September 2019	MT Ance [2707, 2717]	No recap	No SC
33.	September 2019	MT STI BERYL [2772, 2812]	No recap	No SC