IN THE MATTER OF THE ARBITRATION ACT, 1996

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

MIDGULF INTERNATIONAL LTD of Cyprus

Claimant
(Sellers)

- and -

GROUPE CHIMIQUE TUNISIEN of Tunis

Respondent
(Buyers)

Sales Contracts dated

27th June 2008 and 7th July 2008

FINAL ARBITRATION AWARD

Whereas

1. By a contract concluded on 27th June 2008 ("the June contract") the Claimant ("Midgulf") agreed to sell and the Respondent ("GCT") agreed to buy a quantity of 23,000 mt, +/-10% in Midgulf's option, of crushed sulphur at a price of US$793.00 per metric tonne CFR (Free Out) Gabes, Tunisia on terms and conditions some of which were in dispute. It was nevertheless agreed between the parties that the June contract was to be construed in accordance with and governed by English law and that any disputes arising out of it were to be referred to arbitration in London.

2. On 2nd July 2008 Midgulf sent a fax message to GCT in which they stated that they were "pleased to indicate subject our reconfirmation" the sale of 150,000 mt +/- 10% in Midgulf's option of bright yellow crushed sulphur to GCT for shipment from Saudi Arabia to Gabes or Sfax, Tunisia at GCT's option during the period July to September 2008. This message concluded by stating that all other terms and conditions pertaining to the shipment, payment, delivery, inspection, force majeure, jurisdiction, arbitration, taxation and insurance of the product:-

> "WILL BE AS PER OUR CONTRACT NO S/S/SULPHUR/2008/06/27 DATED JUNE 27TH, 2008"

3. GCT accepted that they had entered into a second contract with Midgulf in early July 2008 ("the July contract") for the purchase of the sulphur described in Recital B above. However, they denied that the terms of the June contract were those set out in a draft contract No. S/S/Sulphur/2008/06/27 which had been attached to Midgulf's counter-offer dated 27th June 2008 and which included a provision that the contract was to be construed and governed in all respects in accordance with English law and that any disputes arising out of it were to be referred to arbitration in London.

4. Disputes arose between the parties under both the June and July contracts as detailed hereafter. Although GCT accepted that the June contract was governed by an English arbitration agreement, so far as the July contract was concerned, when Midgulf commenced arbitration proceedings in August 2008 GCT denied that it was governed by English law or by an English arbitration agreement. In October 2008 Midgulf therefore commenced proceedings in the High Court in London, applying to the Court for the appointment of an arbitrator under Section 18 of the English Arbitration Act 1996.

5. In response, GCT issued proceedings in Tunisia seeking a declaration that the July contract was not governed by an arbitration agreement.

6. In November 2008 GCT issued further proceedings in Tunisia claiming damages under the July contract amounting to the equivalent of approximately US$2.85 million based on an allegation that the sulphur supplied did not comply with the agreed quality specification.

7. In December 2008 GCT issued an application in the High Court challenging the Court's jurisdiction in relation to Midgulf's application for the appointment of an arbitrator.

8. In February 2009, shortly before an oral hearing was due to take place in Tunisia of GCT's claim in the action seeking a declaration, Midgulf issued an application in the High Court for an anti-suit injunction restraining GCT from proceeding in the Tunisian Court. GCT responded by issuing an application challenging the jurisdiction of the English Court.

9. A temporary injunction having been granted pending the hearing of Midgulf's application for the appointment of an arbitrator, this application and an application for the continuation of the temporary anti-suit injunction were heard by Teare J in the High Court in April 2009. He held that the arbitration clause contained in the draft "Contract No. S/S/Sulphur/2008/06/27" (which was attached to Midgulf's counter-offer of 27th June and had been referred to by

Midgulf in their offer of 2nd July) was not incorporated by reference into the July contract.

10. Midgulf appealed the decision of Teare J. The Court of Appeal reversed his judgment, holding that, by confirming the purchase of the further sulphur in July without any reservation as to its terms, the Buyer had accepted Midgulf's offer of 2nd July which incorporated the terms set out above including the arbitration provision contained in the document referred to as "Contract No. S/S/Sulphur/2008//06/27".

11. By an order dated 10th February 2010 the Court of Appeal ordered as follows:-

> *"Pursuant to the provisions of s. 18 of the Arbitration Act 1996 in respect of the disputes between the Appellant [Midgulf] and Respondent [GCT] arising out of a contract for the sale by the Appellant of 150,000 MT plus/minus 10% bright yellow crushed sulphur to the Respondent in July 2008 ("the July contract"), Messrs. Alan Oakley and Charles Baker be appointed as the arbitrators (being the same arbitrators appointed in respect of a related contract made in June 2008) with a view to them appointing a third arbitrator to act as Chairman, with liberty to apply to the High Court in action 2008 Folio 1057 in the event that they cannot agree the same within 21 days; and that the arbitrations under the June 2008 and July 2008 contracts be consolidated and proceed together as one."*

12. Pursuant to the terms of the said order of the Court of Appeal, the undersigned Alan Oakley of Hoy's Farm, Upwick Ware, Herts SG11 2LD and the undersigned Charles Baker of 5A Bourne Lane, Tonbridge TN9 1LG duly accepted appointment as arbitrators. We, the two arbitrators so appointed, in turn appointed the undersigned Christopher Moss of 4 Charlotte Place, Wilton Road, London SW1V 1DP as third arbitrator. Our appointments took effect in respect of disputes arising under both the June and July contracts, where the Court of Appeal ordered that the two arbitrations should be consolidated and proceed as one reference.

13. The disputes under the June and July contracts involved a claim by Midgulf for damages in relation to the alleged repudiatory breach by GCT of the July contract, and a counterclaim by GCT for damages for losses incurred in the use of 23,000 metric tonnes of crushed sulphur, allegedly out of contractual specification, delivered by the Claimants under the June contract, and carried on board m/v "ROCKAWAY BELLE".

14. Following a two week hearing from 9th to 20th September 2013 this tribunal, consisting of Alan Oakley, Charles Baker and Christopher Moss, published a First Final Declaratory Award on 7th November 2013 in which it determined four issues as preliminary issues, viz.,

(i) that the terms of the June contract are those set out in the draft Contract No. S/S/Sulphur/2008/06/27, including the "inspection" clause (Clause 12), which was attached to Midgulf's counter-offer dated 27th June 2008;

(ii) that the arbitration tribunal had sole and exclusive jurisdiction over all disputes between the parties in respect of both the June 2008 contract and July 2008 contract;

(iii) that by not pursuing a claim in damages in respect of a shipment carried by the mv. AGIOS NEKTARIOS and/or the July 2008 contract GCT had lost the right to do so and/or were estopped from doing so at any point in the future; and

(iv) that GCT were in breach of their agreement to arbitrate disputes arising under the July 2008 contract.

15. We do not repeat here all the findings made in the First Final Declaratory Award, but they should be regarded as having been incorporated into this award.

16. Proceedings were also commenced by GCT before the Tunisian Court of First Instance. In May 2014, the Tunisian Court of Appeal allowed Midgulf's appeal against the decision of the Tunis Court of First Instance which had ordered Midgulf to pay GCT damages under the

July contract, recognising that disputes under the July contract were to be determined exclusively in London arbitration.

17. Our previous finding that the June contract incorporated the terms set out in the draft contract no. S/S/SULPHUR/2008/06/27, sent to GCT by Midgulf with the shorter of their two faxes dated 27 June 2008, sits alongside the Court of Appeal's decision that the July contract also incorporated these terms, including the law and arbitration clauses.

18. At the hearing in September 2013, Midgulf applied for an adjournment to deal with an allegation of fraud that emerged for the first time during the cross-examination of their expert, Dr. Sheard of Brookes Bell. GCT alleged during that cross-examination that SGS's results for ash, based on analyses of sub-lot samples taken at the Berri Gas Plant (Berri) in Jubail, were "made up", i.e. fraudulent.

19. We allowed Midgulf's application for an adjournment: (a) to investigate the allegation of fraud being made by GCT with SGS and to give SGS the opportunity to explain their analysis results; and (b) to have analysed by Inspectorate the load port samples retained by SGS.

20. When the hearing resumed in July 2014 the remaining potential issues to be determined were the following:

    (i) whether the certificates of quality issued by SGS Jubail are final and binding;

    (ii) if not, whether the sulphur supplied by Midgulf was on specification at the time of loading;

    (iii) if the sulphur was not on specification at the time of loading and the SGS certificates are not final and binding, whether GCT was entitled to treat the July contract as being at an end for breach of the specifications clause;

    (iv) whether GCT was entitled to terminate the July contract by reason of renunciation of that contract by Midgulf;

(v) whether GCT was entitled to rescind the July contract for misrepresentations allegedly made by Dr. M.Z. Dajani;

(vi) whether Midgulf is entitled to recover substantial damages for GCT's anticipatory repudiation of the July contract and whether the date on which such repudiation was accepted by Midgulf as bringing the contract to an end was 26 August 2008 or earlier; and

(vii) whether GCT's counterclaims for alleged loss of production of phosphoric acid and fertilizer end products at Sfax and Skhira and loss of sulphur at Madhilla under the June contract succeed. (This is only relevant if we find that the SGS certificates are not final and binding and that the cargo carried on board the AGIOS NEKTARIOS was off-specification.

21. Midgulf claimed in respect of three types of loss:

(i) losses totalling US$6,411,653 suffered in relation to the cargo shipped on the m/v NIKOL H which was already en route to Tunisia when GCT purported to cancel the July contract;

(ii) US$49,356,620, alternatively US$42,013,105, representing the market loss suffered by Midgulf on the remainder of the July contract; and

(iii) demurrage in the amount of US$192,621.53 incurred at Gabes by the m/v AGIOS NEKTARIOS.

22. Midgulf also claimed the following declarations:

(i) A declaration that GCT were in repudiatory breach of the July contract and that Midgulf were entitled to terminate and did lawfully terminate that contract.

(ii) A declaration that Midgulf were not in breach of the June contract and/or the July contract.

(iii) A declaration that GCT are not entitled to recover from Midgulf any loss and damage in respect of the June contract and/or the July contract.

23. The parties also claimed compound interest pursuant to Section 49(3) of the Arbitration Act 1996 and their costs.

24. Both parties were represented by counsel in the arbitration. Midgulf's counsel, instructed by Consult Marine Ltd., were Dominic Kendrick QC and Ms. Sushma Ananda and GCT's counsel were David Goldstone QC and Michael Nolan, instructed by Dentons UKMEA LLP.

25. The seat of the consolidated arbitration under each contract is London, England.

NOW WE, the said Alan Oakley, Charles Baker and Christopher Moss, having taken upon ourselves the burden of this reference and having carefully and conscientiously considered the documentary evidence and submissions put before us by the parties and having given due weight thereto and for the reasons attached to this award, **DO HEREBY MAKE, ISSUE AND PUBLISH** this our **FINAL ARBITRATION AWARD** as follows:

WE FIND AND HOLD that Midgulf's claims succeed to the following extent and no more:

(i) US$6,411,653 (Six million four hundred and eleven thousand six hundred and fifty three United States dollars) in relation to the cargo shipped on the m/v NIKOL H in July 2008 ('the NIKOL H claims');

(ii) US$36,358,743 (Thirty six million three hundred and fifty eight thousand seven hundred and forty three United States dollars) representing the market loss suffered by Midgulf on the remainder of the July contract ('the Market Loss claims'); and

(iii) US$192,621.53 (One hundred and ninety two thousand six hundred and twenty one United States dollars and fifty three cents) in respect of demurrage incurred at Gabes by the m/v AGIOS NEKTARIOS ('the Demurrage claim').

WE AWARD AND DIRECT that GCT shall forthwith pay to Midgulf the said aggregate amount of US$42,963,017.53 (Forty two million nine hundred and sixty three thousand and seventeen United States dollars and fifty three cents) together with interest thereon at 5% per annum and *pro rata* compounded at three-monthly rests. Interest shall run on the following different elements of the claims from the following dates until the date of payment:

(i) the NIKOL H claims – on US$5,005,630 from 28 July 2008 and on US$1,410,196 from 10 October 2008;

(ii) the Market Loss claims – on US$36,358,743 from 15 September 2008; and

(iii) the Demurrage claim – on US$192,621.53 from 2 September 2008.

WE AWARD AND DIRECT that GCT shall bear their own costs of the reference and shall pay Midgulf's costs on the standard basis, such recoverable costs of Midgulf, if not agreed, to be assessed, in Midgulf's option, either by the English High Court of Justice or by us in an award of costs, for which we hereby reserve our jurisdiction as may be necessary.

WE AWARD AND DIRECT that GCT shall bear and pay the costs of this award in the sum of £59,500 provided that, if Midgulf shall have paid any part of the said costs, they shall be entitled to immediate reimbursement by GCT of the amounts so paid together with interest thereon at 5% per annum and *pro rata* compounded at three-monthly rests from the date of such payment until the date of reimbursement.

GIVEN UNDER OUR HANDS in England this 27th day of October 2014.

Signed .....

Alan Oakley

Signed .....

Charles Baker

Signed .....

Christopher Moss

Midgulf International Ltd of Cyprus

(Claimant)
(Sellers)

-v-

Groupe Chimique Tunisien of Tunis

(Respondent)
(Buyers)

Contracts for the sale and purchase of sulphur

dated 27th June 2008 and 7th July 2008

REASONS FOR AND FORMING PART OF THE

FINAL ARBITRATION AWARD

(A) The background facts

1. The parties in this sale of goods arbitration have considerable experience of the commodity in question which is bright yellow elemental crushed sulphur. Midgulf, who are experienced traders in sulphur, were able to supply the sulphur because they had a term contract with Saudi Aramco by which they bought crushed sulphur derived from sulphur in block form stored at the Berri Gas Plant ('Berri') in Saudi Arabia.

2. GCT is a state-owned company which processes sulphur to produce phosphoric acid and fertilisers (in particular phosphate) at plants at

various locations in Tunisia. For this purpose they require sulphuric acid which they make themselves by processing sulphur. Their need for sulphur is substantial (850,000MT in the last 6 months of 2008) and they accordingly buy from many sources. They prefer to deal with prime producers, but from time to time deal with traders.

3. Elemental sulphur ("sulphur") is converted from hydrogen sulphide recovered from the processing of sour natural gas, a by-product of the oil and gas industry. The sulphur is produced in three main forms – molten (i.e. liquid), granular (formed into granules, prills or pellets by cooling molten sulphur with air or water), and crushed. Crushed sulphur is the result of breaking block sulphur, created from molten sulphur which has been poured to form a solid block for storage.

4. The crushed and granular sulphur supplied by Saudi Aramco from Berri originate from the same source (natural gas) using the same process (Claus process) which generates very pure molten sulphur.

5. For the production of crushed sulphur molten sulphur is poured into detachable forming 'moulds' to create huge homogeneous blocks of sulphur which stand outdoors at Berri. Crushed sulphur is reclaimed from such blocks using mechanical equipment (bulldozers, loaders and excavators) as and when needed. It is transported from Berri to vessels at Jubail Commercial Port in covered steel containers on trucks and loaded into the vessels by crane.

6. GCT had good experience of buying granular sulphur from Saudi Aramco, but had never used crushed sulphur from Berri before. They had, however, been using crushed sulphur from other sources since the mid-1990s.

7. Midgulf agreed to sell bright yellow crushed sulphur to GCT under two contracts in 2008 – one concluded in June for "23,000 MT +/- 10% in Seller's option" at US$793 per MT (CFR) ("the June contract") and a second in July for the significantly larger quantity of "150,000 MT +/- 10% more or less in Seller's option" at US$895 per MT (CFR) ("the July contract").

8. A not unimportant part of the background to this case is the significant movement of price and demand in the sulphur market in 2008. The phosphate industry is the largest end user of sulphur (for the manufacture of fertilisers). As a result, the market conditions in that industry help drive demand and prices in the sulphur industry. In the first half of 2008, prices in both the phosphate and sulphur markets rose to unprecedented levels. The June and July contracts were made at the peak of the boom in the sulphur market.

9. However, the upward momentum of the phosphate and sulphur markets changed towards the end of July 2008 when those markets weakened, with the downward trend accelerating from August 2008 onwards. Major suppliers (including the usual suppliers to GCT such as ADNOC and KPC) had posted record prices, but had failed to achieve them, and prices crumbled.

10. The leading market bulletin[1] headline for the week of 24 July 2008 was:

> *"Major downward price correction now underway – contract suppliers fail to secure target prices."*

11. Midgulf had correctly anticipated the rise in demand and made a contract to buy crushed sulphur from Saudi Aramco in April 2008. It was common ground that Saudi Aramco is considered to be a first rate producer. Midgulf would then sell on to purchasers in the market. Their rates were competitive and attracted purchasers such as GCT who were interested in beating the very high prices (around US$950-1000 per MT) being posted by other suppliers (notably ADNOC) in June and early July 2008.

12. Before buying the crushed sulphur from Saudi Aramco, Midgulf had carried out sampling and analysis to satisfy themselves as to the quality of the product they were buying and would be selling on. They subsequently sold this sulphur successfully to a variety of purchasers. It

[1] Fertilizer Market Bulletin, also known as FMB

was the evidence of Dr. M. Z. Dajani, the President of Midgulf, that only GCT alleged any quality problems.

(B) Shipment under the June contract

13. The June contract was for one shipment only of 23,000 MT (+/-10% in Midgulf's option) of crushed sulphur. The vessel nominated for this shipment was the ROCKAWAY BELLE, which loaded 23,700MT at Jubail Commercial Port. Loading in fact commenced during the night of 25th June 2008, as Midgulf were aware that the quarterly prices under their contract with Saudi Aramco were due to change on 1st July and would inevitably rise.

14. The ROCKAWAY BELLE shipment was carried from Jubail to Sfax in Tunisia where the vessel arrived on the 19th July 2008. On the 21st July, GCT wrote to Midgulf informing them that a preliminary analysis made on a sample drawn when the vessel berthed showed that the cargo had an ash content of 1300 ppm as opposed to 300 ppm as provided in the contract and acidity of 400 ppm instead of the 300 ppm guaranteed.

15. On the 21st July Mr Samarraie of Midgulf sent a fax to GCT's Mr Hamrouni saying that Midgulf had appointed an SGS surveyor to attend with GCT's surveyor at the vessel to take composite representative samples from all holds, one to be kept by GCT, one by SGS, one to be sent to Midgulf and one to be sent for analysis to any independent European laboratory.

16. On the 22nd July Mr Hamrouni sent a fax to Dr M. Z. Dajani telling him that an average sample, taken jointly by SGS with "our people", had been analysed by GCT. The results of that analysis had proved even worse. The ash content was 1270 ppm, the carbon was 780ppm and the acidity was 550 ppm. All these figures were in excess of the contractual specifications.

17. Mr Hamrouni also observed that the two loadport certificates produced by SGS in respect of this cargo and the first shipment under the July contract on board the AGIOS NEKTARIOS (which had not yet arrived)

showed exactly the same figures which *"practically can never happen"*. He said that that indicated that the cargo on the latter vessel was exactly the same as that on the ROCKAWAY BELLE, or that the certificates were false, and could not be accepted. He said that Midgulf were in breach, that GCT held them fully responsible and that they therefore declared the contract as "resiliated." He asked Midgulf to find alternative destinations for the cargo on board the AGIOS NEKTARIOS and for that on the NIKOL H which was also then en route to Tunisia. The latter vessel – which was the only other vessel which had by then been loaded - was subsequently diverted by Midgulf to Egypt and its cargo sold elsewhere.

(C) The June and July Contracts

18. The terms set out in draft contract no. S/S/SULPHUR/2008/06/27 which, save for the price and quantity, were incorporated also into the July contract, were as follows:

1. PRODUCT

BRIGHT YELLOW CRUSHED SULPHUR

2. QUANTITY

23,000 METRIC TONS+/- 10% (SELLERS' OPTION)

3. SPECIFICATIONS

SULPHUR CONTENT (ON DRY BASIS): 99.70 PCT MIN.

ASH CONTENT: 0.03% MAX

CARBON: 0.03% MAX

MOISTURE: 3% MAX

ACIDITY: 0.03% MAX

(MOISTURE IN EXCESS OF 0.5 PCT TO BE DEDUCTED FROM BILL OF LADING WEIGHT FOR INVOICING PURPOSES AND NOT TO BE CONSIDERED A DISCREPANCY)

LUMP SIZE SHALL NOT EXCEED 100 MM MAX.

COMMERCIALLY FREE FROM ARSENIC, SELENIUM, AND TELLURIUM.

4 PRICE

US$793.00 PMT ...PER METRIC TON CFR/FREE OUT GABES OR SFAX, TUNISIA.

5. PACKING

IN BULK

6. ORIGIN

SAUDI ARABIA

7. DESTINATION

GABES OR SFAX, TUNISIA, BUYERS' OPTION, TO BE DECLARED BEFORE CROSSING SUEZ CANAL.

8. SHIPMENT

FROM JUBAIL, SAUDI ARABIA .....

9. PAYMENT

BY IRREVOCABLE CONFIRMED L/C PAYABLE WITHIN 30 DAYS FROM BILL OF LADING DATE .....

OPERATIVE AND WORKABLE L/C TO BE IN OUR HAND LATEST THREE WORKING DAYS AFTER SALES CONFIRMATION ....

10. SHIPPING TERMS

CFR (FO), ONE SAFE PORT, ONE SAFE ALWAYS AFLOAT, ALWAYS ACCESSIBLE, AT ALL TIMES (PROTECTED BERTH), ALL OTHER SHIPPING TERMS INCLUDING SERVICE OF NOR, DEMURRAGE AND DESPATCH TO BE AS PER PERFORMING VESSEL'S GENCON C/P.

12. INSPECTION

TO BE CONDUCTED BY INTERNATIONALLY REPUTABLE INSPECTOR (S.G.S.) FOR QUALITY, QUANTITY AND ANALYSIS WHOSE FINDINGS AT LOAD PORT WILL BE FINAL AND BINDING FOR BOTH PARTIES. SELLER TO APPOINT AND BEAR COSTS OF INSPECTION.

BUYER SHALL HAVE THE RIGHT TO BE PRESENT OR TO BE REPRESENTED AT LOADING BY AN INDEPENDENT SURVEYING COMPANY TO BE APPOINTED BY THE BUYER AT ITS ACCOUNT TO

INSPECT AND CONTROL THE LOADING OPERATION, BEING UNDERSTOOD THAT THIS DOESN'T DISCLAIM THE SELLER FROM ITS FULL RESPONSIBILITY FOR THE QUALITY.

14. JURISDICTION

THIS CONTRACT IS TO BE CONSTRUED AND GOVERNED IN ALL RESPECTS IN ACCORDANCE WITH ENGLISH LAW.

15. ARBITRATION

ENGLISH LAW TO GOVERN. VENUE IN LONDON.

(D) Issues for determination

(a) Were the certificates of quality issued by SGS Jubail final and binding?

19. Without prejudice to their denial that the above terms, including clause 12, formed part of either contract, GCT asserted that on a true construction of that term, in order for any findings to be binding on both parties:

(i) those findings were required to be those of an SGS inspector who was internationally reputable and had actually inspected and sampled the cargo properly and in the way described in the certificate;

(ii) those findings were required not to be fraudulent;

(iii) loading of the cargo concerned and inspection of it, should have commenced only after the making of the contract;

(iv) CGT should have had the opportunity to be present or represented throughout the process of loading, from its commencement;

(v) the inspector should have complied with his instructions;

(vi) the findings should not have contained a fundamental mistake.

20. GCT also submitted in the alternative that terms to the same effect were to be implied into the contract as being too obvious to need stating or to give the contract reasonable business efficacy.

21. In their Closing Submissions the specific criticisms levelled by GCT at the system of sampling and analysis adopted by SGS were founded on two main propositions. The SGS certificates needed to be honest (and based on a proper system of sampling and analysis) and, equally importantly, any loadport inspection had to have taken place at the loadport in the course of loading. Furthermore, if either duty was breached, such a breach was repudiatory.

22. With regard to the second point (described by Midgulf's Counsel as "the geographical complaint") GCT's complaint was that the certificates purported to be loadport certificates, certifying that the cargo loaded onto the respective vessels had been sampled throughout loading between the dates specified in the certificates, that a composite sample had been made from those samples, that that composite sample had been analysed and that the analysis had shown the cargo to be on specification. Any recipient of that certificate would have been reassured that SGS had taken representative samples of the cargo actually loaded on the vessel as it was being loaded or once loaded and that the cargo met the contractual specifications. But that was not the case. Furthermore, the methods of sampling used at Berri to ascertain the chemical content of the cargo were unsatisfactory at best and that there was a real possibility that the samples were unrepresentative.

23. There is some overlap between the geographical complaint and the complaint that the certificates were dishonest. When GCT concluded that the certificates contained misstatements as to where and when the cargo had been sampled their submissions were amended expressly to plead fraud. However, quite different allegations of arguably more reprehensible dishonesty were made during the hearing after the internal work sheets covering the SGS Jubail laboratory's analyses were scrutinised.

24. At the first hearing a large quantity (80 or so) of quality reports were produced, one for each of the 1,000 MT sub-lots comprising the ROCKAWAY BELLE, AGIOS NEKTARIOS and NICOL H cargoes. Each of those quality reports was supposedly based upon a manuscript worksheet which purported to record the underlying analysis data used to produce the quality report. Since that hearing, SGS have produced similar worksheets (though not the associated quality reports) purporting to record analyses of a further 127 sub-lots of cargo loaded on the other 5 vessels that carried block sulphur from Jubail in the summer of 2008 to other buyers.

25. The method for determining the ash content of sulphur in any sample is straightforward. A clean crucible is weighed. A small quantity of the material to be analysed ("the sample") is then placed in the crucible and weighed. The sample[2] and the crucible in which it is contained are then put in an oven to burn off the sulphur, leaving a residue ("ash"). The crucible and the residue contained in it are then weighed. The weight of the clean crucible is then deducted from the weight of the crucible + ash. The result is the ash weight.

26. The ash weight is then converted into a percentage by multiplying it by 100 and dividing it by the sample weight. It can also be expressed in ppm by multiplying the percentage figure by 1,000.

27. Because the raw data records measurements to 0.1 mg, the ash weight can thus be calculated to 0.1 mg which for an ash weight of 15.0 mg is three significant figures (i.e.15.0 mg). The percentage and ppm can thus also be

[2] Strictly speaking it is of course a sample of a sample. The composite sub-lot samples weighed 1kg each but according to the work sheets, the weight of material actually analysed for ash was between 50g and 100 g.(25)

determined to three significant figures. For example, in the case of sub-lot A1, the ash content appears as 0.0300% or 300 ppm.

28. The worksheets did not in fact separately record the ash weight whether to three significant figures or otherwise. Nor did they record the percentage or ppm to three significant figures. Rather, the only figure for ash content which was explicitly recorded in the worksheets was a percentage rounded to one significant figure. Thus in the case of sub-lot A1 we see a figure of 0.03% and it is this figure which is then inserted into the quality report for the relevant sub-lot.

29. GCT claimed at the September hearing that the SGS worksheets and analyses were fraudulent and unreliable on two related bases: first, the percentage ash figures when rounded to three significant figures were 0.0300% or 0.0200% (this is so for 70 out of 81 sub-lot analyses across the three shipments); second, GCT also said that, with few exceptions, the ash weight figures were all 15.0mg or 20.0mg or 30.0mg although the weights were being measured to the nearest 0.1mg. GCT alleged that an uncanny similarity in the figures and an implausible pattern demonstrated fraud.

30. During the adjournment lasting approximately nine months GCT did not seek to amend their submissions to plead this further case based on an allegation of fraud. However, GCT's allegations were put to SGS, who sent Mr Anthony Samples, their Legal Counsel, and Mr John Bartlett, Head of Investigations for SGS Corporate Security, to Jubail to conduct interviews with laboratory staff and management, tour the laboratory and sample storage facility, and review the hardcopy work files and contemporaneous documentation located at the Jubail laboratory and office complex.

31. On 6th May 2014 Midgulf's expert, Dr Daniel Sheard of Brookes Bell, produced his final report on the 80 or so work sheets produced by SGS in respect of the sub-lot results on cargo shipped on board the ROCKAWAY BELLE, AGIOS NEKTARIOS and NICOL H, as well as on sub-lots of 5 other shipments made to other buyers.

32. The statements obtained from laboratory staff were also put into evidence, as was SGS's report following their visit. On the basis of a statement by the Laboratory Supervisor, Umesh Mhatre, to the effect that the percentage of ash found in a sample was reported to two decimal points, "rounding up or down using accepted mathematical convention" Dr Sheard concluded in his final report that:

> *"I agree that for at least a large number of the sub-lot analyses and some of the other data, some of the weighings recorded by SGS in their workbooks cannot be a record of data which was actually measured during experimentation. In particular this involves the crucible+ash weight often not being independent from the empty crucible weight.*
>
> *I cannot deduce with certainty what SGS did during their analysis or how the noted shortcomings of the lab workbook came about."*

33. He adds, however:

> *"It appears to me that the empty crucible weights and the weight of sulphur used are genuine experimental results. If they are fabricated, this has been done in a relatively sophisticated fashion, which is inconsistent with the patterns that can be seen with the ash weight results and the percentage ash results.*
>
> *Fourier analysis leads me to conclude that there appears to have been an underlying distribution of ash weights which was truncated by rounding.*
>
> *I believe that rounding is a more likely explanation for the data than fabrication.*
>
> *Intermediate temperature weighings provided for the three shipwide composite samples are both suggestive of genuine experiments having been carried out and are also consistent with the ash levels being below 0.03% at the time of the sampling."*

34. We noted that Dr Sheard relied on several different aspects of the data which he considered to be inconsistent with the simplistic allegation of fabrication. It is the existence of all of these aspects which led him to reject the fabrication allegation. The aspects relied upon, quoted from his report dated 6th May 2014, were the following:

> *(i) "The presence of a number of sub-lots which do not conform to the simplistic pattern identified by Mr Goldstone suggest to me that the explanation for what is written in the SGS worksheets is not simply fabrication."*

(ii) "Mr Goldstone only tabulated the main sub-lot results from the three shipments. The SGS records also include "check" tests, the tests on the composites, the retests carried out on instructions from Midgulf on 21 and 22 July 2008, and finally the test on the sample drawn by SGS during the discharge of AGIOS NEKTARIOS in Tunisia which was sent to Saudi Arabia for testing."

"These 10 duplicate tests do not exhibit the same pattern Mr Goldstone drew attention to in the main sub-lot results. Here we have a number of instances where the ash weight and ash percentages are relatively close to the round figures of 0.0200, 0.0300, but they are not exactly so. This is another aspect of the data which does not sit happily with the simplistic fabrication allegation."

(iii) "For these three overall composites, we have two results in which the percentage ash is exactly 0.0200% but the individual ash weights are not round figures. The sulphur figures used are different but in each case the calculation gives exactly 0.0200%. For NIKOL H, neither the ash weight nor the result are round figures."

"These tests on the composite samples appear to use different crucibles to those used for the sub-lot tests, and they do not follow the simplistic round figures pattern identified by Mr Goldstone. Again, this is a factor which suggests that the allegation of fabrication is not accurate."

"Some very interesting figures are recorded on the SGS analysis worksheet for the three composite tests said to have been carried out at the time of loading the three vessels. These are in respect of intermediate temperature weighings carried out during the ash test."

"Intermediate temperatures were discussed during the hearing in the context of the testing carried about by GCT laboratories. During the ash test, if the heating is interrupted at intermediate temperatures and the crucible weighed at those temperatures, the data can be used to establish figures for carbon/bitumen content."

"Most of the SGS records give only the high temperature reading used to calculate ash, but that is not the case on the sheets covering the analysis of the shipwide composites, where intermediate weighings are recorded at 400 and 600 C°."

"The data for these 400 and 600 C° mid-points during the testing carried out on the three shipload composites are not round figures and thus if the mid-point data has been fabricated, it has been done so in an entirely different manner to the rest of the data, yet no attempt has been made to fabricate ash results on those composites as anything other than a round result."

"The weighings for empty crucible and sulphur weight appear to be genuine independent sets of measurements. It would be very strange indeed to go to great lengths to create credible crucible and sulphur weights and yet not to bother creating a credible set of overall ash percentage results or ash weights."

"I believe that the existence of what I see as independent crucible weight and sulphur weight data can be taken as an indication that testing did indeed take place – i.e. SGS did run the tests as they say they did and they did record the crucible weights and the sulphur weights."

"I note that Umesh Mhatre says in his statement of 7 November that the data was entered into an excel spreadsheet. Spreadsheets make it easy to round data automatically. They also make it relatively easy to back-calculate figures like the ash+crucible weights across a large number of sublots relatively quickly."

"It would appear to me that this is what has happened. By this I mean that whilst the experiment was being carried out, the ash weight results were calculated by subtracting the measured crucible and ash weight figure from the empty crucible figure and then rounding that result to one significant figure. An excel spreadsheet has then probably been used to recreate ash+crucible figures based on the empty crucible weights and the rounded ash weight. I am aware that this explanation does not fit some of the data points, but I cannot identify a mechanism which does explain everything."

"On that explanation then, I would imagine that SGS have lost or deleted the original data containing the actually measured ash+crucible weights and have attempted to recreate it. However, this explanation does suggest that testing was actually carried out, but that the results recorded by SGS were in many cases only accurate to one significant figure. As noted previously, that is sufficient accuracy for the purposes for which the tests were being run."

35. Midgulf accepted that it is unclear what specific rounding mechanism SGS has used for the different ash results, and that there is no one explanation that appears to fit all the data – this may simply be a consequence of different SGS operatives having different approaches to rounding.

36. The area of scientific expertise of GCT's expert, Dr Roberto Trotta of Imperial College, lies in probability theory and statistical methods, as applied to physical phenomena in astrophysics and cosmology. Dr Trotta did not accept the methodologies and many of the assumptions adopted by Dr Sheard, in particular his use of Fourier analysis.

37. According to Dr Sheard the aim of this technique is to look beyond the SGS ash percentage data to discern any credible underlying pattern to the figures which arose from the genuine results of analytical testing. If there is, that underlying pattern would support the view that the SGS figures are based on the results of laboratory testing of samples from the cargoes, but were in some way rounded or truncated. That situation should be contrasted with the hypothesis put forward by GCT that the SGS figures were "fabricated".

38. The experts' Joint Memorandum produced after their meeting illustrates wide divergences of approach and methodology on probability theory which the tribunal was frankly unqualified to evaluate. We do not consider that ultimately this matters very much for the following reasons.

39. We start from the assumption that our view on the overall reliability of the laboratory procedures and recording of observations adopted by SGS is a relevant issue in this arbitration. However, we should emphasise that, if, giving a fair commercial construction to the SGS certificates, we were to hold that they complied with clause 12 of the contract, it matters not what particular methods may or may not have been used by SGS's laboratory staff, nor whether their attempted rationalisation of those methods 6 years later is scientifically plausible. Subject to two clearly defined exceptions, it would result from our determination and the consequent application of clause 12 that the certificates are to be treated as final and binding. Those exceptions are fraud and a departure by the inspector from his instructions in a material respect.

40. In paragraph 19 (above) we have summarised the 6 conditions which GCT claimed must be satisfied before any certificate can be said to have conclusive effect. We do not accept that the wording of clause 12 or the case law on this subject necessarily supports these conditions, apart from those mentioned under sub-paragraphs (ii) (concerning fraud) and, in certain circumstances, (v) (departure from instructions).

41. Taking the sub-paragraphs in order, our views on these purported conditions are as follows:

(i) It is not, of course, the individual inspector who has to be "internationally reputable", but the inspectorate company. It was common ground that SGS met this express requirement in clause 12.

(ii) A fraudulent certificate clearly cannot be 'final and binding', or indeed have any contractual effect.

(iii) Leaving aside the fact that the contracts do not expressly provide that loading of the cargo concerned and inspection thereof should only commence after the contracts had been concluded, nothing in the first paragraph of clause 12 suggests to us that the validity of the SGS certificates is in any way contingent upon the time when loading commences.

(iv) The right given to GCT by the second paragraph in clause 12 (which paragraph is not directly concerned with certificates of quality) "to be present or to be represented at loading" was no doubt drafted on the natural assumption that loading normally occurs after a sale contract is made. It does not follow that the conclusive effect of such certificates can be impugned simply because the buyer has no practical opportunity to be present at the outset of loading. If such precipitant loading by the seller were to cause some prejudice to the buyer, it may be that the latter could found a claim for damages for breach of some implied term. In the present case, however, GCT were informed on 27th June 2008 that loading of the ROCKAWAY BELLE cargo had commenced already, but they raised no objection and replied by confirming their acceptance of the vessel to load "during laycan 26-30 June".

(v) That the inspector should have complied with his instructions goes without saying, but failure to do so will invalidate a 'final and binding' certificate only where there is a departure by the expert or inspector from his instructions in a material respect. In the present case the obligation to instruct SGS was Midgulf's. Midgulf accepted that they were obliged to give instructions which were within the bounds that a reasonable company could give. Clearly such instructions have to be consistent with what is set out in the Inspections clause.

There was no complaint as to the nature of the technical or analytical brief given to SGS. The essential complaint was that SGS did not comply with clause 12, because they did not make their findings for "quality, quantity and analysis ….at loadport". This 'geographical complaint' is considered below.

(vi) The position as to whether a "fundamental mistake" by the inspector in the way in which he carries out his instructions (as distinct from a material

departure from instructions) vitiates the inspector's determination changed with the Court of Appeal decision in *Campbell v. Edwards*[3] where Lord Denning stated:

"It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives them a valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it."

42. The court's reluctance to look behind a conclusive evidence (or 'final and binding') certificate is illustrated by the Court of Appeal case of *Coastal (Bermuda) Ltd. V. Esso Petroleum Co. Ltd*[4]. In that case the independent inspectors, Caleb Brett, certified a composite sample of an oil cargo which, some days after loading, was sold on to Esso under a contract containing a 'final and binding' clause. Under the contract quality clause the maximum asphaltines content was 3.88%. On outturn the asphaltines and water and sediment content were found to be double the amount certified by Caleb Brett.

43. It was subsequently established that Caleb Brett had not tested for asphaltines, but had simply asked the refinery for their test result.

44. In his leading judgment Sir John Donaldson, M.R defined the question as follows:

"On that fresh evidence, it is argued that there has to be a full investigation to see what the reality was. What this appeal really comes down to in the last resort is, does it matter what the reality was if, on a fair construction of the telex which was sent about July 14, Caleb Brett were confirming the analysis of the sample in accordance with the inspection clause?

*I have given this a good deal of thought, and it seems to me that in the end it is a pure question of construing the contract and the cable (*i.e. the telex*). I have come to the conclusion, in agreement with the learned Judge, that,*

---

[3] [1976] 1 Lloyd's Rep. 522 See also *Toepfer v Continental Grain Co.* [1974] 1 Lloyd's Rep 11 (CA)

[4] [1984] 1 Lloyd's Rep. 11 (CA)

bearing in mind the clear intention that questions of quality and quantity should be determined as a primary method of determination by documentation and giving the telex a fair commercial construction, this contract was complied with. There was a confirmation by Caleb Brett, it was in the terms of the contract, and accordingly the plaintiffs are entitled to their money."

45. It appears from May LJ's judgment to have been accepted that Caleb Brett could delegate the analysis for asphaltines to others; however, the analysis would still have had to relate to a sample taken "at loadport".

46. In the present case, provided that SGS did not depart materially from the task defined for them under clause 12, and did not act fraudulently or dishonestly, it is not open to GCT to go behind the certificates and challenge them on the basis of the laboratory staff's at times inexplicable working practices.

The allegations of fraud/dishonesty

47. GCT suggested that the SGS certificates were fraudulent because the figures for ash and acidity in the ROCKAWAY BELLE and AGIOS NEKTARIOS certificates were identical – the inference being that the identical figures were not the product of actual testing and analysis but were invented by SGS to ensure the sulphur cargoes complied with contractual specification. Dr. Sheard explains that the only reason the results for ash and acidity in the two certificates are identical is because they have been quoted to one significant figure. His analysis of the SGS laboratory worksheets shows that when the ash and acidity results are quoted to more than one significant figure, the results for the ROCKAWAY BELLE and AGIOS NEKTARIOS are not identical. In any event, the NIKOL H ash and acidity figures are not identical to the other two vessels.

48. GCT also complains that the results in the certificate were not based on one analysis of a single overall composite sample but on the arithmetical average of multiple composite samples of sub-lots.

49. We agreed with Midgulf that this last complaint is artificial because there should be no difference between the arithmetical average of various

composite sub-samples and one analysis of a composite made up from those samples. Many companies would not bother to analyse sub-samples, but would only analyse one final composite sample.

50. The complaint is also factually wrong. In fact, SGS carried out tests on both an overall composite sample for the entire shipment and tests of individual sub-lot samples. As explained by Dr Sheard, for both the ROCKAWAY BELLE and AGIOS NEKTARIOS, the results for ash and acidity for the overall composite sample are identical to the arithmetical average of the results for the individual sub-lot samples. Those results were reported in the SGS certificates of analysis.

51. For the NIKOL H, Dr. Sheard explains that there are small discrepancies between the ash and acidity results for the overall composite sample and the arithmetical average of the results for the individual sub-lot samples. In light of that discrepancy, SGS inserted the figures obtained from analysis of the overall composite. Again, that SGS certificate is correct.

52. The practice was thus to create overall composites and the results on the certificates were based on the results of testing on those overall composites.

53. It is important to bear in mind that there are two different sets of contracts: the contract of purchase between Aramco and Midgulf and the June and July contracts of sale between Midgulf and GCT. They have very different regimes for testing.

54. The Saudi Aramco contract, alone, permitted the buyer, Midgulf, to take samples for every 200MT of sulphur lifted and for analysis to be carried out on the samples collected for every 1,000MT. The sub-lot results were provided for this contract.

55. In contrast, clause 12 of the June and July contracts simply requires "findings" and an "analysis". This was provided by the certificates based on overall composite samples prepared from the multiple sub-lot samples taken at Berri. As the certificates explicitly stated, they contained

the results of analysis on an overall composite, which are not in any way parasitic upon the sub-lot analyses.

56. To take the NIKOL H shipment as an example, the Certificate No. J0139M-JB08-1 presented under the July contract certifies the analysis of a composite sample drawn from the cargo of 24,000 metric tons. The working sheet in respect of that composite sample furnishes the figures that we see (ash content 0.0198% - rounded to 0.02% - and acidity 0.006%). When there is a difference between the arithmetic of the aggregate sub-lots and the composite, it is the figure in the composite that appears in the certificate. It is the composite test which determines the figures that appear in the certificates.

57. We were referred to the decision of the Privy Council in *Grace Shipping v. Sharp & Co.*[5] in which Lord Goff, giving the leading speech, emphasised the importance in any case involving allegations of fraud of having regard to the contemporary documents and the overall probabilities:

> *"It is not to be forgotten in that in the present case the judge was faced with the task of assessing the evidence and witnesses about telephone conversations that had taken place about five years before. In such cases, memories may very well be unreliable and it is of crucial importance for a judge to have regard to the contemporary documents and to the overall probabilities. In this connection their Lordships wish to endorse a passage from a judgment one of their number in The Ocean Frost*[6]*. [That is, of course, Robert Goff LJ himself] when he said at page 57:*
>
> *'Speaking from my own experience I have found it essential in cases of fraud when contesting credibility of the witnesses always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case and also to pay particular regard to their motives and to the overall probabilities'."*

---

[5] [1987] 1 Lloyd's Rep.207

[6] *Armagas Ltd v. Mundogas S.A. (The Ocean Frost)* [1985] 1 Lloyd's Rep.1

58. With regard to motivation, it must be asked who would benefit from this purported fraud. The sub-lot analyses were required for the ARAMCO / Midgulf contract because, if the ash content exceeded 0.05%, Midgulf were entitled to a small price reduction. It was never suggested that ARAMCO would stoop to fraud, let alone for such a small amount of money, to ensure that Midgulf did not seek any discount in the event of the ash content exceeding 0.05%. There is, significantly, no allegation of fraud against Midgulf.

59. There was also no reason for SGS to have acted fraudulently. They were never told that there was a target of 0.03% in the Midgulf / GCT contracts, nor were they aware of there even being any sub-buyer. Their instructions were that the maximum ash level was 0.05%, this being the standard ash specification in Saudi Aramco sales.

60. The contemporaneous documents, namely the certificates for each composite sample drawn from the 1,000MT lots, show that the crushing at the plant starts just as or just after the vessel arrives. The sampling during crushing is completed before the vessel completes loading. Moisture sampling goes on a little longer. It is exactly the same pattern with the other vessels, supporting the SGS account that the samples were taken during crushing and that crushing of the block was to all intents contemporaneous with the arrival of each vessel.

61. Indeed, GCT pleaded that if SGS had produced its certificates on the basis of the sub-lot samples, that, in itself, would have been fraud, and contrary to international standards. However, SGS did exactly what they said in the certificates. It is the analysis of the overall composite samples, alone, which matters to GCT's case on fraud.

62. Midgulf submitted that these results are undoubtedly honest, and based on genuine analysis and testing. It is those results which were inserted into the SGS certificates, and therefore it is those results that matter.

63. The worksheets for the analysis of the composite samples and a summary of the results were produced in evidence. There are a number of reasons why Midgulf says (relying on the expert evidence of Dr.

Sheard in the 6 May 2014 report) that these results are based on genuine analysis and testing, and are untainted by any allegation of fraud made by GCT on the sub-lots:

(i) The empty crucible and sulphur weights for the tests on the overall composites for all three shipments appear to be the result of genuine, independent weighings. The crucibles used also appear to be different to those used for the sub-lot tests – this again underlines the likelihood that separate, actual testing took place.

(ii) The ash weight figure for the tests on the overall composites for all three shipments are not round numbers to one significant figure – they were different from each other, and were not 15.0mg or 20.0mg or 30.0mg. The ash percentage result for the NIKOL H is not a round number to one significant figure. In other words, the results do not follow the pattern that formed the basis of GCT's allegations put to Dr Sheard during cross-examination.

(iii) Critically, the tests on the overall composites include weighings carried out at intermediate temperatures of 400°C and 600°C to establish figures for carbon/bitumen content before the final ash test weighings, which were carried out at 800°C. The residue weight and residue percentage figures at 400°C and 600°C showed none of the patterns identified by Mr. Goldstone when cross-examining Dr. Sheard – neither figure is a round number or close to it. Having analysed these results in his 6 May 2014 report, Dr. Sheard concludes:

> *"The results at both intermediate temperatures appear to be the genuine result of independent experiments on sample material from the same source. Put another way, the intermediate weighings of crucible+residue at 400 and 600 degrees appear to be credible, independent weighings. Thus the intermediate weighings, and all of the results calculated from them, do not fit the pattern identified by Mr Goldstone – none of these intermediate results are exact round figures… Mathematically, the most obvious explanation is that laboratory testing was carried out involving weights being observed at all three temperatures, i.e. 400, 600 and 800 degrees. However, for ROCKAWAY BELLE and AGIOS NEKTARIOS, the crucible + ash weights were recorded to give a round figure for ash percentage by whatever procedure was being followed by the SGS personnel. In contrast, the weighings for crucible and residues at 400 and 600 degrees for all three vessels do not exhibit this pattern and seem to be genuine measurements."*

(iv) In short, the intermediate weighings cannot be impugned for fraud. Indeed, there was no reason whatever to falsify them. At 600°C, the residue for all three shipments was less than 0.03%. That is an on-specification result even at this relatively low temperature. The residue weights decrease as the temperature to which the sulphur sample is heated increases. So the ash results for 800°C will be less again. No expert report was put in by GCT to refute this point.

(v) Accordingly, the independent, unrounded data for the residue remaining at 600°C gives powerful credibility to the percentage ash figures of 0.02% quoted on each of the certificates. This also strongly suggests that the ash tests at 800°C were carried out and the results, as recorded, are based on genuine analysis and testing, even if some rounding might have taken place to produce the round ash percentage figures for the ROCKAWAY BELLE and AGIOS NEKTARIOS.

64. The issue whether the results for ash quoted on the certificates of analysis are honest and reliable does not turn on the credibility of the numerous sub-lot by sub-lot results. The certificates were not based on those results.

65. The statistical analysis carried out by Dr. Trotta in his first report, and in his reply report and subsequent letter, does little more than prove that the specific explanation of rounding given by SGS in its letter of 18 November 2013 does not fit all of the SGS data for the sub-lots, some of which exhibit signs of rounding done in a different manner to that explained by SGS – see, for example, the ROCKAWAY BELLE sub-lots A1, A4, A5 and A8. This analysis neither proves nor disproves fraud and is of no assistance in assessing the genuineness of the analyses performed on the composite samples used to produce the certificates for each shipment.

66. While many of the results recorded by SGS's laboratory staff in their internal work sheets relating to sub-lot samples were at times either mathematically inaccurate or the produce of a methodology found baffling by both parties' experts, nothing in the evidence persuaded us that SGS based their results in respect of the composite samples – which

results were recorded in the certificates of quality – on anything other than genuine, independent weighings.

67. We do not consider that GCT has come near to discharging the heavy burden of proof required to establish fraud. To succeed on this point, GCT had to persuade us at the very least that the case for believing that the analyses at Jubail were systematically fabricated was more persuasive than the case for not so believing. On the contrary, the results of the analysis of the overall composite for each of the three shipments appeared to us to be honest, credible and reliable. The finality of the SGS certificates of analysis for the three GCT shipments cannot be disregarded on the basis that SGS's analysis and/or findings were fraudulent.

68. This is not to say that the analyses also carried out by SGS Jubail on the *sub-lots* were even remotely satisfactory. They were not, but at the same time they were not fraudulent. SGS produced worksheets relating to five other vessels loading sulphur in Jubail in 2008. These were DELTA SALUS, MARITIME MASTER, JIN PRINCE, ALBARELLA and MONA. Dr Sheard noted that the same approach seems to have been followed by SGS in most instances in the 5 vessel workbook as in the Midgulf/GCT three vessel workbook, and the results are broadly similar notwithstanding the fact that the 5 vessel workbook was prepared for contracts having ash levels of 0.05%.

69. We have dealt at length with the allegations of fraud, not only because of their very serious nature and potentially devastating effect on Midgulf's claims, but also because they were advanced with the support of, and answered by, prodigiously detailed expert evidence. We consider that Dr Sheard managed to navigate safely between the Scylla of recognising that SGS's work on the sub-lots called their competence into question and the Charybdis of discrediting their certificates of analysis, and anchored with his professional reputation intact.

The geographical complaint

70. In order for these certificates to fall within the final and binding clause, clause 12 requires them to be "findings" by SGS at the loadport, which for exports of crushed sulphur is Jubail Commercial Port.

71. SGS took samples at Berri during the crushing process for chemical analyses. The contemporaneous documents show that just after the ship arrived, crushing started for loading the cargo onto the ship. Sampling was undertaken before the cargo was loaded onto trucks for transportation to the Jubail Commercial Port.

72. SGS also took samples at the quayside at Jubail Commercial Port for moisture analyses. SGS analysed both sets of samples at its laboratory in Jubail (Berri samples for chemical parameters and quayside samples for moisture).

73. The inspection clause incorporated in both contracts provides that SGS's findings "at load port" will be final and binding. GCT contend that the analyses relied on are not analyses of the cargo at the loadport, since the gas plant at Berri is some 21 km from the Jubail Commercial Port. It was described by Mr Hassouneh as being within Jubail "for administrative purposes".

74. Midgulf's response to this was to provide evidence that the Berri Gas Plant is referred to as "Berri Gas Plant (Jubail)" by, for example, Wikimapia and local commercial entities. They also contended that, when negotiating the contracts, both Dr. M. Z. Dajani and Mr. Hamrouni understood that the sampling of Aramco crushed sulphur for chemical parameters would take place at Berri in accordance with good ordinary practice, whereas taking samples during loading at Jubail Commercial Port would have presented numerous practical difficulties.

75. Midgulf placed particular reliance on a fax from Mr. Khorchani of GCT dated 21 July 2008 which refers to GCT sending an inspector for the shipments on board the two vessels (SYRIA STAR and BERDYANSK) which were nominated after the NIKOL H *"to perform all the necessary*

inspections of the sulphur quality/quantity and take samples from the sulphur blocks at Berry (sic) and attend afterwards the loadings operations at Jubail…". When taken to this document, Mr. Hamrouni accepted in cross-examination that Mr. Khorchani knew sampling took place at Berri.

76. We felt unable to accept that sampling at Berri was sampling at the load port. Whatever Mr Hamrouni or Mr Korchani may or may not have known about the loading of crushed sulphur at Jubail has no relevance to the proper construction of the Inspection clause. The pertinent words in clause 12 are:

> *"To be conducted by ……(S.G.S.) for quality, quantity and analysis whose findings at load port will be final and binding …."*

77. Although Midgulf's construction arguably makes better commercial sense, the language of clause 12 is such as to preclude their interpretation. It was common ground that the clause did not require that the laboratory analyses themselves be carried out within the strict confines of the port, but the words used clearly envisage that such analysis should be on samples taken either from containers on trucks on the quayside or from the vessel's holds.

78. Conclusive determination clauses are regarded in law as exception clauses. Any ambiguity in the language used in such clauses will therefore be interpreted by courts or arbitrators against the party seeking to rely on them, which in this case is Midgulf. The justification for this restrictive approach was described by Mr Justice Donaldson (as he then was) in *Rolimpex –v- Dossa & Sons*[7]:-

> *"(Conclusive determination clauses) involve a very substantial modification of the rights of the parties and in particular of the buyer's rights, since they may be called upon to accept and pay the full price for goods which are substantially sub-standard. In such circumstances*

---

7 [1971] 1 Lloyd's Rep. 380

common sense and the law both dictate that the parties must use clear language if they intend this result…."

79. Our attention was also drawn to correspondence exchanged between Midgulf and SGS's head office in Geneva in April 2008 concerning Midgulf's request that SGS (Jubail) inspect the sulphur to be supplied under Midgulf's contract with Saudi Aramco. In their email to SGS (Geneva) on 7th April 2008 Midgulf ask SGS to quote for a scope of work broken down into two separate stages. The first stage is described as ("Cargo (Blocked Sulphur) at Barry (*sic*) Gaz Plant (BGP)" and the second stage as ("Vessel/Cargo inspection at Jubail Commercial Port"). Both stages were to include "cargo inspection for quantity, quality and analysis" and the issuance of certificates.

80. On 25th April 2008 Midgulf contacted SGS (Geneva) to inform them that the only analysis now required during the second stage at Jubail Commercial Port was for moisture, but not for the other parameters (sulphur content, ash, carbon, acidity, and organic matter) for which SGS had originally been asked to quote.

81. These exchanges seemed to us strongly to support the view that (i) sampling at Berri is not, and was not at the time, regarded as the same as sampling at Jubail Commercial Port and (ii) there was nothing preventing Midgulf from arranging for SGS to sample the sulphur at the port.

82. Each SGS certificate, relating to "a composite sample drawn by SGS from subject shipment throughout the above loading operation…", purports to be "issued at loading port". It may be that the first statement is correct, since the loading operation could be regarded as a continuous process which begins at Berri, where the newly crushed sulphur is loaded into containers which are then sent by truck to the port, and ends with the containers being emptied into the holds. We do not need to decide this, since the clear intention implied in clause 12 is that the samples are to be taken at the loadport. The parties had not agreed to be bound by a determination as to quality carried out elsewhere.

83. The following words, which are found in all the certificates, also appear to us to be untrue:

> *"We have carried out the following chemical analysis of Crushed Sulphur from MV (there follows the name of the vessel) at Jubail, Saudi Arabia."*

84. No analysis had been carried out of crushed sulphur from the vessels in question. The "*following chemical analysis"* refers to that producing the results for sulphur, ash, carbon, etc. in addition to moisture. The analyses were carried out for all those properties, it was carried out on samples of crushed sulphur taken not *"from the vessel"*, but at Berri (apart from the analysis for moisture).

85. It was common ground that an independent inspector's determination is not binding if he departs from his instructions in a material respect. It has been argued before that a departure is not material unless it affected, or could have affected, the outcome of the determination. However, that argument was rejected by the majority in the Court of Appeal in *Veba Oil Supply and Trading G.m.b.H. v. Petrotrade Inc.*[8] where Simon Brown, L.J. said:

> *"I would hold any departure to be material unless it can truly be characterised as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party."*

86. We are satisfied that the taking of samples other than at the location expressly stipulated in the Inspection clause cannot be dismissed as trivial or *de minimis*. GCT submitted that the reason for seeking the appointment of an independent inspector at the loadport is so as to be sure that somebody independent sees that the cargo analysed is the cargo loaded and to ensure that some other cargo is not loaded in its place. They added that this was not to accuse Midgulf of loading different cargo to that sampled at Berri; nor was it to say that substantial contamination took place between Berri and Jubail port. It

---

[8] [2001] EWCA Civ 1832

was simply to say that the whole purpose of the system of loadport inspections is to provide safeguards for the purchaser against these matters occurring. It is not for a seller unilaterally to decide that those safeguards are unnecessary.

87. As Mr Justice Knox pointed out in *Nikko Hotels v. MEPC*[9] it is not the business of the Court (or this tribunal) to weigh the importance of a stipulation in a contract or to enquire why it was included. Midgulf rightly did not argue that such a stipulation was trivial.

88. It follows from the above finding that the certificates are non-contractual and cannot therefore be 'final and binding'.

89. That, however, is not the end of this issue, since GCT contended that the mere fact that Midgulf arranged for sampling to be carried out at Berri, rather than at Jubail Commercial Port was itself a repudiatory breach of the July contract.

(b) Did the instructions given by Midgulf to SGS Jubail amount to a renunciation of the July contract?

90. Broadly speaking, repudiation may be by renunciation (evincing an intention not to perform a contract or only in a way that involves a serious breach), impossibility (actual incapability to perform, either at all or without committing a serious breach) or by serious actual breach.

91. In their Amended Points of Defence and Counterclaim GCT alleged that Midgulf evinced an inability to perform the July contract or an intention not to do so in four different ways. Our findings above make it unnecessary to consider three of these alleged repudiatory acts – (i) fraud/dishonesty, (ii) the fact of the ROCKAWAY BELLE and AGIOS NEKTARIOS cargoes being "seriously out of specification" and (iii)

---

9 [1991] 2 E.G.L.R. 103

inability to perform resulting from the fact that the sulphur bought by Midgulf from Saudi Aramco was of a lower specification than that provided for in their contracts with GCT.

92. However, the fourth alleged repudiation by renunciation is Midgulf's "conduct in failing to arrange for the cargo to be supplied to GCT to be sampled and analysed at the loadport, but instead instructing SGS to sample blocks of sulphur at Berri some 10 km[10] from the loadport before the vessels arrived for loading".

93. This alleged repudiation was raised for the first time only in July 2013, five years after the July contract was terminated. Although it may surprise some, under English law a party can retrospectively justify termination of a contract by reference to a ground upon which it did not rely at the time of termination (*Boston Deep Sea Fishing v Ansell*[11]).

94. We accept that, viewed in isolation, a failure to arrange for sampling to be carried out at the place specified in the Inspection clause of a sale of goods contract is capable of having serious consequences which subvert the whole purpose of the clause.

95. When considering what constitutes a serious potential or actual breach the precise threshold of seriousness is defined in several different ways in the authorities. In *Telford v. Ampurius*[12] the Court of Appeal conducted an exhaustive review of the authorities. In his leading judgment Lewison LJ states:

> *"There was no dispute about the applicable legal test. It is stated in para 24-018 of Chitty:*
>
> *"A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be*

---

[10] Midgulf accepted in their Skeleton that the distance is in fact some 21 km.

[11] (1888) 39 Ch D 339

[12] [2013] EWCA Civ 577

unable to perform, his obligations under the contract in some essential respect. The renunciation may occur before or at the time fixed for performance. An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged, as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive. Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The renunciation is then evidenced by conduct. Also the party in default:

"...may intend in fact to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations"....

96. If one party evinces an intention not to perform or declares his inability to perform some, but not all, of his obligations under the contract, then the right of the other party to treat himself as discharged depends on whether the non-performance of those obligations will amount to a breach of a condition of the contract or deprive him of substantially the whole benefit which it was the intention of the parties that he should obtain from the obligations of the parties under the contract then remaining unperformed."

97. Lewison LJ's approach was as follows:

"it seems to me that the starting point must be to consider what benefit the injured party was intended to obtain from performance of the contract..... The next thing to consider is the effect of the breach on the injured party. What financial loss has it caused? How much of the intended benefit under the contract has the injured party already received? Can the injured party be adequately compensated by an award of damages? Is the breach likely to be repeated? Will the guilty party resume compliance with his obligations? Has the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations?"

98. GCT bears the burden of showing that Midgulf was in anticipatory repudiation of the remaining instalments under the July contract. This is

a heavy burden. In the words of Lord Wilberforce in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*[13]:

> *"Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations".*

99. In *Decro-Wall International SA v Practitioners in Marketing Ltd*[14] Salmon LJ said that if the contract did not spell out the consequences of breach "the courts must look at the practical results of the breach in order to decide whether or not it does go to the root of the contract." This approach seems to us entirely consistent with that set out by Lewison LJ above.

100. When comparing the benefit GCT obtained by reason of sampling being carried out at the Berri gas plant and contrasting this with the benefit that GCT would have gained, if sampling had taken place at Jubail Commercial Port, we accepted that no discernible difference in the representativeness or content of the samples would have arisen solely by reason of their being collected at Berri rather than at the port.

101. As for the effect of this breach on the injured party (GCT), it seems to us that the only adverse effect would be to Midgulf's interests, since the breach rendered SGS's certificates of quality uncontractual, as a result of which Midgulf could not treat them as conclusive evidence of quality under the 'final and binding' clause. The breach did not cause GCT any financial loss, but merely improved their contractual rights in the event of a cargo's non-conformity with the specifications.

102. We also do not see that the breach fundamentally changed the value of future performance of Midgulf's outstanding obligations. Their primary obligation under the July contract was to ship on-spec. cargoes at agreed

---

[13] [1980] 1 WLR 277 (HL) at 283

[14] [1971] 1 WLR 361

intervals from Jubail. Their failure to arrange sampling in a manner that reflected the wording of Clause 12 did not mean that the cargoes themselves became non-compliant, nor (as we have found below) that no confidence could be placed in the analysis results set out in the certificates.

103. It was not suggested that Midgulf would have refused to amend their instructions to SGS in order to have chemical samples taken at Jubail Commercial Port, if the error of their ways had been pointed out to them.

104. As mentioned earlier, when taken to the fax from GCT dated 21 July 2008, Mr. Hamrouni accepted in cross-examination that Mr. Khorchani of GCT's Sulphur Purchasing Department was fully aware that sampling took place at Berri.

105. Concentrating on the practical results of the breach in accordance with the tests set out above, we have no hesitation in finding that Midgulf's (no doubt inadvertent) misinterpretation of Clause 12 and the consequent instructions they gave to SGS as to the place of sampling did not begin to 'go to the root of the contract'. The breach was accordingly not repudiatory.

(c) If the certificates of quality issued by SGS (Jubail) are not final and binding, was the sulphur supplied by Midgulf on-specification at the time of loading?

106. GCT contended that it was clear from all of the analyses, apart from those carried out by SGS Jubail, that the ROCKAWAY BELLE and AGIOS NEKTARIOS cargoes were off-spec.

107. The tribunal was given a table summarising all the post-shipment tests carried out both on behalf of Midgulf and GCT and was referred to sections 4 and 5 of the expert report of Dr. Sheard which describes each of the tests in some detail. Some of the tests were carried out at Jubail, but numerous tests were based on discharge port samples. It is important

to bear in mind that, under the June and July contracts, it is the condition of the cargo upon loading that matters.

108. Midgulf says that the best evidence of the quality of the sulphur it supplied to GCT at the time of loading are the analyses carried out by SGS during the loading operation – they were carried out at the right time and by the contractually agreed inspectors. In the light of our decision on Issue (a) sampling for chemical parameters was not carried out at the right place, which is an aspect we consider below. In particular, Midgulf relies upon the honest and reliable results of testing on the overall composites, discussed above, on which the SGS certificates of analyses were based.

109. Much detailed factual and expert evidence was offered as to the sampling practices at Berri. There is no ISO standard specific to the sampling of bulk sulphur, but there are general ISO sampling guidelines and standards available for the sampling of a variety of other bulk products. It was common ground that an important principle in all of these standards for the establishment of average properties on shipments such as these is that all parts of the cargo be given equal weight in the analysis. In reality this is invariably achieved by means of composite samples made up of a number of incremental sub-samples. The aim of sampling is for the analysis results on these necessarily small samples to give a good measure of the average parameters for the cargo as a whole.

110. Clearly, the more homogeneous a cargo, the easier it is to sample reliably. Before weighing the many criticisms made by GCT's expert, Mr Gerard d'Aquin of Con-Sul, Inc, we do not overlook that the homogeneous nature of the cargo is indicated by the similar results obtained for sample after sample not only from the very many sub-lots drawn from the three shipments (the results for which GCT particularly criticised), but also the tests carried out on five other shipments from the same block made by Midgulf between mid-May and mid-June 2008. The latter five cargoes were sold to other parties under contracts which stipulated the usual maximum ash content of 0.05% (rather than the 0.03% inserted in the two contracts with GCT), yet the results for ash on composite samples from these cargoes varied only between 0.01% and 0.03%.

111. Furthermore, in their contract of sale to Midgulf (which stipulated the usual contractual maximum ash content of 0.05%) Saudi Aramco attached a Quality Report of an October 2007 sample and analysis, which showed an ash content of 0.01%. That report was prepared by Saudi Aramco's own inspectors. A sample was sent by the buyer (Midgulf) at the same time to the Royal Scientific Society Industrial Chemistry Center in Jordan, whose analysis using the now superseded BS 4113 procedure showed <0.01% Ash Content at 250 C^{0} (as opposed to the higher temperatures specified in the SGS CA011 (800 C^{0}) and ISO3425 (850-900 C^{0}) methodologies, which Dr Sheard did not believe made a material difference).

112. The sampling was carried out as follows. One sample was drawn at the Berri Gas Plant for every 200MT and thus five samples per 1000MT, which were composited to form a composite sample of crushed sulphur representing the cargo in that 1000MT sub-lot., Samples were taken after the sulphur had been broken up at Berri and the sulphur was then loaded into open-top steel containers (covered by tarpaulins) which were carried by truck to the Commercial Port of Jubail. The samples taken at Berri were analysed for ash, acidity, purity and carbon. Further samples were taken at the port, but these were tested only for moisture.

113. Dr Sheard explains in his Supplementary report dated 30th August 2013 one consequence of dealing with a substantially homogeneous cargo:

> *"This homogeneous nature in turn means that the sampling procedures could have been very relaxed and still be guaranteed to obtain the correct overall average figures. I remain of the opinion that the SGS sampling regime was perfectly acceptable and representative, particularly given the nature of the cargo at the time."*

114. Mr d'Aquin's first report examined the following areas with regard to sampling and analysis:

(i) Whether it is correct to describe block or crushed sulphur from Berri as of the same quality as standard Aramco granular sulphur;

(ii) SGS's published sampling procedures;

(iii) The sampling and analysis carried out on the cargoes loaded on ROCKAWAY BELLE and AGIOS NEKTARIOS;

(iv) The likely reason for the high acidity and ash found in certain discharge samples;

(v) Whether, if all the sulphur came from the same source, it is likely that further shipments obtained and loaded in the same manner from the same source would have an extremely high likelihood of demonstrating the same deficiencies;

115. Mr d'Aquin's company, Con-Sul, Inc. provides technical and commercial advice regarding molten or formed (e.g. granular) sulphur, but he admitted in cross-examination that he had never dealt with the buying or selling of crushed sulphur. He was not a "crushed sulphur man", but had seen sulphur being crushed on several occasions during his long career. It was not, however, part of his job as a consultant to get involved with the sampling of crushed sulphur.

116. Mr d'Aquin's strongly held conviction that it is impossible to say that crushed sulphur is of equal quality to granular sulphur appeared to be based on minimal direct experience of the former. The first example he gives in his first report to justify this conclusion is to say that *"Aramco's specification for BBS indicate it contains 10mg/kg of chlorine, whereas (granular sulphur) has none."* as Dr Sheard points out, that is *"an unjustifiable statement – a contractual maximum of 10mg/kg does not imply that the sulphur contained 10mg/kg at all"* and *"is not supported by the data from either Midgulf or GCT"*.

117. The thrust of that part of Mr d'Aquin's report that seeks to compare crushed and granular sulphur is that crushed lump sulphur from Berri is substantially inferior to granular sulphur. Dr Sheard examined SGS analysis reports covering a number of shipments of formed sulphur (granular or pelletized) and crushed sulphur from various ports to various receivers worldwide. The average ash level across 8 shipments of granular sulphur was 0.019%. The average for 7 shipments of crushed sulphur was 0.020%.

118. A subsequent study of loadport data for sulphur shipments disclosed by GCT covering other vessels from a variety of loadports was examined by Dr Sheard. Ignoring cargoes of liquid sulphur and those where it was not clearly stated whether the cargo was crushed or granular, there were 14 sets of data for each category. The results for ash and acidity had the following averages:

ASH: granular 0.0131%; crushed 0.0140%

ACIDITY: granular 0.0108%; crushed 0.0111%

119. Mr d'Aquin's premise was accordingly not supported by the empirical evidence.

120. Further, his comments on SGS's sampling of crushed sulphur amounted to little more than an at times inappropriate comparison with how granular sulphur is sampled. This was perhaps unsurprising, given that Mr d'Aquin's experience over the last 30 years had been almost exclusively with formed sulphur. The specific criticisms (ignoring one concerning moisture sampling, which was not in issue) were:

(i) No SGS-developed sampling plan had been provided.

(ii) SGS's sampling plan had been provided/dictated by Midgulf.

(iii) The apparatus used for collection of samples was not the one recommended by SGS's written procedures in the US/Canada.

(iv) Sampling was undertaken from a static pile.

121. Dr Sheard replied to these points as follows:

(i) The SGS Cargo Inspector Guide for Fertilizers can only ever offer guidelines – the mode of sampling in many instances needs to be designed to fit the facilities available. Sampling from a conveyor was not an option available in Jubail for crushed sulphur. There were only two realistic options – one at Berri where the cargo is created from the block form, which is where SGS took samples with a scoop. The alternative option is to sample from the steel containers as they arrive at the ship's side (which is where SGS took samples to test for moisture).

[The third possibility of taking samples with a bucket dropped into the

ship's holds in the course of loading was not one that Mr d'Aquin mentioned in his report, though he subsequently supported this method during cross-examination.]

The method of sampling described by the SGS Cargo Inspector Guide for Fertilizers in the part of the Guide dealing with 'Sampling from Truck or Railcar' is in fact extremely similar to the method described by Mr Hassouneh, Midgulf's Project Manager at Berri, in his evidence.

(ii) After setting out the most comparable EU regulation for sampling similar materials and the IMSBC Code, Dr Sheard concludes that by either measure the sampling carried out by SGS Jubail involving 120 sub-samples in total for ROCKAWAY BELLE and NIKOL H and 175 for AGIOS NEKTARIOS was the same as that used for other shipments at or about the relevant time and was appropriate and representative.

Mr Hassouneh testified that the sampling procedure followed by SGS Jubail was no different than for all other shipments and had in fact been "created by Saudi Aramco because they are the biggest producer of sulphur in the world and they know how to deal with sulphur, how to do sampling ….".

Dr Sheard "saw no problem with Midgulf asking SGS to sample in a certain way at a certain point in time. If SGS had not considered the mode of sampling to be appropriate, they would have been at liberty to refuse to have done that sampling and clearly they would not have gone on (correctly, in my view – see section 9 of my first report) to give the declaration they did in 2009 that they considered the sampling to be "drawn as per industry standards"." (Dr Sheard, Supplementary Report of 30 August 2013)

(iii) "I attach no significance to whether a probe or a scoop is used to collect the samples. As I said in my first report, a scoop is the appropriate tool for sampling from a newly created homogeneous pile." (Dr Sheard, Supplementary Report of 30 August 2013)

(iv) In his Supplementary Report Dr Sheard explains why it is "simply wrong" to regard the sampling at Berri to have been from static stockpiles. Mr d'Aquin's subsequent 'Examination and Commentary' on Dr Sheard's report did not take issue with what Dr Sheard says on this point.

122. A number of other factors appeared to us to support the reliability of the SGS Jubail findings.

123. The freshly crushed sulphur cargo was homogeneous when samples were taken at Berri. The cargo had not been exposed at that stage to increases in acidity in different parts of the ship's stow due to different amounts of water and bacteria being present or different particle sizes. Nor had it been exposed to contamination (by rust, paint flakes, corrosion product, etc.) from the peripheries of the holds. Sampling and analysis at Jubail thus gave the most accurate indication of the cargo as loaded onto the vessel.

124. The sampling carried out by SGS at Berri was appropriate and representative for the cargo in question, i.e. freshly created piles of crushed sulphur of which each individual part is statistically identical to the rest.

125. As explained by Dr. Sheard, the analysis methodologies used by SGS in testing the loading samples were appropriate. This was not contested by GTC.

126. The overall composites analysed by SGS were made up of numerous sub-lot samples. This comprehensive sampling provided an overall composite which gave a very good insight into the true properties of the cargo.

127. Berri is the best and usual place to sample. The samples drawn at Berri by SGS, just after crushing, were likely to have given the same results as samples drawn at the Jubail Commercial Port itself from the steel containers. It was not suggested that contamination occurred between sampling and loading or that sampling at Berri for chemical parameters rather than sampling at the quayside at Jubail Commercial Port would have made any difference to the results obtained. This is especially so as the amount of contaminants that would have had to have entered the covered containers between Berri and Jubail Commercial Port to cause the increases in ash alleged by GCT would be huge, and therefore inherently unlikely to have occurred – indeed it was not understood

that GCT suggested otherwise. Dr. Sheard's evidence to this effect was unchallenged, and Mr. d'Aquin agreed that any change in the cargo between Berri and Jubail Commercial Port was unlikely.

128. Save as mentioned in the section above headed 'The geographical complaint', each statement on the SGS certificates about Jubail and the loading operation is factually correct:

(i) "We have carried out the following chemical analysis… at Jubail". This was true. SGS's laboratory where the analyses were carried out was in Jubail.

(ii) "The analyses were made on a [composite] sample drawn from subject shipment throughout the loading operation". This was true, subject only to the self-evident point that crushing and sampling of each cargo necessarily had to commence, and did so, shortly before loading of the vessel could start.

(iii) The "loading operation", interpreted in a broad sense, commenced with the crushing of sulphur blocks at Berri and concluded with the loading of the sulphur cargo into the vessels' holds. Samples were drawn for chemical analysis purposes during the crushing process, and for moisture analysis from the trucks at the quayside at Jubail Commercial Port. For present purposes it is not necessary for us to decide whether, in the strict sense, those samples were drawn "throughout the loading operation".

(iv) Further, given that cargo was crushed, sampled and analysed for loading onto each particular vessel (see Mr. Hassouneh's evidence) and this process only commenced on the day the vessel arrived at port, it was also correct for the certificates to state that the samples were drawn from each of the three subject shipments during that loading operation.

(v) "The chemical analysis was done by SGS Jubail Laboratory". This too was true.

129. It seems that there is no longer any criticism of SGS's analysis and results for *acidity*. As for ash, as explained above, the analysis results obtained by SGS at Jubail and recorded in its certificates of analysis were truthful and reliable. The intermediate weighings of the overall composites at lower temperatures of 400˚C and 600˚C demonstrated this (see paragraph 67(iii) above).

130. In his first report Mr d'Aquin concludes that :

"results derived from analyses at the discharge port therefore stand as the most representative data available for these cargoes of sulphur loaded and therefore unloaded".

131. In our view, Dr Sheard was entirely right to criticise this bald assertion as *"quite an astonishing statement, given that nowhere in* (Mr d'Aquin's) *report is there any discussion or consideration of the sampling procedures followed by the various surveyors at the time of discharge of the vessels in Tunisia".*

132. For the several reasons given by Dr Sheard in Chapter 12 of his first report, we accept that the cargoes on ROCKAWAY BELLE and AGIOS NEKTARIOS and the samples taken from them at Sfax and Gabes respectively were not homogeneous in particle size, susceptible to increases in ash and acidity, and unlikely to be representative.

133. Turning to the sampling procedures at Gabes and Sfax and subsequent analyses, Dr Sheard made, inter alia, the following comments:

AGIOS NEKTARIOS (at Gabes)

(i) The 8 surface samples taken by Intertek from the holds during discharge cannot be representative.

(ii) The standard principles of sampling indicate that the variability in the material to be sampled needs to be taken into account when selecting the number of individual sub-samples to be taken. In view of this the number of samples (25) taken by Intertek must be considered inadequate and calls into question the representativeness of the samples.

(iii) For the reasons explained in his first report, the ash test is especially sensitive to the accuracy associated with the weighings. This is particularly so for the tests carried out by GCT, as in nearly all of the GCT tests for which records were produced, only about 10g of sulphur were used. (The ISO method calls for 50g and SGS used 100g in most cases and 50g for some.) The distinction is important because of the very small amount of ash which ends up in the crucible when only 10g of sulphur is used at the start of the test. Even for the highest ash results reported by GCT, the weight of ash in the crucible was only just over 0.01g. GCT wanted to measure sulphur said to contain, say, 0.03% ash. To weigh such a small amount accurately (when to do so you have to weigh the crucible including the ash and subtract the weight

of the empty crucible) was (as Dr Sheard put it in cross-examination) "extraordinarily difficult to do….. accurately. It is pushing it, even if you have perfect conditions".

(iv) Since the GCT test runs for ash involved an intermediate weighing for the carbon test, the whole process of testing would have required lengthy periods to be allowed for the crucible to cool in a desiccator, weighed for the intermediate/carbon measurement, then heated again and finally cooled in the desiccator for the final weighing. Any attempt to "hurry" a test would be likely to result in incorrect results.

(v) At best, the GCT results can only ever be a tenth as accurate as the SGS results where 100g of sulphur were used, and similarly, the ISO methodology (reportedly used by INERIS, the French laboratory used by GCT) is five times as accurate as that used by GCT.

(vi) Inspectorate give a mean ash of 0.047% and acidity of 0.027%. These are significantly lower than any of the results obtained by GCT. SGS Tunisia's results on the discharge port samples they took were 0.03% for both ash and acidity.

(vii) During cross-examination on the wide span (from 0.0715%, GCT, down to 0.0470%, Inspectorate) between the analyses conducted by four different laboratories (INERIS, LCAE, GCT and Inspectorate) on what were supposed to be identical samples from one and the same final discharge composite, Dr Sheard commented as follows:

> *Q. "There is no reason to prefer any one of those to any other one, is there? You just have a range of results.*
>
> *A. It is worse than that. It is because there is so much variation in them, and they are supposed to be identical samples, that I'm a little bit concerned about those.*
>
> *Q. The variation is between 470 ppm and 715 ppm?*
>
> *A. That is quite a lot."*

(viii) The 8 individual surface samples taken by Intertek on AGIOS NEKTARIOS on arrival at Gabes include three with ash in the range of 200-260ppm (0.02%). Given that ash can only ever increase or stay the same, but can never reduce, these are consistent with the cargo having originally had a

more-or-less uniform ash level of around 0.02 to 0.03% as indicated in the SGS Jubail sub-lot analyses.

(ix) The seal number recorded by INERIS does not match any of the INTERTEK seal records. The sample was also inexplicably ground before being sent to INERIS.

(x) "The picture regarding sample identification and sealing is very poor indeed for many of the samples." Only one seal number from all the samples taken at the discharge of either of the vessels in Tunisia actually matches a laboratory report (the LCAE report). There is no, or no coherent, documentary evidence matching any of the GCT analysis reports with any of the sealed samples.

ROCKAWAY BELLE (at Sfax)

(i) No seal numbers recorded in the contemporaneous survey documents for ROCKAWAY BELLE appear in any of the Saybolt or GCT laboratory reports, nor the INERIS report commissioned by the Tunisian Court Surveyor. Samples were also ground by Professor Saadi Abdeljaouad before being forwarded to INERIS. A certificate was issued by Professor Saadi Abdeljaouad in November 2012, over four years after the voyage, but apart from this no documentary evidence links the samples received by INERIS to the discharge of ROCKAWAY BELLE. No reason is given for grinding the samples, a practice described by Dr Sheard in cross-examination as "an ideal opportunity to get contamination".

(ii) The seal number referred to by Professor Saadi Abdeljaouad for the sample is unrelated to any of the seal numbers recorded in the contemporaneous SGS or Saybolt survey documents.

(iii) By far the highest overall figure for acidity is that obtained by GCT on their analysis of the loading composite. There is no reason for the acidity of this sample to have been significantly greater than the discharge composites, and this calls into question the reliability of GCT's analysis.

134. When different analyses of material from the same sample produce such a wide range of results given by INERIS, LCAE, GCT and Inspectorate), it is difficult for a tribunal to view such results with any measure of confidence.

135. SGS samples at Jubail for both vessels were re-analysed by SGS on 21st and 22nd July 2008 and were found to be on spec. Thus, the worksheet on the Tunisian composite sample for the AGIOS NEKTARIOS which was sent back from SGS Tunisia to SGS Jubail to analyse gives an overall figure of 0.034% ash. As Dr Sheard says in his report, this bears none of the oddities which Mr Goldstone ascribes to the SGS worksheets. The certificate and the report number is the same as on the worksheet and records the inorganic ash as 0.03% because SGS's practice is to round the figures up or down. Thus, if it is 0.034%, they record it at 0.03%; and if it is 0.026%, they record it as 0.03%.

136. The NIKOL H cargo was sampled and loaded in the same way as the other two vessels and was discharged into outdoor storage in Egypt, then subsequently transferred into steel containers and reloaded a month later onto the NANCY and carried to Selaata in Lebanon. The samples taken by SGS during loading of the NANCY in late September/early October 2008 showed that the ash content (0.038%) was only very slightly above the specification in the June and July contracts, whilst acidity was on spec at 0.02%.

137. We wondered why, in the much less rigorous conditions at the loadport in Jubail, the cargo on the AGIOS NEKTARIOS and the ROCKAWAY BELLE should be so much worse than that surveyed on the NIKOL H, which is what GCT allege. After all, unlike the cargoes on the former vessels, the NIKOL H cargo had, during a period of almost 3 months, completed a part-voyage to Egypt, been discharged and stored outside and later reloaded for further carriage. All those factors could be expected to result in a noticeable increase in ash and acidity.

138. Finally, we were shown a table that listed 21 vessels which loaded crushed sulphur at different loading ports for different destinations between March and December 2008. The table shows the loadport and discharge port analysis results for ash and acidity for each shipment. The ash and/or acidity content on discharge is shown to have increased in 17 out of the 21 cargoes, often very significantly - by well over 200% for ash and generally by a yet greater margin for acidity. The results in this table demonstrate

that the ash and acidity levels in a sulphur cargo are very likely to increase significantly over the course of an ocean voyage.

139. Taking into account what is set out above, as well as the overall technical and contemporaneous evidence, it is our view that the SGS results obtained on the composite samples taken at Berri are likely to provide the most accurate indication of the quality of the crushed sulphur when loaded onto the three vessels at Jubail Commercial Port.

140. It follows that GCT have failed to establish that the sulphur supplied by Midgulf was off-specification at the time of loading.

141. We would add that, even if we had concluded to the contrary that the sulphur loaded on the AGIOS NEKTARIOS and NIKOL H did not comply with the ash or acidity specifications in the July contract, this breach of the contract quality clause cannot be treated as a breach of the implied condition as to description under s. 13(1) of the Sale of Goods Act 1979. The specifications set out in clause 3 are concerned with quality, whereas the description of the cargo is dealt with under clause 1. The law distinguishes between description and quality. Warranties as to quality are categorised as "innominate" terms, breach of which will entitle the buyer to reject the cargo only if the breach is so serious that it goes to the root of the contract. (See *Tradax Internacional S.A. v. Goldschmidt S.A.*[15] and *R. G. Grain Trade v. Feed Factors International*[16])

142. When deciding what level of ash could be said to be sufficiently serious to warrant rejection and be treated as a breach of 'condition', we noted that GCT's own standard specification, which they had tried to introduce into the June contract on 26 June 2008, provided:

---

[15] [1977] 2 Lloyd's Rep. 604

[16]]2011] 2 Lloyd's Rep.432

"The origin of the cargo is the Kingdom of Saudi Arabia, produced by Saudi ARAMCO, quality of which shall comply with GCT standard spec as per annex 1, herewith attached."

143. Annex 1 contains the following provisions as to ash content:

"ASH: MAXIMUM 0.05 PER CENT

.....

IN THE EVENT THAT ANY SULPHUR DELIVERED HEREUNDER SHOULD FAIL TO MEET THE ABOVE SPECIFICATIONS THE PRICE TO BE PAID .....SHALL BE REDUCED BY AN AMOUNT AS PER THE FOLLOWING FORMULA (PER TONNE).

$$\text{ASH} \quad \text{USD } 5 \times \frac{\text{ASH EXCESS OVER 500 PPM}}{500 \text{ PPM}}$$

IN CASE THE EXCESS OVER THE ABOVE SAID MAXIMUM OF .... ASH CONTENTS EXCEEDS 400 PPM, THE BUYER IS ENTITLED TO REJECT THE CARGO."

144. Accordingly, the price GCT would have to pay under their own standard specifications would be reduced if the ash content were higher than 0.05% (or 500 ppm). Only if ash exceeded 0.09% would they have the right to reject.

145. We noted also that the Saudi Aramco standard contract also provides for price adjustment if the ash content exceeds 0.05%. However, the buyer is entitled to reject the cargo only if the ash exceeds the far higher level of 0.3%.

146. The evidence provided by GCT to support their counterclaim for alleged production losses and loss of sulphur was weak and such losses appeared to us to be too remote: it cannot have been within the contemplation of the parties that supplying off-specification sulphur which was within GCT's own tolerances in its specifications would have the effects that GCT claim. Other contracts pursuant to which GCT bought sulphur from traders and suppliers plainly illustrate the capability of GCT's plants to use sulphur containing far higher levels of ash and acidity than 0.03%.

147. There was no evidence that use of the ROCKAWAY BELLE cargo caused a decline in performance of the plants, or that any such decline in performance caused the plants to shut down early or suffer actual loss of production. Plants were shut down in the autumn, but the main or only reason for this was reported by FMB on 30 October 2008 as follows:

> *"GCT has confirmed that due to weak market conditions, it is stopping production of DAP and phosphoric acid at Gabes and La Skhira until the end of this year." "Gabes has two types, 650,000 DAP capacity and 1 million phosphoric acid capacity. La Skhira can produce 375,00 phosphoric acid. As a result GCT is requesting the suspension and cancellation of contracted sulphur shipments. Production of TSB and phosphoric acid will continue at Sfax. A similar situation exists in Morocco……."*

148. In the light of such evidence we agreed that the more reliable discharge analysis results on the AGIOS NEKTARIOS and NIKOL H cargoes did not support an argument that the breaches of the quality specifications were so substantial and serious as to go to the root of the July contract.

149. It follows from this latter finding that, even if we had found that the sulphur loaded on the AGIOS NEKTARIOS and NIKOL H did not comply with the ash or acidity specifications in the July contract, such breaches did not give rise to any right to reject.

(d) The cancellation of the July contract

150. It also follows from our findings (a) that the certificates of analysis presented under the June and July contracts were not fraudulent, and (b) that the three cargoes shipped under these contracts were not off-spec. that GCT were not entitled to treat the July contract as being at an end for breach of contract.

151. GCT's notices of termination of the July contract on 22 July and 24 July 2008 were sent prior to the arrival of the AGIOS NEKTARIOS at Tunisia, and solely on the basis of GCT's analysis of discharge port samples on the ROCKAWAY BELLE cargo, which was shipped under the June contract. The earlier of these faxes (both sent by Mr Hamrouni, the

Central Purchasing Manager of Raw Materials) refers to GCT's analysis of the ROCKAWAY BELLE cargo and states:

> *"We consider that this case represents a clear breach to our agreement, for which we hold you fully responsible, and therefore declare it as resiliated and ask you to consider in this respect all our previous confirmations/agreements as null and void and stop any further deliveries under the above mentioned agreement and immediately find alternative destinations for the two vessels presently en route, mv AGIOS NEKTARIOS B/L 14.0702008 and NIKOL H B/L 21.07.2008."*

152. The "above mentioned agreement" refers to the title of the message which identifies the July contract, albeit that the problem complained of arose under the June contract.

153. The second fax merely *"reconfirm(s) to you the pure and simple cancellation:*

1) of M/V AGIOS NEKTARIOS B/L 14/07/08 and M/V NIKOL H B/L 21/07/08 for which we ask you again to find alternative destinations.

2) of all the remaining sulphur tonnage ....."

154. It was not disputed by GCT that, if we found that they were not entitled to terminate the July contract on the grounds of Midgulf's breach, each of the faxes sent on 22 July and 24 July 2008 constituted a repudiation by renunciation in that it evinced a clear intention not to perform the July contract. However, GCT had a second string to their bow, namely their alternative claim that they were entitled to rescind for misrepresentation.

(e) Was GCT entitled to rescind the July contract for misrepresentations allegedly made by Dr. M.Z. Dajani?

155. This alternative ground for cancelling the July contract appears to have seen the light of day for the first time in November 2010, when GCT served their Defence and Counterclaim submissions. As mentioned above, it has long been accepted that a party can retrospectively justify termination of a contract by reference to a ground upon which it did not rely at the time of termination (*Boston Deep Sea Fishing v Ansell*). For

obvious reasons difficulties can arise in practice, however, if the belatedly discovered ground for rescission involves the previously quiescent representee having to convince a tribunal that he would not have entered the contract in the first place but for the misrepresentation.

156. GCT relies on two statements made by Dr. M. Z. Dajani in the course of negotiations for the June contract:

1) The first is a statement made by Dr. Dajani on 24 June 2008 during his telephone call with Mr. Hamrouni that the specification of the crushed sulphur to be supplied to GCT under the June contract would be the same as the granular sulphur that GCT was used to (such as Saudi Aramco granular sulphur). It is not disputed that this statement was made.

2) The second is a statement by Dr. Dajani in his fax of 27 June 2008 to Mr. Hamrouni [8/67] in which he states "WE GUARANTEE THE INTEGRITY OF SUPPLIED PRODUCT AS PER OUR OFFER SPECS. ITS PURE BRIGHT YELLOW SULPHUR, HAS THE SAME QUALITY AS FOR STANDARD ARAMCO GRANULATED SULPHUR. AND YOU HAVE NOTHING TO BE WORRIED ABOUT, WE HAVE SHIPPED THE SAME QUALITY FROM JUBAIL ALREADY TO ALL END-USERS IN CHINA, INDIA, INDONESIA, EGYPT, AND SOUTH AMERICA, FAULTLESSLY."

157. What was said in the fax was that Midgulf guaranteed the integrity of the sulphur "as per our offer specs", which of course at maximum 0.03% ash was more demanding than the standard Saudi Aramco specs. (It will be recalled that the latter provided for a maximum ash content of 0.05% with price adjustments if the ash was between 0.05% and 0.3%.)

158. GCT's misrepresentation claim alleges two distinct statements in the fax which they say were untrue: one as to the quality, but also one as to the specification.

159. Firstly, it is said that the sulphur which Midgulf agreed to supply to GCT was not of the same specification as the granular sulphur that GCT was accustomed to using. The sulphur was bought by Midgulf from Saudi Aramco under a contract which came into force on the 1st April 2008. By that contract Saudi Aramco agreed to supply sulphur with a moisture content of 5% maximum (as opposed to the maximum 3% allowed under

the Midgulf/GCT contracts), an acidity content of 1 % maximum (0.03% maximum under the Midgulf/GCT contracts), and an ash content of 0.05% (0.03% maximum under the Midgulf/GCT contracts).

160. Secondly, the sulphur in fact supplied was of significantly inferior quality to that which GCT was accustomed to using.

161. We have to say that we were not persuaded that this alternative claim based on misrepresentation had much in its favour. Our reasons are as follows:

162. GCT have first to establish that the statements made by Dr M. Z. Dajani were actionable statements of fact, as opposed to mere 'sales talk'. Both Dr M. Z. Dajani and Mr Hamrouni had considerable experience of crushed block sulphur. Mr Hamrouni was familiar with the high quality of Saudi Aramco granular sulphur and the contractual specifications he was being offered exceeded the Saudi Aramco specifications. He had no reason whatsoever to place reliance on what Dr M. Z. Dajani told him as to quality or specifications, since such matters would be set out in detail in any eventual contract.

163. Mr Kendrick referred us to the following passage in the judgment of Hamblen J, in *Robert Colin Foster & An'or v. Action Aviation & Others*[17]:

> *"'When an issue is considered and addressed in the contract itself, it is difficult to see why a representation addressing the same or a similar issue should be implied outside the four corners of the contract."*

164. The issue of implication is determined by considering whether a reasonable representee in the position of a trader such as Mr. Hamrouni would reasonably have understood that an implied representation was being made. That enquiry depends on the relative knowledge of the parties. In circumstances where Mr. Hamrouni was an experienced trader with extensive knowledge of the sulphur market, and in particular both

---

[17] [2013] EWHC 2439 (Comm)

crushed and granular sulphur, no representation is to be implied beyond the four corners of the contract. It is improbable that he relied on statements made by Dr. M. Z. Dajani rather than exercising his own judgment as to whether to contract or not, or on what terms.

165. Assuming that what Dr M. Z. Dajani said to GCT in the pre-contractual negotiations amounted to a representation of fact, rather than a mere 'puff', it was at best a representation as to what he believed would happen in the future, namely that the crushed sulphur Midgulf would supply would be as good as Saudi Aramco's granular sulphur. Representations as to some future event can only be factual in so far as they reflect a statement of expectation or belief or of an actual opinion held. The only requirements are that such statements are made honestly and reasonably, not that they necessarily prove to be totally accurate.

166. We concluded that these representations were made in good faith and on reasonable grounds. The following facts appeared to compel this conclusion:

1) Our finding that the actual quality of the Aramco crushed sulphur supplied to GCT and others was consistently within Aramco's granular specifications;

2) Dr. Sheard's Supplemental report which analyses Midgulf's shipments of Aramco granular and crushed sulphur and concludes that "the suggestion that there is a substantial difference in quality (specifically in relation to ash) between crushed lump sulphur and granular/formed sulphur is not supported by the evidence." As we have already determined above, Dr Sheard's detailed evidence is to be preferred to Mr d'Aquin's general assertion that it is impossible to say that crushed sulphur is of equal quality to granular sulphur;

3) Even in the analysis certificates disclosed by GCT covering other vessels there is no statistical evidence of granular sulphur being of lower ash or acidity than crushed lump sulphur;

4) Saudi Aramco sold its granular and crushed sulphur with the same specifications, presumably believing both types of sulphur to be of the same quality. This is unsurprising: they are both by-products of the same process and originate from the same source which generates pure molten sulphur. Midgulf tested the quality of the Aramco crushed sulphur product prior to

contacting with Aramco. This showed Aramco's crushed sulphur to be well within Aramco's specifications for crushed and granular sulphur.

5) The sulphur in block form at Berri is unlikely to have been significantly contaminated due to outdoor exposure. Indeed GCT itself stored sulphur outdoors at its plant in Madhilla.

167. Mr. Hamrouni declared in evidence that he had been induced to enter into the contracts by the statements made by Dr. M. Z. Dajani, but having reviewed the contemporaneous correspondence we found that this assertion simply invites disbelief. Never once, in contemporaneous exchanges, did GCT refer to pre-contract misrepresentation, nor is there a single contemporaneous internal document that refers to Dr. M.Z. Dajani's misrepresentation, or to GCT being alleged victims of such misrepresentation. They entered into the July contract because of the description and quality specifications in the contract itself, and not otherwise. They also did not change their position in reliance on any statement made by Dr. M. Z. Dajani.

168. GCT's real reasons for entering into the June and July contracts are revealed in their memoranda to the Tunisian High Committee of Deals, dated 25 June 2008. These memoranda were produced by GCT in order to request permission from the Tunisian government to contract with Midgulf. They contemporaneously set out GCT's motives for contracting with Midgulf. Both documents make no mention of Dr. M. Z. Dajani's alleged misrepresentation. They instead state that contracting with Midgulf would allow GCT to drive down prices with Gulf sulphur suppliers, ADNOC (who according to Mr Hamrouni were seeking "about US$1,000 per MT) and KPC (including by publicising the price achieved with Midgulf in the international sulphur market). Price, in conjunction with the possibility of driving down the prices of other sulphur suppliers, was therefore the key reason for contracting with Midgulf.

169. For all of these reasons we find that GCT's counterclaim for misrepresentation fails.

(f) Are Midgulf entitled to recover substantial damages for GCT's anticipatory repudiation of the July contract and was the date on which such repudiation was accepted by Midgulf as bringing the contract to an end 26 August 2008 or earlier?

170. Whilst the date on which GCT repudiated the July contract was 22 July 2008, it was common ground that such a repudiation has no effect on the contract unless and until it is 'accepted' by the other party either by words or conduct. GCT acknowledged that, if they were guilty of repudiating the contract, that repudiation was accepted by Midgulf. But the parties differed as to when that acceptance took place. Midgulf claim that they accepted the repudiatory breach only on 26 August 2008, when Consult Marine faxed GCT to confirm Midgulf's acceptance. If that is right, they are entitled to damages for accrued breaches up to this date, and thereafter damages for repudiation. The so-called 'duty to mitigate' would also start on 26 August 2008.

171. The losses that Midgulf seeks to recover as a result of GCT's repudiatory breach fall into two categories:

172. First, the losses suffered in relation to the NIKOL H which was already on its way to Tunisia at the time of GCT's purported termination. GCT was in actual breach of this instalment by refusing to open a letter of credit (which entitled Midgulf to refuse to proceed until rectified). On 26 August, Midgulf accepted the repudiatory breach of the entire July contract, including the NIKOL H cargo. That vessel had to be stopped outside the Suez Canal and redirected to Adabiya, Egypt, where the NIKOL H cargo was discharged and stored until an alternative buyer, LCC, could be found for the cargo. The cargo was then loaded onto the NANCY, chartered in by Midgulf as CFR sellers, and carried to Selaata in Lebanon.

173. Secondly, the market loss suffered by Midgulf on the remainder of the July contract.

174. A third type of loss, albeit not one resulting from GCT's repudiation, is Midgulf's accrued claim for demurrage incurred at Gabes by the AGIOS NEKTARIOS.

1. NIKOL H losses

175. The first issue to be determined is the date at which GCT's repudiation was accepted. GCT say that Midgulf accepted GCT's breach as putting an end to the July contract at a rather earlier date than 26 August. Such acceptance (they say) was implicit and occurred by reason of Midgulf's conduct –:

(i) in ordering the NIKOL H to stop at Suez rather than proceeding to Tunisia; and

(ii) in not shipping cargo for GCT on the SYRIA STAR, nominated and accepted with a laycan of 16th to 20th July, and the BERDYANSK, nominated and accepted with a laycan of the 21st to 23rd July.

176. Further, even if Midgulf had not accepted the breach, they ought to have done so, because they had no legitimate interest in keeping the contract alive rather than suing for damages.

177. GCT therefore argued that Midgulf's damages fall to be measured by the difference between the contract price for the balance of the sulphur and the market price as at the 22nd July (as opposed to 26 August, as contended by Midgulf) in accordance with section 50(3) of the Sale of Goods Act 1979.

178. The experts, Mr Bain and Mr d'Aquin, agreed that the market price on the 24th July (the nearest pricing date to 22nd July) was between US$780 and US$810. Taking the median figure the market rate on that date was US$795.

179. Midgulf maintained that it was entitled to recover its actual losses in respect of the NIKOL H cargo pursuant to s.50(2) of the Sale of Goods Act 1979 and that the application of the *prima facie* 'market damages' rule

in section 50(3) was displaced on the facts of the present case for the following reasons:

(i) There is a market for crushed sulphur at Jubail. But there is no market for crushed sulphur afloat. Furthermore, sulphur traders are well-informed. As a result of the purported rejection by GCT, the crushed sulphur cargo afloat on the NIKOL H was a distress cargo, and was not in any sense an ordinary market commodity.

The view of Mr Bain, Midgulf's expert, was as follows:

"I would have said that in the chaotic market conditions it was almost impossible to sell the Nikol H cargo of crushed sulphur, whatever its quality in July and August 2008... The key point ignored by Mr. D'Aquin... is that buying virtually stopped from late July to early September ..."

Mr d'Aquin accepted that *"this exercise* (the sale of a rejected cargo while still afloat) *is very hard and imprecise, but (I) believe the NIKOL H could have been placed rapidly in India."*

(ii) Midgulf were facing a major crisis in having a distress cargo afloat in a dire market. Even if there had been a market for the rejected NIKOL H cargo, the correct date for assessment of the market is not 22 July 2008, but 26 August 2008 when Midgulf accepted GCT's repudiatory breach. This is because their conduct in continuing to press for performance between 22 July and 26 August was entirely reasonable - indeed Midgulf's persistence paid off as GCT did accept the AGIOS NEKTARIOS cargo in spite of its initial indications to the contrary.

(iii) Midgulf managed to fit the NIKOL H cargo into an existing term contract which they had with Lebanese buyers, LCC, and so mitigate what would otherwise have been a far greater loss. Dr. Huraira Dajani's evidence on the reasonableness of the steps taken by Midgulf to mitigate its losses in respect of the NIKOL H was largely unchallenged during cross-examination. Dr. Huraira Dajani explained that he did not sell the NIKOL H cargo in July 2008 as the July contract was not yet terminated at that time and GCT might have changed its mind (as it did with the AGIOS NEKTARIOS cargo) and accepted delivery of the NIKOL H cargo. He also explained in response to questions from the tribunal the difficulties that Midgulf would have faced in redirecting the NIKOL H to another port (such as India) to allow the cargo to be sold there.

(iv) Finally, on 14 August 2008, GCT indicated unequivocally that it would not open any further letters of credit in Midgulf's favour. This repudiatory breach by GCT in refusing to open any letter of credit for the NIKOL H, and in refusing to take delivery of any further cargoes under the July contract, was accepted by Midgulf as bringing the contract to an end on 26 August 2008.

180. We find that the steps taken by Midgulf after they realised that GCT were likely to persist in their refusal to open a letter of credit for the NIKOL H cargo, namely their actions in stopping the NIKOL H, discharging that vessel at Adabiya and reselling the cargo were reasonable and that the resulting costs, expenses and losses were reasonably incurred.

181. As noted above, GCT contended that Midgulf accepted GCT's repudiation in late July 2008 by ordering the NIKOL H to stop at Suez rather than proceeding to Tunisia and in not shipping cargo on the SYRIA STAR and BERDYANSK, and that therefore Midgulf's damages fall to be measured as at 22 July 2008.

182. We rejected this argument for the following reasons:

(i) In order to constitute acceptance of repudiation, there must be a communication of the decision to accept repudiation to the party in default in clear and unequivocal terms or an unequivocal overt act which is inconsistent with the subsistence of the contract without any concurrent manifestation of intent directed to the other party. (See *Chitty on Contracts*, 31st Edition, paragraph 24-013.)

(ii) Stopping the NIKOL H, and not shipping the SYRIA STAR and the BERDYANSK cargoes cannot be regarded as conduct which manifested acceptance of repudiatory breach. It was a condition precedent to performance by Midgulf that GCT should open a letter of credit. But, since it was a condition in Midgulf's favour, Midgulf was entitled to waive it and load the NIKOL H, while continuing to require that the letter of credit be provided promptly. After it had still not been provided, Midgulf was entitled to stop the NIKOL H and wait for it to be provided. When it was still unforthcoming and this default was coupled with a

continued and irrevocable refusal to perform the July contract at all, Midgulf duly terminated the entire contract on 26 August.

Application of the *White and Carter* principle

183. GCT also submitted that a further reason why Midgulf ought to have accepted GCT's repudiation earlier than on 26 August was that they had no legitimate interest in keeping the contract alive rather than suing for damages.

184. The general principle applicable in cases where one party has committed a renunciatory breach (anticipatory repudiation) is known as the *White and Carter* principle, which refers to the decision of the House of Lords in *White and Carter (Councils) Limited v McGregor*[18]. Clarke J in *Stocznia Gdanska SA v Latvian Shipping Co*[19], after citing several cases which had interpreted the *White and Carter* decision, referred to the principle as being:-

> *"that an innocent party is entitled to continue to perform a commercial contract which has been repudiated by the other party unless he has "no legitimate interest, financial or otherwise in performing the contract" (per Lord Reid) or he should "in all reason" accept the repudiation (per Lord Denning) or where it would be "wholly unreasonable" to keep the contract alive (per Mr Justice Kerr) or where it would be "not merely unreasonable but wholly unreasonable" to do so (per Mr Justice Lloyd)."*

185. Clarke J then said that he did not think there was any real difference between those differing ways of expressing the principle. The question before us was whether GCT could show that the 'Lord Reid exception' to the general principle should apply in this case.

---

[18] [1962] AC 413

[19] [1996] 2 Lloyds Rep 132

186. In *The Aquafaith*[20] Cooke J stated that the authorities established that in deciding whether the particular case constitutes an exception to the general rule, the following matters must be borne in mind: -

> *"1. The burden is on the contract breaker to show that the innocent party has no legitimate interest in performing the contract rather than claiming damages.*
>
> *2. This burden is not discharged merely by showing that the benefit to the other party is small in comparison to the loss to the contract breaker.*
>
> *3. The exception to the general rule applies only in extreme cases: where damages would be an adequate remedy and where an election to keep the contract alive would be unreasonable."*

187. The question before us was whether GCT had discharged the burden of showing that Midgulf had no legitimate interest in maintaining the July contract and had done so by showing that this was an extreme case where damages would be an adequate remedy and where an election to keep the contract alive until 26 August 2008 would be so unreasonable that Midgulf should not be allowed to do so.

188. On 22 July 2008, when GCT declared that the July contract was "resiliated" and that Midgulf should find alternative destinations for the AGIOS NEKTARIOS and NIKOL H cargoes which were then afloat, Midgulf had a very obvious interest in keeping the July contract alive. There followed numerous exchanges between GCT and Midgulf covering such matters as the taking and analysis of discharge port samples to be sent to a neutral laboratory, the location and choice of such laboratory, the intervention of Midgulf's lawyers, the exchange of proposals to allow the AGIOS NEKTARIOS to discharge her cargo at Gabes, the continuing delay on GCT's part in opening letters of credit, in particular for the cargo on NIKOL H, the stopping of that vessel at Suez, and the discharging of AGIOS NEKTARIOS.

---

[20] [2003] EWHC 1936 (Comm)

189. In such circumstances we found it impossible to say that Midgulf's decision to keep the contract alive was unreasonable, let alone (as Cooke J defined the test for applying the Lord Reid exception in *The Aquafaith*) *""wholly unreasonable", "extremely unreasonable"* or *"perverse""*. Nor was any step taken by Midgulf between 22 July and 26 August incompatible with that decision.

Quantum of NIKOL H claim

190. GCT disputed Midgulf's claim regarding the NIKOL H on a number of bases, although they do not dispute that these losses were incurred, or the amount of the losses. The losses claimed by Midgulf, totalling US$6,411,653, are:

(i) US$5,005,630 - The loss of profit on the sale to LCC, i.e. the difference between the sale price to LCC of US$680 per MT and the price under the July contract of US$895 per MT. GCT accepted that the price achieved with LCC was "excellent" for the market at the time.

(ii) US$262,500 - Detention costs while the vessel was detained at Suez for 10 days and 12 hours. The correspondence between the owners of the NIKOL H and Midgulf during the vessel's detention at Suez shows that the owners initially demanded a detention rate of US$32,000 per day or pro rata, but that Midgulf persuaded them to accept the demurrage rate in the NIKOL H charterparty of US$25,000 pdpr.

(iii) US$52,986 - Demurrage at Adabiya.

(iv) US$365,449 - Costs for discharging, transportation, storage and loading at Adabiya.

(v) US$ 56,010 - Port charges at Adabiya

(vi) US$ 581,505 - Freight on the NANCY to carry the NIKOL H cargo to her new buyers in Selaata, Lebanon.

(vii) US$79,448 - Insurance premiums paid in relation to the storage of the NIKOL H cargo at Adabiya and its onward carriage on the NANCY.

(viii) US$8,125 - Costs of supervision and follow up trips as a result of Midgulf personnel travelling to Egypt to oversee exchange of bills of lading for

Egyptian customs purposes, discharge of the NIKOL H, the storage of its cargo at Adabiya and the loading of the NANCY.

2. Market loss suffered by Midgulf on the remainder of the July contract

191. Midgulf claimed the difference between the contract price and the market price at Jubail at the time when the balance of the sulphur ought to have been accepted by GCT. Acceptance in CFR sales is usually acceptance of the shipping documents tendered rather than the goods themselves (see paragraph 19-233 of *Benjamin on Sale of Goods*, 8th Edition), so acceptance would take place shortly after each shipment.

192. GCT disputed Midgulf's claim on the basis that Midgulf's damages should be measured by reference to the difference between the contract price and market price as at 22 July 2008, or alternatively by reference to Midgulf's so-called actual losses.

193. Even if, contrary to our findings above, GCT were right on the date of termination, this would not reduce the damages; the loss on future shipments must still be assessed by reference to the dates on which each of those remaining instalments ought to have been accepted by GCT. This is the measure of damages for non-acceptance defined in section 50(3) of the Sale of Goods Act 1979 (the SGA).

194. In an instalment contract, these damages must be calculated by reference to the market rate at the time when the documents for each instalment ought to have been accepted. This is the true measure of loss. We agreed that GCT was wrong in law to argue that Midgulf's damages for all instalments should be assessed by reference to one date, whether 22 July 2008 or some other date.

195. As a result, Midgulf's losses are properly assessed by reference to the shipment schedule or when actual cargoes were to be shipped by Midgulf in accordance with its nominations of vessels, which had been accepted

by GCT. The damages for each instalment are the difference between contract and market on those dates.

196. Midgulf's primary position is that its market losses should be assessed on the basis that the remaining cargo under the July contract ought to have been accepted at a rate of two shipments per month over August and September 2008. It relies in this regard on the terms of the July contract which stated "SHIPMENT JULY, AUGUST, SEPTEMBER 2008. SCHEDULE TO BE AGREED IN DUE COURSE" and the communication from Midgulf on 9 July 2008 recording a schedule "FOR LOADING OF ABOUT TWO VESSELS PER MONTH". Since the AGIOS NEKTARIOS and NIKOL H cargoes were shipped in July, the remaining cargoes would be shipped in August and September. The way this has been pleaded is to space the four instalments out equally, - mid-August, end-August, mid-September, and end-September.

197. Alternatively, Midgulf argued that its losses should be assessed as at the dates when the third and fourth vessels carrying cargo shipped under the July contract (the SYRIA STAR and BERDYANSK), whose nominations GCT had accepted before it purported to terminate the July contract, would have completed loading. The laycan for the SYRIA STAR was 16 – 20 July and that for the BERDYANSK 21-23 July. The latter dates in these short date ranges would be closer to the dates on which the shipping documents were likely to be tendered under the contract, which is the correct date for measuring the loss. No point was taken on this aspect, nor was it suggested that market prices were moving up at this time (and thereby reducing Midgulf's loss). GCT accepted that these date ranges were correct for the purpose of section 50(3).

198. The BERDYANSK was in fact rejected as unfit after her arrival at Jubail, so it would have been necessary for Midgulf to nominate another vessel, which we can safely assume they would have done, but for GCT's repudiation on 22 July. It might be assumed that, but for the repudiation, a replacement vessel would have reached Jubail and completed loading by around 4th August, but the alternative claim was not advanced on that assumption.

199. Midgulf's position is that its losses on this alternative basis should be assessed as at the end of August and end of September 2008 in accordance with GCT's message 18 July 2008 requesting all further nominations of vessels (after the BERDYANSK) to be postponed until the second half of August 2008.

200. After taking into account the quantities shipped on the AGIOS NEKTARIOS and NIKOL H the amount remaining to be shipped under the July contract was 106,718MT, if one assumes that Midgulf would have exercised their contractual option to ship 10% more than the 150,000MT 'base' quantity. It was Dr Huraira Dajani's evidence that, if the July contract had been properly performed, Midgulf would have shipped the additional 10% of crushed sulphur that it was entitled to ship under the July contract. This evidence was not challenged. We accepted that it was highly probable, indeed patently obvious, that Midgulf would have fully availed themselves of this option.

201. As to prices, Midgulf relied on the expert evidence of Mr. Barrie Bain, a director of Fertilizer Intelligence (a division of Fertecon Limited) who assessed the market values for the remainder of the sulphur to be supplied under the July contract on the two alternative bases set out above. While those values are in some instances lower than the prices set out in the Joint Memorandum, Mr. Bain explains in his comments in the Joint Memorandum that that is because the prices quoted in his report take into account (a) the difficulties in selling sulphur from mid-July onwards, demonstrated by the paucity of reported deals, such that the prices set out in the Joint Memorandum would have been difficult to achieve; (b) that *"the reputation of the sulphur from the Berri block had been damaged by its rejection by GCT"*; and (c) that *"from mid-August rumours of the collapse of the Midgulf-GCT deal would have made it more difficult to sell the Midgulf sulphur"*.

202. We were impressed by the evident care and thoroughness with which Mr Bain prepared his reports which were cross-referenced with detailed FMB Weekly Fertilizer Reports. We considered that the estimated prices which

he put forward for different dates were fully supported by the material to which he referred.

203. The price estimates in his report are not in fact all lower (and therefore more favourable to Midgulf) than the estimates in the experts' Joint Report and take account of the clear trend between the weekly dates in the table in the Joint Report. To take an example, the Joint Report shows low and high prices of US$380 and US$480 for 25 September and US$160 and US$335 a week later on 2 October. Mr Bain's figures extrapolated for end September are US$205-380.

204. It was our view that the alternative basis of claim set out in paragraph 14A of the Re-Amended Claim Submissions more accurately reflected Midgulf's loss in accordance with section 50(3) of the SGA, if one assumes that Midgulf were quite content to give effect to GCT's request to postpone further nominations until the second half of August. Dr Huraira Dajani's statement confirms that Midgulf would have complied with this request.

205. The figures below are those given in Mr Bain's report for the likely CFR Tunisia prices at the following dates:

Quantity (mt)	Dates (2008)	Contract price (US$)	Market prices range (US$)	Loss (US$)
16,000	16–20 July	895	820-840	880,000-1,200,000
22,000	21–23 July	895	750-820	1,650,000-3,190,000
34,359	End August	895	490-590	10,479,495-13,915,395
34,359	End September	895	205-380	17,694,885-23,707,710
Total 'market' damages				30,704,380-42,013,105

The total amount of the claims in respect of the balance of cargo accordingly falls between US$30,704,380 and US$42,013,105. We have taken the mean of these two figures, in other words US$36,358,743.

3. Demurrage incurred at Gabes by the AGIOS NEKTARIOS

206. Midgulf claim that the vessel was on demurrage for 5.50347 days, which at US$35,000.00 per day equals US$192,621.53. GCT say no demurrage is payable because: -

(i) the NOR was tendered out of office hours at 0135 on 3 August 2008; and

(ii) the demurrage rate was not declared pursuant to clause 10.4.2 of the July contract.

207. The contract contains the following provisions relevant to demurrage:

10 "SHIPPING TERMS

.....ALL OTHER SHIPPING TERMS INCLUDING SERVICE OF NOR, DEMURRAGE AND DESPATCH TO BE AS PER PERFORMING VESSEL'S GENCON C/P.

10.1 DISCHARGE RATE

CARGO TO BE DISCHARGED AT A MINIMUM RATE OF 5,000 METRIC TONS FOR VESSELS MORE THAN 15,000 MT DWT AND AT A MINIMUM RATE OF 4,000 MT FOR VESSELS LESS THAN 15,000 MT DWT PER WEATHER WORKING DAY OF TWENTY FOUR CONSECUTIVE HOURS SUNDAYS HOLIDAY EXCLUDED UNLESS USED. TIME FROM 12.00 ON SATURDAY OR THE DAY PRECEDING A HOLIDAY UNTIL 08.00 HOURS MONDAY OR THE NEXT WORKING DAY NOT TO COUNT UNLESS USED.

10.3 NOTICE OF READINESS

NOR TO BE TENDERED AS PER GENCON CHARTER PARTY. NOR TO BE TENDERED DURING OFFICE HOURS WHETHER IN PORT OR NOT, WHETHER IN BERTH OR NOT, WHETHER CUSTOMS CLEARED OR NOT, WHETHER IN FREE PRATIQUE OR NOT. NOR IS VALID ONCE VESSEL ARRIVES SEA ROADS/OUTER ANCHORAGE AREA.

10.4 <u>LAYTIME</u>

10.4.1 COMMENCEMENT OF LAYTIME

(A) LAYTIME FOR DISCHARGING SHALL COMMENCE AT 1400 HRS SAME DAY IF NOR IS GIVEN BEFORE NOON AND 0800 HRS NEXT WORKING DAY IF GIVEN AFTER NOON.

.....

10.4.2 DEMURRAGE RATE / DESPATCH RATE

TO BE DECLARED UPON EACH VESSEL NOMINATION. DEMURRAGE/DESPATCH TO BE SETTLED WITHIN 15 DAYS AFTER VESSEL COMPLETES DISCHARGE."

208. The clauses quoted above are rather less than satisfactory. For example, the opening paragraph of clause 10 assumes that the charterparty used by the Seller will be on the GENCON form, which may well not be the case and is not something the Seller can necessarily always insist upon when fixing a vessel. Furthermore, there are two versions (1976 and 1994) of the GENCON charter in common use, each with very different laytime and demurrage provisions, neither version of which is the same as the laytime and demurrage regime set out expressly in the contract.

209. In the case of the AGIOS NEKTARIOS a heavily amended GENCON 1976 version was used. Unsurprisingly, the laytime clauses differ in several respects from those in the clause 10 of the sale contract. The charterparty recap dated 5 July 2008 provides for a discharging rate of 5,500MT per weather working day and demurrage rate of US$35,000 per day or pro rata (her owners having initially asked for US$42,000).

210. We regarded GCT's first objection, namely that the Notice of Readiness was ineffective as it was served outside office hours, as being without merit. On the proper construction of clause 10.3 a Notice of Readiness given out of office hours in the early hours of Sunday 3 August is deemed received when offices next re-open [21] . Laytime according commenced pursuant to clause 10.4.1(A) at 1400 hours on Monday 4 August.

211. As to the second point, in circumstances where GCT accepted the nomination of the AGIOS NEKTARIOS although no demurrage rate was declared, GCT waived the right to require knowledge of the rate, and implicitly represented that it was content to proceed on the basis that a reasonable rate applied. We accept that the demurrage rate of

---

[21] *The PETR SCHMIDT* [1997] 1 Lloyd's Rep.284

US$35,000 was a reasonable rate for a vessel of this size (52,350 MT DWT) in the then still buoyant freight market.

212. Turning to the Laytime Statement, Statement of Facts and Port Statement in Appendix 1 to the Claim Submissions, we were surprised to note that "Break time", namely periods when stevedores take a break, and time spent "Cleaning berth" (which the Statement of Facts explains means "Cleaning truckway on berth") have been excluded from laytime. No such exclusions are contained in clause 10 of the contract, nor in the charterparty. Be that as it may, Midgulf have not taken these points against GCT and we have therefore ignored them. The time involved is of no significance in the present context.

213. Although the charterparty provides for payment of brokerage there is no similar clause in the sale contract. We were not asked to decide whether the laytime and demurrage clauses in the sale contract were to be read independently of the charterparty or whether they only served as an indemnifying provision, but our preference is to treat the laytime/demurrage clauses in the sale contract as a more or less complete code intended to operate independently of the charterparty.

214. It follows that GCT are liable for the gross demurrage of US$192,621.53, and cannot claim to reduce this figure by the 2.5% address commission presumably paid to Midgulf under the charterparty.

Interest

215. Midgulf claimed and are entitled to compound interest on their claim pursuant to section 49 of the Arbitration Act 1996.

216. The period when interest starts to accrue differs depending upon the particular claim in question.

(i) NIKOL H

By far the largest component of Midgulf's losses in respect of the NIKOL H

shipment is the difference in sale price (US$5,005,630). Instead of receiving payment of the contract price upon presentation of the shipping documents under a letter of credit within, say, one week of completion of loading, Midgulf had to wait until the shipping documents in respect of the rerouted shipment on board the NANCY could be negotiated before receiving payment of a lesser price. This loss accordingly arose around 28 July 2008 (one week after completion of loading at Jubail), although it took several months before the precise measure of that loss could be assessed.

The remaining losses in connection with the detention of NIKOL H at Suez and Adabiyah, the chartering in of NANCY and re-sale of the cargo arose mainly in August to October 2008.

We decided to award interest on US$5,005,630 to run from 28 July 2008 and from 10 October 2008 on the balance of the NIKOL H claim of US$1,410,196.

(ii) Market Losses

These claims were in respect of shipments which we have assumed would have taken place towards the end of August and the end of September 2008. In the exercise of our discretion we have determined that 15 September 2008 is the appropriate date from which interest on these damages of US$36,358,743 should accrue.

(iii) Demurrage - AGIOS NEKTARIOS

Clause 10.4.2 provides for the settlement of demurrage "within 15 days after vessel completes discharge". The AGIOS NEKTARIOS completed discharging on 17 August. Demurrage was accordingly payable not later than 1 September 2008 and interest on the outstanding amount of US$192,621.53 runs from 2 September 2008.

217. We consider an award of interest at 5% to represent a fair commercial rate and reasonable for the periods in question.

Costs

218. Midgulf, having been substantially successful, are entitled to their costs and we have awarded them accordingly.

IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN THE MATTER OF AN ARBITRATION

between

MIDGULF INTERNATIONAL LTD of Cyprus

Claimants
(Sellers)

-and-

GROUPE CHIMIQUE TUNISIEN of Tunis

Respondents
(Buyers)

Sales Contracts dated 27th June 2008 and 7th July 2008

FINAL ARBITRATION AWARD

27th October 2014