IN THE MATTER OF AN ARBITRATION
UNDER THE RULES OF THE LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA)
ARBITRATION NO: 194422

BETWEEN:

WEST AFRICA GAS LIMITED (BVI)

CLAIMANT

V

THE GOVERNMENT OF THE REPUBLIC OF GHANA (ACTING THROUGH THE MINISTRY OF ENERGY) (FORMERLY THE MINISTRY OF POWER)

RESPONDENT

FINAL AWARD

Contents

INTRODUCTION

1. The dispute arises out of the termination by the Claimant, West Africa Gas Limited (BVI), ("**WAGL**" or "**Claimant**") of a Gas Sales Agreement dated 9 October 2015 **("GSA**") made between WAGL and the Republic of Ghana ("**GoG**").

THE PARTIES AND THEIR REPRESENTATIVES

The Claimant

2. WAGL's address is:

6th Floor, Capital Centrum Building
45 Aguiyi Ironsi Street
Maitama
Abuja
Nigeria

Tel: +234(0)9-903-6036
e-mail: info@wa-lpg.com

3. WAGL's legal representatives are:

Reed Smith LLP
The Broadgate Tower
20, Primrose Street
London EC2A 2RS

Tel: +44 (0) 20 3116 3000
e-mail: asandiforth@reedsmith.com

The Respondent

4. GoG is represented by the Ministry of Energy. Its address is:

Ministerial Enclave
P.O. Box SD 40
Stadium Post Office
Accra
Ghana

5. Its legal representatives are:

Amofa and Partners
#4, Isaac Dodoo Street
Off Ring Road Central
Behind Starr FM
Nima
Accra
P.O. Box AN 6700 North Ghana

e-mail: e.amofa@amofa.partners

THE ARBITRATION AGREEMENT

6. Clause 26 of the GSA provided:

"26 ***ARBITRATION***

26.1 ***Resolution of Disputes***

26.1.1 Any dispute arising between or among the Parties relating to this Agreement which is not a dispute which shall be determined by an Expert in accordance with Article 27 (a "**Dispute**") shall (unless the Parties otherwise agree in writing) be finally resolved by arbitration conducted in accordance with the applicable rules of the London Court of International Arbitration.
26.1.2 Pending the resolution of a Dispute in accordance with this Article 26 the Parties shall to the greatest extent possible continue to perform their covenants and obligations in accordance with this Agreement.
26.1.3 Any disputes or disagreement arising out of or in connection with this Agreement shall be settled, if possible, by negotiation between the Parties.

26.2 ***Commencement of Arbitration***

Notwithstanding Article 26.1.3, a Party may at any time give notice to the other Party of the existence of a Dispute (an "**Arbitration Notice**") and such Arbitration Notice shall set out in reasonable detail the grounds for the Dispute in the opinion of the Party giving the Arbitration Notice.

26.3 ***Appointment of Arbitrator***

The procedure for the appointment of arbitrator shall be as follows:

26.3.1 where the dispute involves two of the Parties to this Agreement (for avoidance of doubt, Buyer and Seller shall be considered one Party each for the purposes of this Article 26.3), each Party shall appoint an arbitrator within fourteen (14) Days after the date of

receipt of an Arbitration Notice by the Party to which the Arbitration Notice was given and those arbitrators shall then jointly appoint a third arbitrator within fourteen (14) Days after the date of appointment of the second arbitrator to act as chairman of the arbitral panel;
26.3.2 If either Party fails to appoint an arbitrator or the two arbitrators appointed by the Parties fail to agree on the choice of the third arbitrator, the appointing authority, in accordance with the Rules, shall be the London Court of International Arbitration. The language of the arbitration shall be English.;
26.3.3 The place of arbitration shall be London, United Kingdom.
26.3.4 The cost of the venue of arbitration under this Article 26 and the fees of the arbitration tribunal shall be borne equally by the Parties, unless otherwise specified by the arbitrators in a final award.

26.4 ***The arbitration award***

26.4.1 Any arbitration award rendered in consequence of an arbitration commenced in accordance with this Article 26:

(i) shall be in writing and shall set out in reasonable detail the facts of the Dispute and the reasons for the decisions of the arbitral panel;

(ii) (to the greatest extent possible under applicable law) shall be final and binding on both Parties; and

(iii) shall forthwith be implemented by the Parties.

26.4.2 Any award shall be final, conclusive and binding upon the Parties (such that, to the extent permitted by the law of the seat of arbitration, the Parties shall be taken to have waived any right of appeal or review in respect of the award), and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction (as per the New York Convention of 1958 on Recognition and Enforcement of foreign arbitral awards)."

THE TRIBUNAL

7. On 21 October 2019, Professor Fidelis Oditah QC SAN and Dorothy Ufot SAN, were appointed by the LCIA as co-arbitrators and Anthony Idigbe SAN as Presiding Arbitrator.

8. On 27 November 2019, the Respondent raised an objection to nationality of both the chair and one of the co-arbitrators. The Claimant provided its comments on 27 November 2019 and the Respondent provided further comments on 3 December 2019.

9. On 5 December 2019, the chair resigned and on 9 December 2019, the LCIA Court decided to maintain the appointment of Ms Ufot and granted the co-arbitrators 14 days to select a replacement arbitrator.

10. On 30 January 2020, pursuant to Article 10.1 of the LCIA Rules, the LCIA Court revoked the appointment of Anthony Idigbe SAN as Presiding Arbitrator and pursuant to Articles 5 and 11 of the LCIA Rules appointed Hilary Heilbron on the joint nomination of the co-arbitrators.

PROCEDURAL HISTORY

11. On 25 July 2019, WAGL served its Request for Arbitration.

12. On 28 October 2019, the Claimant elected to have its Request treated as its Statement of Case and proposed a procedural timetable.

13. On 4 November 2019, the Respondent asked for an extension to file its Response.

14. On 20 November 2019, the Tribunal issued Procedural Order No. 1.

15. On 30 January 2020, the revocation of Mr Idigbe and the appointment of Hilary Heilbron QC as a replacement arbitrator was notified to the parties.

16. On 5 March 2020, GoG served its Response to the Request for Arbitration.

17. On 20 March 2020, WAGL served a Reply.

18. On 19 April, 2020, the Tribunal issued a further Procedural Order.

19. On 22 April 2020, GoG served a Response to the Reply.

20. On 14 May 2020, WAGL served the first witness statement of Oluwatosin Etomi, Country Manager for Ghana at the Sahara Energy Group ("**Sahara Group**").

21. On 25 June 2020, GoG served the first witness statement of Solomon Adjetey, Director in charge of the Generation and Transmission Directorate at the Ghanaian Ministry of Energy.

22. On 7 July 2020, WAGL served a second witness statement of Mr Etomi.

23. On 8 July 2020, WAGL served an Amended Request for Arbitration.

24. On 10 August 2020, GoG served an Amended Response to the Amended request for Arbitration together with a second witness statement from Mr Adjetey.

25. On 10 June 2020, the Tribunal made an order relating to disclosure.

26. On 16 July 2020, the Tribunal held a procedural hearing via Zoom and subsequently confirmed the directions in writing.

27. The parties served skeleton arguments on 17 August 2020.

28. On 18 August 2020, WAGL served an Amended Reply.

29. An oral hearing of the arbitration was held by Zoom between 24-26 August 2020. It had been adjourned from 27-29 July because of amendments made to the Request for Arbitration. At the hearing WAGL was represented by Mr Christopher Smith QC and Mr Du and GoG by Mr Amofa and Mr Godfred Dame, Honourable Deputy Attorney-General and Deputy Minister of Justice. No parties raised any issues either during or after the virtual hearing regarding the manner in which the virtual hearing was carried out.

30. Mr Etomi and Mr Adjetey gave evidence and were cross-examined.

31. On 4 September 2020, the parties served their submissions on costs.

32. On 8 September 2020, the parties served their responsive submissions on costs.

33. On 2 December 2020, the Tribunal closed the arbitral proceedings.

OVERVIEW

34. It is not in dispute that in 2015 Ghana faced an urgent energy crisis and approached WAGL to supply Liquefied Natural Gas ("**LNG**").[1] This led to the signature of Heads of Terms dated 15 May 2015[2].

35. WAGL is a joint venture company established between Ocean Bed Trading (BVI), a member of the Sahara Group, and the Nigerian National Petroleum Company ("**NNPC**").

36. Following further negotiations, the GSA was executed on 8 October 2015 for the supply of LNG at the port of Tema, Ghana, for a period of five years.

37. In order to enable the GSA to be implemented, as there was no berthing facility at Tema, WAGL was contractually obliged to incur substantial infrastructure and other costs, set out in more detail below. The GSA provided for certain conditions precedent to the obligation to sell and purchase the Gas. It is common ground that both WAGL and GoG did not fully comply with such Conditions.

38. Despite attempts to resolve the impasse, WAGL by letter dated 22 April 2019 terminated the GSA and initially sought payment of US$1,080,889,309 by way of Recovery Fee pursuant to Article 17 of the GSA. That figure has since been substantially

[1] C8-9; C155.
[2] C16.

reduced. GoG has refused to pay the Recovery Fee based on its interpretation of the GSA and has itself claimed damages in this arbitration by way of Counterclaim.

39. The issue of liability turns on the construction of the GSA.

40. The Tribunal is most grateful to counsel representing both parties for their helpful written and oral submissions. The Tribunal in this Award only summaries the main relevant arguments of the parties, but it has carefully considered all submissions and evidence put before it, even if not set out in this Award.

THE RELEVANT TERMS OF THE GSA

41. The following are the relevant terms of the GSA.

The Recitals

Recital D provides:

> "Certain capital works are necessary around the discharge port in Tema, Ghana in order for the Buyer to receive Gas from the FSRU and the Seller agrees to undertake (or procure the undertaking of) these works, and incur the initial capital cost thereof."

The Definitions:

Buyer's Approvals: all Authorisations required from any Governmental Authority in connection with the design, construction, installation, commissioning, maintenance, repair and operation of the Buyer's Facilities.

Conditions Date: as defined in Article 2.5.5.

Effective Date**:** the date upon which all of the Conditions have been satisfied by each Responsible Party or waived in accordance with Article 2.5.6.

Execution Date: the date shown above, being the date upon which this Agreement is entered into between the Parties.

Floating Storage Regasification Unit FSRU: the vessel owned or chartered by the Seller which is stationed at the discharge port in Tema, Ghana and is primarily used for the storage of LNG and the regasification of LNG into Gas.

Infrastructure Works: means the works the Seller will undertake, or procure, in the port area at Tema, Ghana, including but not limited to dredging of the port, extending breakwaters, constructing a jetty and moorings, installing a metering station and laying a Gas pipeline from the FSRU to the Delivery Point.

Project Costs: the costs that the Seller will incur in order to facilitate the Buyer receiving Gas from the FSRU, including:
a) the costs of undertaking or procuring the Infrastructure Works at the port in Tema, Ghana;
b) the costs of securing Access Rights, Authorisations and Seller Approvals;
c) the costs of leasing the FSRU; and
d) any interest and legal costs associated with the above.

Seller's Approvals: all Authorisations required from any Governmental Authority in connection with the construction, maintenance, repair and operation of the Seller's Facilities.

Start Date: as defined in Article 2.1.3.

Termination Date: the date upon which this Agreement expires or is otherwise terminated in accordance with its terms.

Article 2

DURATION, CONDITIONS AND GAS PURCHASE ORDER

2.1 ***Duration***

2.1.1 This Agreement shall, subject to Article 2.2 come into force on the Execution Date and shall terminate upon the earlier event to occur of:
(a) the fifth (5th) anniversary of the Start Date; or,
(b) when the Contract Quantity has been made available for delivery by the Seller; or
(c) any other termination event in accordance with Article 24 **Error! Reference source not found.**

2.1.2 If within eighteen (18) Contract Months but not less than six (6) Contract Months prior to the fifth (5th) anniversary of the Start Date, the Buyer or the Seller serves on the other Party a notice for the extension of the Contract Period then the Buyer and Seller shall negotiate in good faith the terms of such extension, including any variation to the calculation of the Contract Price, and providing the Buyer and Seller are in agreement on all of the terms of such extension by no later than ninety (90) Days prior to the fifth (5th) anniversary of the Start Date, the Buyer and Seller may extend the Contract Period for an additional five year term in accordance with the terms to be agreed by the Parties.

2.1.3 The Start Date shall be the date agreed to in writing by the Parties, and in the absence of the Parties agreeing a date the Start Date shall occur on the Day being three (3) months after the Effective Date.

2.2 ***The Conditions***

The provisions of this Agreement (except for Articles 1, 2.2, 2.3, 2.4, 2.5, 17, 21 and 23 to 34 are conditional upon the fulfilment or the waiver of the conditions in Articles 2.3, 2.4 and 2.5 (the "Conditions").

2.3 ***The Seller's Conditions***

Except as set out in Article 0, the Buyer is not obligated to purchase and receive Gas from the Seller under this Agreement, unless and until the Conditions set out below are satisfied by the Seller or waived by the agreement of the Buyer and the Seller in writing:

2.3.1 The Seller has obtained all Seller's Approvals necessary for the acquisition of LNG and the regasification, transportation and the sale of Gas as contemplated in this Agreement.

2.3.2 The Seller has executed the following agreements:
(i) the LNG Supply Agreement; and
(ii) the FSRU lease agreement.

2.3.3 The Seller has obtained all authorizations required under the Seller's constituting documents to enable the Seller to validly execute this Agreement and undertake the performance of its obligations hereunder.

2.3.4 The Seller has established a Disputed Amount Account with the Buyer for the receipt and management of disputed amounts in accordance with Article 14.8 of this Agreement.

2.3.5 The Seller has completed, or has procured the completion, of all works to the FSRU and the Infrastructure Works which are necessary for the Seller to be able to perform its obligations under this Agreement.

2.3.6 The Seller has secured all Access Rights necessary for the Seller to fulfil its obligations under this Agreement.

2.3.7 The Seller has secured any financing required to perform this Agreement.

2.3.8 The Seller has obtained a legal opinion from Ghanaian legal counsel in a form acceptable to the Seller confirming the capacity of the Ministry of Power to enter into this Agreement on behalf of the Government of the Republic of Ghana and to bind it to the obligations set out in this Agreement.

2.4 ***The Buyer's Conditions***

Except as set out in Article 2.5, the Seller is not obligated to supply Gas to the Buyer under this Agreement, unless and until the Conditions set out below are satisfied by the Buyer or waived by the agreement of the Buyer and the Seller in writing:

2.4.1 The Buyer has provided to the Seller evidence of the approval by the Parliament of Ghana and a legal opinion of the Attorney-General in respect of GoG's authority to

enter into, its execution of, and its ability to fulfil its payment obligations under this Agreement.

2.4.2 The Buyer has provided a revolving irrevocable cumulative standby letter of credit acceptable to the Seller established by the Buyer in favour of the Seller and confirmed by an LC Bank (approved by the Seller) for the initial amount of $140,000,000 covering a period of four (4) months ("Letter of Credit" or "LC"). The LC shall be for the purpose of backstopping the payment obligations of the Buyer and shall be maintained and renewed in accordance with this clause for the duration of this Agreement and for a period of 12 months after the termination or expiry of this Agreement, always substantially in the form attached in Schedule 8 to this Agreement. The Parties acknowledge that the value of the LC reflects the current market price of Brent crude, which as at the date of this Agreement is approximately $50/bbl. If immediately prior to the date of renewal of the LC the price of Brent crude has increased by 10% or more from the price as at the date of this Agreement or the previous date of renewal (as applicable), the Buyer shall be obliged to obtain an LC for a greater amount and the Seller shall notify the Buyer of the new LC amount, which shall always reflect the then market price.

2.4.3 The Buyer has obtained all other Buyer's Approvals necessary to purchase, receive, and use Gas as contemplated in this Agreement.

2.4.4 The Buyer has obtained all authorizations required under the Buyer's constituting documents to enable the Buyer to validly execute this Agreement and undertake the performance of its obligations hereunder.

2.4.5 The Buyer has established a Disputed Amount Account with the Seller for the receipt and management of disputed amounts in accordance with Article 14.8 of this Agreement.

2.5 ***Satisfaction of the Conditions***

2.5.1 Each Party shall use Reasonable Endeavours to satisfy or procure to the satisfaction of each of the Conditions for which such Party is primarily responsible ("Responsible Party"). The Seller shall be the Responsible Party for those Conditions identified in Article 0 and the Buyer shall be the Responsible Party for those Conditions identified in Article 0, except that the GoG undertakes, so far as possible and in accordance with the terms of this Agreement and applicable law, to expeditiously and in good faith assist with all necessary approvals in relation to those Conditions identified in Article 0 (to the extent that Authorisations are required from a Ghanaian Governmental Authority) and Article 2.3.6.

2.5.2 Each Party, upon the request of the Responsible Party and at the expense of such Responsible Party, shall use Reasonable Endeavours to assist the Responsible Party to satisfy the Conditions for which the Responsible Party is primarily responsible.

2.5.3 The Parties shall from time to time discuss and coordinate their plans for the satisfaction of the Conditions, and each Party shall keep the other Parties informed on a timely basis as to progress in relation to the satisfaction of the Conditions.

2.5.4 Upon the satisfaction of a Condition by the Responsible Party, the Responsible Party shall notify the other Party of the satisfaction. Such notice shall include the necessary supporting documentation to substantiate the satisfaction of the Condition. The other Party may by giving notice within five (5) Days dispute whether such Condition has been satisfied.

2.5.5 Each of the Conditions shall be satisfied on or before the Day being five (5) months after the Execution Date (such Day being the "Conditions Date").

2.5.6 The date upon which all of the Conditions have been satisfied or waived by the Parties shall be the Effective Date.

2.5.7 Subject to Article 2.5.8, if any Condition is not satisfied by the Responsible Party or waived by the Parties by the Conditions Date:

(i) the Responsible Party in respect of such Condition shall forthwith give notice to the other Party of the reason for the delay in satisfaction of the Condition and the revised date by which it is reasonably expected that the Condition shall be satisfied; and

(ii) on the Conditions Date, unless the relevant Condition has been satisfied or waived in accordance with this Agreement or the Seller and Buyer have agreed in writing on a new Conditions Date, the Seller may thereafter terminate this Agreement with immediate effect by giving notice of such termination to the Buyer; PROVIDED however, that no claim shall lie against any Party in respect of any costs or losses whatsoever, direct, indirect or consequential for failure to fulfil the said Conditions except to the extent that the Buyer is liable to pay the Seller the Recovery Fee in accordance with Article 17.

2.5.8 If the Seller is delayed in completing the Infrastructure Works or constructing, installing and/or commissioning the Seller's Facilities as a result of:

(i) any act of prevention, hindrance or interference caused by or attributable to the Buyer or the GoG;
(ii)breach by the Buyer or the GoG of any obligations under this Agreement;
(iii) the GoG not fulfilling its obligations pursuant to Article 2.5.1; or
(iv) any Force Majeure Event,
then the Seller may extend the Conditions Date, by notice to the other Parties in writing by a reasonable period necessary to accommodate the delay.

2.6 ***Status of the Agreement***

Subject to the provisions of Article **Error! Reference source not found.**, each of the Parties is b ound by the provisions of this Agreement as of the Execution Date; provided however that until the Conditions have been satisfied or waived in writing by the Parties, Seller is not obligated under Article **Error! Reference source not found.** to make Gas available, and Buyer i s not obligated under Article **Error! Reference source not found.** to take or pay for Gas.

17 ***Project Costs***

17.1 The Buyer acknowledges that the Seller has incurred the Project Costs in reliance of the Buyer agreeing to take or pay for Gas for a period of 1826 Days, in accordance

with the provisions of this Agreement. The Contract Price formula set out in Article provides for recovery of the Project Costs over the full term of this Agreement.

17.2 The Buyer and Seller agree that in the event that this Agreement is terminated: (i) as a result of the Seller issuing a notice pursuant to Articles 2.5.7, 3.1.2, 23.5, 24.2, or as a result of either Party issuing a notice pursuant to Article 24.5; or as a result of the operation of Articles 24.1.4, 24.1.5 or 24.1.6, , then notwithstanding any other rights or remedies available to the Seller, the Buyer shall pay the Recovery Fee to the Seller.

17.3 The Seller shall maintain accurate books, records and other supporting documentation evidencing the Project Costs, which will be used as the basis for calculating the Recovery Fee in Article17.4. The Buyer shall have the right to inspect such books, records and documentation for the purposes of verifying the quantum of the Project Costs on giving the Seller at least five (5) Working Days' written notice.

17.4 The "Recovery Fee" shall be such amount as is necessary to allow the Seller to recover the all costs suffered as a result of Buyer's Termination and which shall be calculated as follows:

Recovery Fee = Project Costs - (Project Costs x (Termination Day/1826)) + any costs payable by the Seller for terminating the LNG Supply Agreement + any costs payable by Seller for terminating the FSRU Lease Agreement + any and all associated costs resulting from termination of this Agreement.

Where "Termination Day" is the Day on which this Agreement has been terminated expressed as a figure, with the Day after the Start Date being counted as "one", the next Day being "two" and so on. If this Agreement is terminated on or prior to the Start Date the Recovery Fee shall be equal to the Project Costs plus any costs payable by the Seller for terminating the LNG Supply Agreement.

The above formula reduces the Recovery Fee from an amount equal to the Project Costs to $0 (zero US Dollars) at the end the full term of this Agreement, excluding (a) any costs payable by the Seller for terminating the LNG Supply Agreement prior to the end of the full term of this Agreement; and b) any and all associated costs incurred by the Seller resulting from termination of this Agreement.

17.5 The Recovery Fee shall be invoiced by the Seller and will be payable no later than five (5) Days after the date of termination of this Agreement.

17.6 The Buyer acknowledges that the Recovery Fee reflects the Seller's investment in order for the Seller to deliver and the Buyer to receive Gas from the FSRU and represents a genuine pre-estimate of loss the Seller will incur if this Agreement does not remain in place for a minimum of sixty (60) Contract Months. The Buyer hereby waives any and all rights it may have to argue that the Recovery Fee is not a genuine pre-estimate of loss or otherwise an unenforceable penalty.

17.7 In the event of the failure of the Buyer to pay any amount due to the Seller within the period stipulated in Article 17.5, the Seller shall at the expiration of the period stipulated in Article 0, give the Buyer a written notice substantially in the form set out in Schedule 7 (the **"Notice of Non Payment**") of Seller's intention to draw on Buyer's LC at the expiration of five (5) Working Days (the **"Grace Period**") from the Day the

Notice of Non Payment was received. Where the Buyer fails to pay the amount due at the expiration of the Grace Period, the Seller may demand payment under the LC.

Other Miscellaneous Articles

22.1 ***Exclusive Remedies***

22.1.1 The remedies set out in this Agreement in respect of a breach by a Party of this Agreement shall be the exclusive remedies of the Parties in respect of such breach and shall be exhaustive of any other remedies howsoever arising (whether at law, in equity or in consequence of any statutory duty, strict or tortious liability or otherwise).

33 ***GENERAL***

33.1 ***Entire agreement***

This Agreement, its Annexures and documents incorporated by reference and the Buyer's payment security if and when provided, shall constitute the entire agreement between the Parties as to the subject matter of this Agreement and shall supersede and take the place of all documents, minutes of meetings, letters or notes which may be in existence at the Execution Date and of all written or oral statements, representations and warranties which may have been made by or on behalf of the Parties as to such subject matter.

33.2 ***Amendment***

Subject to Article **Error! Reference source not found.**, this Agreement may only be a mended or supplemented by a written agreement of the Parties which is expressed to be an amendment of or supplement to this Agreement.

33.2 ***Waiver and exercise***

33.3.1 The waiver, release or modification by a Party of a default by the other Party or Parties in the performance by that other Party of any of its covenants or obligations in accordance with this Agreement shall not operate or be construed as a waiver, release or modification by the default waiving Party of any other default by the other Party.

33.3.2 The waiver, release or modification by a Party of any of the rights or interests of the right waiving Party in accordance with this Agreement shall not operate or be construed as a waiver, release or modification of any other right or interest of the right waiving Party in accordance with this Agreement.

33.3.3 Except where expressly provided to the contrary in this Agreement, a Party shall not have and shall not be deemed to have waived, released or modified any of its rights or interests or the requirement for or any default in the performance of the covenants or obligations of the other Party in accordance with this Agreement unless the waiving Party has expressly stated in writing that it does so waive, release or modify such rights or interests or the requirement for or any default in the performance of such covenants or obligations.

33.3.4 The exercise by a Party of any of its rights or interests in accordance with this

34 ***Applicable Law***

This Agreement shall be governed by and construed in accordance with the laws of Ghana. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.

THE FACTUAL BACKGROUND

PRIOR TO THE GSA

42. WAGL contends that because of the urgent need for Gas, once the Heads of Terms were signed on 15 May 2015, and given the long lead times required to implement certain aspects of the project, it started making preparations before the execution of the GSA, recognizing that if the GSA did not materialize, it was at its financial risk.

43. Accordingly, on 30 May 2015, WAGL obtained a quotation from Sterling Engineers ("**Sterling**") for drilling and bathymetric surveys in the sum of US$100,000.[3]

44. On 10 June 2015, WAGL entered into an agreement with Hemla Energy AS ("**Hemla**") to provide Project Management Services.[4] The description and scope of the work was divided into two phases. Phase I comprised: dredging of the port; extension of the outer breakwater; fabricating and installing and commissioning a pipeline; providing a mooring facility; providing the FSRU by way of time charter party; providing site supervision and installing the Scada system. Phase II included a concept analysis, selection of an energy procurement and construction ("**EPC**") contractor, preparation of tender documents, tendering contract award, fabrication, delivery at site and installation and commissioning.

45. In July 2015, Envirorich provided a proposal to Sahara in relation to the environmental impact assessment study.[5]

[3] C17.
[4] C20-C42.
[5] C72-C111.

46. Prior to the signature of the GSA, to the knowledge of GoG, WAGL commenced a geological survey and soil investigation at the proposed area[6] and there were negotiations relating to the loading arms.[7] Hemla also provided monthly progress reports to WAGL.[8]

47. On 9 September 2015, WAGL entered into an agreement with MBC Capital Limited ("**MBC**") to provide project finance advisory services and capital raising.[9]

AFTER THE GSA

48. On 28 October 2015, WAGL entered into a time charter with Golar LNG NB13 Corporation ("**Golar**") for the provision of the FSRU at the port of Tema, Ghana for a period of 5 years.[10] WAGL submits that it was necessary to enter into this agreement early on to secure a FSRU, given the limited supply of such vessels and the need to meet certain deadlines arising from the urgency of the project.

49. On the same day, 28 October 2015, Sahara Energy Resource Limited registered in the Isle of Man and a member of the Sahara Group ("**Sahara IOM**") entered into a performance guarantee with Golar by which it guaranteed the due and proper performance by WAGL of its obligations under the time charter.

50. On 2 November 2015, WAGL paid the application fee to the Ghanaian Energy Commission.[11]

51. On 30 November 2015, WAGL signed a purchase order with FMC Technologies ("**FMC**") for the supply of two marine loading arms.[12]

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[6] C155-6.
[7] C261.
[8] C208.
[9] C433.
[10] B110.
[11] C510.
[12] C548.

52. On 1 December 2015, WAGL signed a consultancy service agreement with Siport XXI S.L. ("**Siport**") in relation to the construction of a FRSU Terminal at the port of Tema in Ghana.[13]

53. On 10 December 2015, the Ghanaian Cabinet considered the approval of the GSA, endorsing the Executive approval granted earlier and requesting some revisions to the GSA.[14]

54. On 23 December 2015, WAGL entered into an agreement with BP Gas Marketing Ltd ("**BP**") to purchase LNG from BP X-ship for an extendable "*Base Term*" of 5 years, which agreement was subsequently notified by WAGL to GoG.[15]

55. On 28 December 2015, WAGL wrote to the Minister of Power at GoG stating:[16]

> "…. We still remain optimistic that our target of first gas is still achievable subject to all the Conditions Precedent of the … (GSA) being met.
> Nevertheless, we continue to work arduously on the other aspects of the project and will continue to regularly keep you updated.
> Finally, we seize this opportunity to remind you on the outstanding issues re-: GSA inter-alia Parliamentary Approval, and your Financial Instrument being in place...."

56. On 21 January 2016, the Ministry of Justice confirmed, on behalf of the Attorney General, that the GSA did not contravene any existing law and could be executed by the parties thereto. The letter added:

> "…. This conclusion notwithstanding, it is our view that Article 30.11 of the Agreement is only an undertaking to confirm the fact that the Agreement will receive Parliamentary approval in line with Article 181(5) of the 1992 Constitution. In view of the fact under Article 2.4.1 of the Agreement, Parliamentary approval is 1 of the Buyers conditions for the effectiveness of the Agreement, this could be done before or after the parties have signed the Agreement. The requirement of parliamentary approval must be met in order to avoid having the Agreement struck down as unconstitutional and therefore null and void and of no effect in future litigation…."

[13] C629.
[14] C831.
[15] C885.
[16] C885.

57. On 25 January 2016,[17] WAGL wrote to the Minister of Power giving an update on progress. The letter noted that the EPC companies had been shortlisted and added that as in the previous update, WAGL had slowed down on issuing EPC contracts whilst awaiting Parliamentary Approval and the letter of credit ("**Letter of Credit**" or "**LC**") to be put in place, adding that in view of on-going efforts to secure such approval and a working LC, work on this aspect had since recommenced. The update also indicated that the estimated time for completion of the high-pressure loading arms was the first quarter of 2016.

58. On 27 January 2016, WAGL received an invoice from MBC for a success fee representing 3% of the total amount of capital arranged for WAGL.[18]

59. On 4 February 2016, WAGL entered into an EPC contract with Amazon Energy Ltd ("**Amazon**").[19] The contract provided for a start date, namely the day after the execution of the EPC Contract and completion of the design, procurement and fabrication, as well as the construction of the works, 9 months thereafter.

60. On 8 March 2016, the Conditions Date in the GSA arose.

61. On 17 March 2016, Sahara Energy & Petroleum Limited, Ghana ("**Sahara Ghana**") wrote to the Executive Secretary of the Energy Commission. The letter sought a provisional licence for an offshore LNG facility for the purpose of receiving LNG to be gasified and made available as Natural Gas to power generation plants along the Tema corridor with an approximate start date of April 2016 .[20]

62. On a date, on or about 18 March 2016, WAGL and GoG entered into an addendum to the GSA increasing the contract quantity, the daily contract quantity the duration of the contract from 5 to 10 years and reducing the regasification costs. The Addendum

[17] C1074-5.
[18] C1078.
[19] C1111-1111.76.
[20]C1115-6.

was stated to form part of the GSA and, insofar as any of its terms or conditions contradicted or conflicted with the terms of the GSA, the Addendum would take precedence. The Conditions Date was not changed.[21]

63. On 18 March 2016, the President of Ghana gave Executive approval to the Addendum to the GSA.[22]

64. On 18 March 2016, the Deputy Minister for Power and the Deputy Minister for Finance sent a joint memorandum to the Ghanaian Parliament to approve the GSA as amended by the Addendum.[23]

65. On 30 March 2016, the Ghanaian Cabinet approved the GSA as amended by the Addendum.[24]

66. On 1 April 2016, FMC wrote to WAGL stating that in the light of the lack of payment since January 2016, as well as the lack of any reply from WAGL or other players despite numerous reminders, FMC's management had been forced to put on hold the manufacturing of the loading arms "*while due funds are not received at FMC's account*". The letter added that upon receipt of the funds, manufacturing would restart and a new schedule and delivery date would be provided and notified. The letter also enclosed an updated offer for the supply of the marine loading arms.[25]

67. On 18 April 2016, WAGL authorised Hemla and its project team to manage the tendering for the pipeline package and the design verification package.[26]

[21] B310-323.
[22] C1313.
[23] B318-323.
[24] C1314.
[25] C1318-1395.
[26] C1397.

68. On 27 May 2016, WAGL notified the Minister of Power that the "*Mt Golar Tundra*", which was to be used as the FSRU, had sailed from Singapore to Tema pursuant to the time charterparty. The letter also reiterated the request for an update on the status of Parliamentary Approval.[27]

69. On 6 June 2016, WAGL updated the GoG on the project, noting that the time charter the *Mt Golar Tundra* had been signed for a period of 5 years; that the vessel had arrived at Ghana on 30 May 2016 and had docked offshore; and that the high-pressure loading arms contract had been awarded to FMC.[28] The update also stated:

> "Had all gone according to plan we would have been supplying the much-needed LNG to the various power plants along the Tema axis by now.
> All the Supply Agreements and agreements that go into making the project a reality has since been executed and the Minister dutifully informed….
> The FRSU was scheduled to arrive in May 2016 and it did in the hope that the infrastructure work would have been completed.
> Were it not for the delays experienced, the project would have long been completed. Moreover…, e shouldered the risk in the project by not looking to the Government to take inject Equity by not looking to Government to bankroll and sit with all the risks…."

70. On 30 June 2016, there arose the deadline for the Condition Precedent under the LNG Supply Agreement.[29]

71. On 12 August 2016, WAGL wrote to the Director of Ports at the Ghana Ports and Harbour Authority referring him to the Minister of Powers letter of 13 July 2015 and informing him of the progress with the LNG project as planned. The letter indicated that WAGL would be forwarding copies of the engineering studies, drawings, works and all other technical and operational aspects in due course for his consideration, comments and suggestions.[30]

72. On 26 September 2016, WAGL wrote to the Minister of Power referring to previous correspondence and requesting that WAGL be provided with an update on the status

[27] C1404.
[28] C1405-13; C1414 re NOR.
[29] Clause 5.2.3: B254.
[30] C1495.

of Parliamentary Approval as well as GoG's financial instrument i.e. the LC. It noted that WAGL had informed the Minister that it had slowed down on progress of the project pending the fulfilment of the GoG's conditions precedent *inter alia* Parliamentary Approval and the Financial Instrument.[31]

73. On 5 October 2016, WAGL wrote again to the Minister of Power acknowledging receipt of a letter dated 4 October 2016, which letter is not before the Tribunal, commenting that they were "*taken aback by its contents*". WAGL's letter went on to state that it had commenced work on the project and taken positions with huge financial implications on the back of the GSA and continued to do so on the GoG's assurances that the Parliamentary process and financial instrument would be secured forthwith. The letter further stated that it had been made expressly clear at a series of meetings held with the various ministries that the work should go on to which WAGL had requested a letter from the Minister of Power in this regard, but it was not received. The letter further drew attention to the monthly hire charges which were being incurred in relation to the FSRU, enclosing copies thereof.[32]

74. No reply was received from the GoG to any of these letters requesting updates.

75. On 19 October 2016, Parliamentary Approval was received for the project including both the GSA and the Addendum, over 7 months after the Conditions Date of 8 March 2016.[33]

76. On 1 November 2016, WAGL wrote to the Minister of Power following the Parliamentary Approval and sought a meeting with the Ministry and other stakeholders to identify the key next steps with a view to the implementation of the project. The letter reminded the GoG that there was still an outstanding obligation on its part under the GSA, namely the provision of the LC.[34]

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[31] 1519.
[32] C1522-6.
[33] C536-7.
[34] C1530.

77. On 21 November 2016, WAGL again wrote to the Minister of Power stating that it was yet to receive any official communication of the Parliamentary Approval and raising again the failure to provide the LC.[35] The letter continued:

> "As a reminder, the FSRU – Mt Golar Tundra arrived Ghana and tendered its Notice of Readiness… on 1 June 2016, and has remained in Ghana water since then. Since its tendering of the NOR, we have continued to keep you regularly updated and informed of the cost implication, which remains for your account.
> Furthermore, due to the delay experienced on the project, our contractors were unable to continue with their obligations. Consequently a lot of them vacated the site. We are now having to recall and mobilize them again and this is not without attendant cost implication.
> Finally, your urgent attention to providing us with the official notification as well as establishing of the Letter of Credit for the project will be most appreciated.…"

78. On 1 December 2016, Golar commenced arbitration against WAGL in relation to the non-payment of hire under the charter.

79. On 1 December 2016, Ghana National Petroleum Corporation ("**GNPC**") entered into a 20 year contract with Höegh LNG for the supply of NG at Tema.[36]

80. On 6 January 2017, Clyde & Co, representing WAGL, wrote to the Government of Ghana, for the attention of the Ministry of Power, indicating that it had been appointed to represent WAGL and noting that WAGL had already been exposed to very significant Project Costs, but had been prevented from progressing matters as a result of the GoG's failure to comply with its obligations *inter alia,* under clause 2.5 of the GSA and that WAGL's exposure was continuing to grow.[37]

81. On 29 March 2017 the Tribunal in the arbitration between Golar and WAGL issued its First Interim Award.[38]

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[35] C1535.
[36] C1605.
[37] C1665.
[38] C1701. Three further interim awards followed: C1732; C1744; and C1848.1.

82. On 5 July 2017, Amazon issued a Notice of Termination of the EPC Contract for failure to make payment thereunder.[39]

83. On 26 July 2017, WAGL wrote to the Minister of Power in response to the latter's request for a submission of a confirmed position on pricing for LNG. Having referred to the GSA and the steps it had taken to fulfil its obligations under that agreement and the failure of the Ministry of Energy to pay the daily hire costs of the FSRU, WAGL sought clarification of the Ministry's request that the Ministry wanted only a review of the price clause even though works on the project were continuing and sought clarification.[40]

84. On 3 August 2017, WAGL wrote again to the Minister of Energy referring to previous meetings, presentations and discussions relating to the implementation of the GSA.[41] The letter stated:

> "Upon Parliaments Approval of the binding GSA… And subsequent kick of meeting (with members of your team in attendance) of 16 December 2016, we are yet to be formally engaged by the Ministry of Energy in expediting steps towards the implementation of the project. Her previous correspondence, and in the bid to curtail the exposure, WAGL has been inclined to slow the pace of execution.
> It suffices to state that this delay is as a direct consequence of non-fulfilment of Buyer Conditions per the GSA. Consequently, costs (such as the hirer on the Floating Storage and Regasification Unit) accrual for Go aboard life 's account resulting in 1/3 Arbitration Award against WAGL by Messer's Golar Limited for which pressures now mount on WAGL for corresponding action.
> We, by this medium reiterate our willingness to work with the GoG on ways to mitigate this exposure and are available for discussions and meetings in this regard.
> Your urgent attention will be highly appreciated."

85. On 25 August 2017, Amazon gave Notice of Termination under the EPC contract.[42] The letter stated:

> "….
> We wish to reiterate WAGL's position on the emergency nature of the project at the negotiations and eventual execution of the Agreement. However, following several discussions in this regard, with WAGL repeatedly assuring us that the project will go

[39] C1742.
[40] C1759.
[41] C1760.
[42] C1761-3.

> ahead we are yet to be mobilized for the first milestone payment. Our last formal engagement with the Ministry f Power was in December 2016 when the project kick off meeting was to be held with no update thereafter.
>
> Despite the seemingly obvious frustration, and WAGL's insistence that the project will forge ahead we are not convinced due to lack of improvement in the execution of the contract.
>
> As a result, due to WAGL's breach of contract, we hereby terminate this agreement in accordance with Articles 500(9).
>
> Consequently, the sum of US$310,000,000…falls due…."

86. On 4 September 2017, GNPC wrote to WAGL inviting negotiations and adding that following a recent review of the country's power requirements, the Ministry of Energy was considering an implementation of the project to be executed by WAGL in Takoradi instead of the original agreed location in Tema, necessitating a review of the GSA.[43]

87. On 14 September 2017, GNPC concluded an agreement with Gazprom for the supply of LNG.[44]

88. On 15 September 2017, WAGL notified an event of force majeure in respect of the FSRU time charter agreement on the basis of the change of port from Tema to Takoradi.[45]

89. On 19 September 2017, Golar gave notice of termination and withdrawal under the time charter.[46]

90. On 24 July 2018, WAGL entered into a Deed of Agreement and Release with Golar and Sahara Energy Resources Limited, Switzerland ("**Sahara Switzerland**") following four interim arbitration awards.[47]

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[43] C1764.1-2.
[44] C1766.1-2.
[45] C1767-8. A similar notice was sent to BP on 26 October 2017: C1805.1-2.
[46] C1773-4.
[47] C1891.4-11. This was subsequently amended on 31 August 2018: C1920-1 and on 4 March 2019: C2011-3.

91. In September 2018, there was a press announcement that the China Harbour Engineering Company had been appointed to build onshore facilities, and that Jiangnan Shipyard had been appointed to provide an FSRU.[48]

92. On 16 October 2018, FMC gave Notice of Termination to WAGL for breach of contract in relation to the marine loading arms.[49]

93. On 22 April 2019, WAGL gave Notice of Termination of the GSA to the Ministry of Power.[50] The letter stated as follows: –

> "Pursuant to Clause 2.5.7(ii) of the Agreement, if any Condition is not met by the Conditions Date the Seller is "entitled to terminate [the] agreement with immediate effect".
> The Execution Date was 8 October 2015. The Conditions Date was 5 months after this (i.e. [8th March 2016].
> Buyer has failed to satisfy the following Conditions in accordance with Clause 2.4 by the Conditions Date:
> 1. Failure to provide a revolving irrevocable cumulative standby letter of credit in accordance with Clause 2.4.2 of the Agreement.
> 2. Failure to obtain all buyers approval necessary to purchase receive and use gas in accordance with Clause 2.4.3
> 3. Failure to establish a Disputed Amount Account with the Seller for receipt and management of disputed amounts in accordance with Clause 2.4.5 and 14.8 of the Agreement.
> As a result, Seller exercises its right pursuant to common-law and/or Clause 2.5.7(ii) and/or Clause 24.1.3 of the Agreement and gives "notice of termination" terminating this Agreement with immediate effect.
> Attached is Sellers invoice for the Recovery Fee payable by Buyer, calculated in accordance with Clause 17.4 of the Agreement.
> ….
>
> Seller reserves the right to revise the Recovery Fee and claim damages at common-law…."

THE CONDITIONS

94. It is agreed between the parties that:[51]

[48] Para. 10., Second W/S Etomi.
[49] C1934-5.
[50] B332-4.
[51] E-mail 20 August 2020.

i. GoG did not obtain a Letter of Credit and was unable to fulfil Article 2.4.2 of the GSA.

ii. GoG did not establish (with WAGL) a Disputed Amount Account and was unable to fulfil Article 2.4.5 of the GSA.

iii. WAGL did not complete the Infrastructure Works under Article 2.3.5 of the GSA.

iv. WAGL did not establish (with GoG) a Disputed Amount Account under Article 2.3.4 of the GSA.

v. The parties did not waive the Conditions under Article 2.2 of the GSA so as to make the GSA Effective.[52]

95. There is a dispute as to whether or not the GoG obtained all of the other Buyer's Approvals as required by Article 2.4.3, but given that there is an admission that neither side fulfilled all the Conditions, the resolution of this issue does not add anything.

96. WAGL submitted that some of these Conditions needed long lead times, and it was necessary to start making preparations in advance of the execution of the GSA. This is further explored later in this Award.

97. It is not disputed that the Conditions Date was 8 March 2016.

98. WAGL's claim is made pursuant to Clause 2.5.7(ii) and Clause 24.1.3.

[52] Para. 14.5 of GoG's Skeleton

THE PARTIES' SUBMISSIONS ON THE CONSTRUCTION OF THE GSA

WAGL's submissions

99. WAGL explained that the GSA was structured to ensure that WAGL would always recover the whole of the Project Costs, either as part of the costs paid for the Gas supplied after the Start Date or through the Recovery Fee or through a mixture of both.

100. WAGL also explained the efforts it had made both before and after the execution of the GSA, part of which explanation is summarised above and the balance of which is dealt with in more detail when considering the Recovery Fee and Project Costs.

101. WAGL further submitted that the GoG had decided that it no longer wished to purchase Gas from WAGL and that was why the GoG did not fulfil the remaining Buyer's Conditions as it was able to receive Gas at a considerably cheaper price from Gazprom, namely at a saving of some US$400 million.

102. WAGL contended that it was not suggested that by waiting until 22 April 2019 to terminate the GSA, WAGL waived its right to do so.

103. WAGL justifies its failure to complete all of the Seller's Conditions on the basis that, as it had repeatedly warned the GoG, it had been obliged to slow down its progress with the project because of the delays on the part of GoG, as Buyer, in obtaining Parliamentary Approval and, thereafter, providing the Letter of Credit. As to the former, GoG failed to ask for it, let alone obtain Parliamentary Approval before 8 March 2016.

104. WAGL further submitted that the fact that some of the Seller's Conditions had not been satisfied is, as a matter of construction of Article 2.5.7, irrelevant, as the Article is engaged if "*any Condition is not satisfied*" emphasizing the word "*any*". It adds that there is nothing in Article 2.5.7 to suggest that WAGL's right to terminate is conditional upon its having fulfilled all the Seller's Conditions. Otherwise it would mean that WAGL

would be compelled to comply with all the Conditions, including completing all of the Infrastructure Works even if the GoG had made it clear that it did not intend to perform.

105. WAGL added that there is no provision in the GSA which points to the obligation of WAGL to comply with its Conditions before invoking the termination clause or to give notice of the Buyer's defaults before termination. On the contrary, there is no equivalent provision to Article 2.5.8 in the Buyer's favour.

106. Addressing the argument that its termination was premature and contrary to the terms of the GSA, WAGL submitted that the GSA makes no provision for prior notice. The termination came about because the negotiations had stalled when GoG decided to buy its LNG from Gazprom at significantly lower prices. On the calculations made by WAGL and put to the various witnesses the saving was, it submits, as stated above, around US$400 million.

107. Finally, it points to the fact that several arguments raised at the hearing were not pleaded (as noted below) and/or no evidence was adduced to support them.

GOG's Arguments on Construction

108. GoG disputes WAGL's right to terminate on various grounds. GoG argues that Clause 2.5.7(ii) imposes an obligation on WAGL to terminate immediately the Conditions Date of 8 March 2016 arises.

109. GoG adds that it satisfied all but two of its Conditions before WAGL prematurely terminated the GSA. While accepting that it did not establish the Letter of Credit under Clause 2.4.2 or the Disputed Amount Account under Clause 2.4.5, it submitted that the time-frame for complying with that requirement was distorted following the Parties' decision to amend the GSA by entering into an Addendum to vary the terms of the GSA. By that decision, the Parties, by necessary implication, waived the period of compliance with Clause 2.4.2, both of which required Parliamentary Approval.

However, the parties subsequently agreed that there had been no waiver of the Conditions. Moreover, the termination pre-empted GoG's ability to comply with those two Conditions.

110. GoG further argued that there was an order of precedence and that the Letter of Credit does not have to be provided before other Conditions are fulfilled.

111. GoG also contended that the sets of conditions imposed on both parties were independent of each other, even though those conditions were to be performed concurrently and WAGL cannot use GoG's failure to perform the Buyer's conditions as a reason to terminate.

112. It was GoG's further contention that WAGL's conditions were the main or primary conditions, the essence of the GSA, whereas GoG's conditions, in comparison, were the minor conditions and WAGL's failure to satisfy the Seller's conditions was a fundamental breach which went to the root of the contract, citing the decision of the Ghanaian Supreme Court in *Social Security Bank Ltd v CBAM Services Inc* [2007-2008] 2 SCGLR 894.

113. GoG further contended that WAGL cannot invoke Clause 2.5.7(ii) to terminate the GSA when all the Conditions have not been satisfied or waived by the parties for the GSA to come into effect on the Effective Date. WAGL cannot be in breach or wanton default of its Conditions and still be entitled to terminate the GSA, when the effect of WAGL's default is to render the GSA unenforceable or ineffective. Without performance of WAGL's conditions, there cannot be any contract, neither can there be an obligation on GoG to pay for gas. Consequently, WAGL purported to terminate an unenforceable agreement which had not yet come into force. *(See Cutter v. Powell (1795) 6 T.L.R. 320; Bolton v. Mahadeva [1972 1 W.L.R. 1009.)* The authorities are to the effect that a party who does not perform perfectly can recover nothing, particularly, where the underlying contract enjoins the parties to complete <u>all</u> and not some of the Conditions.

114. As to the Conditions Date, GoG argued that as the Conditions could only be satisfied after the actual Conditions Date of 8 March 2016 had passed, the parties had implicitly

agreed to do away with the Conditions Date i.e. had postponed the Conditions Date indefinitely.

115. GoG also argued in oral submissions that WAGL did not use its reasonable endeavours to perform the GSA because it did not even obtain a licence to import LNG into Ghana in accordance with the provisions of the Energy Commissions Act. WAGL only provided a LNG provisional licence in the name of Sahara. Neither of these allegations were pleaded. However, the evidence of Mr Etomi was that a second licence was obtained in WAGL's name and it was produced to the Tribunal.[53]

116. GoG referred to WAGL's reliance on the need for the LC which was for "*backstopping the payment obligations of the Buyer".* It submitted that until WAGL had satisfied all of its conditions, in particular completed the infrastructure works, and was in a position to supply Gas to GOG, GOG's payment obligations did not arise. GoG submitted that WAGL's admission that it could not raise financing as a result of GoG's failure to establish an LC, even though the contract did not make the establishment of an LC a contingent condition for WAGL to raise financing for the contract, laid bare the real reason why WAGL was compelled to terminate the contract, namely that WAGL did not have the financial capacity to complete the project.

THE TRIBUNAL'S ANALYSIS AND CONCLUSION ON CONSTRUCTION

Principles of Construction

117. In construing the GSA, the Tribunal applies Ghanaian law. However, in relation to construction there is no material difference between Ghanaian law and English law and GOG did not cite any relevant principles of Ghanaian law which suggested that the approach to construction of commercial agreements was different. The cases relied upon by the GoG in the various contexts add nothing to the recognized principles of English law applied in Ghana and turn on their own facts.

[53] C1395.

118. For example, the Ghanaian Supreme Court decision in *Social Security Bank Ltd v CBAM Services Inc* [2007-2008] 2 SCGLR 894 illustrates the English law principle that, at common law, a party who has not performed its own obligations which are independent of the counterparty's obligations cannot recover damages for an alleged counterparty breach. The authorities discussed by Christine Dowuona-Hammond, *The Law of Contract in Ghana*, on the meaning and application of the common law requirement of exact and precise performance of entire contracts, are all English cases – *Cutter v Powell, Sumpter v Hedges, Moore v Landauer and Bolton v Mahadeva*. If anything, they show that English law and Ghanaian law principles of contract are the same. However, the authorities are irrelevant because the question is not the meaning or application of common law principles applicable to discharge of entire contracts which have been incompletely performed, but the meaning and effect of relevant provisions of the GSA.

119. The established principles of construction in English law provide for the contract to be construed at the date it was entered into and on an objective basis by ascertaining what a reasonable person would have understood the parties meant against the background knowledge which would have reasonably been available to them in the situation they were in at the time of the contract. The words in issue have be looked at in the context of the contract as a whole. If there are two possible constructions, the court or tribunal is entitled to prefer the construction which is consistent with business common sense and to reject the other.

120. It is no part of a court's or tribunal's role to re-write the parties' bargain and the court or tribunal should try to give the ordinary and natural meaning to the words, but if something has gone wrong with the language to the extent that it produces an absurdity or would create inconsistency with the rest of the document or is an obvious linguistic mistake then the law does not require courts or tribunals to attribute to the parties an intention which they plainly did not have. Thus an obvious mistake in a

written instrument can be corrected as a matter of construction without obtaining a decree in an action for rectification i.e. "*corrective interpretation*".[54]

121. The Tribunal applies the principles of construction in this Award set out above. In construing the GSA it has to look at the position at the time the contract was entered into against the factual matrix known to the parties at the time and not subsequent events. It is clear from the evidence, which is not in dispute, that at the time of the negotiations for the GSA, the Heads of Terms and the GSA itself, Ghana was facing an urgent energy crisis and had approached WAGL to provide power urgently.

Factual Background

122. WAGL was to make a very substantial investment which it would recoup if the GSA became Effective within the meaning of the GSA, from the sale of the Gas. GoG, on the other hand, was to make no financial investment, other than any Bank costs associated with setting up a Letter of Credit. WAGL accepted that if the GSA was not executed, any costs it had incurred would be at its own risk. In the Tribunal's view, it is clear that the overall financial risk lay with WAGL if the GSA did not become Effective such that Gas could not be sold and WAGL thereby recover its investment.

123. It is quite clear, despite an argument at one point put forward by GoG, that the GSA came into force on the Execution Date (see Articles 2.1.1 and 2.6), that the Execution Date was the date from which the Conditions Date is calculated (Article 2.5.5) and the intervening five month period was when the parties had to comply with their respective Conditions. There is provision to extend the Conditions Date by the Seller under Article 2.5.8 or by a written agreement under Article 2.5.7 mutually to extend the Conditions Date (and presumably by waiver under Article 33.3.3).

[54] *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998[1W.L.R. Kookmin Bank v Rainy Sky SA [2011] UKSC 50*, at [14] per Lord Clarke, *Wood v Capita Insurance Services Limited* [2017] AC 1173 at [10-13] per Lord Hodge; Chitty 33rd Edition paras 13-081-094.

124. The Effective Date is the date on which all the Conditions of both Seller and Buyer have been satisfied or waived (Articles 2.2 and 2.5.6). This then becomes the date from which the Start Date for the sale of Gas is calculated, namely three months after the Effective Date unless otherwise agreed in writing. The Seller is not obliged to sell and the Buyer not obliged to purchase and receive Gas until the other has complied with all their respective conditions or they have been waived by agreement in writing (Article 2.3 and 2.4). Thus if neither party fulfil their conditions, as in this case, there is no obligation to supply or receive Gas i.e. the GSA is not Effective and hence there is no Start Date for the supply of the Gas. There are obligations of notification on each party to notify the other when each Condition has been satisfied (Article 2.5.5).

125. It is common ground that the Effective Date never came into existence because all the Conditions were not fulfilled. It is likewise common ground that neither party fulfilled all its Conditions.

The Issues of Construction

126. There are two principal issues of construction which the Tribunal needs to resolve. In addition, there are some shorter issues, which GoG has raised, some of which were not originally pleaded, but which the Tribunal will address.

127. The first issue is whether the conditions are independent or inter-dependent i.e. whether the Seller, WAGL, can terminate the GSA under Article 2.5.7(ii) if it itself is in breach of any of the Conditions and or otherwise whether the termination is premature. The second issue relates to the delay in exercising this right.

128. WAGL blames the delay in its own fulfilment of some of the Conditions on GoG's failure to provide Parliamentary Approval until late in the day without which the whole project would have been null and void and unconstitutional, as well as the need to obtain the Letter of Credit so as to enable WAGL to obtain the necessary financing.

129. The problem with this argument is that the GSA does not say anything about priority of, importance of, or inter-dependence of such conditions or refer to any link between WAGL's obligation to secure financing and the provision of the LC, nor is it included as a Condition in Article 2.5.1 for which GoG's assistance is expressly required. The highest contractually WAGL can put it is to rely on Article 2.5.2 which obliges each party to use reasonable endeavours at the request of the other party to assist the party primarily responsible to satisfy the Conditions.

130. In any event, while the Tribunal accepts that the obtaining of Parliamentary Approval is fundamental, it is less convinced as to the critical need for the LC which is a revolving LC that only comes into effect when the Gas starts to flow for purchase. But these arguments are academic as a matter of construction when the GSA is silent on the matter of priority or inter-dependence.

131. The obligation to satisfy the Conditions is one of reasonable endeavours. WAGL explained, as set out above, why it says it was unable to comply with its own Conditions and why it halted some of the works etc. No evidence was adduced of any failure to exercise reasonable endeavours. But again the reason behind the non-fulfilment is irrelevant to the construction of the critical words as this all happened after the GSA was entered into and the GSA has to be construed as at the time of its execution.

132. With that summary of the contractual framework, the Tribunal now turns to the critical Article: 2.5.7(ii) which is the Seller's right to terminate. This right arises on the Conditions Date for failure to satisfy any Condition on the original Conditions Date or a different Conditions Date if the original Conditions Date is waived in writing or the parties have in writing agreed on a new Conditions Date. The following are relevant:

133. First, this right to terminate, which is of course a right that, *ex hypothesi*, precedes the Effective Date and the obligation to supply and receive Gas, is given only to the Seller. In the Tribunal's view, this is reflective of the allocation of risk referred to above, which when read with Article 17, allows the Seller to receive a Recovery Fee which is in effect its compensation for wasted costs.

134. Second, importantly, it is triggered on failure by the Responsible Party to satisfy "*any condition*" without any specificity as to which Condition. The words are wide and self-explanatory.

135. Third, it is subject to Article 2.5.8, which entitles, but does not oblige, the Seller, to unilaterally extend the Conditions Date on written notice to the Buyer where the Seller is delayed in completing the Infrastructure Works or constructing, installing and/or commissioning the Seller's Facilities as a result of failures by the Buyer as specified therein, namely: an act of prevention, hindrance or interference attributable to the Buyer; breach by the Buyer i.e. GoG of any of its obligations under the GSA; or GoG not fulfilling its obligations to assist the Seller in getting certain approvals. This right was not exercised in this case.

136. Fourth, where "*any condition*" is not satisfied by the Conditions Date the Responsible Party is mandated to give the other party notice, the reasons for the delay and the date by which the Condition will be satisfied. This provision applies to both parties and unlike Article 2.5.8, does not entitle the party to extend the Conditions date: but merely to explain the delay and indicate a time for delayed fulfilment of the Condition.

137. Fifth, accordingly, the Conditions Date, which is agreed to be 8 March 2016, can only change or be postponed if the Seller i.e. WAGL and not the Buyer, elects to rely on Article 2.5.8, or if the parties waive the date in writing. Neither of these things happened here.

138. Sixth, Article 2.5.8 pre-supposes that the Seller has not complied with the Conditions by the Conditions Date because of certain actions on the part of the Buyer, and gives the Seller the option to extend the Conditions Date to accommodate the delay on its part so caused by acts of the Buyer. But this right does not undermine the alternative right under Article 2.5.7(ii) to terminate, which is expressly made subject to the option under Article 2.5.8. Thus, as Article 2.5.8 is not mandatory, yet Clause 2.5.7 is subject to it, it must have been contemplated that the Seller may not have completed all its

Conditions, yet chooses not to extend the Conditions Date and instead rely on the termination provisions in Article 2.5.7(ii).

139. Seventh, as WAGL argued, it would be very uncommercial if the GoG could announce that it was not going to further perform, yet WAGL had to undertake further expenditure to complete e.g. the Infrastructure Works, which would mean an increased Recovery Fee which GoG would ultimately have to pay. That would be in neither party's interests.

140. Eighth, there is nothing in the GSA which makes the Seller's right to terminate conditional on it having itself complied with all the conditions. Nor does the Buyer have an equivalent provision to Article 2.5.8 entitling it to extend the Conditions date for failures on the part of the Seller.

141. Moreover, if the Seller terminates it can only claim a Recovery Fee in accordance with Article 17. The Recovery Fee is effectively a wasted costs claim calculated on the basis of the formula in Article 17 to which the Tribunal will return later in this Award.

142. For all these reasons the Tribunal rejects the contention that the Seller can only terminate the GSA under Article 2.5.7(ii) if it itself has complied with all the Seller's Conditions.

143. The next question is whether the delay in exercising the right to terminate prevents WAGL from so doing. There is no doubt that there was a very substantial delay between the Conditions Date on 8 March 2016 and the Notice of termination on 22 April 2019, but there was no written waiver of the Conditions Date. While it would appear that the project stalled first because of the delay in obtaining Parliamentary Approval, then to accommodate negotiations, it was the knowledge of the agreement with Gazprom together with the letter from GNPC in September 2017 seeking a review of the contractual arrangements with WAGL that made WAGL realize that GoG was no longer interested in performing the contract as Mr Etomi explained.

144. What is not clear however is why there was an additional delay of 18 months before the actual Notice of Termination was served. Nonetheless, it is accepted that there was no waiver of the Conditions Date. But ultimately what happened subsequently cannot as a matter of legal interpretation affect the issue of construction to which the Tribunal now turns.

145. The relevant words are "*on the Conditions Date unless the relevant Condition has been satisfied or waived in accordance with this Agreement or the Seller and Buyer have agreed in writing on a new Conditions Date, the Seller may thereafter terminate this Agreement with immediate effect by giving notice of this termination….*" [Emphasis added]

146. Not only was there no waiver, but neither party gave a formal indication of a revised date for satisfaction of the unfulfilled Conditions under Article 2.5.7(i), although the correspondence, at least on the part of WAGL, could be said to give the reason for the delay. In any event neither party has taken a point on this. The relevance, however, of Article 2.5.7(i) is that it does contemplate delay without an extension of the Conditions Date which does not affect the position under Article 2.5.7(ii).

147. The underlined words in the phrase "*may thereafter terminate this Agreement with immediate effect*" permit of two alternative interpretations. The words "*with immediate effect*" can either govern the date on which notice of that termination has to be given such that the word "*thereafter*" has to be read as having a limited time scale of immediacy, or it governs the consequence or effectiveness of the termination of which notice has been given.

148. The Tribunal recognizes that the drafters of the GSA did not contemplate the present situation where the termination did not occur within a relatively short time of the Conditions Date. Nonetheless the parties have not waived the original Conditions Date and continued to negotiate and even enter into an Addendum after the expiry of the Conditions Date. However, the Tribunal has to construe the GSA at the time the parties

entered into it and therefore cannot, as stated above, take account of what happened subsequently.

149. Looking at the GSA when it was entered into it seems to the Tribunal clear that the correct interpretation is that the word "*thereafter*" has to be read as governing the consequence or effectiveness of the termination of which notice has been given. In other words, there was no precise time within which a Notice of Termination had to be served, but once served it took effect immediately.

150. If this were not the case the word "*thereafter*" would be redundant. It would have been enough to say "*on the Conditions Date*" which is what triggers the entitlement to terminate for non-compliance. There is no limit put on the word "*thereafter*" which is the critical additional word. The words used "*with immediate effect*" denote a consequence: not a time limit and hence denote the consequence of a notice; not the time within which to serve it. Had the words been intended to govern the time within which to terminate, there would have been a time limit as to the period of termination such that the phrase would have read something along these lines: "*the Seller shall immediately terminate this agreement or may terminate this Agreement within x days*". No such or similar wording appears.

151. Further support for this view can be seen by contrasting other grounds for termination by the Seller referred to in Article 24.1.3 (on which WAGL also rely but limited to Article 2.5.7). Article 3.1.2 uses the phrase "*may forthwith terminate*"; Article 23.5 which entitles the Seller "*to terminate*" if no acceptable replacement LC is provided "*immediately*"; Article 24.2.1 entitles either party to terminate upon notice in the case of an insolvency *"upon or after the occurrence of an Act of Insolvency*"; Article 24.3 entitles the Buyer to elect to terminate for prolonged failure to deliver Gas "*upon giving…notice, which notice shall be given within a period of thirty (30)Days after the expiration of the period of six (6) Contract Months….";* a similar time limited provision applies to a Seller's termination under Article 24.4.3; and under Article 25 either party may terminate for force majeure on notice *"within thirty (30) Days after the expiration of six (6) Contract Months…*.".

152. Thus it is clear that where a time limit for termination was required the relevant provisions of the GSA said so.

153. Moreover, to argue that the termination should have been carried out immediately is inconsistent with the GoG's argument that the termination was premature because WAGL had not fulfilled the Seller's Conditions.

154. While the Tribunal recognizes that there was a long delay between the accrual of the entitlement to terminate, absent any agreed waiver, there is no specific time limit within which the Seller is required to terminate if it elects to do so. Realistically a termination would not have been delayed unless there was some prospect of the GSA coming to fruition as otherwise the Seller would remain out of pocket. That appears to be what happened here, at least for part of the period of delay, namely that the parties were trying to resolve the issues between them, but in the end the GoG took a unilateral decision to obtain its Gas elsewhere to save several million US dollars leaving WAGL in practice no alternative but to terminate the GSA under Article 2.5.7 in order to recoup its investment.

155. Accordingly, although one member of the Tribunal had some misgivings as to this construction based on the application of the construction to the facts of this case as they transpired, the Tribunal concludes that there is no time limit on the exercise of the right to terminate under Article 2.5.7(ii). Such misgivings are ameliorated by the Tribunal's financial award on which the Tribunal is unanimous.

156. Finally, the Tribunal needs to address a few other arguments raised by GoG.

157. First, GoG pleaded for the first time on 10 August 2020 by way of Amended Response[55] that the parties had impliedly agreed by conduct not to be bound by the Conditions Date. As WAGL has pointed out, no particulars were pleaded of this alleged implied agreement nor was it alleged that it was in writing nor its date. No evidence was given as to how this implied agreement arose. Instead it is pleaded only that: "*It would be*

[55] Para. 36A.

most unjust for the Claimant to expect the Respondent to obtain Parliamentary approval five (5) months following execution of the GSA when negotiations to complete the terms of the GSA were still ongoing".

158. Whilst in principle a written agreement can be modified by conduct even when the agreement provides that any amendment must be in writing, there was no such implied amendment in the present case. No new Conditions Date is suggested by GoG. In such a carefully drafted GSA, it is unattractive to contend, as GoG does, that the Conditions Date is at large having been postponed indefinitely. That would introduce unnecessary uncertainty. Besides any such implied term would be wholly contrary to the express terms which make it plain that Parliamentary Approval has to be obtained within 5 months (Article 2.4.1). The GSA had been agreed. The only negotiations related to possible future amendments. As with the Addendum, the parties could have agreed a new Conditions Date if that was indeed their intention.[56]

159. Moreover, GoG did not comply with either Article 33.2 (Amendment) or Article 33 (Waiver and Release), both of which provide that any amendment or waiver has to be in writing which they were not. There is no written document waiving the Conditions Date. It was not even changed in the Addendum which post-dated the Conditions Date, as the Addendum made it clear that all other terms of the original GSA remained.

160. Accordingly, the Tribunal rejects any argument that the Conditions Date was impliedly extended.

161. Another late argument was that GoG failed to fulfil its conditions <u>because</u> WAGL failed to fulfil the Seller's Conditions. The allegation is denied by WAGL, but in any event it is irrelevant as the entitlement to terminate under Article 2.5.7(ii) is triggered by the factual non-fulfillment of any Condition without there being any need to prove a reason. Nor was any evidence tendered to support this allegation. On the contrary, it

[56] Chitty on Contracts 33rd Edn. 14-012-014.

is inconsistent with GoG's argument that it was in the process of trying to establish a LC.

162. A further argument was raised by the GoG that it was not obliged to pay the Recovery Fee because the GSA "*was ineffective prior to its termination."*[57] This argument confuses Execution Date and Effective Date. The GSA had been executed, which brought into existence Articles 2 and 17, but it did not become Effective for the purpose of other clauses, including the obligations to supply and receive Gas. Contrary, therefore to GoG's argument that because the GSA was not effective, WAGL could not rely upon Article 2.5.7(ii) to terminate it, the GSA states the reverse. The Ghanaian cases relied upon by GoG on this issue are therefore irrelevant because they are concerned with the effect at common law of partial performance of an entire agreement, which is not the position here. WAGL relies upon the express terms of the GSA (Articles 2.5.7(ii), 17 and 24) and not upon its common law rights.

163. Accordingly, the Tribunal concludes that WAGL is entitled to the Recovery Fee pursuant to Article 17 which fee is payable upon a termination under Article 2.5.7(ii). The Tribunal now turns to the Recovery Fee.

[57] GoG's response, para. 41; A/36.

THE RECOVERY FEE

THE LEGAL ISSUES

164. GoG has raised several issues of construction as to the entitlement of WAGL to recover the Recovery Fee and the extent therefore. The Tribunal addresses these first before considering the quantum of the claim.

The Reference to Buyer's termination in Article 17.4

165. The first Issue relates to the introductory words of Article 17.4 itself which reads:

> The "Recovery Fee" shall be such amount as is necessary to allow the Seller to recover the all costs suffered as a result of Buyer's Termination and which shall be calculated as follows:" [Emphasis added]

166. GoG contends that no Recovery Fee arises because it relates to a termination by the Buyer and that the Tribunal should read the words as they are printed, noting that the page had been initialed. WAGL, on the other hand, says that such an interpretation would be nonsense and contrary to the other provisions in the GSA.

167. The Tribunal has to consider Article 17.4 in the context of the whole GSA and in particular Article 17.

168. Article 17.2 makes it clear that in the event of a termination by the Seller following the issue of a notice of termination under Articles 2.5.7; 3.1.2, 23.5, 24.2 or 24.4, the "*Buyer shall pay the Recovery Fee to the Seller*". This is a mandatory obligation imposed on the Buyer: not the Seller. Article 24.1.3 indicates that the issue of a notice of termination under Article 2.5.7 is an event of termination. In its Notice of Termination dated 22 April 2019, WAGL gave notice of termination under both Article 2.5.7(ii) and Article 24.1.3.

169. It is clear to the Tribunal that Article 17.2 is the governing article because it defines the entitlement to receive and the obligation to pay Recovery Fee, while Article 17.4 merely describes the parameters of financial recovery and the method of calculation "*which shall be calculated as follows*". As such it must be Article 17.2 which governs the liability to pay the Recovery Fee if the costs fall within Articles 17.1 and 17.4. Article 17.2 clearly refers to the liability being that of the Buyer to the Seller in various situations including upon termination as result of a Seller's Notice, as here, under Article 2.5.7. Thus the words "*as a result of the Buyer's Termination*" in Article 17.4 are superfluous in any event and cannot contradict the mandatory obligation under Article 17.2 which provides for a Recovery Fee upon the Seller's termination.

170. Moreover, it is quite clear that the Recovery Fee is a payment to be made to the Seller to compensate it for its investment in the GSA if it is terminated before the Effective Date or is otherwise terminated early, as is clearly set out in Article 17.6 of the GSA. In addition, Article 2.5.7(ii) says in terms that "…*the Buyer is liable to pay the Seller the Recovery Fee in accordance with Article 17*" upon termination under that Article and that Article gives the Buyer no right to terminate.

171. The GoG has pointed to no Article in the GSA which entitles it to a Recovery Fee and one would not expect to see one as the GoG had not made any investment in the project. The provision of a Recovery Fee to the Seller in certain circumstances was clearly inserted for the protection of both parties: first to ensure that sums expended by WAGL would be reimbursed if the contract either did not materialize or go the full period, yet would prevent the GoG having to pay any other direct or indirect costs of losses to WAGL.

172. The Tribunal therefore concludes that WAGL's entitlement to a Recovery Fee derives from Article 17.2 of the GSA.

173. However, were it necessary to consider the reference to "*Buyer's*" in Article 17.4, the Tribunal agrees with WAGL that in relation to the word "*Buyer's*" something has gone wrong with the language in Article 17.4, probably a typo. The word should either be

ignored or replaced with the word "*Seller's*" as a matter of constructive interpretation on the basis of the principles of construction set out above. Otherwise the Article as it now stands is an absurdity and contrary to all the provisions of the GSA. The Tribunal also notes another typo in the same line with an unnecessary definite article "*the*" before "*all*" which adds further support to the view that the most likely explanation is that something has gone wrong with the typing. However, the Tribunal emphasises that such an interpretation is not tantamount to rectifying the clause, as no claim has been made for rectification, but merely interpreting it constructively in accordance with legal authority.

174. The Tribunal therefore unhesitatingly rejects the GoG's argument that the Seller has no remedy by way of Recovery Fee. References hereafter in this Award to Article 17.4 or entitlement under Article 17.4 are in the context of the parameters and calculation of the Recovery Fee, if any, in the context of the prima facie liability arising under Article 17.2 of the GSA.

The Recovery Fee had not Accrued

175. It was next argued by GoG that no Recovery Fee was payable because the GSA had not become Effective and there was no Start Date from which to make the calculation according to the formula in Article 17. Again the Tribunal considers this argument to be misconceived. Article 17.4, in defining "*Termination Day"* for the purpose of the calculation, provides in terms for the position where "*…the Agreement is terminated on <u>or prior to</u> the Start Date".* [Emphasis added]

Mitigation

176. GoG argues next that as a matter of principle WAGL was under a duty to mitigate the extent of the Project Costs incurred for the purpose of the Recovery Fee with varying comments as to the need to suspend various activities. This argument is inconsistent with GoG's case that WAGL had to fulfill all the Conditions before it could terminate.

177. The Tribunal does not consider that there arose a general duty to mitigate as a matter of law because WAGL's claim is in debt, not damages. However, the Tribunal will deal with WAGL's entitlement to specific costs below.

The Costs Incurred prior to the Execution of the GSA

178. The GoG argues that WAGL cannot claim expenses incurred prior to the execution of the GSA.

179. WAGL explained the reason why it incurred the costs in advance of the GSA, namely that there were long lead times and it was necessary to start preparations to meet the urgency requirements of the GoG. It also stated that GoG was made aware of what it was doing. WAGL did however accept, as stated above, that if the GSA was not executed, those costs would be its risk.

180. Again this is a question of construction and any representation allegedly made by either party to the other prior to the GSA is not relevant, given the Entire Agreement clause in the GSA (Article 33.1).

181. The starting point is the definition of Project Costs which states that such costs are those that "*…the Seller will incur in order to facilitate the Buyer receiving Gas from the FSRU"* [Emphasis added]. The Tribunal also notes Recital (D) which states:

> "Certain capital works are necessary around the discharge port in Tema, Ghana in order for the Buyer to receive gas from the FSRU and the Seller agrees to undertake (or procure the undertaking of) these works, and incur the initial capital cost thereof." [Emphasis added]

182. The next relevant reference is Article 17.1 which WAGL relies upon which states:

> "The Buyer acknowledges that the Seller has incurred the Project Costs in reliance of the Buyer agreeing to take or pay for Gas for a period of 1826 Days, in accordance with the provisions of this Agreement. The Contract Price formula set out in Article 13 provides for recovery of the Project Costs over the full term of this Agreement."

183. Article 17.6 provides:

> "The Buyer acknowledges that the Recovery Fee reflects the Seller's investment in order for the Seller to deliver and the Buyer to receive Gas from the FSRU and represents a genuine pre-estimate of loss the Seller will incur if this Agreement does not remain in place for a minimum of sixty (60) Contract Months…." [Emphasis added]

184. The Tribunal acknowledges that WAGL incurred some costs before the GSA was executed, taking a financial risk that the GSA would not be executed, in order to get matters rolling so as to enable it complete the project in time. In the Tribunal's view the issue is whether these costs were costs which would have had to be incurred after the GSA was executed in any event and as such formed part of and were integral to the overall investment.

185. The Tribunal therefore concludes that for the purpose of calculation under Article 17.4 the phrase "*will incur*" is not temporal and hence limited to costs only incurred after 8 October 2015, but a description of the costs that will be incurred as part of the Seller's investment and to allow the Seller to recover "*all costs suffered"* as a result of the termination (Articles 17.2 and 17.4) as further defined in Article 17.4.

Recovery for Costs paid by Sahara Companies

186. During the cross-examination of Mr Etomi, GoG for the first time took the point that some of the costs had been incurred or paid by other members of the Sahara Group and not WAGL. WAGL submits this is irrelevant as, depending on the costs in issue, the relevant Sahara company was either (a) a guarantor (FSRU costs) and a guarantor is normally entitled to be indemnified by the principal debtor; (b) the costs were subject to an inter-company debt as Mr Etomi confirmed in evidence, a Sahara Group company, being one of the joint venturers in WAGL;[58] or (c) if the sums were a gift, then they were collateral benefits which should be ignored under the principle in ***Parry v Cleaver***[59].

[58] Second W/S Etomi, paras. 11-13.
[59] [1970] AC 1.

187. WAGL submitted that the issue could be avoided by the Tribunal exercising a power under Section 48(5) of the Arbitration Act 1996 which provides that a tribunal has the same power as the court to (a) "*order a party to do or refrain from doing anything*" and suggested the following order:

> "The Respondent to pay to the Claimant the sum of US$ 65,501,135.68 (which is the total claimed of US$ 392,368,261.74, less the Clyde & Co invoice conceded yesterday, less the unpaid sums);
>
> The Respondent to pay to Reed Smith LLP's client account the sum of US$ 326,865,398.86 (being the total of the unpaid sums) for the account of the Claimant; and
>
> The Claimant to give irrevocable instructions to Reed Smith LLP that any sums paid into its client account pursuant to your order should be paid out to MBC Capital Limited and/or FMC Technologies SA and/or Amazon Energy Limited as appropriate;"

188. WAGL added that compliance with an award in this form set out above would mean that GOG's obligations to WAGL were fully discharged in a manner which enabled WAGL fully to discharge its liabilities to the relevant companies.

189. GOG rejected this proposed order commenting that it would mean that the Tribunal would be making orders which would be second-guessing the actions of non-parties to the arbitration proceedings. Nor does the proposed order deal with the question as to what would happen to the funds made to Reed Smith LLP's client account where neither MBC nor FMC nor Amazon initiated an action against WAGL now or in the future.

190. Project Costs, as defined, refers to costs incurred by the Seller i.e. WAGL. Article 17.4 refers to "*costs payable by the Seller".* Article 17.6 is also pertinent as this explains that the Recovery fee is to reflect "*the Seller's investment"* and is intended to reflect a genuine pre-estimate of costs if the GSA does not remain in place for its full period. It was the intention that the Seller *i.e.* WAGL would otherwise recover its investment through sums it received from the sale of the Gas over the period of the GSA.

191. While the Tribunal acknowledges that the point was taken late in the day, the Tribunal nonetheless heard evidence on the point. Ultimately it must be for WAGL to establish its entitlement to the various elements of Project Costs within the meaning of the GSA. The Tribunal will therefore consider this issue further when looking at the various elements of the Project Costs claimed.

Breach of the Reasonable Endeavours Clause

192. GoG disputes the claims for Project Costs and the various elements thereof on the basis that they arise from WAGL's breach, i.e. WAGL failed to use its reasonable endeavours to ensure performance of the Seller's Conditions. However, WAGL's claim is for a Recovery Fee under Articles 17 and 24, rather than for damages under common law to which the issue of its breach might have been relevant. Moreover, there is no pleaded case on breach and no evidence was adduced in this regard.

THE QUANTUM OF THE COSTS

193. The originally pleaded claim sought payment of US$1,080,889,309. By an Amended Request for Arbitration dated 8 July 2020, the claim was considerably reduced. No point has been taken by GoG as to the exchange rates used. The claim now made is as follows:

No.	Description	Amount (US$)
1.	Envirorich	5,263.16
2.	Siport21	203,400.00
3.	Amazon	310,000,000.00
4.	Sterling	12,000
5.	Hemla	3,484,471.19
6.	FMC	3,099,898.86
7.	Energy Commission	10,000.00

8.	FSRU	61,200,000.00
9.	Legal costs	558,984.56
10.	MBC	13,765,500
11.	Travel costs	28,743.97
	Total:	**392,368,261.74**

194. It is first necessary to consider what is recoverable under Article 17. The following provisions of the GSA are relevant. First, the definition of Project Costs which is defined as:

> "the costs that the Seller will incur in order to facilitate the Buyer receiving Gas from the FSRU, including:
> a) the costs of undertaking or procuring the Infrastructure Works at the port in Tema, Ghana;
> b) the costs of securing Access Rights, Authorisations and Seller Approvals;
> c) the costs of leasing the FSRU; and
> d) any interest and legal costs associated with the above."

195. Next the Tribunal turns to Article 17, which in so far as relevant provides:

> The "Recovery Fee" shall be such amount as is necessary to allow the Seller to recover [the] all costs suffered as a result of [Buyer's] Termination and which shall be calculated as follows:
>
> Recovery Fee = Project Costs - (Project Costs x (Termination Day/1826)) + any costs payable by the Seller for terminating the LNG Supply Agreement + any costs payable by Seller for terminating the FSRU Lease Agreement + any and all associated costs resulting from termination of this Agreement.
>
> Where "Termination Day" is the Day on which this Agreement has been terminated expressed as a figure, with the Day after the Start Date being counted as "one", the next Day being "two" and so on. If this Agreement is terminated on or prior to the Start Date the Recovery Fee shall be equal to the Project Costs plus any costs payable by the Seller for terminating the LNG Supply Agreement.
>
> The above formula reduces the Recovery Fee from an amount equal to the Project Costs to $0 (zero US Dollars) at the end the full term of this Agreement, excluding (a) any costs payable by the Seller for terminating the LNG Supply Agreement prior to the end of the full term of this Agreement; and b) any and all associated costs incurred by the Seller resulting from termination of this Agreement. [Emphasis added]

196. It is important to note that the GSA was terminated before the Start Date which means that the alternative formula, underlined above, is applicable. In other words, the cost of leasing the FSRU is part of the Project Costs.

197. The Recovery Fee is stated to reflect the Seller's investment and can apply at any time if the Termination takes place prior to the end of the 5 years if the GSA provides for a Recovery Fee. The clear purpose of the Recovery Fee is to compensate WAGL for all costs it has incurred as a result of the termination which it otherwise would have recouped over the five year term of the GSA. Thus the Recovery Fee is not limited to the current situation i.e. "*prior to the Start Date*", but extends also to the position "*after the Start Date*", albeit with a slightly different formula applying.

198. In the case of termination prior to the Start Date, as here, it is akin to a claim for wasted costs. In such a case the Recovery Fee appears to be more limited (para.3) and includes both Project Costs, and costs relating to the termination of the LNG Supply Agreement. Although there is no specific reference to "*any and all associated costs*" in para. 3, a pre-Start Date Recovery Fee must have been intended to include such costs. Otherwise legitimate associated costs would become recoverable or irrecoverable depending on whether or not the termination was before or after the Start Date. Unlike the FSRU Lease Agreement costs these are referred to in paragraph 4 of Article 17.4.

199. However, any costs are qualified in that they must arise "*as a result of"* or "*resulting from*" the termination of the GSA (Article 17.4)

200. In the case of a pre-Start Date Termination, as in this case, there are three elements to the Recovery Fee.

    i. The first is recovery of "*any costs payable*" for terminating the LNG Supply Agreement. This figure bears no limitation.

ii. The second element is "*the sum equal*" to the costs "*incurred*" in relation to the four elements of Project Costs incurred in facilitating compliance with the following:

a. The undertaking or procuring the Infrastructure Woks;

b. The securing Access Rights, Authorisations and Sellers Approvals;

c. The leasing the FSRU; and

d. Any interest and legal costs associated with the above;

iii. The third element is any and all associated costs incurred by the Seller as a result of the termination of the Agreement such as travel expenses which are not Project Costs as defined.

201. The Tribunal notes that Clause 2.3, which sets out the Seller's Conditions, distinguishes between the stages at which the various matters should have reached by the Conditions Date. Thus WAGL had only to execute the LNG Supply Agreement and the FSRU lease agreement which would have carried with them contractual liabilities, no terms for which were specified in the GSA. On the other hand, it had to have actually secured the relevant approvals, secured all Access Rights, and to have "*completed, or procured the completion, of all works to the FSRU and the Infrastructure Works which are necessary for the Seller to be able to perform its obligations"* under the GSA.

202. Nowhere does the GSA say that such costs have had to have been actually paid. In the context of the LNG Supply Agreement, such costs only have to be "*payable"*. In the context of Project Costs the word used is "*incur*" (in various tenses) throughout the relevant parts of the GSA, e.g. Article 17.1. In the Tribunal's view, there is no practical distinction between the two words (see e.g. Article 17.6 which covers both elements).

203. Thus in the context of Project Costs this means such costs (a) which fall within one of the four categories of Project Costs for a pre-Start Date claim; (b) for which a liability

to pay on the part of WAGL has arisen or will arise at the date of termination and (c) which, but for the termination, WAGL would have been reimbursed by the supply of and payment for the Gas.[60]

204. However, liabilities arising independently from the terms of a collateral relationship between a third party and WAGL are not, in the Tribunal's view recoverable. Such sums are not the result of any termination of the GSA. For example, if contractual penalties arise under the terms of a contract with a third party as a result an independent act of WAGL unrelated to the termination of the GSA, such as non-payment by WAGL, such costs are unlikely to be the result of the termination of the GSA.

205. As stated above, the costs incurred in relation to Project Costs similarly must be those incurred at the time of the termination. It is no answer to say that had the GSA been fulfilled, GoG would have incurred the full contractual costs, because the Recovery Fee in relation to Project Costs is a sliding scale, as was accepted by WAGL, according to the actual amounts incurred at the date of termination. It is not a guarantee by GoG for full payment of all the costs of the investment whether incurred or not. Excluded from this sliding scale are costs payable for terminating the LNG Supply Agreement and associated costs incurred resulting from the termination of the GSA.[61]

THE VARIOUS CATEGORIES OF COSTS

(1) Envirorich

206. Envirorich was engaged to carry out various consultancy services relating to environmental impact of the Infrastructure Works. It provided a proposal to Sahara in July 2015, i.e. before the execution of the GSA, which indicated that the works would be accelerated and would take 8 weeks at an estimated cost of GHS151,755.[62]

[60] Articles 13 and 17.1.
[61] Para. 4 of Article 17.4.
[62] C78-111.

207. On 16 September 2015, WAGL paid GHS 20,000 to Envirorich as an initial payment in relation to the fee for completing the Environmental Impact Assessment Registration Form to the Environmental Protection Agency which was Phase 1 of the Consultancy Agreement (using the prevailing exchange in late 2015 rate of 1:3.8, the sum amounts to US$5,263.16).[63]

208. GoG contends that WAGL is not entitled to these costs as they were part of the Infrastructure Costs and a Condition which WAGL failed to fulfil.

209. The Tribunal considers that WAGL is entitled to recover this sum. The cost of evaluating the environmental impact of the Infrastructure Works is plainly a cost of undertaking the Infrastructure Works and therefore a Project Cost. It was foreshadowed as a condition precedent in the Heads of Terms and WAGL was entitled therefore, in the Tribunal's view, to seek to obtain this ahead of formalizing the GSA. Of course, had the GSA not materialized, then such expenditure would have been for WAGL's account.

210. Accordingly, WAGL is entitled to recover the sum of US$5,263.16 for the fees of Envirorich as part of the Recovery Fee.

(2) Siport

211. Siport was engaged pursuant to a Consultancy Services Agreement dated 1 December 2015 i.e. after the execution of the GSA to provide nautical studies for the design, construction and operation of the LNG terminal. The contract price was EUR 600,000, to be paid in four instalments together with a 30% down payment, payable 30 days after the contract sign date.[64]

212. The work was to commence in December 2015 and complete no later than 30 June 2016 i.e. after the Conditions Date and was *"conditioned on receiving approval for the*

[63] C 388-390
[64] Clause 4 of the Consultancy Services Agreement; C629.

final layout of the terminal. *Therefore, the delivery time will depend on this decision and the working schedule will be suspended while it is taken by the client."*

213. The contract was budgeted to be in two stages: stage 1 at a cost of Euro 288,000 and stage 2 at a cost of Euro 483,000.[65]

214. On 14 December 2015, i.e. after the execution of the GSA, Siport invoiced the Claimant for EUR180,000, a down-payment representing 30% of the total fees, which has been paid in full by WAGL.[66] (Using an exchange rate of 1:1.13, the sum amounts to **US$203,400**). This sum was paid by WAGL on 29 November 2016.)[67]

215. On 4 January 2016, Siport provided a detailed Fortnightly Progress Report setting out the work it had done, namely: wave and wind data; propaganda tests; agitation studies; British Petroleum information, mooring arrangement alternatives, fender calculation and navigation areas. There is no evidence as to what further work it undertook as proposed in that report.[68] The contract with Siport was subsequently abandoned due to the project at Tema not being advanced.

216. GoG submits that it was WAGL's breach that led to the contract with Siport being abandoned and hence it should not be liable for the payment and that it has provided no evidence that Stage 2 of the Consultancy Services Agreement, the operational stage, had been complied with.[69]

217. The Tribunal considers that this was a legitimate cost accrued and incurred during the period between Execution of the GSA and the Conditions Date for the purpose of undertaking the Infrastructure Works. It did not even represent the full cost of the first phase. Work was actually carried out under the contract and as consideration for the payment. Siport were entitled to stop all work if payment of the various instalments

[65] C690.
[66] C838.
[67] C1551.
[68] C886-923.
[69] C644.

were not received within 30 days. This did not affect the original down-payment for which services had been provided by Siport.

218. Accordingly, the Tribunal considers that WAGL are entitled to recover the sum of US$203,400 for the fees of Siport as part of the Recovery Fee.

(3) Amazon

The EPC Contract

219. Amazon was engaged by WAGL to design, procure, supply, execute, install, commission and complete the Infrastructure Works as defined therein pursuant to an EPC Contract dated 4 February 2016 for a cost of US$310,000,000 i.e. after the execution of the GSA. The Works included a metering station, pipeline, breakwater, jetty, and dredging.[70] 60% of the Contract Cost (US$186,000,000) became payable one day after execution of the EPC Contract i.e. on 5 February 2016. 40% of the EPC Contract Cost (US$124,000,000) became payable upon "*Delivery and satisfactory completion of the Works and issuance of a job completion certificate by the Company*".[71]

220. By a letter dated 14 March 2016, Amazon requested the first instalment of US$186,000,000 representing 60% of the Contract Price to be paid by the Claimant.[72]

221. By 5 July 2017, the first milestone payment not having been paid by WAGL,[73] Amazon served a "*Notice of Termination of the Turnkey EPC Contract (Tema LNG Terminal Project)*".[74] The notice referred to the failure to pay the first milestone payment and referred to Amazon's intention to terminate and cited Clause 50.8 and 50.9(b). On 25 August 2017, Amazon served a notice of termination under clauses 50.8 and 50.9

[70] Appendix D of the EPC Contract; C1111.
[71] C1111.75.
[72] C1114.
[73] Pursuant to Clause 50.9 of the EPC Contract.
[74] C1742.

which according to clause 50.15 of the EPC Contract, meant, according to WAGL, that it became liable, for (amongst others) the Contract Price of US$310,000,000 and is indebted to Amazon in this amount. The Notice of Termination indicated that there had been no formal engagement since the kick-off meeting some 7-8 months earlier and indicating that Amazon was yet to be mobilized for the first milestone payment.

222. Alternatively, by reason of Appendix D of the EPC Contract, WAGL claims the sum of US$186,000,000 by which it is indebted to Amazon.

223. GoG submits that it had no obligation to pay third party services contracted by WAGL to put the FRSU into operation and the notice of termination related to WAGL's failure to pay the first milestone payment when it was due for a reason not attributable to the GoG. GoG also submits that the costs arose from WAGL's own failure to complete the Terminal to receive the FSRU.[75]

224. Thus the question for the Tribunal is whether these costs were incurred by WAGL in undertaking or procuring the Infrastructure Works and are recoverable as being the result of the termination of the GSA or irrecoverable as being the result of WAGL's non-performance under the EPC Contract unrelated to termination. It is not disputed that Amazon terminated the contract with WAGL for failure to pay the first instalment which was due prior to the termination. The EPC Contract represented potentially an element of Project costs in that it related to "*the costs of undertaking or procuring the Infrastructure Works"* if goods and/or services were provided by Amazon to WAGL for the purpose of enabling WAGL to undertake or procure the Infrastructure Works.

225. The EPC contract provides:

> "Advance Payment" means the sum payable in accordance with Clause 2.2.
>
> "Early Engineering Works" means any services, including but not limited to, the design engineering and other services which the Contractor performs before the issuance of the Notice to Proceed.

[75] Para. 27, GoG's Skeleton Argument.

“Remaining Work” means any of the Works other than any Early Engineering Works

“Entry into Force of the Contract”

2.2 Payment by the Employer of any amounts to the Contractor prior to the Start Date, shall be deemed to have been made on account of the Contract Price (such that the amount payable in respect of the Advance Payment and the Contract Price shall be reduced by the total amount paid).

“Start Date”

34.1 The Contractor shall not be required to commence the Remainder of the Works prior to the issue of a notice instructing the Contractor to proceed with the Remaining Work (Notice to Proceed)

34.2 The Contractor shall commence the Remaining Work on the Start Date.

34.3 The first Day of the Time to Taking-Over is calculated from the Start Date.

“Payment of the Contract Price”

38.1 As payment to the Contractor for the full and complete performance of the Works the Employer shall pay the and the Contractor shall accept the sum set out as the Contract Price in the main form f the Contract as provided in Appendix D….

38.2 The Parties recognize and agree that the Contract Price is payable in instalments according to the progress of the Works in an Invoice Period [defined as one calendar month beginning on the Day of Notice to Proceed] and otherwise in accordance with the provisions of this Contract.

Invoice Periods

39.1 The Contractor shall be entitled to apply for the payment of the amount corresponding to progress on the Works during the respective Invoice Period.

“Applications for Payment”

39.3 Applications for payment shall be submitted in the form set out in Appendix E, and shall include:

(a) the amounts to which the Contractor considers himself to be entitled to the end of the payment period, together with supporting documents…

(c) amounts to be deducted for the Advance Payment.

“Termination for Fault”

50.8 Upon occurrence of a material breach either Party may notify the other of such breach and its intention to terminate the Contractor’s employment under the Contract. Notice of termination must be given at least 14 (fourteen) Days prior to the Intended Date of Termination. If the notified Party fails to rectify the default within a period of 14 (fourteen) Days, then the Party having given notice may by further written notice to the other Party terminate the Contractor’s engagement under this Contract

50.9 Material breaches by the Employer include, but are not limited to: …

(b) failing without express or implied agreement from the Contractor to pay sums due under the Contract for more than 60 Days from the date for payment and that exceed one million USD ($1,000,000) which is due and payable in accordance with the terms of this Contract and is not reasonably in dispute and such failure continues for sixty (60) Days following notice of failure to the Employer which notice expressly refers to this Clause and the Contractor's intention to terminate the Contract. [Emphasis added.]

50.15 If the Contractor terminates for fault pursuant to and in accordance with Clause 20.9, the Employer shall pay to the Contractor:

(a) the Contract Price for Termination;

[and other costs]"

226. Schedule D of the EPC provides:

Appendix D - Payment schedule

FULL PRICING		
Scope of Service	**Price & Currency in Numbers (==)**	**Price & Currency in Words**

1. The Employer shall pay the Contractor the total and fixed cost as shown below:

Metering Station	**US$32,000,000.00**	Thirty-Two Million United States Dollars Only.
Works for Pipeline plus SCADA system	**US$79,000, 000.00**	Seventy-Nine Million United States Dollars Only
Breakwater Construction Civil	**US$35,000,000.00**	Thirty-Five Million United States Dollars Only
Works/Preparatory Works for pipeline	**US$5,000,000.00**	Five Million United States Dollars Only
Jetty Construction & Topside infrastructure	**US$95,000,000.00**	Ninety-Five Million United States Dollars Only
Dredging works	**US$64,000,000.00**	Sixty-four Million United States Dollars Only
TOTAL	**US$310,000,000.00**	Three Hundred and Ten Million United States Dollars Only

2. The above total contract sum of US$310,000,000.00 (the **"Contract Cost")** is inclusive the cost of any parts, packaging, air freight, custom clearing, shipping, and all expenses to be incurred in connection with the performance of the Works.

3. Payment shall be made by the Company as follows:

a. The advance payment of 60% (sixty percent) of the Contract Cost in the sum of **US$186,000,000.000** (One Hundred and Eighty Six Million United States Dollars Only) shall be paid to the Contractor in advance following the execution of this Agreement, and

b. The final payment in the value of 40% (Forty percent) of the Contract Cost in the sum of **US$124,000,000.00** (One hundred and Twenty-Four Million United States Dollars Only) upon Delivery and satisfactory completion of the Works and issuance of a job completion certificate by the Company.

4. **Payment Conditions**

a) Payments shall be made within 15 days from receipt of Contractor's invoice and all necessary information provided by the Contractor.

b) All payments are exclusive of Value Added Tax. Withholding Tax shall be deducted by the Company and remitted to the relevant tax authority.

227. The Tribunal has not had any detailed submissions on the Amazon EPC contract and its construction. Although Article 39.1 of the EPC contract refers to entitlement to payment corresponding to the progress of the Works during the respective Invoice Period commencing on the Notice to Proceed, Invoice Period being defined as each calendar month, Articles 2 and 3 on the first page of the EPC contract refer to Schedule D payment as the basis for payment. In any event, it is on the basis of Schedule D that payment was sought, which invoice was not challenged by WAGL when received nor for that matter did GoG challenge the invoice on that basis in the arbitration.

228. The Tribunal will deal with each of the two tranches separately: the first tranche of US$186,000,000 being 60% of the EPC Contract and the second tranches US$124,000,000 being 40% of the EPC Contract. It will turn to the latter first.

<u>The Second Tranche</u>

229. The sum of US$ 124,000,000 i.e. the remaining balance of the payment under the EPC contract became due as a result of WAGL's non-performance of its payment obligation in relation to the 60% down-payment under the EPC contract.

230. WAGL had an independent obligation to secure financing which would no doubt have enabled it to pay Amazon, but it did not do this. While the Tribunal has heard evidence from Mr Etomi that this was hindered by the failure of the Buyer to provide the LC: not only, as the Tribunal has found, were such conditions not inter-dependent, but also the Tribunal is far from convinced, in the absence of any direct evidence, that those raising the finance would have been affected to such an extent, as seems to be the argument, by a failure to secure a revolving LC commencing only on the supply of Gas.

231. Had the position been so important, then WAGL should have inserted something into the GSA to this effect. Moreover, it would appear that WAGL had access to monies from other Sahara Group companies as Mr Etomi explained in another context.[76] No evidence was given to the Tribunal as to WAGL's inability to pay. It's failure to pay is admitted.

232. Thus, while, as the Tribunal has found, WAGL could terminate without itself having complied with all the Seller's Conditions, it necessarily means that it may have to shoulder certain financial risks which otherwise it would not have had to do if it had complied with all its own Conditions.

233. WAGL knew that it was at risk of Amazon giving notice and then terminating the EPC contract 14 days after its failure to pay. In fact, Amazon did not issue the invoice for US$186,000,000 until 14 March 2016, did not give notice of termination until 5 July 2017 and the actual termination of the EPC Contract was much later, but the failure to pay occurred in April 2016 prior to termination of the GSA in 2019 and had nothing to do with termination.

234. In the Tribunal's view therefore this liability to Amazon is unrelated to the termination of the GSA and hence irrecoverable.

[76] Second W/S Etomi, para. 25.

The First Tranche

235. The Tribunal now turns to the US$186,000,000 which became due under the EPC contract a day after the signing of the EPC contract. In order to be recoverable that sum must not only be one that has been incurred by Amazon in undertaking or procuring the Infrastructure Works, but it must also arise as a result of the termination of the GSA.

236. As to the first tranche, WAGL incurred a liability to Amazon to make a 60% Advance Payment because it entered into an EPC contract with Amazon which so provided. The Advance Payment, as defined in the EPC contract, was in substance a monetary credit to be provided by WAGL to Amazon to be set off against future invoices and had no relationship to any of the work scopes set out in Appendix D of the EPC contract or the works performed by Amazon.

237. WAGL has provided no evidence that without the substantial Advance Payment the EPC contract could not have been entered into and that no other competent EPC contractor could have been engaged. The obligation in relation to Amazon is not an obligation to enter into a specific contract (as it is with the FSRU lease and the LNG Supply Agreement), but an obligation to undertake or procure the Infrastructure Work and one of the Seller's Conditions was completion or procuring the completion of the Infrastructure Works (Article 2.3.5).

238. There is nothing in the GSA which determines the terms upon which WAGL should contract with third parties. Such contractual relationships and the terms thereof are for WAGL, provided the relevant contract enables WAGL to fulfil the relevant Seller's Conditions. However, Project Costs are limited to the costs incurred for the purpose of undertaking or procuring the Infrastructure Works. This means that payment must relate to works which have actually been undertaken or procured at the termination. Merely entering into a contract with the aim of undertaking or procuring Infrastructure Works is not enough if in fact no infrastructure works were undertaken or procured.

239. WAGL and Amazon appear to have recognized that the 60% Advance Payment was a credit to be provided by WAGL to Amazon and otherwise unrelated to the works actually carried out by Amazon under the EPC contract (See, for example, Clauses 38.2 and 39.1 set out above). There are also provisions in clause 39 for WAGL to certify sums due in respect of works actually performed by Amazon and for retentions to be kept by WAGL in accordance with the EPC contract.

240. Whilst these provisions might appear to sit uneasily with Appendix D of the EPC contract that specifies a 60% advance payment to Amazon, it is only the sums payable by WAGL to Amazon in respect of the progress of the Works under the EPC contract that constitute WAGL's Project Costs because they represent the costs incurred by WAGL in undertaking or procuring the Infrastructure Works under the GSA, rather than the advance payments and other credits extended to Amazon by WAGL.

241. While there is nothing in the GSA which determines the terms upon which WAGL should contract with third parties and such contractual relationships and the terms thereof are for WAGL, provided the relevant contract enables WAGL to fulfil the relevant Seller's Conditions, nonetheless it is only the costs relating to the liabilities incurred in "*undertaking or procuring the Infrastructure Works*" that are recoverable as Project Costs. This requires that the Infrastructure Works (or a portion therefore) have been undertaken or procured, even if only partially, which justify such costs. Article 17.4 is not a blank cheque for reimbursement of all sums paid by WAGL irrespective of the purpose for which they were incurred. Such costs have to fit within the contractual scheme for such reimbursement.

242. The terms of WAGL's contractual relationship with third parties are not therefore determinative. Some evidence of the relationship between costs incurred and performance by WAGL or the parties is required. Irrespective of the arguments made or not made by GoG in relation to this issue, the onus must be on WAGL to establish that its costs fall within Project Costs incurred and hence within the Recoverable Fee. Otherwise WAGL could enter into a contract with a third party requiring WAGL to pay 100% of the contract price in advance and then contend that the entire advance payment is recoverable as a Project Cost even if WAGL has made no payment and the

third party has rendered no service. That could not have been intended by the parties, nor could such 100% advance payment be properly described as a wasted cost or an investment made by WAGL to undertake or procure the Infrastructure Works.

243. It is common ground that the Infrastructure Works were not carried out. There is no evidence before the Tribunal of any work having been undertaken by Amazon pursuant to the EPC Contract which would justify the payment of US$186,000,000, even on a cursory basis. There is some evidence that design and other preliminary works were carried out by Amazon. There is reference to commencement of steps in relation to other matters dependent on access to the site for further implementation, but no details are given and it would appear that such steps were preliminary in nature.[77]

244. However, the Tribunal has seen no evidence of the amount allocated to design works or for that matter, any other works. In fact, as the Notice to Proceed was not issued, it would seem that there have been no invoices tendered at all. In other words, the only evidence before the Tribunal is that a small unspecified proportion of the contracted works appear to have been carried out in compliance with or furtherance of the relevant Seller's Condition. On the other hand, no Notice to Proceed was ever given.[78]

245. GoG did not argue that only a proportion of the EPC costs were recoverable. Instead it argued that none of the costs claimed by way of Recovery Fee should be awarded to WAGL either because, contrary to the finding in this Award, the termination was not triggered by GoG's breach and accordingly, the costs were incurred as a result of WAGL's own breach of the Conditions.[79] The question is not whether or not WAGL was in breach of its Conditions, but whether or not the Project Costs, as defined, were incurred as a result of the termination.

[77] Letter 8 February 2016:C1112.
[78] Transcript Day 2, page 28.
[79] See e.g. paras. 27-28GoG's Skeleton Argument.

246. Accordingly, the Tribunal considers that the sum of **US$186,000** is not recoverable as part of the Recovery Fee.

(4) Hemla

247. Hemla was engaged pursuant to a Project Management Services Agreement ("**PMSA**") dated 10 June 2015 i.e. before the GSA, but after the Heads of Terms, to provide project management services in relation to the LNG terminal at Tema.[80]

248. Under clause 4 of the PMSA, the Claimant agreed to pay (a) a fixed price of US$2,500,000 for Phase I; (b) travel and accommodation expenses; and (c) Additional Services on an hourly rate.

249. Pursuant to the PMSA and various letters of authorisation, and as set out in 25 invoices issued by Hemla from 2015 to 2017, WAGL became liable for fees and expenses totaling **US$3,484,471.19**. Those fees and expenses have apparently been paid by WAGL and/or by other companies within the Sahara Group (in which case, WAGL argue, that it is liable to indemnify those companies for the sums paid and is indebted to those companies for the amounts so paid).

250. GoG submits that this contract was entered into presumptively prior to the execution of the GSA at a time when Parliamentary Approval had not been obtained and therefore WAGL is not entitled to such sums: nor is there any evidence of payment.

251. The first 14 invoices pre-date the GSA. Of the 11 other invoices which all post-date the Conditions Date: some are for travel expenses and others relate to work undertaken pursuant to Letters of Authorization.

252. Three issues arise for consideration in relation to these payments. First, the Tribunal having ruled that in principle payments prior to the execution are recoverable if an integral part of the performance and would have had to be paid anyway were the

[80] C20.

reason for the payments so integral in relation to Hemla; second, whether there is evidence of liability on the part of WAGL as the GSA refers to incurring the costs: not payment; and third, whether costs incurred pursuant to subsequent agreements entered into after the Conditions Date are covered.

253. The Tribunal considers that Hemla's costs pre Execution Date are an integral part of the project and would have been incurred in any event if they had been engaged after the Execution Date, thus subject to the other issues these costs are recoverable. The contract with Hemla provides for a total cost of US$2,500,000 plus travel, accommodation and other expenses for Phase I and that additional services in what would be Phase II to be paid for by specific ad hoc contractual arrangements (Clauses 4.1 and 5). The costs also relate to consultancy services actually provided by Helma.

254. The Tribunal has been provided with a table of all invoices relating to Hemla.[81] The first 14 invoices relate to Phase 1 of the contract and cover the advance payment, monthly payment and travel, accommodation and other expenses. The balance of the costs relates to 7 claims for travel expenses between 1 October 2015 and November/December 2016 made pursuant to various authorisation letters. The remaining 6 invoices comprise a mixture of travel expenses and other fees for consultancy work pursuant to various supplemental consultancy agreements/authorisations.[82] Not all these letters are before the Tribunal e.g. relating to the claim for US$300,991[83], but the material before the Tribunal is sufficient to establish that the invoices were accurate on their face without the need to look at all the underlying authorization and accordingly, that the invoices are based on prior agreements such that a liability arose. They are also supported by the evidence of Mr Etomi.[84]

255. The Tribunal therefore concludes that such works fall within Project Costs. The Tribunal has already concluded that the test is "i*ncurred*" not "*paid*" i.e. the second

[81] WAGL's Closing speaking note.
[82] For example: 1491 (29 July 2016); 1510 (16 September 2016).;
[83] C1717.
[84] Second W/S Etomi, paras. 33-36.

issue. The fact that such costs were incurred after the Conditions Date is irrelevant, as WAGL, as the Tribunal has found, was entitled to terminate at any time and provided the costs were incurred within the meaning of the Recovery Fee and resulted from such termination, which in the case of Hemla they did, in the Tribunal's view, WAGL is entitled to such costs.

256. The Tribunal now turns to the third question, the payment issue. Nine of the invoices are support by a swift payment made by a Sahara company[85]. For the balance, WAGL relies upon the accounts of WAGL for the years 2016-2018 and the evidence of Mr Etomi. WAGL also argues that such sums are a gift and as such collateral payments within the meaning of *Parry v Cleaver supra*. *Parry v Cleaver,* a case concerning whether an ill-health pension was deducible from damages for personal injury, was a very different case from the position here where what is at issue is the inter-company financial arrangements between members of a group. The Tribunal does not find much assistance from the 2016-2018 accounts as the figures are lump sums not directly related to the payments in issue.

257. WAGL relies on the evidence of Mr Etomi that payments were often made by other members of the Sahara Group, notably Sahara (IOM) and Sahara (Dubai) and are recorded in the inter-company accounts as a debt owed by WAGL to another Sahara Group subsidiary. Thus, he adds, WAGL is obliged to indemnify the relevant Sahara company, which made the payment on behalf of WAGL.[86]

258. However, the issue is not payment, but liability to pay and the invoices are made out to WAGL. How WAGL chooses to discharge that liability is not directly relevant. In any event the Tribunal accepts the evidence of Mr Etomi that all such payments made or to be made by any other company in the Sahara group would be reimbursed pursuant to an inter-company debt.

[85] C1675; 2041;
[86] Second W/S Etomi, paras. 11-13.

259. Accordingly, the Tribunal concludes that WAGL is entitled to the costs incurred in relation to Hemla in the sum of **US$3,484,471.19**.

(5) Sterling

260. Sterling was engaged on the terms set out in a quotation dated 30 May 2015 i.e. before the GSA, to drill 24 boreholes and to carry out a bathymetric survey at a total cost of US$100,000. The contract was partially performed, and the Claimant paid a total of US$12,000 to Sterling.

261. GoG submits that as these costs were both initiated by a contract prior to execution of the GSA and were also paid before, they are irrecoverable. For the reasons already given, the Tribunal does not consider that this automatically renders the costs inapplicable as part of the Recovery Fee. The barymetric survey would have had to be carried out after the Execution Date in any event and by doing it before, it merely speeded things up. Accordingly, in the Tribunal's view, this sum of **US$12,000** is recoverable as part of the Recovery Fee.

(6) FMC

262. FMC was engaged to undertake or procure the Infrastructure Works (as defined), pursuant to a purchase order dated 30 November 2015[87] i.e. after the execution of the GSA, which incorporated by reference quotation DR 12915_rev8 from FMC under which WAGL purchased 2 high pressure marine loading arms on the terms set out therein at a price of EUR 2,585,000.[88]

263. Clause 2.5.1 of the contract provided that: (a) 20% of the contract price was payable upon order placement, and (b) 30% of the contract price was payable upon raw material purchase order payment by the supplier.

[87] C548.
[88] C555.

264. Pursuant to clause 2.5.1 of the contract, FMC issued (a) invoice 900046127 on 17 December 2015 (first instalment), and (b) invoice 900047334 on 22 March 2016 (second instalment) totaling 50% of the contract price, namely EUR1,292,500.

265. On 1 April 2016, FMC indicated that it was putting the manufacture of the loading arms on hold as a result of lack of payment since mid-January and lack of any reply from WAGL despite its reminders. The invoices remained unpaid and the construction of the loading arms was suspended, as notified by FMC on 1 April 2016.

266. On 16 October 2018, FMC issued a notice of termination and claimed EUR2,743,273.33.[89] This sum comprised (a) EUR1,292,500 for the amounts billed to date; and (b) EUR1,450,773.33 for the expenses incurred for which WAGL became liable[90] and is indebted to FMC in the amount of EUR2,743,273.33 (using an exchange rate of 1:1.13 the Claimant is indebted to FMC in the amount of US$ 3,099,898.86). This was followed on 13 September 2019, by a further letter of demand claiming the above sums.

267. GoG disputes WAGL's entitlement to these sums on the basis that it should have obtained the necessary financing and was itself in breach of the Conditions. It points to the reason for termination given by FMC and adds that there is no evidence of payment.

268. Although the immediacy of the payment was brought about as a result of WAGL's failure, unlike the case of Amazon, the contract with FMC did not provide for additional payments not then incurred. Clause 19 of the contract with FMC provided only for payment of the amounts then billed and expenses actually incurred such as development costs. Thus, in the Tribunal's view, such costs were part of WAGL's Project Costs which would have been recouped by the supply of Gas had the GSA not been terminated.[91]

[89] C1935; 2032.
[90] Clause 19 FMC's standard Terms and Conditions.
[91] Article 17.1 of the GSA.

269. Accordingly, WAGL is entitled to the sum of **US$3,099,898.86** for the FMC costs as part of the Recovery Fee.

(7) The Provisional Licence

270. On 17 March 2016 Sahara Ghana applied for a provisional licence for an Offshore Gas Facility to the Energy Commission of Ghana and incurred and paid an application fee of US$10,000 (using the prevailing exchange rate at the time, the sum was converted into GHS38,000).[92]

271. GoG denies liability for this sum because of the inchoate status of the project. However, the Tribunal concludes, the onus being on WAGL, that this was not a liability incurred by WAGL, but by Sahara Ghana and rejects the claim.

(8) The FSRU Time Charter

272. By a Time Charter dated 28 October 2015, ("**Charterparty**") i.e. after the execution of the GSA WAGL agreed to charter the FSRU named "*Golar Tundra*" ("**the FSRU**") from Golar LNG NB13 Corporation ("**Owners**").[93]

273. The Charterparty provided for Hire to be payable at a rate of US$146,000 per day.

Clause 7.4 provided:

> "(b) The date on which the Owner shall be due to tender a Noticeof Readiness to the Charterer at the Unloading Port (the "**Scheduled Delivery Date**"), shall be a date notified by the Charterer to the Owner as set out below….
> (c) The Owner shall tender a notice to the Charterer upon arrival of the FSRU at the pilot boarding station of the Unloading Port, or at the nearest safe port or anchorage to the Unloading Port if the Unloading Port is not ready to safely receive the FSRU (a "**Notice of Readiness**") …."
> (d) Upon tendering of a Notice of Readiness pursuant to clause7.4(c), the Owner shall, subject to the terms of this Agreement and provided that the Terminal is in all respects ready to safely receive the FSRU, navigate the FSRU to the Terminal and the Owner and

[92] C510-511; 1115.
[93] B110.

Charterer shall cooperate, pursuant to the terms of this Agreement, to securely moor the FSRU at the Terminal.
(e) The Date that the FSRU shall be deemed to be tendered to the Charterer for commencement of the Delivery Tests (the "**Tender Date**") under this Agreement shall be the later to occur of:
(i) the Scheduled Delivery Date; and
(ii) the date the Owner served a Notice of Readiness
(pursuant to clause 7.4(c)).

(f) The Charterer shall be responsible for ensuring that the Terminal is fully prepared in order to safely accommodate the FSRU, including, but not limited to, ensuring that the jetty and mooring facilities situated at the Unloading Port and the pipeline linking the FSRU manifold to the Gas Metering Station are and shall remain of a specification envisaged by this agreement and compatible for safe berthing of the FSRU and the carrying out of LNG and Gas operations as envisaged by this Agreement.."

274. By a Charterer's Performance Guarantee dated 28 October 2015 ("**FSRU Guarantee**"), Sahara Energy Resource Limited, a company incorporated in the Isle of Man and part of the Sahara Group, guaranteed the Claimant's obligations under the Charterparty.[94]

275. On 17 June 2016, the FSRU having arrived at Tema anchorage, the Owners tendered a Notice of Readiness. Pursuant to clause 7.4(e) of the Charterparty, that date became the Tender Date. The Commercial Start Date under the Charterparty was 17 July 2016, being the Tender Date plus 30 days.

276. Thus in respect of the period from 18 July 2016 to 16 October 2016, the Claimant became liable to pay US$13,140,000 as follows:

(i) By 17 July 2016, the Performance Tests had not been completed. This was because the terminal had not yet been completed, which was WAGL's responsibility under the Charterparty, and a Charterer Delay Event. Therefore, pursuant to clause 7.4(h) of the Charterparty, the WAGL was liable to pay an equivalent amount to Hire for each day of delay beyond the Commercial Start Date caused by a Charterer Delay Event.

[94] B203.

(ii) By 16 October 2016, 120 days after the Tender Date, the Performance Tests had still not been completed due to the aforementioned Charterer Delay Event. Therefore, pursuant to clause 7.4(i) of the Charterparty, the FSRU was deemed to have passed the Performance Tests and been accepted by WAGL, and Hire became payable.

(iii) In respect of the period from 16 October 2016 onwards, the Claimant became liable to pay Hire and expenses, until the Charterparty was brought to an end on 19 September 2017 (as set out below).

(iv) On around 20 November 2016, a Sahara company, on behalf of WAGL, paid US$1,000,000 to the Owners on account of hire and other costs of leasing (after deduction of bank charges, US$999,965 was received by the Owners). Accordingly, WAGL became liable to indemnify this Sahara company for US$1,000,000 and is indebted to it in that amount.[95]

(v) No further payments were made before the Owners commenced legal proceedings and obtained awards against WAGL.

277. On 11 November 2016, the Owners commenced arbitration under the LMAA arbitration clause in the Charterparty. The Owners also commenced arbitration against Sahara IOM as the guarantor.

278. On 28 November 2016, a Sahara company made a payment of US$1,000,000.[96] There followed four interim awards and other claims were made against WAGL and the guarantor, Sahara IOM , namely:

(i) On 29 March 2017, the LMAA Tribunal published its First Interim Final Award, which awarded the Owners US$23,382,035 in respect of the costs of leasing the

[95] C1542.
[96] C1550.

FSRU for the period from 18 July 2016 to 1 January 2017 (credit having been given for the US$999,965 paid earlier).[97]

(ii) On 22 June 2017, the LMAA Tribunal published its Second Interim Final Award, which awarded the Owners interest and costs in respect of the First Interim Final Award. [98]

(iii) On 12 July 2017, the LMAA Tribunal published its Third Interim Final Award, which awarded the Owners US$22,046,000 in respect of the costs of leasing the FSRU for the period from 1 January 2017 to 1 June 2017.[99]

(iv) On 26 July 2017, the Owners obtained an award against Sahara IOM in relation to the FSRU Guarantee in the amount of US$23,382,035 plus interest and costs.

(v) On 19 September 2017, the Owners issued a Notice of Termination/Withdrawal in respect of the Charterparty and the FSRU.

(vi) On 4 October 2017, the Owners brought further claims, including for US$16,206,000 in respect of hire from 1 June 2017 to 19 September 2017, and for US$523,500 in respect of fuel.

(vii) On 29 January 2018, the LMAA Tribunal published its Fourth Interim Final Award, which dismissed an application by the Claimant to set aside the First, Second, and Third Interim Final Awards.[100]

(viii) On 10 April 2018, Sahara made payment of US$10,000,000 on account of the costs of leasing the FSRU / on account of the LMAA Tribunal's awards. [101]

(xi) Following the termination of the Charterparty on 19 September 2017, the Owners updated their total claim for hire and expenses to US$57,566,100, and advanced a further claim for US$117,315,563 in respect of damages.

[97] C1701.
[98] C1732.
[99] C1744.
[100] C1758.1.
[101] C1859-60.

279. By a Deed of Agreement and Release dated 24 July 2018, Addendum No.1 dated 31 August 2018, and Addendum No. 2 dated 4 March 2019 ("**the FSRU Settlement**"), the Owners, WAGL and Sahara IOM settled all claims arising under the Charterparty and the Guarantee for the principal sum of US$50,000,000 plus interest of up to US$200,000 (in addition to sums already paid by or on behalf of the Claimant). Pursuant to the FSRU Settlement WAGL became jointly and severally liable with Sahara IOM to pay the sum of US$50,200,000 in settlement of its obligations relating to the cost of leasing the FSRU and/or the cost of terminating the FSRU Lease Agreement.

280. Pursuant to the FSRU Settlement as amended, the following payments were made on behalf of WAGL, all in respect of the cost of leasing the FSRU by companies in the Sahara group for which WAGL is liable to indemnify and is indebted to each of those companies in the amounts in the table below.

281. WAGL submitted that the settlement represented a very substantial discount against potential future liability to Golar after Golar terminated the Charterparty

	Date of Payment	Payer	Amount
1.	21 September 2018	Sahara IOM	US$5,000,000
2.	27 September 2018	Sahara IOM	US$ 12,500,000
3.	28 September 2018	Sahara IOM	US$ 8,500,000
4.	3 October 2018	Sahara IOM	US$ 11,500,000
5.	5 October 2018	Sahara IOM	US$2,000,000
6.	10 October 2018	Sahara IOM	US$500,000

7.	31 December 2018	Sahara Energy Resources DMCC,[102] ("**Sahara Dubai**")	US$740,000
8.	18 January 2019	Sahara IOM	US$900,000
9.	1 February 2019	Sahara IOM	US$ 430,000
10.	9 February 2019	Sahara Dubai	US$ 570,000
11.	4 March 2019	Sahara Nigeria	US$7,560,000[103]
		Total:	**US$50,200,000**

282. There is no evidence that the payments were made pursuant to the obligations under the Guarantee.

283. GOG submitted that it was WAGL's obligation to complete, or to have procured the completion, of all works to the FSRU and the Infrastructure Works as defined in the GSA which are necessary for the Seller to be able to perform its obligations under the GSA and they cannot be transferred to GoG, but WAGL had not done so.

284. GOG added that WAGL has admitted the non-payment. It submits that the four arbitration awards found that-

● The Terminal had not been built or completed to receive the FSRU by the Claimant;

● A valid Notice of Readiness was tendered on 17 June 2016 without objection by the Claimant; and

● The Performance Tests could not be completed because the Claimant had not completed the Terminal.

[102] A company incorporated in Dubai.

[103] This sum comprising US$7,360,000 principal plus US$200,000 interest was paid initially to Winter Scott LLP, appointed as Escrow Agent under the Settlement Agreement and on 6 June 2019 was paid to Owners.

285. GoG further submitted that the Claimant did not mitigate its losses, but incurred additional cost from 1 January 2017 to 1 June 2017 until the Owners of the FSRU decided to bring to end the Charterparty on 19 September 2017 by which time WAGL had by their own conduct incurred avoidable losses. WAGL submitted there was no provision in the charterparty to suspend hire: only to terminate.

286. Essentially GoG says that the vessel sailed to Tema prematurely on the direction of WAGL when it was clear that the critical marine works of infrastructure had not been completed and as such the sums did not arise as a result of the termination and cannot be said to be an investment.

287. In the Tribunal's view, it is clear that the issue as to the payment of hire and the consequent arbitrations for breach of the Time Charter was a result of WAGL's failure to pay ongoing hire, precipitated by not having completed the Infrastructure Works in breach of the Seller's Condition so the vessel could berth. However, this is not the issue in relation to the Recovery Fee as already explained, the calculation of which Recovery Fee depends on whether it falls within the provisions of Article 17.4 of the GSA.

288. Project Costs include the cost of leasing or hiring the FSRU, but not the cost of terminating the LNG Supply Agreement or terminating the FSRU Agreement. These are added to form part of the Recovery Fee under the second paragraph of Article 17.4. However, where the GSA is terminated before the Start Date, the third paragraph of Article 17.4, limits the amount of the Recovery Fee to the Project Costs and the costs of terminating the LNG Supply Agreement. It thus includes the hire costs of the FSRU, but not the termination costs.

289. However, in this case the Tribunal considers that these costs are hire costs which are recoverable as part of the Project Costs and not the cost of terminating the FSRU. In any event, the settlement provides a discount on what would otherwise have been due.

290. Accordingly, WAGL is entitled to the sum of for the FRSU hires costs of **US$61,200,000** as agreed in the Settlement as part of the Recovery Fee.

(9) Legal Fees

291. WAGL also incurred legal fees associated with undertaking or procuring the Infrastructure Works; securing Access Rights, Authorisations and Seller Approvals; and leasing the FSRU as follows:

(i) The fees of Clyde & Co LLP to provide advice in relation to the GSA, the Charterparty and other contracts which WAGL needed to enter into in order to perform the Agreement at a cost of £202,273.67. WAGL's claim in relation to the legal fees relating to the GSA has now been abandoned in the light of Article 33.10 of the GSA. A sum of £1,727.20 or US$2,193.54 using the exchange rate of 1:1.27 must be deducted from this figure giving a reduced figure of £200,546.27.[104]

(ii) WAGL and Sahara IOM (as WAGL's guarantor) engaged Clyde & Co LLP to provide legal services in relation to the arbitrations commenced by the Owners regarding the FSRU at a cost of £60,895.87 and £41,055.53 respectively.

(iii) WAGL and Sahara IOM (as WAGL's guarantor) engaged Reed Smith LLP to provide legal services in relation to the arbitrations commenced by the Owners regarding the FSRU at a cost of £124,239.46.

(iv) Sahara IOM (as WAGL's guarantor) engaged Appleby (Isle of Man) LLC to provide legal services in relation to the enforcement in the Isle of Man of the arbitral awards obtained by the Owners regarding the FSRU at a cost of £9,010.20 for which WAGL claims it is liable.

(v) WAGL engaged Walkers to provide legal services in relation to the arbitration commenced by the Owners regarding the FSRU at a cost of US$3,931.65.

[104] Transcript Day 3/115.

292. Using an exchange rate of 1:1.27, legal costs of US$558,984.56 were incurred. These legal costs were either paid by WAGL, or by Sahara IOM and/or other companies in the Sahara Group (in the latter case, WAGL contended that it is liable to indemnify each relevant group company for the sums paid and is indebted to such companies for the amounts paid).

293. GoG submitted that it is not liable for any costs associated with the arbitrations relating to Golar. However, the Tribunal has found that GoG is liable for the sums achieved by way of settlement after the arbitration. As for payment by other companies in the Sahara Group, the Tribunal has already addressed this.

294. Accordingly, WAGL is entitled to its legal fees in the sum of **US$556,791.02.**

(10) Financial Advisory Costs

295. MBC was engaged by WAGL pursuant to a letter dated 9 September 2015, i.e. before the execution of the GSA, to provide project finance advisory services, and support and assistance in raising capital, for the construction of an offshore jetty and associated infrastructure to enable it to deliver Natural Gas to nominated power plants along the Tema corridor (i.e. for the purpose of the GSA), for a two year extendable engagement[105] on the following payment basis, namely:

> (i) An Advisory Fee of US$750,000 plus 5% VAT, totaling US$787,500 pursuant to paragraph 6(a) of the letter of which US$300,000 plus VAT was payable on execution.
>
> (ii) A monthly retainer of US$15,000 for a period of 24 months, pursuant to paragraph 6(b) of the letter, in the sum of US$360,000 plus 5% VAT, which totals US$378,000.

[105] C344

(iii)A success fee of 3% in the sum of US$12,600,000 (including VAT) in accordance with MBC's invoice dated 27 January 2016, pursuant to paragraph 6(c) of the letter. [106]

296. These fees have not been paid.

297. The contract provides that "*A success fee of 3% of the total project cost is payable to MBC Capital. The success-based fee becomes due once financing arrangements have been signed and will be paid in full on first drawdown of financing, or on terms to be mutually agreed between the parties*".

298. Mr Etomi stated that his understanding was that the money was raised, but not used in the sense of drawn down. Yet somewhat inconsistently he also said that it would have been difficult if not impossible to raise finance without mirroring the exposure with the LC[107]. No evidence has been produced to the Tribunal either way as to the status of raising of the finance.

299. GoG denied liability for the claim and repeated some of the arguments it had made in relation to other claims, such as that the contract preceded the execution of the GSA; that there is no evidence of payment; and that the 3% success fee is belied by the fact that WAGL failed to raise such financing to carry out the works.

300. However, although pre-execution of the GSA, the Tribunal considers that it was necessary for WAGL to engage the services of MBC to raise finance and it would have had to do this after the Execution Date in any event such that they are potentially Project Costs. However, the Tribunal is not satisfied in the light of the contradictory evidence of Mr Etomi and the absence of documentary evidence that financing arrangements had been signed that MBC were entitled within the contract to the success fee. Similarly, there is no evidence that MBC provided any services or took any

[106] C1077.
[107] Transcript Day 1: page 68; 177; Day 2: pages 33-40.

steps to raise financing for WAGL. The MBC fees are therefore not recoverable as Project Costs.

301. Accordingly, the Tribunal considers that WAGL is not entitled to any sum in respect of MBC fees.

(11) Travel and Accommodation

302. WAGL claim travel and accommodation costs in the amount of US$28,743.97 which fees and expenses have been paid by WAGL and/or by other companies within the Sahara Group (in which case, WAGL submitted that it is liable to indemnify those companies for the sums paid and is indebted to those companies for the amounts so paid). These relate to travel expenses of executives of the Sahara Group.[108]

303. GoG submit that some of these expenses follow termination. Very few of such expenses appear to have been incurred directly by WAGL. However, the Tribunal takes the view that they fall within the words "*any and all associated costs*" for which WAGL is liable to reimburse the various Sahara companies, but only for those costs prior to termination. The Tribunal has not received detailed evidence as to these travel costs and, given that in the context of the whole claim, the sum is small, the Tribunal concludes that the fair way to deal with them is to reduce the overall claim to a round figure of US$22,000 to take account of those expenses which post-dated the termination.

No.	Description	Amount Claimed(US$)	Amount Awarded
1.	Envirorich	5,263.16	5,263.16
2.	Siport21	203,400.00	203,400.00
3.	Amazon	310,000,000.00	0
4.	Sterling	12,000	12,000.00
5.	Hemla	3,484,471.19	3,484,471.19

[108] C2047.

6.	FMC	3,099,898.86	3,099,898.00
7.	FSRU	61,200,000.00	61,200,000.00
8.	Legal costs	558,984.56	556,791.02
9.	MBC	13,765,500	0
10.	Travel costs	28,743.97	22,000
	Total:	**392,368,261.74**	**68,584 ,323.37**

Costs of Terminating the LNG Supply Agreement

304. BP have not yet terminated the LNG Supply Agreement and it is not known whether or in what circumstances it will be terminated, if at all, but WAGL submit that the risk remains. WAGL therefore seeks a declaration in these terms:

> "If BP Gas Marketing Limited hereafter terminates the Delivered Ex Ship LNG Sale and Purchase Agreement dated 23rd December 2015 in accordance with the terms of that agreement, then the Respondent will be liable to pay to the Claimant (as part of the Recovery Fee due under the Gas Sales Agreement) the amount of any Buyer Termination Fee (as defined) properly payable to BP Gas Marketing Limited pursuant to the terms of that agreement".

305. WAGL indicated that the LNG Supply Agreement had become effective as the conditions precedent in that agreement had been waived.[109] This agreement is for a period of 5 years after the Start Date. It thus expires by effluxion of time around the end of December 2020. Clause 5.2.4 of the LNG Supply Agreement provides:

> "Following expiration or termination of this Agreement pursuant to Clause 4.3 the Parties shall have no rights, obligations or liabilities to each other except for (a) the accrued rights and liabilities of the Parties prior to such expiry or termination and any and all other remedies available under this Agreement or pursuant to law and (b) as provided by Clause 23 [the Confidentiality Clause]

306. Thus unless BP terminates in the next few months, it cannot do so and has no claim.

[109] C1658.

307. GoG submitted that WAGL is not entitled to any costs as the LNG Supply Agreement has not been terminated; that WAGL had not completed the Infrastructure Works which would enable BP to confirm that WAGL's facilities were satisfactory under Clause 5.2.1. It submitted that WAGL should have terminated the LNG Supply Agreement and mitigated its losses rather than waiting for BP to terminate and in any event the costs have not been incurred within the meaning of Article 17.4.

308. Article 17.4 of the GSA does entitle WAGL, even prior to the Start Date to any costs payable by the Seller for terminating the LNG Supply Agreement in contra distinction to the costs of terminating the FSRU agreement. In principle, therefore, provided the costs arise from the termination of the GSA, WAGL is entitled to these costs.

309. Mr Etomi in evidence estimated that the liability to BP could range from US$250,000,000 to US$624,000,000.

310. The Tribunal does not consider that a declaration which is conditional and leaves the issue in the air is appropriate. WAGL chose the timing of these arbitral proceedings. The Tribunal could have issued an unconditional declaration by saying, for example, that the cost of terminating the LNG Supply Agreement is recoverable as part of the Recovery Fee under Article 17.4 of the GSA, but that is not WAGL seeks. Insofar as WAGL seeks to protect itself from the costs of terminating the LNG Supply Agreement, the onus must be on WAGL to prove its loss. At the moment there is no loss nor is any potential loss quantified. The Tribunal therefore rejects the claim for a declaration in relation to the LNG Supply Agreement.

THE COUNTERCLAIM

311. In essence, the counterclaim is premised on the basis that WAGL failed to respond to GoG's failure to fulfil the conditions by not suspending further work, an allegation somewhat inconsistent with GoG's earlier argument that WAGL should have proceeded with the Infrastructure Works. It is also alleged that WAGL failed to notify GoG of any pending alleged breaches. GoG further alleges that WAGL invoked

termination in breach of the GSA, something which the Tribunal has concluded was not the case.

312. As a result, the GoG claims damages in the sum of US$87,926,839.69 alleged to be the difference in value between the Gas to be purchased from WAGL under the GSA and the amount that the GoG will have to pay under its new arrangements.

313. GoG's contention as to suspension is an allegation of mitigation, which the Tribunal has already decided has no application in this case where the claim is in debt. Nor was there any obligation on WAGL to notify GoG of its breaches. Finally, the alleged breaches, which *ex hypothesi* would be breaches of the reasonable endeavours obligation, are not particularized and no evidence was adduced in relation to them.

314. Accordingly, the Tribunal concludes that GoG has not made out its Counterclaim either in law or in evidence and dismisses it.

INTEREST

315. WAGL claims interest pursuant to Section 49 of the Arbitration Act 1996. Article 49 provides:

> "Interest
>
> (1) The parties are free to agree on the powers of the tribunal as regards the award of interest.
>
> (2) Unless otherwise agreed by the parties the following provisions apply.
>
> (3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case—
>
> (a)on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;
>
> (b)on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.
>
> (4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).

(5) References in this section to an amount awarded by the tribunal include an amount payable in consequence of a declaratory award by the tribunal.

(6) The above provisions do not affect any other power of the tribunal to award interest.

316. The question of interest is a matter for the Tribunal's discretion. Neither party has made submissions as to the amount of interest, nor has any specific claim been made for interest on costs.

317. The Notice of Termination was received by GoG on 30 April 2019. It included the original invoice seeking a Recovery Fee in excess of US$ 1,000,000,000. Shortly before the recent hearing, as explained above, WAGL considerably reduced its claim. In such circumstances it appears to the Tribunal that GoG were justified in disputing the amount originally claimed. However, GoG also disputed any liability which the Tribunal has concluded they were not justified in doing.

318. In the circumstances the Tribunal considers that the appropriate rate is to apply simple interest at a roughly average rate of US annual dollar prime rate of 4.5% plus 2% i.e. 6.5% on the sums awarded from 22 April 2019 until payment. Interest should run from the date of the Notice of Termination of the GSA, namely from 22 April 2019. No interest is awarded in relation to legal costs.

LEGAL AND ARBITRATION COSTS

LEGAL AND OTHER COSTS

319. Article 28 of the LCIA Rules provides:

"28.1 The costs of the arbitration other than the legal or other expenses incurred by the parties themselves (the "Arbitration Costs") shall be determined by the LCIA Court in accordance with the Schedule of Costs. The parties shall be jointly and severally liable to the LCIA and the Arbitral Tribunal for such Arbitration Costs.

28.2 The Arbitral Tribunal shall specify by an award the amount of the Arbitration Costs determined by the LCIA Court. The Arbitral Tribunal shall decide the proportions in which the parties shall bear such Arbitration Costs (in the absence of a final settlement of the parties' dispute regarding liability for such costs). If the Arbitral Tribunal has decided that all or any part of the Arbitration Costs shall be borne by a party other than a party which

has already covered such costs by way of a payment to the LCIA under Article 24, the latter party shall have the right to recover the appropriate amount of Arbitration Costs from the former party.

28.3 The Arbitral Tribunal shall also have the power to decide by an award that all or part of the legal or other expenses incurred by a party (the "Legal Costs") be paid by another party. The Arbitral Tribunal shall decide the amount of such Legal Costs on such reasonable basis as it thinks appropriate. The Arbitral Tribunal shall not be required to apply the rates or procedures for assessing such costs practised by any state court or other legal authority.

28.4 The Arbitral Tribunal shall make its decisions on both Arbitration Costs and Legal Costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be inappropriate under the Arbitration Agreement or otherwise. The Arbitral Tribunal may also take into account the parties' conduct in the arbitration, including any co-operation in facilitating the proceedings as to time and cost and any non-co-operation resulting in undue delay and unnecessary expense. Any decision on costs by the Arbitral Tribunal shall be made with reasons in the award containing such decision."

320. WAGL claim the sum of £422,093.84 as legal and other costs. This figure includes some arbitration costs, so the net figure is £410,329.39. This figure includes counsel fees respectively of £113,800 and £65,387 and the fees of Reed Smith of £171,364. The rates charged by Reed Smith, namely £475-£525 for a partner and £310-325 for an associate are, in the Tribunal's view, entirely reasonable. These figures have only to be contrasted with those of GoG who has claimed not only legal costs in the sum of US$247,978.07 but a figure of US$390,000 for KMPG among other costs. It has to be remembered that Amofa & Co were only instructed as from 15 June 2020. The Tribunal therefore has no hesitation in concluding that the legal and other costs of WAGL are entirely reasonable.

321. Applying the principle that costs should reflect the parties' relative success and failure in the award or arbitration, while it is correct that WAGL has succeeded on the legal issues, the ultimate sum awarded, represents two thirds of its revised monetary claim, ignoring its failure to succeed in obtaining a declaration in respect of the LNG Supply Agreement. By contrast the initial claim, as pleaded in the Request for Arbitration was for US$1,080,889,309.00 including US$250,000,000 (i.e. US$830,000,000) for

termination of the LNG Supply Agreement, such that WAGL's recovery is approximately a quarter of that initial claim.[110]

322. The claim was amended late in the day reducing the claim (excluding the LNG Supply Agreement) by approximately 50% and necessitating an adjournment of the original date for the hearing. The Tribunal does not know whether, had a more reasonable figure been advanced initially, the parties might have resolved their differences.

323. The Tribunal therefore considers that in considering WAGL's relative success, it has to look at the wider picture of the size of the original claim and not simply the last minute amendment. In such circumstances the Tribunal considers that GoG should pay approximately 50% of WAGL's claim for legal and other costs which it will round down to £200,000.

ARBITRATION COSTS

324. In accordance with Article 28.1 of the LCIA Rules the LCIA Court has determined the costs of the arbitration (other than the legal costs of the parties) in the total sum of £ which is made up as follows: -

Registration fee £1,750.00
LCIA Administrative charges £27,211.67
Tribunal's fees and expenses £249,288.18
Total costs of arbitration **£278,249.85**

325. Towards these costs, WAGL has paid £153,108.88 which includes the Registration fee, deposits lodged, interest accrued, and GoG has paid £125,140.97, which includes deposits lodged and interest accrued. Total deposits lodged by the parties therefore amount to **£278,249.85** of which **£278,249.85** has been applied to the costs of the arbitration as set out above. There is therefore no surplus to be refunded to the parties by the LCIA.

[110] Letter 30 April 2019.

326. Unlike the Legal and Other Costs, where the issues as to allocation of costs relate to the degree of success, it was necessary for WAGL to commence this arbitration to recover the sums awarded. Thus the Tribunal concludes that liability for the full Arbitration costs should rest with GoG and accordingly WAGL is entitled to be reimbursed the Arbitration Costs it has paid in the sum of **£153,108.88.**

Accordingly, the Tribunal **AWARDS** and **DECLARES** as follows;

i. The Respondent do pay to the Claimant the sum of **US$ 68,584,623.37** as the Recovery Fee under the GSA.

ii. The Respondent do pay the Claimant simple interest on the sum awarded in (i) above from 22 April 2019 at the annual rate of 6.5% until payment.

iv. The Respondent do pay the Claimant's Legal and Other Costs in the sum of **£200,000**.

v. The Respondent do pay the Claimant the Arbitration Costs in the sum of **£153,108.88.**

v. The Counterclaim is dismissed.

vi. All other claims, including the claim for a declaration and counterclaims are rejected.

Place of Arbitration, London, United Kingdom

Dated: 15 January 2021

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Hilary Heilbron QC

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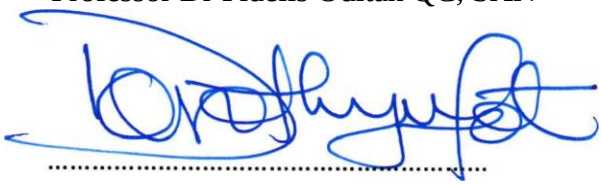
Professor Dr Fidelis Oditah QC, SAN



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Dorothy Ufot SAN