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Laycan clarification for S&P agreements

*The English High Court decision in Vitol SA v JE Energy Ltd [2022] EWHC 2494 provides useful clarification as to the meaning of laycan under a sale & purchase agreement as well as on the interrelationship between the terms of a sale & purchase contract and its corresponding letter of credit. **Alex Hudson**, Director, CJC and Maria Azevedo of Ocean Network Express (Europe) Ltd summarise the case.*

The facts

The Claimant, Vitol S.A. ("Vitol"), is a well-known international commodities and energy trader. The Defendant, JE Energy Ltd. ("Jeda"), is a Ghanaian importer of petroleum products and crude oil.

Vitol sold Jeda a cargo of 30,000 mt (-/+ 10%) fuel oil to be delivered free on board (fob) Tema in Ghana. The agreement was initially detailed in a Recap dated 10 December 2019. This provided, amongst other things, for a laycan of 23-24 December 2019 and for payment security by way of letter of credit. It was envisaged that the Recap would later be supplemented by fuller terms into a long-form sale contract.

Following the Recap, the parties discussed potential providers for the letter of credit. It was agreed that Vitol would only accept a letter of credit issued or confirmed by a recognised international bank approved by Vitol. Vitol's preferred provider was Citibank London. Jeda led Vitol to believe that it had sent letter of credit wording to Citibank London for agreement weeks earlier than it actually did. This was due to Jeda being unable to secure a sub-buyer for the cargo until some weeks later, in early January.

Laycan under the Recap passed without a vessel being presented on 24 December but Vitol did not terminate the contract. Rather, it continued to demand performance. Discussions as to supplementing the Recap terms also continued with Vitol presenting a long form sales confirmation on 9 January. Jeda agreed the majority of the proposed terms but sought to vary the laycan dates previously agreed in the Recap to 18-20 January (as the 23-24 December laycan window had already passed). Vitol refused.

Jeda eventually provided a vessel for loading the cargo on 16 January, the M.V. HAFNIA PEGASUS. Jeda also presented a letter of credit the following day however the letter did not cover the full purchase price for the cargo and was not issued by Citibank London (or any other bank acceptable to Vitol). As a result, Vitol placed the cargo on financial hold and refused to allow loading.

Separately, to ensure that any future letter of credit presented by Jeda would be valid, Vitol requested that the shipment date wording for the letter of credit be amended to 31 January 2020.

The HAFNIA PEGASUS remained alongside and idle until 20 January 2020 when it was ordered to vacate the berth by the port authority. The vessel was given permission to re-berth on 31 January, at which point there still was no suitable letter of credit in place meaning that the cargo was kept on financial hold and loading was not permitted.

On 1 February 2020, Jeda gave notice that it considered the Recap / sale contract to be "null and void". Absent any progress being made, Vitol alleged Jeda's conduct was in repudiatory breach and terminated the Recap / sale contract on 10 February 2020.

The Issues

Vitol commenced English High Court proceedings claiming more than US$3 million in damages. Vitol alleged:

1. Jeda had failed to nominate a vessel which would arrive within the agreed laycan 23-24 December 2019;
2. Jeda failed to open a suitable letter of credit; and/or
3. Jeda's declaration that the contract was "null and void" on 1 February 2020 was a repudiatory breach.

Jeda argued that the word "laycan" did not impart the obligations alleged by Vitol. Rather, it was simply a reference to the intended shipment or loading period for the cargo. If that was wrong, Jeda argued that Vitol's request to amend the letter of credit terms constituted an agreement or variation to the Recap / sale contract provisions with Vitol being obliged to load the cargo on board the vessel by 31 January 2020. Vitol's failure to do so was a repudiatory breach.

The Decision

The presiding Judge, Lionel Persey KC, held that negotiations following the Recap were a classic case of the parties sorting out terms against the background of a concluded contract (as per *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 and *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] 2 Lloyd's Rep 685). The terms agreed between the parties were not limited to the Recap where terms detailed in the sale confirmation subsequently issued had also been agreed.

Mr Persey KC also held that the term 'laycan' in FOB sales *"…means that the seller can cancel the contract if the vessel, which it is the buyer's duty to procure, does not arrive at the port by the cancellation date."*. Affirming the classic charterparty definition held in *The Luxmar [2007] 2 Lloyd's Rep. 542*, he rejected Jeda's submission that "laycan" could have had a different meaning. Jeda's failure to present a vessel within the laycan gave Vitol the right to terminate upon the expiry of the laycan. Vitol's decision not to do so meant that it was entitled to demand performance.

Mr Persey KC further found that the parties had agreed to wording proposed by Vitol for the letter of credit. The letter of credit presented by Jeda on 17 January 2020 did not meet these requirements. Accordingly, Vitol had been entitled to place the cargo under financial hold and refuse to load.

Finally, Mr Persey KC rejected Jeda's submission that the Recap / sale contract had been amended by agreement to oblige Vitol to load cargo on board by 31 January. Whilst parties to a sale contract can potentially vary their contractual obligations by agreeing to a letter of credit in different terms to those specified in the sale contract, there was no such agreement here. The parties did not agree to amend the Recap / sale contract to provide for a 31 January shipment *deadline*.

Mr Persey KC consequently held that Jeda had failed to present a letter of credit in satisfactory terms and was in repudiatory breach of contract when it treated the contract as being null and void. It had no grounds for so doing. He subsequently awarded Vitol US$3,292,650 in damages calculated in accordance with *section 50(3) of the Sale of Goods Act 1979* – amounting to the difference between the contract price and the market price when the goods ought to have been accepted for shipment.

Comment

The decision was relatively straightforward and uncontroversial. Jeda had clearly got itself into difficulties following delay in its on-sale of the cargo and was (unlawfully) attempting to extract itself from its agreement with Vitol.

That said, practitioners will welcome Mr Persey KC's clear findings on the interrelationship between a letter of credit and its underlying sale & purchase contract as well as the clarification of laycan terms under a sale contract. The takeaway point is clear: Buyers under FOB contracts should be wary of the consequences of failing to provide a vessel ready to load within the laycan window.

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