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### *Vitol S.A. v JE Energy Ltd. – meaning of laycan in FOB sale contracts and useful reminder on repudiatory breach*

On 7 October 2022 the English Commercial Court handed down a judgment in *Vitol S.A. v JE Energy Ltd.* [2022] EWHC 2494 (Comm), where the Court revisited the meaning of laycan in the context of FOB sale contracts. The case is also a recent example of a not so uncommon scenario where a party wrongfully terminated the contract, thereby being in repudiatory breach itself which allowed the other party to bring the contract to an end and claim damages.

#### Facts

Vitol S.A. ("**Vitol**") agreed to sell 30,000MT (+/- 10%) of Fuel Oil to be delivered FOB Tema in Ghana to JE Energy Ltd. ("**Jeda**"). The deal recap of 10 December 2019 provided that the laycan period was between 23-24 December 2019 and payment security would be provided by way of a documentary letter of credit ("**LC**").

Following the deal recap the parties discussed the terms of an acceptable LC and a suitable provider, however, it was not until weeks later that Jeda actually attempted to open an LC. As the laycan started approaching, Vitol started to chase Jeda for performance.

The laycan under the sale contract closed with no LC in place, no vessel having been nominated and cargo having not been lifted by Jeda. Vitol did not cancel the sale contract and continued to work with Jeda in order to try to perform the contract.

A nominated vessel eventually arrived on 16 January 2020 and berthed on 17 January 2020, and whilst an LC had been issued, as it was not compliant with what the parties had agreed, Vitol placed the cargo on "Financial Hold", meaning it would not be released for loaded until it was comfortable that payment would be received. Parties continued to discuss the LC terms, but due to congestion in the port, the nominated vessel had to vacate the berth and it was not until the end of the month she was expected to be able to reberth. As a result Vitol

sought an extension to the shipment date in the LC to 31 January 2020 to ensure the LC was cashable in light of the expected shipment date being later than in the LC that had been issued.

In parallel to this, further discussions regarding the sale contract terms were taking place. Both parties envisaged that the recap would be supplemented by fuller contract terms in due course, but it was in dispute as to whether a long-form contract had actually been agreed.

On 9 January 2020, after the laycan had passed, Vitol prepared a long-form contract and sent that to Jeda. Back and forth discussions between the parties followed, where, among other things, on 22 January 2020 Jeda sought to revise the laycan dates to 23-24 January 2020. Vitol maintained that the laycan as originally agreed was to apply and no further push-back to that was received from Jeda.

As Jeda's onsale contract would have represented a loss, it issued a notice on 1 February 2020 that it considered the sale contract "*null and void*". On 10 February 2020 Vitol brought the sale contract to an end by accepted Jeda's repudiatory breaches for (a) failing to nominate a vessel for the agreed laycan, (b) failing to open an acceptable LC, and (c) declaring the contract "*null and void*".

Jeda denied liability and contended that Vitol was itself in repudiatory breach of contract arguing that "laycan" meant simply the shipment or loading period, and not its usual meaning in FOB contracts,

and therefore contenting that Vitol were not entitled to terminate the contract when the vessel did not arrive by the cancellation date, or in the alternative, the parties had varied the contract to agree that Vitol would ship the cargo by 31 January 2020, failing which the contract could be terminated.

### Decision

Vitol succeeded on liability and was awarded damages in the amount of US\$3,292,650, being the difference between the contract price and the price that it would have obtained on the date on which the contract was terminated.

In respect of the initial point of whether the relevant contract comprised of the deal recap only or a long-form was also agreed, the Court held that this was a classic case of the parties sorting out the terms against background of a concluded contract. The Judge's reasoning was based on the fact that both parties envisaged that a full contract would be concluded and then discussed the terms in correspondence until there were no differences between them.

The Court confirmed the position that in a charterparty context "laycan" means the earliest day upon which an owner can expect his charterer to load and the latest day upon which the vessel can arrive at its appointed loading place without being at risk of the charterparty being cancelled. When the term "laycan" is used in FOB sale contract it means that the seller can cancel the contract if the vessel, which is the buyer's duty to procure, does not arrive at the port by the cancellation date. Jeda's submission was rejected and the Court noted that there was nothing in the facts to suggest that the parties had agreed a different meaning to be given to the term "laycan".

Jeda's failure to present a vessel within laycan gave Vitol a right to terminate the contract or to demand performance. It chose to do the latter which meant that it had a reasonable time (meaning one that was not frustrating) in which to load the cargo after Jeda had provided a vessel.

The Court dismissed Jeda's assertion that the contract had been varied to the effect that Vitol was required to ship the cargo by 31 January 2020, failing which the contract could be terminated, as no such agreement was evidenced by the correspondence. Similarly, Jeda's alternative argument that Vitol was estopped from denying that both parties were working under the assumption that Vitol was under such an obligation was rejected as no such common assumption could be shown.

In respect of changing the shipment date in the LC, the Court found that an agreement to that effect did not vary the underlying sale contract itself. Whilst it was common ground between the parties that parties to a sale contract under which payment is to be made by way of an LC can vary their contractual obligations subsequently by agreeing to an LC on different terms to those specified in the sale contract, the Court found that this was not one of these cases. Vitol required the LC to be amended so as to ensure that it would be cashable as the anticipated shipment date was later than the shipment date in the LC provided.

The Court also agreed with Vitol that Jeda had failed to put up an LC in accordance with the terms of the contract and that Jeda was in repudiatory breach of the sale contract when it sought to terminate the sale contract suggesting that it was "null and void".

### Comment

The case makes an interesting read and whilst it is of particular relevance to FOB buyers and sellers, the Court also in its judgment deals with several important issues which traders across the board deal with on a daily basis. The Court has usefully revisited the meaning of laycan in the context of FOB contracts and as is seen from the above, clear evidence would need to be shown to suggest that the parties had agreed to depart from that meaning. This case also serves as an important reminder to parties to ensure that before going ahead and terminating a contract they have established whether they indeed have a right to do so, as otherwise they risk being in repudiatory breach themselves entitling the other party to bring the contract to an end and seek damages for their losses.

Please click [here](#) for a copy of the full judgment.

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