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Addax Energy SA v Petro Trade Inc

In *Addax Energy S.A. v Petro Trade Inc*¹, the London Circuit Commercial Court was tasked with examining the parties' dealings over a number of years, ultimately finding that a course of dealing had been established and that written contracts sent by email recorded the terms that had already been agreed between the parties.

The case was unusual in that Petro Trade was not represented and did not appear at trial but had been represented by solicitors and counsel at an earlier (unsuccessful) hearing on jurisdiction². The Court therefore had the benefit of Petro Trade's defence, two witness statements and a skeleton argument. In hearing the matter, the judge and counsel for Addax drew upon those documents, which assisted Addax in discharging its obligation to "present the case fairly"³ in Petro Trade's absence.

Basis of Addax's claim

The dispute related to the sale, by the claimant Addax Energy SA ("**Addax**"), and purchase, by the defendant Petro Trade Inc ("**Petro Trade**") of gasoil (diesel fuel) and mogas (motor gasoline) under a spot contract and a (disputed) term agreement. Addax claimed for four unpaid invoices for petroleum products delivered to Petro Trade in Liberia.

In addition, Addax and Petro Trade had entered into what amounted to a tripartite storage and release agreement with a third party (ACE Depository DMCC, "**ACE**", the agreement being the "**SDA**"). Under the SDA: Addax would deliver products into tanks in Monrovia, retaining title; those tanks would be managed by ACE and the products held to Addax's order; and Addax and Petro Trade would then enter into separate sales contracts for smaller parcels of product that would be released to Petro Trade in accordance with those sale contracts.

The SDA arrangement allowed Addax to effect larger supplies into Liberia, saving on freight costs for Petro Trade that would otherwise have made the

shipments uneconomic, discharging in Petro Trade's name (Petro Trade being a licence-holder and therefore permitted to discharge products in Liberia), while allowing Petro Trade to stem product in smaller parcels in accordance with its financial resources.

Course of dealing

In presenting the evidence in relation to the spot contract, Addax asked the Court to find that written contract terms, sent after the parties had discussed main terms and exchanged recaps, represented the agreements reached by the parties for individual trades.

Mr Elvin KC found (for Addax) that "*the procedure the parties followed was an informal one and followed a clear and consistent pattern with the written terms only being provided as the final stage in the negotiation*" such that "*there was a course of dealing sufficient to conclude that the written terms*

¹ <https://www.bailii.org/ew/cases/EWHC/Comm/2023/1609.html>

² Before Mrs Justice Cockerill - <https://www.bailii.org/ew/cases/EWHC/Comm/2022/237.html>

³ See paragraph 9 of the judgment in which David Elvin KC quotes Simon Rainey QC, sitting as a Deputy High Court Judge in *Hirbodan Management Co v Cummins Power Generation Ltd* [2021] EWHC 3315 (Comm) on a party's obligations in this respect.

of the spot contract...did form part of the binding agreement"⁴ between the parties.

In addition, Addax asked the Court to find a course of dealing between the parties which culminated in the term agreement. It was Addax's case that the parties had agreed terms in January 2018 and that those terms were recorded in writing and provided to Petro Trade in November 2018. Petro Trade denied the position, relying on the fact that there was no fixed agreement on the premium to be paid, and therefore on price. This, it was argued, was inconsistent with the parties' previous course of dealing, which proceeded on the basis of an agreed premium in each case. It was material that no further spot contracts were issued after November 2018 other than in one instance in relation to a delivery of fuel oil (the term agreement applied only to gasoil and mogas).

Mr Elvin KC found that there was "*an intention to enter into a legally binding agreement*"⁵ and that the "*Term Agreement...was agreed in January 2018 and put into written form on 20 November 2018 and was therefore a binding agreement between [the parties]*"⁶, regardless of a lack of agreement on a fixed premium⁷.

Conclusion

This case is a useful illustration of the factors that a court will consider when a party seeks to establish a course of dealing argument. It was remarked upon by the judge that Petro Trade never sought to challenge, amend or protest to the written terms as provided by Addax.

As was evident, both in the jurisdictional challenge before Mrs Justice Cockerill and in the present case before David Elvin KC, the Commercial Court (both the London Circuit Court and the King's Bench Division) has a sophisticated knowledge of international trade and the ways in which trading partners negotiate and contract.

That said, parties would be well advised to conclude contracts in which the terms, notably in respect of governing law and jurisdiction, are clear so as to avoid lengthy delays in payment due to disputes as to the terms governing the relationship.

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⁴ Paragraphs 86 and 88 of the judgment.

⁵ Paragraph 129(9) of the judgment

⁶ Paragraph 130 of the judgment

⁷ See paragraph 129(8) in which Mr Elvin KC found support in *Didymi Corp v Atlantic Lines & Navigation Co, Inc* [1987] 2 Lloyd's Rep 166 by analogy – where hire charges were subject to adjustment for performance "*by an amount to be mutually agreed*"