Rhine v Vitol: Commercial Court decision on the relevance of internal 'hedges' to the assessment of damages for breach of contract

Paul Toms

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The Commercial Court handed down judgment on 26th May in ***Rhine Shipping DMCC v Vitol SA*** [2023] EWHC 1265 (Comm), a case which concerns the relevance of internal 'hedges' to the assessment of damages for breach of contract.

The dispute arose under a voyage charterparty concluded between Rhine Shipping DMCC ("**Owners**") and Vitol SA ("**Vitol**") in respect of the vessel the M/T Dijilah. Vitol had chartered the Vessel in part for the purpose of taking delivery of a cargo of crude oil at Djeno, Congo, pursuant to a sale contract. The price payable under the sale contract was determined by reference to the date of the Bill of Lading. The Vessel was detained at the first loadport by reason of an arrest of property on board in support of a London arbitration pursued by third parties against the bareboat charterer of the Vessel. By reason of that detention, the price payable under the sale contract significantly increased as compared to the position as it would have been had there been no detention. Vitol claimed the difference in price caused by the delay.

Issues

The Court had to consider, firstly, whether Owners were obliged to pay for that loss either as damages for breach of a warranty or under an indemnity in the charterparty.

If so, there were two main quantum questions. The first was whether that loss was reduced by Vitol's internal risk management processes, which Owners alleged had the same effect as external hedging. These processes involved recording a notional internal "swap" in respect of each of the pricing dates that would have been used to price the cargo, and then 'rolling' those internal "swaps" to later dates once the Vessel was delayed. There was no external counterparty for the internal "swaps", which were grouped together with other internal "swaps" derived from unconnected physical transactions concluded in the ordinary course of trading.

The second main quantum question was: if the loss had not been reduced by Vitol's internal risk management processes, was the loss too remote, or not something for which Owners had assumed responsibility applying ***The Achilleas*** [2009] 1 AC 61. Specifically was Vitol only entitled to recover what it would have lost if it had concluded swaps which had been effective to reduce its loss? There was a further question, as to whether Vitol had proved what the Bill of Lading date would have been if there had been no delay, and whether that question was to be determined based on a loss of chance or balance of probability analysis.

The Judgment

The Court held that there had been a breach of the warranty and the indemnity was engaged. The Court also found that the likelihood of the Vessel meeting the originally anticipated loading date was sufficiently certain that damages were to be assessed on the basis of that date.

As to the alleged "hedging", the Court considered Vitol's risk management processes, having heard evidence from a commercial analyst at Vitol and oil trading experts from both sides. The Court found that Vitol's processes were not equivalent to the position where external hedges had been entered into or closed out as a result of a breach of contract as canvassed in ***Glencore Energy UK Ltd v Transworld Oil Ltd*** [2010] EWHC 141 (Comm) and ***Choil Trading SA v Sahara Energy Resources Ltd*** [2010] EWHC 374

(Comm). Rather the actions of "netting off" notional internal transactions of this kind did not have the effect of reducing Vitol's loss.

In the light of the evidence before the Court, it was also held that a party in Owners' position would have contemplated that Vitol might have had an internal risk management process of the kind it did, and so the loss claimed was not too remote and Owners had assumed responsibility for it.

Paul Toms acted for Vitol, instructed by Ingolf Kaiser and Ryan Hunter of MFB.

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Paul Toms

"Paul is a talented and effective advocate, and is clearly respected by judges. He quickly gets to the heart of the issues and gives first-rate advice." (Legal 500, 2023)

Paul is an experienced junior barrister specialising in commercial and international trade disputes. He is described as "very erudite and quick on his feet; he has an unparalleled eye for detail and is careful, considered and astute" (Chambers UK 2020).

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paul.toms@quadrantchambers.com