FOB Buyers beware: Sale Contract Letter of Credit and Laycan provisions Vitol SA v JE Energy Ltd

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The Court's decision in ***Vitol SA v JE Energy Ltd*** [2022] EWHC 2494 (Comm) contains much useful guidance regarding the liability obligations of an FOB Buyer, including as regards the obligation to open a contractually compliant letter of credit and to provide a performing vessel within the laycan.

The case involved a familiar factual scenario often encountered in repudiatory breach disputes. The parties contracted for the sale of 30,000 mts (+/- 10%) of fuel oil on FOB Tema (Ghana) terms. The buyers (Jeda) had purchased the cargo speculatively, without having either a sub-buyer or a performing vessel lined up. The market turned and the deal became loss-making to Jeda. By the time a sub-buyer was found, it was at a sub-sale price far below the price at which Jeda had agreed to purchase the cargo from Vitol (Jeda having purchased at + $100 pmt over the relevant benchmark, but sub-sold at +$43).

Jeda was found to have repudiated the sale contract through a combination of: (i) failing to nominate a performing vessel to arrive within the agreed laycan, (ii) failing to open a contractually-compliant letter of credit, (iii) when an acceptable LC was eventually opened, failing to extend its expiry date to match the likely date of shipment, and (iv) purporting to declare the contract null and void prior to shipment of the fuel oil by Vitol.

The decision confirms and clarifies the law in four important respects.

First, the decision confirms that where parties agree a (short-form) "deal recap" which sets out the essential terms of the trade, then this may readily be supplemented by a subsequent long-form contract, and that it is not necessarily appropriate for the strict requirements of a positive offer and a positive acceptance to be satisfied. Orthodox contractual analysis of offer/acceptance is less obviously apposite in cases involving *"sorting out the details against the background of a concluded contract"* (per the classic dictum of Bingham J in ***Pagnan v Feed Products*** (1987)). On the facts, both parties had envisaged that long-form contract terms would apply, and had negotiated by reference to Vitol's long-form terms until there were no or virtually no differences between them: those terms were thus held to form part of the bargain. See Judgment [15, 19].

Second, the decision clarifies the classic meaning of the term "laycan", when used in an FOB sale contract. The facts were that the deal recap referred to a contractual laycan of 23-24 December 2019, and it was Vitol's position that 24 December was therefore the latest date by which the Buyer's Vessel had to arrive. The long-form terms included provisions along these lines also. However, the berthing allocation programme published by the Port authorities at Tema referred to berthing slots colloquially as "laycans", and Jeda contended that in all the circumstances the "laycan" provision should be construed as imposing a "shipment window" on Vitol- i.e., a latest date by which the cargo had to be shipped. See Judgment [10, 22].

The Judge rejected Jeda's submissions. The starting point was that, as is well-known, in the charterparty context the laycan refers to the period commencing on the earliest day upon which an owner can expect his charterer to load (laydays) and ending with the latest day upon which the vessel may arrive without being at risk of the fixture being cancelled (cancelling date). Transposed to a FOB sale contract, this becomes the date by which the Seller may cancel the contract if the Buyer's Vessel has not arrived (see e.g. the ***Luxmar*** (2007)). Whilst every case turns on its facts, there were insufficient features in this case to justify a departure from this usual meaning of the term: notwithstanding the terminological confusion created by the Port's "laycan schedule" of berthing allocations. Since Vitol chose not to cancel after the laycan expired, it therefore had a reasonable (non-frustrating) time in which to load the cargo once the performing vessel arrived and a compliant letter of credit was open. See Judgment [76-78].

Third, the Court considered the nature of an FOB buyer's obligations as regards opening a letter of credit. In this regard, it is well-established that, where payment is to be by letter of credit, the opening of a compliant LC is a condition precedent to the Seller's obligation to load the cargo: see e.g. ***Kronos Worldwide Ltd v Sempra Oil Trading SARL*** (2004). But on the facts, the deal recap simply referred to "Payment security: Documentary LC", without elaboration. The Court held that the

LC eventually opened (late) was not compliant in that: (i) the value was appx. $500,000 short of the agreed amount and thus insufficient to cover the full value of the cargo; (ii) the LC was not confirmed as Jeda had promised it would be; (iii) it did not provide for a credit tolerance, and (iv) it departed from the draft terms which the parties' respective finance teams had agreed. The Court accepted these errors were significant: e.g. the monetary shortfall and lack of credit tolerance meant Vitol had no financial security for part of the cargo value which it was being asked to load; and the lack of confirmation was a problem because Jeda's issuing bank did not hold sufficient creditworthiness with Vitol's Treasury/Credit Team to issue an unconfirmed LC. See Judgment [46].

A particularly interesting aspect here is that the Court thereby rejected Jeda's submission (recorded at [48]) that Vitol should have commenced loading on the faith of its assurances that the errors would be corrected, and if necessary apply a "cut-off" to the quantity loaded so as not to place cargo onboard the Vessel beyond the value of the (non-contractual) LC. This suggests FOB Buyers cannot expect their sellers to perform *any* loading operations at all unless and until there is an LC in place for the *entire* cargo value. This makes sense given that the FOB Buyer has control of the Vessel and thus any cargo pumped onboard may be lost to the seller: who thus needs the security of an acceptable letter of credit before taking that risk.

Fourth and finally, the decision touches on the circumstances in which the parties to a sale contract which provides for payment by LC, can be held to have varied their *sale contract* obligations by subsequently agreeing to an LC in different terms to those specified in the contract: see e.g. ***Ficom v Sociedad*** (1980). In this case, the parties had agreed a "shipment date" in the LC to reflect the date at which the cargo would likely be shipped. When delays occurred, Vitol required that date to be extended to ensure the LC remained cashable and did not become worthless. But this did not carry with it some implicit agreement to vary the contractual laycan (which had long since expired) and replace it with a "latest shipment date" provision by which Vitol had to ship the cargo. See Judgment [79-80]. The decision therefore confirms that it is conceivably possible for parties to agree LC terms which in turn vary the underlying sale contract, this will not be found to have happened if the LC amendments were for another purpose not objectively consistent with sale contract variation. As the Court found, Jeda were in reality seeking to use the need for a routine LC amendment extending the shipping date as leverage to try to renegotiate a loss-making bargain. This was impermissible. See Judgment [64].

Paul Henton acted for the successful sellers, Vitol, instructed by Elizabeth Farrell and Nick Moon of Reed Smith LLP.

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Paul is an experienced Commercial practitioner recommended in the directories for Shipping, Energy, Commodities and International Trade. He has been instructed at all levels of the Court system, including the Court of Appeal, Privy Council and Supreme Court. His first instance Court work is primarily in the Commercial and Admiralty divisions; but he has also appeared in the Chancery Division, Companies Court and Mercantile Courts.

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