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Rhine Shipping DMCC v Vitol SA [2024] EWCA Civ 580¹: Court of Appeal confirms approach to hedging and damages

The Court of Appeal recently dismissed an appeal by Rhine Shipping DMCC ("**Rhine**"), the disponent owner of a vessel chartered by Vitol SA ("**Vitol**"), a major trader in oil and petroleum products, in a dispute over the effect of hedging on the assessment of damages for breach of charterparty. The court refused to allow Rhine to raise a new argument on appeal that Vitol had avoided a loss by not having to hedge a risk that would have existed but for Rhine's breach. The court also confirmed that Vitol's internal hedging arrangements did not reduce its recoverable loss.

Background

Vitol had voyage chartered the M/T DIJILAH (the "**Vessel**") from Rhine in part to carry a cargo of crude oil that loaded at Djeno, Congo (the "**Cargo**"). Vitol had contracted to purchase the Cargo from TOTSА Total Oil Trading SA ("**TOTSА**") (the "**Purchase Contract**"). Under the Purchase Contract Vitol was obliged to present the Vessel for loading within the vessel presentation range.

The Vessel's arrival to Djeno was delayed because it was detained at the previous loadport where its bunkers and stores were arrested due to a dispute between third parties and the Vessel's bareboat charterer. As a result of that delay, the Vessel failed to meet the contractual vessel presentation range and there was a substantial increase in the price under the Purchase Contract. Vitol claimed that price difference, in the amount of US\$ 3,674,834.22.

It is relevant that Vitol placed a series of internal swaps to hedge against an increase in the price under the Purchase Contract. These swaps were recorded against the original pricing period but were then rolled to close at later dates once the Vessel was detained. This rolling of the swaps generated a gain within Vitol's "group trade capture" system, Vista, of US\$2,871,971.53,

resulting in a net position of a loss of US\$802,863 in respect of this trade on Vista.

Rhine argued that: (a) any loss suffered by Vitol had been reduced by its internal hedging arrangements and, to the extent reduced, was not recoverable; and (b) even if Vitol's loss had not been reduced by its internal hedging arrangements, the only recoverable loss was the loss that would have been suffered had Vitol placed external hedging to reduce its losses.

High Court decision²

The Commercial Court held that the detention was an "*arrest/detention or other sanction levied against the vessel*", and therefore the indemnity in the charterparty was engaged and the warranty breached, such that Rhine was liable to Vitol for the delay to the completion of loading of the Cargo. It found that, but for the detention, the Cargo would have completed loading on 6 May 2020, and the bills of lading would have been issued on that date (from which it followed that damages were to be assessed on the basis of that date). There was no appeal from those findings.

On the question of internal hedging, the Court found that the "*internal swaps [were] not legally recognised as binding contracts*" because a legal person cannot contract with itself. They were internal arrangements and did not affect Vitol's profit or loss on the basis that the profit from the rolling of the swap shown for one portfolio was mirrored by a loss on the matched portfolio. Accordingly, they were not equivalent to external hedges. Further, the swaps had been entered into in the ordinary course of business and had not been prompted by Rhine's breach of the charterparty. Vitol was therefore entitled to retain the proceeds. The Court accepted that, had the hedging been external, the benefit would have been taken into account.

¹ <https://caselaw.nationalarchives.gov.uk/ewca/civ/2024/580>

² The High Court decision was covered in CIF Weekly edition 36, available: [cif-weekly-36.pdf \(shlegal.com\)](#)

The Court further held that Vitol's claimed losses were not too remote to be recoverable: it was common for large traders to manage risk internally, and there was no expectation to hedge a specific risk externally.

Appeal to the Court of Appeal

The dispute on appeal concerned the effect of Vitol's hedging arrangements on the assessment of damages for the delay. The pricing terms of both contracts involved variables by reference to the Brent Dated and Brent Futures indices, respectively, around the time of loading and anticipated delivery. These two variables could be hedged in order to lock in the pricing profit and remove the risk of market movement on those indices.

The appeal was concerned only with the first aspect of such hedging, namely the hedging of the Purchase Contract price, which was the only hedging which could potentially affect the loss caused by the delay in the bill of lading being issued at Djeno, for which Rhine was contractually liable under the charterparty.

The parties' positions

Rhine argued that Vitol's internal hedging arrangements, and in particular the rolling of the swaps, reduced or eliminated its loss and should be taken into account in the assessment of damages. Rhine contended that the internal hedging was not materially different from external hedging and that the gain recorded internally reflected the benefit that Vitol would have received from a third party if it had hedged externally.

Alternatively, in an argument raised for the first time in the Court of Appeal, Rhine argued that the other transactions within the system that offset the risk transferred by the rolling of the swaps (following late loading) were also relevant to the assessment of damages, as they represented a benefit derived from mitigation or an avoided loss³.

In relation to the new argument, Vitol contended that the other transactions within the system that offset the risk transferred by the rolling of the swaps were not relevant to the assessment of damages, as they were neither steps taken in mitigation nor an avoided loss, but rather collateral benefits that were independent of the breach and the loss.

The Court of Appeal's decision

The Court of Appeal dismissed Rhine's appeal and upheld the Commercial Court's decision. The Court of Appeal refused to allow Rhine to raise a new argument on appeal that Vitol had avoided a loss by not having to

hedge a risk that would have existed but for Rhine's breach. This decision was on the basis that the argument was entirely new and raised factual and legal issues that were not addressed at the trial and would require further evidence and findings.

The Court of Appeal confirmed that Vitol's internal hedging arrangements did not reduce its recoverable loss, as they did not involve any contract or benefit from a third party and did not make good any loss to Vitol as a company.

Comment

Given the paucity of authority in this area previously, this decision provides welcome guidance on the approach the courts will take to assessing damages where internal hedging arrangements are in place. However, the applicable legal tests (e.g. mitigation, collateral benefit, and avoided loss) are complex and highly fact sensitive.

For this reason, the decision also serves as a salutary warning to raise all relevant arguments and evidence in support at the trial of first instance, because a novel argument raised for the first time at the appeal stage, particularly one that would require new evidence and findings, is unlikely to be allowed.

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Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking [here](#).

³ It was argued that had Vitol hedged the Purchase Contract price risk externally it would have resulted in a loss, and Rhine's breach meant that this loss had been avoided.