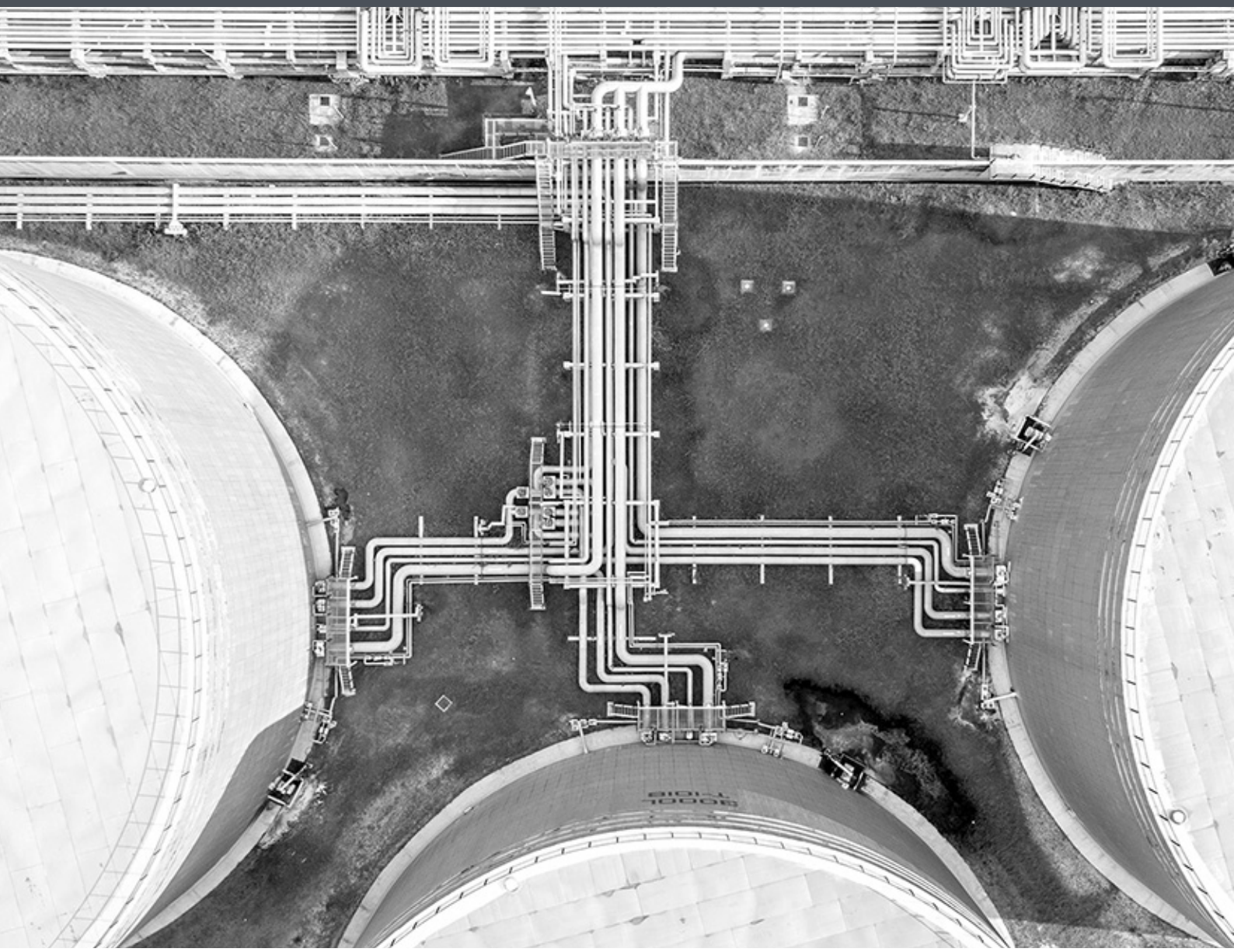

COMMODITIES: COMMON ISSUES IN OIL TRADING CONTRACTS – POTENTIAL PITFALLS IN CONTRACT FORMATION

This is the first in our new series, *Commodities: Common issues in oil trading contracts*, in which we tackle some of the issues which regularly crop up for oil trading clients. Commodity contracts are often made during quick email exchanges between traders, sometimes resulting in unintended consequences. This article will highlight some potential pitfalls using the example of a case in which HFW acted for the successful claimant.

"If you want a particular specification to form part of the description of the product, this must be stated clearly."

Introduction

Proton Energy Group SA v Orlen Lietuva[1], addressed three important issues:

1. At what point during email negotiations is there a contract between the parties?
2. Can a condition precedent be implied into a contract?
3. What is the difference between quality and description, and when can a trader reject a cargo?

Facts

By an email sent on 14 June 2012, Proton made a "firm offer" to sell to Orlen 25,000 metric tons of crude oil mix, European origin. Email correspondence continued between the parties on the same day, culminating in a one-word email from Orlen stating *"Confirmed"*.

On 20 June, Proton sent Orlen a draft detailed written contract for the sale. The draft terms of this written contract provoked further email exchanges and ultimately a revised draft which Proton sent to Orlen on 27 June. By this stage, there was at least one issue on which the parties had not agreed: namely, the documents which Proton would be required to present for payment.

On 29 June, Orlen wrote to Proton to say that it was withdrawing from the negotiations. It did not open any letter of credit and it did not accept the cargo. On 2 July 2012, Proton notified Orlen that it was accepting Orlen's failures to open a letter of credit and to take delivery as repudiatory breaches and was thereby bringing the sale contract to an end.

Was there a contract?

Orlen contended that since not all of the details had been agreed, no contract could have been formed. Proton relied on previous case law[2] to argue that as long as the main terms are agreed there will be a contract, even if all the details have not yet been agreed. The English Commercial Court agreed, holding that a contract between the parties had come into existence on 14 June on the terms of Proton's offer, which included quantity, description, origin, law and jurisdiction, with all other terms being *"as per seller's standard CIF contract"*.

Condition precedent?

Orlen also argued that if a contract had been formed, there was an implied term that it would only be bound if it was reasonably satisfied as to the origin of the product. This term had not been fulfilled and so the contract could be set aside. (Orlen was concerned that the product was of Iranian origin, even after being advised by Proton that the origin of the cargo was France.)

This claim failed resoundingly. The Court concluded there was no hint in the correspondence to justify the implication of such a term. It also concluded that terms may only be implied if the test of necessity is satisfied – here it was not.

Description v quality – right to reject?

Orlen's third argument was that even if there was a contract, it would have been entitled to reject the product for misdescription as the product which Proton would have supplied was materially different from its description, in several quality parameters. Orlen relied on s.13 Sale of Goods Act 1979, which provides that it is a condition that where there is a contract for the sale of goods by

1 [2013] EWHC 2872 (Comm). HFW represented the successful claimants, Proton in this case.

2 *RTS Flexible Systems Ltd. v Molkerei Alois Müller GmbH & Co.* [2010] 1 WLR 753.

description, there is an implied term that the goods will correspond with the description.

The Court disagreed, holding that quality is quite distinct from description. A difference between the agreed and actual quality would allow Orlen to claim damages, but not to reject the product, unless the contract expressly provided for that.

Also remember...

1. If Party A makes an offer and Party B makes a counter offer, Party A must accept that counter offer in order for a contract to be formed.

2. It is possible to accept an offer by conduct, so act carefully! Even where there is no express acceptance, a party can accept an offer by carrying out its contractual obligations as though it had done so.

3. If a party proposes a variation to an agreed contract but then reverts to the original term agreed, the agreed contract remains afoot.

4. Parties will often send offers and counter offers to each other in the form of their own standard terms, in an attempt to have their terms governing the contract. If a party attempts to accept an offer whilst laying down its own standard terms, there is no acceptance. Usually, the last set of terms sent before an instance of unequivocal acceptance will be taken to govern the contract.

5. Oral contracts can be binding in English law. Oral contracts create uncertainty and we advise that parties always record terms in writing.

Key takeaways

Certainty is best: know when you are forming a contract and on what terms. Express written agreement is always preferable. If you want a particular specification to form part of the **description** of the product, this must be stated clearly.

If you would like to discuss any of the issues raised in this briefing, please contact:

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