GAFTA Default Clause and Damages for Non-Acceptance – *Sharp v Viterra* [2022] EWHC 354 (Comm)

Quadrant CHAMBERS

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Approximately 80% of the world's grain trade is conducted using GAFTA standard form contracts; and the GAFTA Default Clause, with immaterial variations, appears in 64 out of the approximately 78 GAFTA contracts currently in use. Authority on the construction and effect of that Default Clause is therefore important for grain traders and international trade lawyers alike.

The recent decision in ***Sharp Corp Ltd v. Viterra BV*** [2022] EWHC 354 (Comm) provides authority on the quantification of damages under sub-clause (c) of the Default Clause for non-acceptance of goods by the buyer. In that case, Cockerill J upheld the GAFTA Appeal Board's valuation of unaccepted goods left on the seller's hands based on the cost of buying identical goods at their port of origin plus the freight to transport them to their destination, in preference to their value in the domestic market at that destination, where they were in fact located on the date of default.

The question in ***Sharp*** was how goods (consisting of Canadian Crimson Lentils and Canadian Whole Yellow Peas) left in the hands of the seller (Viterra BV) at their discharge port of Mundra, India fell to be valued under the Default Clause following their non-acceptance by the defaulting buyer (Sharp Corp Ltd). Are such goods to be valued based on an assumed purchase and carriage of identical goods on the same delivery terms as the original sale (in this case, C&F Free Out Mundra, shipped from Vancouver) or "as they are, where they are" (in this case, Customs-cleared in Mundra, India) on the "date of default"? That question had a large impact on the quantification of the seller's damages in this case because the goods had risen in value between the date they were cleared through customs by the buyer and the date of default under the Default Clause found by the tribunal, as a result of the Indian Government's imposition of Customs tariffs of 50% on peas and 30.9% on lentils between those dates.

The sale contracts in ***Sharp*** were on the GAFTA Contract No. 24 form, the Default Clause of which provides as follows:

> *"25. DEFAULT*
>
> *In default of fulfilment of contract by either party, the following provisions shall apply:-*
>
> *(a) The party other than the defaulter shall, at their discretion have the right, after serving a notice on the defaulter to sell or purchase, as the case may be, against the defaulter, and such sale or purchase shall establish the default price.*
>
> *(b) If either party be dissatisfied with such default price or if the right at (a) is not exercised and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.*
>
> *(c) The damages payable shall be based on, but not limited to, the difference between the contract price of the goods and either the default price established under (a) above or upon the actual or estimated value of the goods, on the date of default, established under (b) above. . . ."*

Although the seller had resold the unaccepted lentils and peas to its related company in Mundra, neither party proposed using those resale prices to value the unaccepted goods, either under sub-clause (a) or sub-clause (c); and the GAFTA Appeal Board did not unilaterally adopt those prices either, which sub-clause (c) gave it discretion to do.

As the goods were Customs-cleared at the discharge port of Mundra, and there was a domestic market for those goods there, the buyer argued that the "the actual or estimated value of the goods, on the date of default" under sub-clause (c) fell to be determined based on their realisable value in that domestic market.

The GAFTA Appeal Board, however, accepted the seller's argument that "the actual or estimated value of the goods" under sub-clause (c) was to be determined by constructing a theoretical C&F FO cost for purchasing identical goods comprising (i) the cost of buying equivalent goods FOB from the goods' port of origin (Vancouver) and (ii) the freight cost for transporting those goods from Vancouver to Mundra, both determined as of "the date of default". This method resulted in prices 25% – 30% lower than those prevailing on the domestic market in Mundra on that date.

Jacobs J granted the buyer permission to appeal against that ruling finding it to be "open to serious doubt" and, if necessary, also "obviously wrong".

On appeal, the buyer argued, inter alia, that the Appeal Board's construction was inconsistent with: (i) the proper construction of the phrase "the actual or estimated value of the goods, on the date of default" in sub-clause (c); (ii) the dicta of the Court of Appeal in ***The Selda*** [1999] 1 Lloyd's Rep. 729 and (iii) the Tribunal's own analysis.

Despite finding that a number of the buyer's arguments had "force" or "obvious force", Cockerill J dismissed the appeal. She concluded that the authorities overall supported the seller's argument that the correct approach under sub-clause (c) "is to value the goods based on the same terms and conditions" as the sale contract breached and that the prices in the domestic market in India urged by the buyer were "on any analysis not a like for like sale: the goods benefitted from the customs clearance and thence (more significantly) from the absence of tariff." The Judge was particularly influenced by dicta of the Supreme Court in ***Bunge SA v Nidera BV*** [2015] 2 Lloyd's Rep. 469 to the effect that sub-clause (c) assumed a "notional substitute contract" concluded on the same terms as the contract lost.

With respect to the Learned Judge, it is submitted that the above analysis is questionable as a matter of construction, commerciality and authority based on *inter alia*:

1. The plain words of sub-clause (c) – "the actual or estimated value of the goods, on the date of default" – which, in the case of the non-acceptance of goods, most naturally refer to the realisable value of the unaccepted goods left on the seller's hands in Mundra, India on the date of default, and not some theoretical goods purchased on that date for carriage from their port of origin to Mundra.

2. The fact that sub-clause (c) expressly permits the value of the goods under that sub-clause to be determined by the price at which the seller actually resold those very unaccepted goods, by reference to sub-clause (a). Since those goods were Customs-cleared and located in Mudra, their sub-clause (a) value would have been the price for Customs-cleared goods on the domestic market in Mundra, not the constructed theoretical cost adopted by the tribunal.

3. Other dicta in ***Bunge SA v Nidera BV*** to the effect that the "notional substitute contract" assumed by sub-clause (c) is one for deemed mitigation, which in the case of non-acceptance naturally involves the resale of the goods by the buyer where they are on the date of default – in this case, in Mundra, India.

4. Dicta of the Court of Appeal in ***The Selda*** [1999] 1 Lloyd's Rep. 729 suggesting that the relevant market under the Default Clause in the case of non-acceptance of goods is the market at the discharge port, where the unaccepted goods are actually located on the date of default.

The precise impact of this ruling on future cases remains to be worked out. Its "headline" effect would appear to be that the parties will now have to adduce evidence of the theoretical cost of buying identical goods and shipping them from their port of origin to their discharge port on the default date, even if there is an available market on that date for the sale of such goods; it is respectfully submitted that such a result is uncommercial and unlikely to have been the intention of the drafters of the Default Clause. Given the pervasive use of GAFTA standard form contracts containing the Default Clause in the grain trade, the proper construction and effect of the Default Clause warrants consideration by the Court of Appeal. It remains to be seen whether the Learned Judge will grant the buyer permission to appeal to that Court.

Chirag Karia QC of Quadrant Chambers (instructed by Saurabh Bhagotra and Daniel Powell of Zaiwalla & Co Ltd) acted for the appellant buyer, Sharp Corp Ltd.

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Chirag Karia QC is a leading commercial silk with a broad commercial, international arbitration, energy, shipping and international trade practice. He appears regularly in the Commercial Court, the Court of Appeal and international arbitrations. He is listed as a 'Leading Silk' for Shipping and Commodities disputes by Chambers UK, Chambers Global, The Legal 500 UK, The Legal 500 Asia Pacific and Who's Who Legal and for Commercial disputes by Legal 500 EMEA.

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