Court of Appeal considers GAFTA default clause and damages for non-acceptance of goods (Sharp v Viterra)

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Commercial analysis: The Court of Appeal's decision in ***Sharp Corp Ltd v Viterra BV*** provides the first appellate-level authority on the quantification of damages under sub-clause (c) of the GAFTA standard form contract default clause for non- acceptance of goods by the buyer. The Court of Appeal held that 'the actual or estimated value of the goods, on the date of default' under sub-clause (c) must be measured by positing a notional substitute contract on the same terms as the parties' contract, save as to price, on the date of default. Prior to the default, the parties had varied the terms of their two contracts to effectively convert them from C&F free out sales into ex warehouse sales of landed and customs cleared goods on instalment payment terms. Since the GAFTA Appeal Board had valued the unaccepted goods on a C&F free out basis, the Court of Appeal remitted the Award to the Board to value those goods on the alternative ex warehouse basis.

Sharp Corp Ltd v Viterra BV *(previously known as* ***Glencore Agriculture BV****)* [2023] EWCA Civ 7

What are the practical implications of this case?

The practical implications of this ruling remain to be worked out in future cases. However, particularly in cases of non-delivery or non-acceptance of ascertained goods, the requirement that those goods must be valued by positing a notional substitute contract as a surrogate for their value, rather than simply valuing those goods 'as is where is' on the date of default, is likely to lead to unnecessary complexity in many disputes. The effect of the Court of Appeal's decision would appear to be that parties in similar cases will now have to adduce evidence of the price hypothetical parties would likely have agreed under a hypothetical contract concluded on the date of default for the purchase or sale of identical goods on the same terms as those that the breached contract had on that date. Arguably, this ruling leads to an uncommercial result that the drafters of the default clause are unlikely to have intended.

What was the background?

The buyer had purchased consignments of Canadian Lentils and Yellow Peas from the seller C&F Free Out Mundra, India, which goods were shipped from Vancouver, Canada. In June 2017, before the buyer had paid the purchase price, the parties agreed that the buyer would discharge, customs clear and store the goods in a warehouse at Mundra, but not remove them from the warehouse without the seller's written consent. The parties then further varied the contracts to provide that the buyer would pay for the goods in instalments, but to take delivery of the whole of each consignment upon paying the first instalment for that consignment.

In November and December 2017, after the goods had already cleared customs, the Indian Government imposed import tariffs of 50% on the peas, and 30.9% on the lentils. The buyer was found liable to the seller for non-acceptance of the goods as a result of its failure to pay their purchase price. The tribunal found 'the date of default' under the default clause to be 2 February 2018 and that the imposition of import tariffs after the goods had been customs-cleared had undoubtedly caused the value of those customs-cleared goods left in the seller's hands to increase.

When it came to the quantification of damages, sub-clause (c) of the default clause required the tribunal to determine 'the actual or estimated value of the goods, on the date of default'.

As the goods were landed, customs-cleared and at the discharge port of Mundra on the date of default, the buyer argued that sub-clause (c) required the goods to be valued on the domestic Indian market for customs-cleared goods at Mundra.

The GAFTA Appeal Board instead accepted the seller's argument that 'the actual or estimated value of the goods' under sub-clause (c) fell to be determined by constructing a theoretical C&F free out 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 yielded prices/values for the goods left in the seller's hands that were 25%–30% lower than those prevailing on the domestic market for customs-cleared goods in Mundra on that date. The practical effect of the tribunal's decision was to award the seller default damages of US$5,067,000, whereas it would have received only US$1,428,000 if the tribunal had valued the unaccepted goods on the domestic market in Mundra, where the goods in fact were on the date of default. Thus, the seller was US$3,639,000 better off as a result of that decision.

Mr Justice Jacobs granted the buyer permission to appeal that ruling to the Commercial Court, finding it to be 'open to serious doubt' and, if necessary, also 'obviously wrong'. The Commercial Court, however, upheld the Award, but granted the buyer permission to appeal to the Court of Appeal.

What did the court decide?

The Court of Appeal first held that, in the case of non-acceptance of goods by a buyer, the seller's recoverable loss under sub-clause (c) of the GAFTA default clause is not to be measured by reference to the value of the goods left on the seller's hands 'as is where is', but instead 'by reference to a notional substitute contract entered into on [the default] date on identical terms save as to price.' Popplewell LJ, delivering the only reasoned judgment of the Court, based his conclusion on certain statements from the judgments of Lords Sumption and Toulson in ***Bunge SA v Nidera BV*** [2015] UKSC 43, [2015] 2 Lloyd's Rep. 469 which he accepted were *obiter* because the construction and working of sub-clause (c) was not directly relevant to the questions that Supreme Court decided in ***Bunge***. Nevertheless, he ruled that those statements had been advanced by way of general principle and therefore fell to 'be transposed to the context of the present case'. To that extent, he approved the approach of Mrs Justice Cockerill below.

However, he disagreed with the judge below and the GAFTA Appeal Board as to the terms that the notional substitute contract used to value the unaccepted goods should have. He held that that notional contract should be on exactly the same terms as the contracts had on the date of default, ie that it should be for the sale of customs-cleared goods ex warehouse with payment on instalment terms. Since the GAFTA Appeal Board had posited a notional contract on C&F free out terms instead, the Court of Appeal remitted the Awards to the Board for reassessment of the quantum of the seller's loss under sub-clause (c) using the correct notional contract—one for the sale of customs-cleared goods ex warehouse.

With respect to the Court of Appeal, GAFTA being a trade organization, it is perhaps unlikely that the drafters of the GAFTA default clause would have intended the determination of 'the actual or estimated value of the goods' left in the seller's hands under clause (c) to involve such a convoluted and hypothetical exercise. It is maybe more likely that GAFTA, being a trade body, would have intended those words to have the simple, and easy to quantify, meaning of the value of the goods wrongfully left in the seller's hands 'as is where is'. In that way, the value of the asset left in the seller's hands can be assessed and deducted from the contract price that it would have received but for the buyer's breach so as to yield the seller's true commercial loss.

It is also questionable whether the Supreme Court's discussion of notional substitute contracts is applicable outside the context of sale contracts prematurely terminated by reason of one party's anticipatory or repudiatory breach. Indeed, both Lord Sumption and Lord Toulson repeatedly pointed out that special rules applied to cases of the premature termination of the contract, which is what ***Bunge*** involved.

Be that as it may, subject to permission being granted to the seller to appeal to the Supreme Court, the Court of Appeal's ruling on the proper construction of sub-clause (c) is likely to be the last word on the question for some time. Commercial parties, trade representatives and legal advisors will have to adapt to quantifying losses under the default clause by positing notional sales based on very specific terms rather than simply seeking to value goods where and as they are. That will likely lead to more disputes and more cases coming to the courts.

Case details

» Court: Court of Appeal, Civil Division

» Judge: Lady Justice Asplin, Lord Justice Popplewell and Lord Justice Phillips

» Date of judgment: 11 January 2023

Chirag Karia KC was instructed by Saurabh Bhagotra at Zaiwalla & Co Ltd.

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Chirag Karia KC 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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