Neutral Citation Number: [2024] EWHC 479 (Comm)

Claim No: LM-2023-000012

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 05/03/2024

Before :

HIS HONOUR JUDGE PEARCE
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

AYHAN SEZER YAG VE GIDA ENDUSTRISI TICARET LIMITED SIRKET	**Claimant**
- and -	
AGROINVEST SA	**Defendant**

- -
- -

Mr PAUL TOMS (instructed by **PENNINGTONS MANCHES COOPER LLP**) for the **Claimant**
Mr DAVID SEMARK (instructed by **KEYSTONE LAW LIMITED**) for the **Defendant**

Hearing dates: 11 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 05 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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His Honour Judge Pearce :

INTRODUCTION

1. This is an Arbitration Claim arising from an award ("the Award") by a Board of Appeal of the Grain and Feed Trade Association ("GAFTA") on an appeal from the First Tier Tribunal ("the FTT") . The award was made by Ms S Bell, Ms S Kosorog, Mr B Tappy, Mr D Lucas and Mr P G Davies ("the Board"). It is dated 18 November 2022 and identified as "Appeal Award No. 4646."

2. The underlying contract to which the Award related ("the Contract") involved the sale of rape meal and soybean meal by the Defendant to the Claimant. The contract was concluded on 2 April 2018. By the award, the Board determined that the Claimant was in repudiatory breach of contract by an email dated 27 April 2018, accepted by the Defendant on 7 May 2018. The Board determined that the Defendant was entitled to damages in the sum of US$484,921.29 calculated by reference to evidence adduced by the Defendant and based on the date of default as found by the Board; but that this claim was extinguished by the prepayment of US$494,500 ("the Advance Payment") made by the Claimant, described in the Contract as an "advance payment/guarantee", which the Defendant was entitled to retain.

3. The claim is brought on two questions of law:

    a. What was the "date of default" for the purpose of clause 23(3) of the Grain and Feed Trade Association contract 100 ("GAFTA 100")?

    b. On the true construction of the contract between the parties, was the Advance Payment non-refundable in the event of breach on the part of the Claimant?

4. Permission to bring the claims on both grounds was granted by HHJ Pelling KC on 27 April 2023.

5. The matter came before me for hearing on 11 December 2023, when I reserved judgment.

EVENTS LEADING TO THE CONCLUSION OF THE CONTRACT

6. It is common ground that the Contract was on the terms annexed to an email of 2 April 2018. The relevant background to the entering conclusion of the contract is as follows:

    a. On 22 March[1], the Defendant sent to the Claimant a draft contract including the terms later annexed to the email of 2 April as to payment and shipment. Those terms were:

        i. In respect of shipment:

        "*1st vessel – prompt*

[1] Hereafter, in referring to dates relating to the conclusion of the contract and its subsequent repudiation, I shall omit the year since all events happened in 2018.

About 1,200 – 2,000 MT +/- 10% Sellers' option, EU Non Gmo[2] Soybean Meal in bulk
About 1,500 MT +/- 10% Sellers' option, EU rape meal in bulk.
2nd vessel – 15 April – 15 May 2018

Balance quantity of EU Non Gmo soybean meal in bulk."

ii. In respect of payment:

"a. US$494,500 advance payment/guarantee upon signing of the contract.

" b. net cash by bank transfer within 24 hours from presentation of e-mailed/fax copies of shipping documents (as described hereinafter) and in any way before breaking bulk".

b. The contract incorporated the standard terms of GAFTA Contract No. 100, including:

"*23. 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 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) above 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 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…"

c. On 23 March, the Claimant sent the Advance Payment to the Defendant. It is common ground that this sum was paid pursuant to the term referred to in paragraph (a)(ii) above as "*advance payment/guarantee.*" However at this stage, contractual terms had not been finalised and there followed a debate about whether the meal would be treated as non-GMO in Turkey.

d. On 26 March, the Defendant sent another version of the contract to the Claimant to be signed and stamped.

e. On 27 March, the Claimant asked the Defendant not to charter a vessel for the meal before they had seen the draft contract from the Claimant. Later on the same day, the Claimant sent their comments on the contract to the Defendant, adding the comment:

[2] Genetically modified organism

> *"Please note that we have paid the mentioned 492,500 USD as deposit to your side, before contract. In case we cannot agree on the contract, you return the said amount to our bank account."*

f. The Defendant responded to the Claimant's comments and, on 28 March, the Claimant first sent a holding message reiterating that the Defendant should not charter a vessel until the terms had been agreed (to which the Defendant responded that they had a vessel outside the intended load port and that the owners were in a hurry to conclude the trip) then later responding to the Defendant's comments on the contract.

g. On 29 March, the Defendant emailed the Claimant with further comments on outstanding matters to be resolved in respect of the wording of the contract, but prefacing the message with:

> "*According to my understanding, when we concluded the business and further more when you remitted the advance payment of US$494 500. I considered that it was fully booked and I released my alternative Buyer to buy from elsewhere. That means that, we have to find together the details of the contract and there is no other way."*

h. There were further discussions on 30 March, including an email from the Defendant to the Claimant in the following terms:

> "*After we concluded the business and moreover, after collecting the 20% down payment, the foods of the 1st shipment have been transferred to the loading station of our port facility and they should be loaded shortly.*
>
> *I'm receiving big pressure from the port administration to charter the performing vessel and arrange the soonest removal of the goods from the loading stating. We have put in the contract everything according to our agreement and we have made all the possible amendments according to you wish. There is no room for further changes in our contract.*
>
> *1st thing next Monday, we have to arrange chartering of a spot vessel for removing the goods from the loading station."*

i. On 2 April, the Claimant sent to the Defendant the document upon which it is agreed that the contract was concluded.

EVENTS LEADING TO REPUDIATION

7. The Board found that the Contract was repudiated by the Claimant. This finding is not challenged, albeit that the findings as to the date of default under the contract and, by implication, the date of its repudiation are challenged. The relevant events following the conclusion of the contract are as follows:

a. On 4 April, the Claimant wrote to the Defendant:

> "*We regretfully see that nothing we write can be understood.*

> *Please note that we have not sent the stated amount to your side definitely for this contracts realization. Amount is of course in accordance with the contract-to-be's price, quantity and advance percentage but we had made no comment on your contract text at the time of payment and stated from the beginning, the amount is paid "in case we agree." It is not necessarily advance payment definitely for this negotiation.*
> *It seems that we can not agree in this business; therefore, we request you to return the paid amount to us (everything we wrote about trust, friendship etc is still valid; this is not a sudden reaction but repeating one of the probabilities stated before)."*

b. On 6 April, the Claimant again requested repayment of the Advance Payment.

c. On 13 April, the Defendant wrote to the Claimant with details of the pre-shipment analysis of the products and suggested loading a quantity of soybean meal as soon as possible. However the Claimant continued to request repayment of the Advance Payment.

d. On 27 April, the Defendant provided further reports to the Claimant supporting the contention that the soybean meal was non-GMO, saying that they would advance the chartering of the performing vessel.

e. The Claimant replied on the same day:

> "*Please definitely not attempt the charter a vessel or any action to send these goods to us; you would cause huge and terrible happenings. Please return the amount we have paid to your side, to our bank account. Mr Sezer has been informed of your below e-mail and report and above are his comments. Please return the amount to us and provide us with the relevant information. This is the only way all these can finalize*."

f. On 2 May, and again on 4 May, the Claimant demanded repayment of the Advance Payment.

g. On 7 May, the Defendant replied:

> "1) *The down payment foreseen and been effected as per our contract, is not refundable.*
> *2) We kept good notice of your refusal to receive, for your own reasons, the contracted non-gmo soybean meal.*
> *3) We suggest to deliver instead, regular gmo soybean meal at our contract price.*
> *4) Otherwise, we might wash out our contract for a fee to be agreed."*

PROCEEDINGS BEFORE THE FTT

8. The Claimant brought arbitration proceedings seeking repayment of the Advance Payment. In those proceedings, the Claimant accepted that it had renounced or repudiated the contract but contended that the Advance Payment was repayable. The Defendant defended that claim on the basis that the Advance Payment was a non-

refundable deposit and/or it had suffered loss and damage by reason of the Claimant's repudiation/renunciation of the Contract which entitled it to retain the Advance Payment.

9. The FTT held that the Advance Payment was refundable; that the date of default was 7 May, this being the date on which the Claimant's repudiation was accepted; and that the Defendant had failed to prove it had suffered any loss by reference to the date of default of 7 May.

10. The Defendant appealed the decision of the FTT.

PROCEEDINGS BEFORE THE BOARD

11. The Board heard the appeal over 2 days. No oral evidence was given.

12. The Defendant argued before the Board that:

    a. The true date of default was 16 May, that being the last possible date on which the Defendant, as seller, could permissibly perform its obligations under the Contract by shipping the goods. However, it was content to proceed on the basis that the date of default was 7 May (as found by the First Tier Tribunal) because nothing turned on the difference between 7 May and 16 May in respect of the assessment of damages.

    b. The communication contended for by the Claimant as being repudiatory and therefore being the date of default, 4 April, was not a sufficient unequivocal refusal to perform the contract so as to amount to repudiation/renunciation.

    c. Its losses calculated by reference to a default date of 7 May were US$501,414.77; and

    d. The Advance Payment was non-refundable.

13. Before the Board, the Claimant argued:

    a. The date of default was the date on which it repudiated or renounced the Contract, namely 27 March (when the Claimant asked the Defendant not to charter a vessel).

    b. In the alternative, the Claimant's case within its skeleton argument was that the date of default was 7 May.

    c. In the hearing before the Board, the Claimant argued for an alternative date of default as 4 April, on the basis that its communication of that date was repudiatory - see Award at [5.34].

    d. The Advance Payment was refundable.

14. As noted above, it was common ground that the Contract was on the terms contained in and annexed to the email of 2 April. The Board found that the Claimant repudiated the contract by its message of 27 April as referred to at paragraph 7(e) above and that the repudiation was accepted by the Defendant in its message of 7 May referred to at

paragraph 7(g) above. It rejected the Claimant's argument that the message of 4 April was a repudiation. In consequence of those findings, the Board found that the date of default under the contract was 7 May.

15. The reasoning in this respect appears at [5.37] of the Award:

> "… w*e do not accept that Buyers' message of 4 April 2018 met the threshold of a repudiation. Sellers' response on 7 May 2018 to Buyers message of 27 April 2018 was the clearest indication of an acceptance of Buyers' repudiatory breach together with Sellers' apparent conduct in taking no further steps in the Contract. We therefore FIND that the date of default is 7 May 2018*."

16. The Board found that, on the true meaning of the Contract, the Advance Payment was non-refundable, determining the function of the "advance payment/guarantee" to be:

    a. As to "advance payment," at [5.21], "*a deposit, paid in the normal course of business to secure the goods…We dismiss the linguistic distinctions that have been argued between Deposit and Advance Payment. The commercial reality of the parties' intentions in agreeing to this term was to provide business efficacy to the Contract* "

    b. As to "guarantee," at [5.22], "*to provide security to Sellers for Buyers' performance. In circumstances where Buyers defaulted, that cannot be attenuated as Buyers would have* it":

THE LAW

17. The Claimant's right to appeal to the court on a question of law arises pursuant to Section 69 of the Arbitration Act 1996. Such an application is subject to the filter of requiring leave. Under section 69(3), leave will only be granted:

> "*if the court is satisfied—*
>
> *(a) that the determination of the question will substantially affect the rights of one or more of the parties,*
>
> *(b) that the question is one which the tribunal was asked to determine, (c) that, on the basis of the findings of fact in the award –*
>
> *(i) the decision of the tribunal on the question is obviously wrong, or*
>
> *(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*
>
> *(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.*"

18. In considering a challenge to an arbitration award, the court's starting point is to seek to uphold it. As Bingham J said in Zermalt Holdings SA v. Nu-Life Upholstery Repair Ltd [1985] 275 EGLR 1134:

> "*As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the object of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it."*

Tomlinson LJ in MRI Trading v. Erdenet [2013] 1 Lloyd's Rep. 638 at [23] said that this passage was "*the classic exposition*" of "*the deference due to arbitral awards*".

19. The primary question for the Court is therefore whether the Board's Award can be read in such a way so as to lead to the conclusion that the Board did in fact apply the correct legal test to both questions. If the answer is "yes" on the questions on which permission to appeal has been given, then the Appeal must be dismissed on that question.

20. Where the relevant findings being appealed are mixed findings of fact and law, "*there will only be an error of law if the tribunal misdirected itself or no tribunal properly instructed as to the relevant law could have come to the conclusion reached*" - see Russell on Arbitration, 24th ed. 2015 at [8-139], citing CTI Group Inc v. Transclear SA [2007] EWHC 2340 (Comm). In that case, Field J said at [13]:

> *"…where, as here, the tribunal has rejected the grounds relied on, the respondent must in my judgment show that in doing so the tribunal erred in law so that, if any of the relevant findings are mixed findings of fact and law, there will only be an error of law if the finding fails the Edwards v Bairstow test that the tribunal misdirected itself or no tribunal properly instructed as to the relevant law could have come to the determination reached. To accept Mr Nolan's submission and decide de novo a question of mixed fact and law decided by the tribunal would be to act contrary to the clear policy of the Act which is to limit severely the grounds on which the reasoning in arbitral awards can be challenged. And it matters not, in my opinion, that it was strictly unnecessary for the tribunal to give the reasons it did for rejecting the ground or grounds sought to be relied on by a respondent to uphold the award*."

21. The essential question is whether the arbitrators erred in ascertaining the correct legal principle. As the editors of Merkin on Arbitration Law put it at [21.9]

> *"…a distinction is to be drawn between a question of law and an error of law in applying that question to the facts. It is now established that an error of law is one by the arbitrators in ascertaining the correct legal principle to be applied to the factual issues in the dispute, and not the incorrect application of the proper legal principle. If, therefore, the arbitrators have correctly stated the law, and have proceeded to misapply it to the facts, there is no basis for an appeal unless it is apparent from the reasoning that the arbitrators in their purported application of the legal principle failed to understand it correctly. The distinction between error of law and error of application was drawn in Northern Elevator Manufacturing Sdn Bhd v. United Engineers (Singapore) Pte Ltd (No 2) [2004] 2 SLR 494, where the arbitrator had allegedly erred in his application of settled principles relating to the assessment of damages. The Singapore court noted that:*

> *'To our mind, a "question of law" must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere "error of law" (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.'*
>
> "*In Benaim (UK) Ltd v. Davies Middleton & Davies Ltd [2005] EWHC 1370 (TCC), HHJ Coulson QC approved the reasoning in Northern Elevator and held that the distinction between misapplying the correct law, and failing to apply the correct law, represented the position in England. Accordingly, as long as the arbitrators have applied the correct legal principle and the correct burden of proof, there is no error of law. It may of course be the case that a failure to apply the law correctly could be evidence that the arbitrator did not properly understand the law, and so the diversion from the law must be within the permissible range of solutions open to the arbitrator*."

22. In dealing with the issue relating to the construction of the contract, the following principles are to be drawn from the authorities leading up to (and summarised in) Arnold v Britton [2015] 1 AC 1619:

    a. The court's concern is to identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*" – Lord Hoffmann in Chartbrook v Persimmon [2009] AC 1101 at [14].

    b. The court does this by assessing the meaning of the relevant words in light of the natural meaning of the particular clause, any other relevant provision in the contract, the overall purpose of the clause and the contract, the facts and circumstances, known or assumed by the parties at the time the document was executed and commercial common sense - – Arnold v Britton at [15].

    c. However the court disregards subjective evidence of any party's intentions – Arnold v Britton at [15].

23. In applying these principles, the court must bear in mind the seven factors referred to in Arnold v Britton at [17] – [23]. Four of these are of potential relevance here:

    a. Reliance on commercial common sense and surrounding circumstances should not undervalue the importance of the language actually being construed - Arnold v Britten at [17]

    b. The less clear the clause is drafted, the more ready the court will be to depart from the words' natural meaning - Arnold v Britten at [18];

    c. Commercial common sense should not be invoked retrospectively - Arnold v Britten at [19];

    d. A court should be slow to reject the natural meaning of the words used simply because the term may seem to be very imprudent for one of the parties to have agreed – Arnold v Britten at [20].

24. It is valuable to bear in mind two points made by Lord Hodge in his judgment in Wood v Capita Insurance Services [2017] UKSC 24 at [11]:

    a. Where there are potentially rival meanings of a clause, the court can "*give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense;"* but

    b. "*in striking a balance between the indications given by the language and the implications of the competing construction the court must consider the quality of the drafting of the clause."*

25. As Lord Hodge put it at [13] of his judgment in Wood v Capita:

> *"Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in Sigma Finance Corpn [2010] 1 All ER 571 at [10], assists the lawyer or judge to ascertain the objective meaning of disputed provisions."*

SUBMISSIONS – DATE OF DEFAULT

26. The Claimant contends that the Board erred in law in its finding that the date of default was 7 May. That determination turned on the question of when the Claimant's repudiatory breach was accepted. However, the Claimant says that, on a proper examination of the authorities, this determination was legally flawed, since the question of the date of default in GAFTA 100 is determined by the date of the repudiation itself, not the date of acceptance of the repudiation.

27. The Claimant notes that the Defendant itself did not advocate that the date of default was 7 May, but rather 15 May, being the last date on which the Defendant as seller could permissibly perform its obligations under the contract. The Claimant therefore contends that the Defendant is not seeking to uphold the Board's determination, but is simply accepting that date because, on the evidence before the Board, the difference between those dates made no difference to the calculation of damages. The Claimant says at [43] in its skeleton argument that "*the Defendant appears to accept that the*

Board did indeed err in holding that the 'date of default' was the date upon which the renunciation/repudiation was accepted."

28. The Claimant accepts that it is in breach of contract by its repudiation/renunciation of the contract. It is common ground that this repudiation is anticipatory in the sense that, whichever of the Claimant's communications is taken to be the repudiation/renunciation, it occurred at a time when the Claimant was not itself in breach of contract through non-performance of its obligations – it had paid the Advance Payment and its next obligations under the contract did not arise until delivery.

29. In arguing that the date of default in the case of a repudiatory breach of contract is the date of the repudiation, not (at least in the case of an anticipatory repudiatory breach), the date of the acceptance of the repudiation, the Claimant relies on two first instance decisions:

    a. The judgment of Goff J in Toprak v Finagrain Compagnie Commerciale [1979] 2 Lloyd's Rep 98 as approved by the Court of Appeal under the same citation.
    b. The judgment of Beatson J in Thai Maparn Trading Co Ltd v Louis Dreyfus Commodities Asia Pte Ltd [2011] 2 Lloyd's Rep 704.

30. In Toprak, a contract of sale stipulated for shipments to start on May 10 and to continue in June and July. The Buyer was required to procure a letter of credit by 31 March. The Buyer failed to do so, but the Seller did not hold the Buyer in default until 30 April. The relevant default clause in the contract was that of GAFTA form 27:

> "*In Default of fulfilment of contract by either party, the other, at his discretion, shall, after giving notice in writing, have the right to sell or purchase, as the case may be, against the defaulter, who shall make good the loss, if any, on such sale or purchase. If the party liable to pay shall be dissatisfied with the price of such sale or purchase, or if the above right is not exercised, the damages, if any, payable by the party in default shall be settled by arbitration and such damages in the absence of special circumstances shall not exceed the difference between the contract price and the market price (or its equivalent as found by the Arbitrators or the Court of Appeal) on the day of default, and nothing contained in or implied under this contract shall entitle the Buyer to any damages in respect of any loss of profit suffered or liability incurred by him upon any sub-contract. Where, however, any special circumstances, in the opinion of the Arbitrators or Court of Appeal, exist, the latter may, in their or its sole and absolute discretion, award to the Buyer such sum in respect of loss of profit so suffered or liability so incurred as they or it shall think fit. In the event of default in shipment or delivery, any damages shall be computed upon the mean contract quantity*."

31. Goff J considered the argument that "default of fulfilment" required an acceptance of repudiatory breach. He said:

> *"[The sellers] submitted first that, having regard to the opening words of the clause, 'In Default of fulfilment' here must mean a default in fulfilment of the contract; and that there is no default in fulfilment of the contract until there is an acceptance of the repudiation, because until that point of time the contract is still open. I cannot accept that argument; the words "in default of fulfilment of contract" mean precisely what they say — a failure to carry out the contract on the due date."*

32. As to an alternative argument that there were two breaches of contract by the buyers, one on 31 March and one on April 30, and that it was open to the sellers to accept only the second breach as repudiatory such that the relevant date of default was 30 April, Goff J said:

> *"I do not however think that it is open to the sellers to pick and choose in this way for present purposes, In many cases, one default by a contracting party is followed inevitably by a number of others; and the innocent party cannot, I think, simply obtain the benefit of a later date by pointing to a later default which has occurred before the acceptance of the repudiation.*"

33. The Claimant concedes that the first breach in Toprak was a breach of an obligation to perform rather than a repudiatory breach by threatening non-performance in the future, but points out that the second breach was indeed anticipatory in nature yet the argument proceeded on the assumption that, had the second breach in fact been the first in time, the date of that repudiatory breach would have been the date of default. On this basis, the Claimant says that Toprak supports the following propositions:

    a. The date of a repudiatory breach is the "date of default."
    b. Where there is an anticipatory repudiatory breach of contract, the "date of default" is the date of that breach.
    c. Where there is more than one breach, the "date of default" is the date of the first in time.
    d. The "date of default" is not the date upon which a repudiation is accepted.

34. In Thai Maparn, the Court was concerned with two contracts of sale which were subject to a GAFTA standard form containing the same default clause as here. The same issue arose on each contract. The relevant facts of one were that the shipment period was 1 February 2008 to 31 March 2008. The buyers were required to give 7 working dates pre-advice of the Vessel's estimated time of arrival. The buyers gave notice on 7 March to the sellers of the expected arrival date, namely 11 March, and stated that they expected the sellers to bring the cargo alongside on 17 March at the latest. (That notice of course failed to comply with the 7 working days requirement.) On 13 March, the sellers stated that "*we are not ready with cargo and printed bags, and hence, we cannot accept your above nomination.*" On 8 April, i.e. after the expiry of the shipment period, the buyers accepted the sellers' message as a repudiation of the contract. The GAFTA Board of Appeal held that the message of 13 March was an anticipatory repudiatory breach and the date of default was 14 March, the day following the repudiatory message.

35. The sellers sought to challenge the Board's determination contending that their conduct was not repudiatory because of the failure to comply with the 7 working days' notice obligation and that the Board had erred in finding that the date of default was to be determined by the date of the repudiation/renunciation of the contract, rather than the date of acceptance. Both arguments failed before Beatson J. The first is of no significance to the issue in the case, but on the second, the reasoning of Beatson J is, the Claimant contends, considerably persuasive because he was dealing with an anticipatory repudiatory breach. The Judge accepted that it was open to the Board to conclude that the message of 13 March was repudiatory in nature. As to the argument of Mr Young, counsel for the sellers, that such an anticipatory repudiatory breach was not itself determinative of the date of default unless accepted, he said:

> *"[27]…Mr Young submitted that the contracts remained open for performance until the buyers accepted the sellers' repudiation, and that the date of that acceptance is therefore the date of default. It followed, he argued, that, since in award 4188, that date was after the end of the shipment period, and in award 4196 it was the last day of the shipment period, and the buyers had not tendered notice of readiness at all or, in award 4196, provided written advice of ETA within seven days of the end of the shipment period, only nominal damages could be awarded. This argument is, however, not consistent with the decision in Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financiere SA [1979] 2 Lloyd's Rep 98.*
>
> *"28. In Toprak v Finagrain the "date of default" in an equivalent GAFTA default clause, clause 28 of GAFTA 27, was held to mean the date of the breach not the date on which such breach is accepted as repudiatory by the other party. Both at first instance and in the Court of Appeal it was clear that the reason in that case that a later date was taken on the particular facts of that case was because the buyer in default had sought and obtained an indulgence from the innocent sellers: see Robert Goff J at page 110, Lord Denning MR at page 115 and Roskill LJ at pages 116 and 117. Robert Goff J (whose judgment was described by Roskill LJ as "admirable") stated (at page 109 col 1) that "subsequent actions of the parties may have some effect upon their respective rights", and gave the examples of an agreed postponement of the contractual date for performance, estoppel, and forbearance. But he distinguished those scenarios from the position where the innocent party does not immediately treat the other party as in default, but decides to wait for a time, and while he waits the contract remains open to performance. He stated (page 109 col 2) that "the mere fact that he waits, and does not treat the other party as in default until a later date, does not mean that, for the purposes of [clause 28 of GAFTA 27] the 'date of default' is changed; that date remains the day when the time for performance came and went without due performance."*

36. Since Beatson J was dealing with a case of anticipatory repudiatory breach in Thai Maparn, the judgment is only consistent with the proposition that, just as in the case of breach by failure of performance of a contractual obligation, the date of default in the case of anticipatory repudiatory breach is the date of the breach itself, not of acceptance of the breach.

37. Applying this principle to the facts of the instant case, the Claimant contends that it was not open to the Board as a matter of law to find that that the date of default was 7 May, the date of acceptance of the repudiatory breach, rather than the date of the repudiatory breach itself.

38. As to the date of the repudiatory breach, the Claimant contends that the first repudiation of the contrary was by its communication of 4 April. In support of this, I am referred to on a passage from Chitty on Contracts, 35th Ed^{n}, at 28-048, for a description of renunciation:

> *"A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect … An absolute refusal by one party to perform his side of the contract will entitle the other party to terminate further performance of the contract … Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the*

party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions".

39. The Claimant contends that the email of 4 April was an absolute refusal to perform the contract, since it was clearly stating the contract was at an end, consistent only with such a refusal, and further required repayment of the Advance Payment which was not consistent with any further performance of the contract or payment for the goods in accordance with the contract. The communication of 27 April (which the Board found to be repudiatory) was no more nor less absolute in its refusal to perform than the communication of 4 April. In those circumstances, the Board should have found the earlier communication to be the repudiatory breach and hence the date of default.

40. In response to the Claimant's arguments, the Defendant's first point is that the Claimant, in its skeleton argument prepared for the purpose of the appeal before the Board, accepted 7 May as an alternative position to its primary argument that the date of default was 27 March. This is recorded in the Award at [5.32]. On the other hand, the Claimant did not argue for 4 April as the date of default. The Defendant contends that it cannot now be open to the Claimant to seek to impeach its own line of argument by saying that 7 May was not a date open to the Board to find as being the date of default, whereas 4 April is available, since the very fact that the Claimant argued for 7 May as an alternative date demonstrates that the acceptance by the Board of that date cannot involve it either having misdirected itself or having reached a conclusion that no tribunal properly instructed as to the law could reach – see CTI Group Inc v. Transclear SA, cited above.

41. Turning to the Claimant's argument that the date of default was to be determined not by the date of the anticipatory breach itself but by the date of acceptance of that breach, the Defendant cites the well-known passage from the judgment of Asquith LJ in Howard v Pickford Tool Co [1951] 1 KB 417: "*An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind*." The Defendant contends that an anticipatory refusal to perform such as here cannot therefore be the date of default. It argues that there is nothing in either Toprak or Thai Maparn that would support the finding that the date of default in a contract governed by GAFTA conditions is the date of repudiatory breach since those were cases concerned with actual default by the party in breach, in one case the failure to open a letter of credit, in the other the failure to give notice of the estimated time of arrival.

42. In any event, the Defendant relies on the judgment of Lord Sumption JSC in Bunge SA v Nidera BV [2015] 2 Lloyds Rep 469 at [28(3)] in support of the proposition that "date of default" in the GAFTA default clause means "*the date of the 'default of fulfilment' referred to in the opening words of clause 20, i.e. the date on which the contract should have been "fulfilled" by performance in accordance with its terms*."

43. In Bunge v Nidera, the Supreme Court was concerned with clause 20 of GAFTA 49 which in all material respects is the same as the clause with which we are concerned here. The manner in which that clause operated was not directly in issue before the Court, but, in his judgment at [28], Lord Sumption identified that the date of default was the date of default of fulfilment in the terms noted above.

44. As to the date of fulfilment, the Defendant argues that it was 15 May, being the last permissible date on which the Contract could have been properly performed in

accordance with its terms. However it would be pointless to remit the case to the Board on this basis since the loss would, on the evidence, be no different than if based on the date of 7 May applied by the Board.

45. As to the date of repudiatory breach, the Defendant contends that the Board's finding that the message of 4 April was not repudiatory because it was "*not a sufficient and unequivocal refusal to perform the contract"* (see the Award at [4.109]) was one that was clearly open to it.

46. In any event, even if the date of default were correctly calculated as 4 April, as contended for by the Claimant, the findings of fact of the Board must lead to the conclusion that the Defendant's losses would have been no different. The Defendant points in particular to the following:

    a. The Board found that the non-GMO rape meal and non-GMO soybean meal were niche commodities which traded in an illiquid market.
    b. At [5.56] of the Award, the Board found that, *"[g]iven the circumstances of an unavailable niche market,*" the dates of resale of the parcels (being 29 June in respect of the soybean meal and probably before 5 July in respect of the rape meal), "*being within 9 weeks of the date of default, were not too remote for us to establish on a balance of probabilities the estimated market values of both products and the loss that Sellers incurred."* There is no reason to conclude that an earlier date of default would have led to any different calculation, in the context of an illiquid market in the products.
    c. The Board relied in coming to this conclusion on the evidence of the Claimant's own broker "*who could find nothing* (sc. by way of resale market for the goods) *after March 2018 and nothing at all for the rape meal*."
    d. The Board's finding at [5.57] that the Defendant was forced by the Claimant's default to hold the goods for an extended period of time was therefore implicitly but necessarily also a finding that they could not have been sold at any earlier date, whether 4 April or 7 May.
    e. The Board found that storage charges should be brought into account because sub-clause 23 (c) expressly provides that "*the damages payable shall be based on, but not limited to, the difference between the contract price and … the actual or estimated value of the goods, on the date of default…"* Those storage charges would have been incurred in the case of the earlier date contended for by the Claimant.

47. On the issue of the application of the judgment of Lord Sumption in Binge v Nidera, the Claimant replies that there are several difficulties:

    a. Bunge v Nidera in fact proceeded on the common ground that the date of default was the date of acceptance of repudiatory breach - see the judgment of Lord Sumption at [4] where he notes that it was agreed that "*the date of default for the purpose of clause 20(c) was 11 August 2010, when the sellers' repudiation was accepted*." In fact, as at that date, there was no "default of fulfilment" if that is said to mean that the parties (or one of them) had failed to perform a contractual obligation at the time that it was obliged to do so.

b. Since the date of default was common ground between the parties, there was no consideration of the judgments in Thai Maparn or Toprak nor any examination of the correct test to be applied.

c. Lord Sumption's terminology might be thought to indicate that the date of fulfilment is the date on which both parties would have fulfilled their contractual obligations had the contract been performed in accordance with its terms. Such an analysis would be improbable because it would link the date of calculation of damages not to the dates on which the defaulting party were in breach of contract, but rather dates which might be determined by the hypothetical acts of the party not in default.

SUBMISSIONS – ADVANCE PAYMENT

48. The Claimant contends that the Board erred in determining that the Advance Payment was non-refundable in the event of breach by the Claimant. The Contract calls the payment an 'advance payment/guarantee'. At [87] of its skeleton argument, the Claimant contends that, applying the ordinary and natural meaning of the language used, "*(t)he payment was not a deposit but rather that it was a part-payment for the contract price which, in the event of non-performance by reason of the Claimant's breach, could permissibly be retained by the Defendant as security for its claim for damages until such damages were assessed. In other words, the payment served a dual purpose of being part payment in the event of performance or a 'fund' by which the Defendant was secured – at least up to the amount of the advance payment – for any claim for damages it might have in the event of default by the Claimant*."

49. The use of the term "deposit" will, unless qualified, lead to the conclusion that it is non-refundable in the event of default of completion of the contract by the person who made the deposit - see Bowen LJ in Howe v Smith (1884) 27 ChD 89 at pp 97-98). But where the term "deposit" is not used, the court should conclude that the parties did not intend the contract to have this consequence.

50. The Claimant accepts that the use of the term 'guarantee' in the Contract must be borne in mind, but that it is wrong to conclude from this that the payment was irrecoverable in the event of default by the Claimant. This is not a true contract of guarantee since that would involve a third party contracting with the Defendant in respect of the Claimant's obligations. It may be considered to be similar to a "performance guarantee" but such a contract, whilst capable of giving rise to a right to claim from the guarantor the payment of a sum whether or not that sum is in fact due, does not avoid the need to account between guarantor and beneficiary of the guarantee as to what is truly due - see Potter LJ in Comdel Commodities Ltd v Siporex Trade SA [1997] 1 Lloyd's Rep 424 at 431. Similarly a so-called "see to it" guarantee does indeed oblige the guarantor to "see to it" that the principal meets its contractual obligations, but does not make payment under the agreement tantamount to a deposit which is non-refundable where no loss is suffered.

51. The Claimant contends that the same conclusion is reached by applying commercial common sense to the parties' dealings. Why would a buyer in the position of the Claimant agree to pay, or a seller in the position of the Defendant require to be paid, a sum equal to about 20% of the sale price in the event of non-performance of the contract, irrespective of whether the seller had suffered any loss or damage through

non-performance? If the seller had suffered loss and damage, it would be able to bring a damages claim, such claim being secured by the Advance Payment.

52. The Defendant replies that the Board's decision on this issue involved it considering a question of mixed fact and law, and that its conclusion should not be open to challenge. It cites an article by Beatson, Discharge for Breach: The Position of Instalments, Deposits and Other Payments Due Before Completion, (1981) 97 LQR 389 at pp. 390-391:

> "*…The traditional analysis of contracts requiring an advance payment makes a sharp distinction between deposits and part-payments. Confining oneself to the situation in which the payment has been made, deposits, such as those required by the sellers of land or goods, are treated as security for due performance, as an earnest, and are forfeited where the contract is discharged because of the purchaser's breach. The latter are simply advance payments of part of the price and can be recovered after discharge unless the contract expressly provides otherwise. The recoverability of an advance payment therefore depends on the purpose for which it is required. A payment might be expressly required as security for due performance but often this is inferred from the language of the contract, for instance, by the use of the word 'deposit'…"*

53. The Defendant points to the importance in this passage of the sentence, "*The recoverability of an advance payment therefore depends on the purpose for which it is required*." The Board made factual findings in this regard which the court should not disregard in considering the true meaning of the words "advance payment/guarantee."

54. The Board found that the rape meal and soybean meal were niche commodities trading in an illiquid market and that:

> "*[5.20]… the term "Advance payment / guarantee" had a dual-purpose function.*
>
> *[5.21] The first limb was a deposit, paid in the normal course of business to secure the goods. It was an agreed contractual condition and Buyers were bound by it. We dismiss the linguistic distinctions that have been argued between Deposit and Advance Payment. The commercial reality of the parties' intentions in agreeing to this term was to provide business efficacy to the Contract AND WE SO FIND.*
>
> *[5.22] The second limb was to provide security to Sellers for Buyers' performance. In circumstances where Buyers defaulted, that cannot be attenuated as Buyers would have it AND WE SO FIND*."

55. In light of these findings, the Board was entitled to find that the objective meaning of the words of the contract was that the Advance Payment was not simply intended as part payment of the purchase price giving security to the Defendant in respect of default by the Claimant, but was for the purpose of "*securing performance than an eventual claim for damages, given the practical difficulties in finding alternative buyers and the likelihood (as the Board found to have been the case here) that the goods would have to be stored for a long period before they could be re-sold*" (Defendant's skeleton argument at [50(a)].

56. In reply, the Claimant points to the decision of Hamblen J as he then was in Cottonex v Patriot Spinning Mills Ltd [2014] 1 Lloyd's Rep 615 in contending that the true construction of the contract is a pure matter of law, not a question of mixed fact and law.

> "*43. A question of construction of a contract is a question of law.*
> *44. This has long been established as a matter of English law, as Lord Diplock explained in Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724 at page 736, and "it is far too late to change".*
> *45. Although the factual background or matrix may mean that there are matters of fact which are relevant to the proper construction of a contract, they do not alter the legal nature or characterisation of the exercise.*
> *...*
> *50. I accept that before deciding that a tribunal has come to wrong conclusion on an issue of construction deference may need to be given to the tribunal's commercial or trade experience, and the advantages that may give in understanding the relevant factual background…*
> *51. The degree of deference to be so accorded will depend on the circumstances of the particular case and the extent to which commercial or trade experience, and the advantages that may give in understanding the relevant factual background, have assisted the tribunal in reaching its conclusion. However, since the issue is one of law, in the final analysis the tribunal's decision is either right or wrong as a matter of law*."

DISCUSSION – DATE OF DEFAULT

57. As argued by the Claimant, this appeal gives rise to three issues as to the date of default:

    a. Whether the Board erred in finding that the date of default was the date of acceptance of the repudiatory breach (namely 7 May);

    b. Whether, if the Board did indeed err in this respect, it should have found the date of default to be the date of repudiatory breach itself alternatively the last date upon which the Claimant could have performed the contract;

    c. Whether if the Board should have found that the date of default to be the date of repudiatory breach rather than acceptance of such breach, it should have found that date to be 4 April rather than 27 April.

58. As noted above, the Defendant disputes that it is open to the Claimant to argue that the date of default was 4 April. Whilst the Board commented that the Claimant's argument was inconsistent with the case advanced in the Claimant's skeleton argument that the date of default, if not 27 March, was 7 May, it did not find that it was not open to the Claimant to argue before it that the date of default was indeed 4 April. Rather the Board engaged with the alternative date of 4 April in its reasoning, stating that the Claimant's message of that date did not meet "*the threshold of a repudiation"* – see the Award at [5.37]. Since it is the Board's determination that is the subject of challenge, and the Defendant has not sought to argue that, as a matter of law, the Board should not have engaged with the Claimant's changed position, I do not see that it is open to this Court to prevent the Claimant arguing the alternative case that the Board permitted to be advanced but rejected.

59. The Defendant further argues that the Claimant's challenge to the date of default based on the 7 May date cannot succeed because the fact that it argued for this date (albeit it as a secondary case) previously demonstrates that there is no prospect of showing that the Board's determination of the date of default as being that date involved it reaching a conclusion that "*no tribunal properly instructed as to the relevant law could have come to.*" Such a finding would be inconsistent with the Claimant having previously advocated that date as an alternative finding on that issue.

60. Certainly, if one were considering an argument that a party had no prospect of challenging a factual conclusion that involved a finding of fact for which that party had itself previously contended, there is a formidable problem in the party pursuing that changed case. But with issues of law, the same is not necessarily true. Parties sometimes change their position on the relevant law (though such a change of position might be taken as an indication that one or other of the positions being adopted was not well conceived). The mere fact that they previously held a different position does not, without more, prevent them doing so, though of course the court (and equally the Board) has case management powers that might prevent this. So long as the error alleged is one as to the underlying legal principles to be applied in determining the date of default, rather than an error in the application of the law to the particular facts, I see no bar in principle to the Claimant pursuing this argument.

61. I turn to the argument as to the true interpretation of the date of default in the contract, dealing first with the question of whether the date of default for the purpose of Clause 23 is to be determined by the date of repudiatory breach, the date of acceptance of that breach or the last date for performance of the contract. This is an issue of pure law rather than one of mixed law and fact. Either the Board's determination of that legal issue was right or it was wrong. If the former, it must be upheld; if the latter the court should intervene to correct the error.

62. I accept the Claimant's argument that Toprak is authority for the proposition that, where there is more than one breach of contract, the date of default will be determined by the date of the earlier breach of contract. It is further correct that the court in that case proceeded on the basis that a repudiatory breach would determine the date of default consequent upon that breach as being the date of the breach itself rather than acceptance of the breach. However that case was concerned with an actual repudiatory breach, in the sense as Goff J put it, of "*a failure to carry out the contract on the due date."* The court was not concerned with an anticipatory repudiatory breach. I see nothing in the judgments either of Goff J or the Court of Appeal (which followed an appeal on issues other than that with which this court is concerned) that amounts to authority for the proposition that the date of default consequent upon an anticipatory repudiatory breach is the date of the breach itself rather than of acceptance of the breach.

63. In contrast, I accept the Claimant's argument that, in Thai Maparn, Beatson J was concerned with an issue of anticipatory breach. Whilst the Defendant has contended that the court there was concerned with the buyer's breach in failing to give 7 days' notice, it is in fact apparent from paragraph 27 of the judgment of Beatson J cited above that the breach with which both the Board and the court was concerned was the seller's repudiatory breach by its message of 13 March declining to accept the nomination. That breach was anticipatory in nature and therefore the conclusion of Beatson J that the date of default was to be determined by the date of the breach itself, not acceptance of the breach, does support the Claimant's argument in this case.

64. It is notable however that Beatons J, whilst citing Toprak, did not identify the possible difference between the actual breach with which the court was concerned in Toprak and the anticipatory breach with which he was concerned.

65. As to the judgment of Lord Sumption in Bunge v Nidera, I am left in some doubt as to what date he was referring to in the passage at paragraph 28(3) of his judgment cited above. I see force in the Defendant's argument that the reference to default of fulfilment supposes that the parties to the contract have not fulfilled their obligations rather than that one of the parties has declared an intention not to be bound by those obligations. This might indeed support the Defendant's argument that the date of default is to be determined by the date on which the contract would have been fulfilled but for the repudiatory breach. However:

    a. I can see no explanation of how this analysis lies with the agreed date of default in the case, namely the date of acceptance of the repudiation. If Lord Sumption had meant that the date of default had been wrongly agreed to be the date of the acceptance of the repudiatory breach, it is surprising that this is not mentioned, not least because to have made that point would have avoided subsequent debate along the lines that has arisen here as to what Lord Sumption really meant.

    b. In any event, if this were to be the meaning that Lord Sumption were giving to the clause, it would appear that the decision in Toprak and Thai Maparn were not cited to him nor seemingly considered by him. At the level of the Supreme Court it would be surprising that reference to those cases had not been made, if the court considered itself to be dealing with the issues that had arisen therein.

66. The explanation for this apparent conundrum may in fact lie in noting what Lord Sumption had to say at [28(1)], of his judgment:

> *"Clause 20 (a) to (c) of GAFTA 49] applies, as its opening words declare, "in default of fulfilment of contract by either party". As a matter of ordinary language, the "fulfilment" of the contract means its performance, and "default of fulfilment" means its non-performance. This is the sense in which "fulfilment" is used throughout GAFTA 49. Thus clause 4 deals with brokerage, and provides that it is payable "contract fulfilled or not fulfilled", but not if "such non-fulfilment" is due to the (lawful) cancellation of the contract under the prohibition or force majeure clauses. Clause 13, the prohibition clause, provides that prohibition of export, blockade or of hostilities will cause the contract to be cancelled if and so far as it "prevents fulfilment whether by shipment or by any other means whatsoever". Clause 14 is a more general force majeure clause applicable to cases where "the execution of this contract or any unfulfilled portion thereof" is prevented by specified categories of event. Clause 22 provides for the closing out of the contract in the event of insolvency supervening "before fulfilment of this contract". In each of these contexts the "fulfilment" of the contract clearly refers to the performance of the parties' contractual obligations, and "non-fulfilment" or "default of fulfilment" to their non-performance. The use of the same term in the opening words of clause 20 indicates that that clause is concerned with non-performance.* ***For this purpose, it does not matter whether the contract has not been performed because it was repudiated in advance of the time for performance, or because it was simply not performed when that time arrived. In either case, there is nothing other than***

> ***contractual performance which can be said not to have been 'fulfilled'."*** **(emphasis added).**

67. In my judgment, the most natural explanation of this passage is that the Supreme Court was seeking to identify that the date of default is tied to the contractual obligations. But if those contractual obligations are renounced, there is non-fulfilment of the contract such that the date of default will need to be determined. The court was not concerned with the question with which the court is concerned here, namely, where a contract is renounced, whether the date of default is assessed by reference to the date of anticipatory breach, the date of acceptance of the breach or the date on which the contract would have been performed but for the breach.

68. On this interpretation, Bunce v Nidera does not assist the Defendant's argument in this case. It is not that it was even arguably wrongly decided or decided *per incuriam.* It was simply not addressing the matters with which this court is concerned and it would therefore be wrong to take the words of Lord Sumption as laying down a principle on the matter before this court.

69. Since I accept that, as a matter of the true construction of the GAFTA default clause, the reference to "date of default" is tied to non-fulfilment of the contract, because it is that very non-fulfilment which is the "default" of which one is assessing the date, the court must, in looking at the true meaning of the words "date of default", have in mind the fulfilment obligations in the contract.

70. It if of course the case that, where an anticipatory breach has been accepted, contractual obligations are discharged by that acceptance – see Chitty at [28-071], where the authors say:

> *"…in cases of anticipatory breach by renunciation of the contract, the cause of action is not the future breach; it is the renunciation itself (The Mihalis Angelos [1971] 1 QB 164; Moschi v Lep Air Services Ltd [1973] A.C. 331, 356). The doctrine is not based on the fiction that the eventual cause of action may, in anticipation, be treated as a cause of action (cf. Frost v Knight (1871-72) LR 7 Ex. 111, 114). So, if the anticipatory breach is accepted as a discharge of the contract, it is not open to the party in breach subsequently to tender performance within the time originally fixed (Xenos v Danube Ry (1863) 13 C.B.(N.S.) 825.373). Further, the innocent party can claim damages at once even though his right to future performance of the contract is then only contingent (Frost v Knight (1871-72) LR 7 Ex. 111; Synge v Synge [1894] 1 QB 466…)."*

71. I have rejected the contention that Bunge v Nidera is authority, whether binding or persuasive, for the proposition that, where a contract has been discharged by the acceptance of an anticipatory repudiatory breach, the date of default is to be determined by the date on which performance of the contract should have taken place but for that repudiatory breach and its acceptance. I further reject the suggestion that I should come to that same conclusion on a proper interpretation of the contract. There is nothing in either the terms of the GAFTA default clause itself or the surrounding circumstances of this contract to lead to that conclusion. Moreover, to reach that conclusion would be inconsistent with the established principles referred to in Chitty in the previous paragraph that the effect of the acceptance of the repudiatory breach is to terminate the contract and to bring to an end the right to call for performance under the contract. Once

the anticipatory breach is accepted, there is no remaining fulfilment obligation, the failure of which might be the basis of calculation of the date of default. It follows that in my judgment, the true meaning of "date of default" cannot be later than the date of acceptance of a repudiatory breach.

72. The question that this leaves is whether the "date of default" is to be determined by the date of the anticipatory repudiatory breach itself or the acceptance of that breach. I have no hesitation in concluding that, where the breach is not anticipatory in nature, the decision of Goff J in Toprak was clearly correct. Where there is an actual breach by non-performance of an extant obligation to perform the contract, that is the clearest case of default by non-fulfilment so as to render the date of that breach to be the natural meaning of the phrase "date of default."

73. The position with an anticipatory breach is less obvious. I bear in mind that there are arguments pointing both towards the date of anticipatory repudiatory breach being the date of default and the date of acceptance of that breach to be the true date of default.

    a. One might consider the repudiatory breach to be a "default" by the party who is acting in breach. It is however more difficult to see it is a "default of fulfilment," simply because by its very nature there is no contractual obligation which is unfulfilled at the time of an anticipatory breach – if there were it would not be anticipatory.

    b. It may be said that it should not be open to the innocent party to pick and choose a date for the purpose of the assessment of any losses (a point made by Goff J in Topack in the context of several actual repudiatory breaches). The point is less powerful with an anticipatory breach because until acceptance, it remains open to the defaulting party to perform in accordance with the contract and hence itself to pick and choose either to meet the losses as calculated under the contract or to incur the cost of performance. Nevertheless, the construction of a "date of default" as meaning the date of breach, whether or not the breach is anticipatory, has the benefit of avoiding uncertainty as to the date of calculation of losses under the GAFTA default clause.

74. Where the true construction of a clause is arguable there is a powerful argument for consistency in the law. In particular:

    a. It is desirable that contracts that are in standard form are construed in a consistent manner. To construe "date of default" as being a reference to the date of breach in a case of a repudiatory breach of contract by the breach of a performance obligation whereas to mean the date of acceptance in the case of an anticipatory repudiatory breach risks inconsistency in the application of the clause.

    b. The judgment of Beatson J itself provides support for that conclusion, the court favouring where possible consistency of decision-making on the same issue.

75. I am not dissuaded from this conclusion by the statement of principle by Asquith LJ in Howard v Pickford Tools cited above. To hold that an unaccepted repudiation of a contract confers no legal rights is neither expressly nor implicitly to say that the date of an unaccepted repudiation cannot, on the true construction of a contract, be the date at

which losses are calculated. The contract in this case departs from the common law rules as to the calculation of damages in other respects and may depart from the usual principle that an unaccepted repudiation is "*writ in water."* The mere fact that one interpretation might give rise to some legal consequence of the term "date of default" does not mean either that the parties cannot have intended that consequence, nor indeed that commercial common sense or the surrounding circumstances should be taken to indicate that they did not intend that consequence. Indeed, in so far as the surrounding circumstances include the background law, those circumstances include not only Asquith LJ's dictum but also the decision in Beatson J in Thai Maparn.

76. Having regard to the competing arguments and the desirability of consistency, I conclude, following the decision of Beatson J in Thai Maparn, that on its true construction the date of default in a GAFTA default clause is the date of breach, even where that breach is anticipatory. For this reason I conclude that the Board erred in law on this issue.

77. That leaves the remaining argument that the true date of repudiatory breach was 4 April not 27 April. This determination by the Board is undoubtedly a mixed question of fact and law. I must therefore be acutely aware of the proper role of the Court as summarised by Field J in CTI Group Inc v. Transclear S.A.

78. I see no reason to doubt that, in stating at [5.37] of the Award that the Claimant's message of 4 April did not meet the threshold of a repudiation, the Board was applying the correct law. Whilst the Board did not set out the legal principles to be applied, I conclude that they did in fact apply the correct law because:

    a. The Board correctly identified the question of whether the message met the threshold of repudiation. This tends to indicate that the Board knew what test they were applying;

    b. The summary of the Defendant's case at paragraph 4.30 of the Award shows that the Board had in mind a test for repudiation/renunciation (words which for these purposes are very often used interchangeably) as being "*a clear and unequivocal refusal to perform."*

    c. The finding that the message of 4 April was repudiatory/renunciatory by the true test, which I take to be that set out at [28-048] of Chitty, set out above, was not perverse. Whilst the Claimant argues that those words show an unequivocal intention not to be bound by the contract, they are in fact equivocal. In particular, language such as "it seems" that the parties cannot agree and the Claimant "requests" the return of monies are capable of being consistent with the Claimant seeking to negotiate an amicable resolution of the dispute rather than stating a firm intention not to comply with its contractual obligations.

79. A differently constituted board (or indeed I, if determining this issue) may not have reached the same conclusion on the particular words used. But that is far from sufficient to satisfy the "error of law" test. This Board, with its particular knowledge of commerce and the ways of business was entitled to conclude that the letter of 4 April was not repudiatory.

80. It follows from the above that I am satisfied that I should allow this claim to the extent that I substitute 27 April as the date of default in place of 7 May.

81. This then raises a question as to whether there is in fact any need to remit the case to the Board to decide the measure of loss at the date of default. I am not satisfied that I can conclude that the Board would have come to the same conclusion on the measure of loss if it had applied the correct date. Whilst the earlier date of default which I have found to be the correct date to take only marginally alters the argument referred to at [5.56] of the Award as to the period between the date of default and the date of resale, it could be that the slightly longer period alters the balance of the argument as to the true calculation of the loss. For the avoidance of doubt, I reject the Defendant's argument that the illiquidity of the market for this meal was such that I could confidently conclude that the Board would have reached the same conclusion as to the measure of loss if the true date of default was as early as 4 April. I also reject the argument that the Award involved any finding of fact that binds the parties (or me) to the true measure of loss, were the date of default to be earlier than 7 May – the findings as to loss clearly related to the finding that the May date was indeed the date of default and do not point to any inevitable conclusion that the loss would have been the same if calculated at an earlier date of default.

82. The Defendant raised the argument that the measure of damages would have been the same in any event, at the permission stage, contending that the alleged error of law did not substantially affect the rights of the parties. Nevertheless, HHJ Pelling KC granted permission. The Claimant contends that in light of this, it is not right to permit the Defendant to reopen the argument that the damages would not have been different, citing Cockerill J in CVLC Three Carrier v Arab Maritime Petroleum [2021] 2 Lloyd's Rep 469 at [34] that "*that the permission stage is intended to be a qualifying hurdle which is not revisited and that, while it may not be impossible to revisit the various component parts of the permission decision, there will have to be highly unusual circumstances justifying this course*." I am not satisfied that "*highly unusual"* circumstances arise here and I agree with the Claimant that this argument is not open to the Defendant at this stage.

83. The Defendant's alternative argument is that the matter should not be remitted to the Board because there is no evidence that could be used to support a finding of the loss to the Defendant if the date of default is in April rather than May. That of course raises the question of what finding the Board would have made had it correctly identified the date of default as 27 April. I cannot conclude on the material before me that it would inevitably be the same as that which was in fact assessed as being the Defendant's loss, even if I suspect that the Board, if asked to determine this issue, may be driven to the conclusion that the loss is indeed the same.

DISCUSSION – ADVANCE PAYMENT

84. I have noted the Defendant's contention that the proper determination of the meaning of the clause relating to the Advance Payment is a mixed question of fact and law which is not suitable for consideration on an appeal, given the deference due to arbitral awards. In light of the judgement of Hamblen J in Cottonex, I do not accept this to be a correct statement of the law. Rather the court must first look at the factual background of the particular term before turning to consider what its true construction is as a matter of law.

85. In looking at the factual background, the difficulty with the Defendant's argument is that, whilst it is true that the Board was entitled to look at the purpose of the parties in agreeing a contract which contained such as a clause, the material before the Board and indeed the Board's own reasoning does not show why as a matter of law the Advance Payment is to be treated as non-refundable in the event of the buyer's default. It certainly cannot be said that this is the only way to give meaning to the payment of the monies. As the Claimant rightly identifies, the pre-payment by the buyer of 20% of the purchase prices gives significant security to the seller since it provides an available fund from which it can recover its losses (if any) that flow from non-performance.

86. But to go further by finding that the Advance Payment was not recoverable even if the seller suffered no loss through non-performance by the buyer would in my judgment go beyond the normal meaning of the words used, in particular in the context of contractual language where the use of alternative language, that of "deposit" would clearly have that consequence. Had the parties intended the Advance Payment not to be recoverable, they would either have called it a deposit or expressly stated this to be the case. They did not do so.

87. The Defendant's reliance on the article by Beatson in the Law Quarterly Review is instructive. In that article, the author, having looked at the need to identify why a pre-payment is made in order to determine whether it is recoverable in the case of non-performance says "*A payment might be expressly required as security for due performance but often this is inferred from the language of the contract, for instance, by the use of the word 'deposit'…"* The very reference to the need either for express language of security for performance or the use of language such as "*deposit"* demonstrates the difficulty for the Defendant here, where there is neither express language of security nor the use of a term such as "deposit" which would demonstrate such an intention.

88. I have considered whether the deference due to members of the industry should lead to the conclusion that this court should defer to the Board's interpretation, striving to uphold the arbitral award. But the result for which the Defendant contends is a potentially draconian one. In my judgment, the parties should only be taken to have intended that if they used clear language to that effect. Given their failure to do so, I conclude that the Board erred in its interpretation of the true nature of the Advance Payment.

CONCLUSION

89. It follows from the above that the appeal is allowed to the extent that;

    a. The true date of default under the Contract is the date that the Board found the Claimant to be in repudiatory breach, namely 27 April 2018, rather than the date of the acceptance of that breach.

    b. The Advance Payment of US$494,500 is repayable to the Claimant.

90. For reasons that I have identified, the material before me does not permit me to assess the Defendant's loss at the date of default. If the parties cannot agree that figure, the matter will have to be remitted to the Board for determination of the issue, albeit that I

would caution the parties that the cost of such remission may not be justified given the relative absence of evidence on the issue before the Board.

91. Separately, a question as to the appropriate costs order now arises. The parties should consider the terms of an order consequent to this judgment.