The Date of Default for cases of Anticipatory Repudiatory Breaches of Contract: Ayhan Sezer v Agroinvest - Paul Toms KC

3 April 2024

Introduction

In the case of ***Ayhan Sezer v Agroinvest*** [2024] EWHC 479 (Comm), HHJ Pearce, sitting as a judge of the High Court in the London Circuit Commercial Court, had to grapple with the apparent tension between an obiter dictum of Lord Sumption in Bunge SA v Nidera [2015] 2 Lloyd's Rep 469 and earlier decisions of the Courts setting out the approach to the identification of the date of default for the purposes of the GAFTA standard form default clause in the context of a claim for damages based on an anticipatory (and not actual) repudiatory breach of contract. This tension was well-known to international trade and commodities practitioners and the point under consideration had arisen in previous GAFTA disputes. The case, therefore, represents much needed judicial clarity on this important issue. The judgment can be found, here.

Facts

Agroinvest had agreed to sell rape meal and soybean meal to Ayhan Sezer. The sale contract incorporated GAFTA 100 which, by clause 23, provided in standard form that damages were to be assessed by reference to the 'date of default'.

The GAFTA Board of Appeal held that Ayhan Sezer had repudiated the sale contract on 27 April 2018 but assessed damages by reference to a date of default of 7 May 2018, this being the date on which the Board held that the repudiation had been accepted by Agroinvest.

Ayhan Sezer obtained permission to challenge that determination from HHJ Pelling KC under s. 69 of the Arbitration Act 1996 contending that:

(1) As a matter of law, the date of default for an anticipatory repudiatory breach was the date upon which the party in breach first repudiated the contract and not the date upon which it was accepted.

(2) The Board had erred in holding that the date upon which Ayhan Sezer had first repudiated the contract was 27 April 2018; it was in fact 4 April 2018.

Arguments before the Court

Before HHJ Pearce, Agroinvest contended that the relevant date of default was the last date on which it, Agroinvest, could permissibly perform its obligations under the contract in reliance on Lord Sumption's dictum at paragraph 28(3) in ***Bunge v Nidera*** as follows:

> *'The second basis of assessment is the difference between the contract price and the 'actual or estimated value" of the contract goods at the 'date of default". This means the date of the 'default of fulfilment" referred to in the opening words of clause 20, ie the date on which the contract should have been 'fulfilled" by performance in accordance with its terms".*

Since the last permissible date on which Agroinvest could have performed the contract was said to be 15 May 2018 but it contended that the assessment of damages by reference to that date, as opposed to the date used by the Board of 7 May 2018, would have been materially the same, Agroinvest was, however, content to support the Board's analysis that the date of default was 7 May 2018.

By contrast, Ayhan Sezer's position was that the approach to the issue before the Court had been set down in binding decisions of the Courts prior to ***Bunge v Nidera*** and, to the extent to which the obiter comments in ***Bunge v Nidera*** departed from those decisions, they should not be followed.

Previous cases

In ***Thai Maparn Trading Co Ltd v Louis Dreyfus Commodities Asia Pte Ltd*** [2011] 2 Lloyd's Rep 104, Beatson J applied the approach of Goff J in ***Toprak v Finagrain Compagnie Commerciale*** [1979] 2 Lloyd's Rep 98, namely that the date of default for a repudiation was the date of the repudiation not its acceptance, to a case of anticipatory repudiatory breach, noting that in ***Toprak***, it was held that the date of default meant, *"the date of the breach not the date on which such breach is accepted as repudiatory by the other party"*.

In ***Bunge v Nidera***, the parties had agreed what the date of default was before the arbitral tribunal which happened to be the date of acceptance of the repudiatory breach. There was, therefore, no argument on the point before the Supreme Court and there appears to have been no argument by reference to ***Toprak*** and ***Thai Maparn***. As part of his consideration of the specific issue arising for determination in that case, Lord Sumption did analyse the structure of the GAFTA default clause observing as follows at paragraph 28(1):

> *"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... 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'".*

The Judgment of the Court

Having considered the three cases, HHJ Pearce stated as follows:

(1) He was left in some doubt as to what date Lord Sumption was referring to in paragraph 28(3) of his judgment in ***Bunge v Nidera***.

(2) He accepted that the reference to 'default of fulfilment' in Lord Sumption's judgment could mean that the parties to the contract had not fulfilled their obligations rather than one of the parties had declared an intention not to be bound by them.

(3) He considered that the *"most natural explanation"* of Lord Sumption's comments in paragraph 28(3) was that he was not purporting to identify the date of default in the case of an anticipatory repudiatory breach of contract but rather that he was simply stating that where the contractual obligations are renounced, there is non-fulfilment of the contract and, therefore, the date of default needs to be determined.

In the light of those conclusions, it was necessary for the Judge to determine what the date of default was in an anticipatory repudiatory breach situation. As to that, he analysed the position as follows:

(1) Once the breach was accepted, there was no remaining fulfilment obligation, the failure of which might be the basis of calculation of the date of default such that the 'date of default' had to be no later than the date of acceptance of a repudiatory breach.

(2) The interpretation of a 'date of default' as meaning the date of breach, whether or not anticipatory, has the *"benefit of avoiding uncertainty as to the date of calculation of losses under the GAFTA default clause"*.

(3) Where the interpretation of the clause was arguable, there was a powerful argument for consistency in the law i.e. the same approach should apply to actual and anticipatory repudiatory breaches.

He, therefore, held that the date of default was the date on which the first in time anticipatory repudiatory breach occurred.

As such, it was necessary for the Judge to proceed to consider whether the Board had erred in law in holding that the date of the first repudiatory breach was 27 April 2018, and not 4 April 2018 as contended for by Ayhan Sezer.

As to that question, the Judge rejected Ayhan Sezer's contention that the question of whether a written communication constituted an anticipatory repudiatory breach was a pure question of law. The Judge held that whether a repudiation had occurred was a mixed question of law and fact. He, therefore, applied the approach to the review of arbitral determinations of questions of mixed law and fact set out in ***CTI Group Inc v Transclear SA*** [2007] EWHC 2340 (Comm). Having applied that test, he held that the Board had identified the relevant principles of law and had reached a decision open to it.

The Judge, therefore, concluded that the Board had erred in law in its approach to the identification of the 'date of default' and remitted the matter back to the Board to assess damages by reference to a date of default of 27 April 2018.

Paul Toms KC acted for Ayhan Sezer, instructed by Penningtons Manches Cooper and David Semark acted for Agroinvest.

Paul Toms KC

"Paul is extremely bright, tactically astute, and an incredibly fluent advocate who is also very pleasant to deal with." (Legal 500, 2024)

Paul specialises in commercial and international trade disputes. He is described in the legal directories as *"very erudite and quick on his feet; he has an unparalleled eye for detail and is careful, considered and astute"* (Chambers UK) and *"a talented and effective advocate … clearly respected by judges. He quickly gets to the heart of the issues and gives first-rate advice."* (Legal 500, 2023). Paul was appointed King's Counsel in 2024.