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GAFTA: ASSESSMENT OF DAMAGES FOR NON-ACCEPTANCE UNDER THE DEFAULT CLAUSE

The GAFTA Default Clause will be a familiar provision to parties who trade on GAFTA contract terms. Although there are minor differences between the wording used in different GAFTA contract forms, in short, the Default Clause governs what is the measure of damages payable in default of fulfilment of the contract by either party.

The recent decision in *Sharp Corp Ltd v. Viterra BV*[1] concerned an appeal to the High Court on the GAFTA Board of Appeal's decision on the quantum of damages payable under the Default Clause in GAFTA Contract No. 24. It was held that the *"actual or estimated value of the goods, on the date of default"* is to be assessed on the basis of a notional substitute contract on the same terms, rather than the value of the relevant goods in the market at the discharge port.

Background

The parties entered into two contracts for the sale and purchase of lentils and peas from Vancouver to Mundra, India, on C&F Free Out terms. The goods were discharged by the buyer, customs cleared and put into storage in a warehouse pending payment. However, the buyer failed to make payment for the goods.

The seller claimed damages for non-acceptance under the Default Clause, which in GAFTA Contract No. 24 provides as follows:

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

The key question was whether, under sub-clause (c), the *"actual or estimated value of the goods, on the date of default"* was to be based on the value of the relevant goods "as is, where is" (i.e. customs cleared in Mundra, India) or on the basis of a notional substitute contract on the same terms (i.e. the cost at Vancouver, plus freight). This issue had a significant impact on quantum, as the value of the customs cleared goods in Mundra had increased substantially following discharge due to the imposition of customs tariffs by the Indian government. Therefore, if the goods were valued "as is, where is", it would materially decrease the quantum of damages payable to the seller.

[1] [2022] EWHC 354 (Comm)

The decision of the Court

The GAFTA Board of Appeal found in favour of the seller and the buyer appealed to the High Court. The Court dismissed the buyer's appeal and held that the authorities overall supported the seller's argument that the value of the goods is to be based on a notional substitute contract on the same terms.

The Court observed that the Board of Appeal had been presented with two "imperfect" alternatives. The buyer presented evidence of the price on the domestic market in India, whereas the seller based its approach on evidence of FOB Vancouver prices plus freight from Vancouver to Mundra. Neither of the parties provided evidence of independent trades of the contract goods C&F FO Mundra. Faced with the two alternatives, the Board decided the seller's evidence "offered the better match".

The Court noted that an "as is, where is" sale as contended for by the buyer was not a "like for like" sale, as the goods benefitted from customs clearance and therefore were not subject to the increased tariff, which increased their value in the market. The appellant buyer did argue that there is obvious artificiality in choosing a notional purchase of similar goods from Vancouver rather than the usual mitigation sale of the goods wrongfully left in the hands of the innocent seller. The Court acknowledged that there was "obvious force" in this point. However, it also observed that there was an "oddity if not a fallacy" in the buyer's position that sub-clause (c) most naturally refers to the specific goods left in the seller's hands, because this is the methodology in sub-clause (a), not sub-clause (c). Ultimately, it was held that the authorities favoured the seller's position.

Comment

The decision appears to have divided opinion. The words *"actual or estimated value of the goods, on the date of default"* may most intuitively be taken to refer to the value of the actual goods that remain the property of the seller in the market where they are located.

Sub-clause (c) does contemplate that damages may be assessed based on the actual value of the goods, which could refer to the re-sale value of the goods. It may be reasonable to assume that this should be an "as is, where is" assessment. If the actual value of the goods falls to be assessed "as is, where is", then it might be expected that the estimated value of the goods is assessed in the same way, rather than by reference to a notional substitute contract. Assessing the value of the goods by reference to a notional substitute contract for shipment from the loading port means that the seller may receive a windfall from the increased value of the goods left in its hands at the discharge port. From a trader's perspective, it may be an unusual outcome if the contractual measure of damages payable is not an accurate reflection of the seller's true loss.

On the other hand, sub-clause (a) refers to the sale of the goods to establish the default price, so it may be assumed that sub-clause (c) must relate to something other than the re-sale value. If the reference in sub-clause (c) to the "actual" value of the goods also relates to the re-sale value, the two sub-clauses arguably would cover the same ground. It may be reasonable to expect that the two sub-clauses must relate to different methods of calculation, otherwise there would be no need for both provisions to be included in the drafting.

It is understandable that some confusion may remain following this decision. It remains to be seen whether permission will be given to refer this case to the Court of Appeal.

Irrespective of which interpretation is correct, the decision is a useful reminder of the importance of correctly analysing the value of the goods based on the contract delivery terms and pricing and providing evidence of a price calculated on the same basis. Even if a party wishes to put forward a primary case based on a different pricing methodology, it may be possible to rely on a different calculation in the alternative. In the present case, the Board of Appeal was not provided with evidence of the value of goods of the contract quality C&F FO Mundra. As the Court observed, had the Board of Appeal been provided with such evidence, there is no reason to think they would not have accepted it rather than choose between two different proxies.

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