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Court of Appeal Considers Measures of Damages Under GAFTA Default Clause

AUTHOR / KEY CONTACT

Elisabetta Scanferla
Solicitor

elisabetta.scanferla@LA-law.com
01202 786179

Sharp Corp Limited v Viterra B.V (previously known as Glencore Agriculture B.V)

In this case, the Court of Appeal clarified the correct approach that needs to be taken in quantifying damages under sub-clause (C) of the Default Clause in the GAFTA contract No. 2 for the non-acceptance of goods by the buyer.

The parties agreed to a contract for the sale of peas and lentils on Cost and Freight (C&F) Free out Mundra for the delivery of the goods from Vancouver to Mundra, India.

The cargo was shipped, and the ship arrived at Mundra, but the buyer did not pay for the goods. After some negotiations, the parties agreed to make a payment in instalments, and the whole cargo was released on payment of the first instalment. The goods were customs cleared.

The Indian Government subsequently introduced import tariffs of 50% on peas and 30.9% on lentils. At this point, the buyer indicated that it could not pay, and the seller obtained a court order to take possession of the goods, which in the meantime, had increased in value because they had been customs cleared before the tariffs were introduced. The seller sold the goods to a third party.

The GAFTA Appeal Board held that the buyer was liable to pay damages in accordance with the default clause in GAFTA contract no. 2, which was incorporated into the contract.

The default clause provides as follows:

In default of fulfilment of the 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

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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 upon, 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 date of default was the date when the seller had obtained possession.

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

The GAFTA Appeal Board, however, accepted the seller's argument and valued the goods based on the theoretical cost of buying the same type of goods from Vancouver on the default date and shipping them to Mundra, i.e. the costs of goods plus freight, both determined as of the date of default. This method resulted in prices 25% - 30% lower than those prevailing on the domestic market in Mundra on that date.

The High Court upheld the Board's decision and found that the Board was correct in determining that the value of the goods should be based on a substitute contract, on the same terms and conditions.

The "value" that the Board was required to determine by sub-clause (C) of the default clause was the value of the goods sold on the relevant terms (non-custom cleared in bulk) and not the value of the goods sold on materially different terms (custom-cleared and sold ex-warehouse in small parcels).

In other words, the contract was not for the sale of customs-cleared goods in small quantities ex-warehouse into the domestic market in India. The contract was for the sale of goods in bulk from Vancouver to Mundra, and buyers had undertaken to pay for those goods before arrival.

The correct approach was to compare like with like, finding a proxy which reflects all the terms and conditions of the contract.

The fact that the seller was in a far better position than if the breach had not occurred was not a benefit arising from the terms of the contract. It was a collateral benefit which arose from the inability to store the goods at the port without clearance, pending payment. Therefore, the imposition of the import tariffs by the Indian Government at this precise point in time was wholly fortuitous.

The Court concluded that the Tribunal was correct in its decision and dismissed the appeal.

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