AMTAC – HOT ISSUES FOR MARITIME LAW PRACTITIONERS

REVISITING DEFAULT CLAUSES, GIVEN UK SUPREME COURT'S DECISION IN BUNGE – VS - NIDERA

Bunge SA vs Nidera BV [2015] UKSC 43

The Facts

- Bunge sells to Nidera 25,000 metric tonnes Russian milling wheat f.o.b. Novorossyisk.
- The contract incorporated GAFTA 49.
- Delivery 23rd-30th August 2010.
- 5th August 2010: Nidera nominated the M/V *'Royal'.*

- 5th August 2010: Russia announces Resolution 599 imposing "temporary prohibition" on the export of milling wheat from Russia between 15th August and 31st December 2010.

Bunge SA v Nidera BV

- 9th August 2010: Bunge wrote to Nidera informing them of the export ban:

  "*In accordance with Gafta 49, clause 13, sellers hereby advise buyers, and declare the contract in reference as cancelled.*"

Bunge SA v Nidera BV

- 11th August 2010: Nidera accepts Bunge's message as repudiation, terminates the contract and claims US$3,062,500.

- Damages assessed pursuant to Default clause - difference between the contract price and the market price on 11th August 2010.

The quantum claimed

US$3,062,500.

Clause 20: GAFTA Default Clause

"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) 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 the actual or **estimated value of the goods on the date of default** established under (b) above...".

Common Ground

- At the arbitration, it was agreed that:

a. the Default Clause applied to anticipatory repudiation;

b. that Nidera had not bought against Bunge pursuant to sub-clause (a);

c. that the date of default for the purpose of sub-clause (c) was 11 August 2010; and

d. that the difference between the contract and the market price at that date was US$3,062,500.

In Dispute – Assessment of Damages

- Bunge's position:

  To award damages, there must be (1) a decision that loss has been suffered by reason of the default and (2) an assessment of the amount of that loss.

- Nidera's position:

  Because the Default Clause applied, they were entitled to damages whether or not they would actually have suffered the loss for which they claimed based on the formula in the clause.

M/V Golden Victory [2007] 2 AC 535.

First Tier GAFTA Tribunal – 1 November 2011

- Bunge was in anticipatory breach by sending their cancellation notice on 9 August 2010. The possibility existed at the date of the cancellation that the embargo might have been lifted in time to permit shipment.

- However, the contract would have been cancelled in any event and this had no value.

- That is: Nidera suffered no loss and were not entitled to any damages.

GAFTA Board of Appeal - 22 June 2012

- The GAFTA Appeal Board accepted that the contract would have been cancelled in any event.....but
- that Nidera was Default Clause to a damages award rence between the contract price a te of default.
- In the Appeal ired by clause 20(c) of GAFTA 49.
- "…A very large GAFTA arbitrators and GAFTA Appeal Boards. The GAFTA Default Clause is a clause with which everyone in the trade is fully familiar".

The Commercial Court - 29 January 2013

- His Honour Hamblen J agreed with the GAFTA Appeal Board.

- "The Default Clause sets out a simple and clear scheme that damages "shall" be based upon.

- There is no principled reason for cutting across the parties' agreed contractual damages scheme. Indeed there is every reason for not so doing, as the Board made clear. Keeping to the agreed contractual scheme promotes simplicity and certainty."

The Court of Appeal – 12 December 2013

Held:

(i) Bunge was in anticipatory breach; and

(ii) damages were to be assessed on the basis of the difference between the market and contract price as at the default date pursuant to the Default Clause even if at common law damages would have been nominal only applying the approach in *The Golden Victory*.

UK Supreme Court – 1 July 2015

UK Supreme Court

- Unanimously allowed the appeal.

- The fundamental principle of the common law of damages is the compensatory principle, which requires that the injured party is "so far as money can do it to be placed in the same situation with respect to damages as if the contract had been performed": *Robinson v Harman (1848) 1 Exch 850, 855 (Parke B).*

UK Supreme Court

- The Supreme Court unanimously and expressly supported the decision of the majority in *The Golden Victory,* holding that the compensatory principle should apply and that when awarding damages, the Court should take into account facts known at the date of assessment.

- In this instance it was relevant to take into account that if the contract had not been repudiated it would have been lawfully cancellable shortly thereafter.

Supreme Court

- Per Lord Sumption:

- A damages clause may, with clear words amend *The Golden Victory* compensatory principle.

  and

- Clause 20(a)-(c) of GAFTA 49 is concerned with the determination of the difference between the contract price of the goods and their market price or value.

UK Supreme Court

- In respect of the need for the common law to provide commercial parties with certainty, finality and ease of settlement of disputes, Lord Sumption simply said:

"*commercial certainty is undoubtedly important…but it can rarely be thought to justify an award of substantial damages to someone who has not suffered any*".

The GAFTA Default clause?

- Per Lord Sumption:
- The Supreme Court held that the GAFTA damages clause could not be regarded
- Whilst it value of the good
- The claus which would ha any event, to
- Applying *The Golden Victory* to this case, the buyers in fact lost nothing and should receive only nominal damages in the sum of US$5.

UK Supreme Court

LORD TOULSON: (with whom Lord Neuberger, Lord Mance and Lord Clarke agree) at para. 61:

"the words "*shall be based on*" were not to be construed as synonymous with "*shall consist exclusively of*" or "*shall be limited to*"".

Where to for the GAFTA Default clause?

- The GAFTA Default clause was not sufficiently clear to preclude the application of *The Golden Victory*.

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(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 the actual or **estimated value of the goods on the date of default** established under (b) above...".

Grain Trade Australia FOB No. 1

- DEFAULT: If a party defaults on any of its obligations under this contract the party not in default may at its discretion and upon giving the defaulter notice of default elect to either cancel this contract, or to sell or purchase, as the case may be, against the defaulter who shall on demand 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 neither of the above rights is exercised the damages if any shall be determined by arbitration, failing amicable settlement.

- The damages awarded against the defaulter **shall be limited to the difference between the contract price and the actual or estimated market price on the day of default**. Damages are to be calculated on the mean contract quantity. **The arbitrators may at their absolute discretion award damages on different quantity and/or award additional damages** if they consider it justified by the circumstances of the default.

Not universally welcomed

- In particular, Professor Sir Guenter Treitel QC has said that the decision meant that the shipowner in that case could not have known where it stood when its right to damages accrued; the value of that right fluctuated in the light of later events for which it was not responsible and which, when the right accrued, were merely a possibility. In this respect certainty was subordinated to the compensatory principle.

- Sir Anthony Colman in a speech at the London Maritime Arbitrators Association in August 2008:

  "*the worst decision on any aspect of English commercial law, and certainly shipping law, that has come out of the House of Lords in my entire career in the legal profession*".

There may not always be an available market?

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