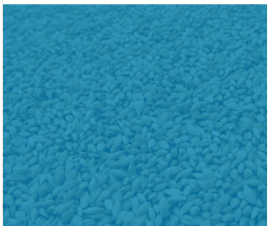
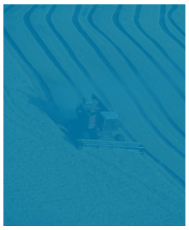
Commodities

June 2014

COMMODITIES BULLETIN





Welcome to the June edition of our Commodities Bulletin.

Our first two articles in this edition focus on soft commodities. The first reports on a recent decision in Australia, *Marsh v Baxter* (29 May 2013), which has significant implications for the GM crop industry. The second looks at the newly announced changes to the "Prohibition" and "Force Majeure and Strikes" clauses in most GAFTA standard form contracts and considers their impact.

Our final article focuses on LNG and considers the English High Court decision *American Overseas Marine Corp v Golar Commodities Ltd* (7 May 2014), in which HFW acted for Golar Commodities. It deals with liability for damage caused by loading LNG cargoes containing debris of a usual type and quantity onto LNG carriers.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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GM crops – an Australian decision

In what has been described as a "landmark" decision for the genetically-modified (GM) crop industry, the Supreme Court of Western Australia has held that a farmer growing a GM crop was not liable for economic loss suffered by his organic farming neighbours. This much anticipated decision had the potential to expose GM farmers to significant liabilities which may have had repercussions throughout the industry.

GM farmers will be reassured by the Court's decision that a farmer will not be liable, where no physical damage is caused, merely because they were growing a lawful GM crop and choosing to harvest it in a conventional way.

BRIAN ROM, SPECIAL COUNSEL

Mr Marsh owned a farm, "Eagle Rest", on which he and his wife farmed organically-certified produce. To the west of Eagle Rest was Mr Baxter's farm, "Sevenoaks". Mr Baxter was a conventional farmer of, among other things, GM canola. Mr Baxter harvested GM canola by a process of swathing, which involved cutting it and leaving it to dry before harvesting.

In November 2010, Mr Marsh found canola on Eagle Rest. Tests revealed that this was GM canola from Sevenoaks which had been blown onto Eagle Rest by strong winds. Consequently, the Marshes' organic certifying agency, the National Association of Sustainable Agriculture Australia (NASAA), decertified 70% of Eagle Rest. For three years, the Marshes could not use the "certified organic" label and were unable to obtain premium prices for their produce.

The Marshes brought actions against Mr Baxter in negligence and in private nuisance, seeking damages of $85,000 and a permanent injunction.

The key issues were whether:

- Baxter's choice to harvest GM canola by swathing was a wrongful interference with the Marshes' use and enjoyment of Eagle Rest.
- Baxter owed the Marshes a duty to take reasonable care to ensure that they did not suffer loss as a result of GM canola being blown from Sevenoaks onto Eagle Rest.

The Court held that the Marshes had not made out their causes of action. It was relevant, in respect of both claims, that:

- There was no evidence that GM canola was physically dangerous or toxic or that it could contaminate the organic produce on Eagle Rest.[1]
- Consequently, the Marshes' loss was purely economic, arising from their private contractual relationship with NASAA.[2]
- The presence of GM canola on Eagle Rest was caused by it being swathed, not by it merely being grown on Sevenoaks.[3]

Private nuisance

This aspect of the judgment focused on the balance between what Mr Baxter was lawfully entitled to do on Sevenoaks and the Marshes' right to not have their use and enjoyment of Eagle Rest unreasonably interfered with.[4]

The Court held that Mr Baxter's choice to harvest GM canola by swathing was not an unreasonable interference with the Marshes' enjoyment of Eagle Rest.[5] Relevantly:

- Baxter had legitimate agricultural reasons for swathing his GM canola crop as it would assist weed control.[6]
- Baxter's conduct was not unreasonable as swathing was not a novel or unconventional method of harvesting.[7]
- GM canola being blown from Sevenoaks onto Eagle Rest was not reasonably anticipated by Baxter and was caused by unexpectedly strong winds.[8]

It was a further factor supporting Baxter that, in the Court's view, NASAA had acted beyond the scope of its contractual rights in decertifying Eagle Rest.[9]

Negligence

The Court held that the duty of care alleged by the Marshes was conceptually misconceived and could not be made out.[10] In addition to the factors outlined above, the Court noted the following:

- The duty alleged was novel and faced a real conceptual difficulty given the law's reluctance to expand the categories of cases in which economic loss is recoverable.[11]
- The level of the duty asserted by the Marshes – "to ensure that that the Marshes did not suffer loss" – was absolute and set far too high in circumstances involving broad acre farming which was exposed to uncontrollable seasonal weather.[12]
- The duty was, effectively, a duty not to grow GM canola. However, from the point of causation, the Marshes' most viable grievance in negligence was Baxter's choice to harvest by swathing.[13]

The Court also found that the Marshes' vulnerability to economic loss arose from their contractual relationship with NASAA. This vulnerability was not a relevant vulnerability to found the duty of care contended for.[14] Further, the cause of the Marshes' loss was NASAA's unreasonable and erroneous enforcement of its contractual rights, not Baxter's swathing of GM canola.

GM farmers will be reassured by the Court's decision that a farmer will not be liable, where no physical damage is caused, merely because they were growing a lawful GM crop and choosing to harvest it in a conventional way. It should be noted that the negligence claim arguably failed because of the break in the chain of causation arising from the conduct of NASAA. However, the primary finding (i.e. that a duty of care is not made out when, absent physical damage, loss arises as a mere incident of broad acre farming) will give GM farmers and the industry as a whole some comfort.

GM farming is controversial and this case has been the subject of much media coverage, with the Marshes and Mr Baxter having received support from influential anti-GM and pro-GM lobby groups, respectively. Therefore, an appeal seems likely.

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1 At [326]-[327], [711]
2 At [331]-[332], [711]-[712]
3 At [341]-[343], [349]
4 At [371]
5 At [710]
6 At [713]
7 At [714]
8 At [717]
9 At [733]-[740]
10 At [741]
11 At [328]-[330], [336]-[338]
12 At [333]-[334], [335]
13 At [341]-[343]
14 At [741]

Revision to GAFTA contracts: a unified approach to prohibition and force majeure

GAFTA has substantially altered the prohibition and force majeure/ strikes clauses found in the majority of their standard form contracts. All agreements entered into after 1 June 2014 which incorporate relevant GAFTA terms will be affected by this change.

GAFTA contracts have previously contained a "Prohibition" clause and a "Force Majeure, Strikes" or "Loading Strikes" clause. The revised contracts instead contain a single "Prevention of Shipment/Delivery" clause which deals with events previously covered under the separate provisions by an overarching concept of "force majeure". This applies to all FOB, C&F and CIF GAFTA contracts.

Structure of the new clause

The main features of the new clause are described below with respect to an FOB contract. CIF/C&F contracts contain identical provisions, except that references to "delivery period" are replaced by "shipment period".

In an FOB contract, the contract will be suspended if a force majeure event prevents the sellers from performing and adequate notice is served on the buyers. Notice must be given within seven consecutive days of the occurrence or not later than 21 consecutive days before commencement of the delivery period, whichever is later.

If the event continues for 21 consecutive days after the end of the delivery period, the buyers may cancel the contract by serving notice on the sellers not later than the first business day after the end of the 21 day period.



If the buyers fail to exercise the option to cancel, the contract will continue for an additional period of 14 consecutive days. After this 14 day period, the contract is automatically terminated if the force majeure event continues to prevent performance.

If the force majeure event ceases before the contract can be cancelled, the sellers must notify the buyers. The sellers are then entitled to as much time as was left for shipment before the force majeure event occurred, or 14 days, whichever is greater.

The clause expressly states that it is the sellers who bear the burden of establishing that a force majeure event has occurred.

Key differences from previous clauses

- Prevention of export and strike are now covered by one unified concept of "force majeure". The clause expressly lists events such as prohibition on exports, fire, breakdown of machinery and acts of terrorism in respect of FOB, CIF and C&F contracts. The express reference to terrorism is a new addition.
- One of the most significant changes is that a prohibition on export will no longer result in the contract being automatically terminated. Instead the contract will be suspended for the duration of the force majeure event, initially up to 21 days from the end of the delivery period. Further to this 21 day period, the contract will only be terminated either by: (1) notice of cancellation from the buyers; or (2) following a further 14 consecutive days of force majeure.
- The revised contracts do not simply adopt the old provisions on timing. Instead, the new clause contains significant changes to the notice periods, of which traders should be aware.
- The old "Force Majeure and Strikes" clause required sellers to give two notices: one stating if it was anticipated that delay would affect the shipment and a second notice claiming an extension of time. The burden on the sellers has now been reduced by removing this second notice requirement.
- Buyers should be aware that the deadline for exercising their option to cancel the contract has changed. Some previous GAFTA CIF/C&F contracts gave buyers an option to cancel if a strike or lockout continued for 30 days after the end of the shipment period. The relevant period is now 21 days from the end of the delivery/ shipment period.
- Some previous GAFTA contracts stated that if buyers did not give notice of cancellation, the contract was automatically extended by 30 days. The period of extension has now been dramatically reduced to just 14 consecutive days.
- Sellers should note that when an event of force majeure has ceased before the contract could be cancelled, sellers are obliged to notify buyers without delay. This requirement is new to some contracts.

Conclusions

Traders should welcome this revision on the basis that it unifies and simplifies the force majeure notification provisions across GAFTA's suite of standard form contracts. It is hoped this will assist traders by setting out a clear and harmonious regime resulting in fewer missed deadlines and late notifications.

In the immediate future, traders should take care to ensure that they are familiar with the new provisions, in particular, the new deadlines for buyers to cancel a contract on the basis of force majeure.

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If the force majeure event ceases before the contract can be cancelled the sellers must notify the buyers.

JOHN ROLLASON, SENIOR ASSOCIATE

Debris in LNG cargoes

A recent English High Court judgment that will be welcomed by LNG traders and charterers has confirmed that loading LNG cargoes containing debris of a usual type and quantity does not breach charters on the "ShellLNGTime1" form. The decision in *American Overseas Marine Corp v Golar Commodities Ltd (LNG Gemini) (7 May 2014)* is in line with the industry's acceptance, as reflected in current SIGTTO[1] guidelines, that LNG carriers are unlikely to suffer damage from debris small enough to pass through a ship's filters during loading.

The judge accepted charterers' evidence that the debris did not have a tendency to harm the vessel.

ALISTAIR FEENEY, PARTNER

Managing owners of *LNG GEMINI* contended that a cargo loaded on the vessel by the defendant charterers, Golar Commodities, was contaminated and that the contamination entitled them to carry out extensive work to the vessel's cargo tanks, pumps and systems at charterers' expense. Owners had discovered debris in the ship's cargo tanks during an inspection in the course of a scheduled drydocking several months after the cargo in question had been loaded and after further cargo operations.

Owners claimed that the debris had come from the first cargo loaded by the charterers and relied upon the "injurious cargoes" clause in the "ShellLNGTime1" charter, which states:

"No acids, explosives or cargoes injurious to the Vessel shall be shipped and without prejudice to the foregoing any damage to the Vessel caused by the shipment of any such cargo, and the time taken to repair such damage, shall be for Charterers account".

Owners argued that (1) no physical damage was necessary, because the ship was an *"instrument of trade"* and any interference with the ship's use for trade, such as the need for cleaning, would be injurious; and (2) a propensity or tendency to cause physical damage was sufficient. The judge rejected the first argument. The second argument, which had not been contested by charterers, was accepted.

The wording of the clause anticipated physical damage. That was clear from the reference to other obviously damaging types of cargo, such as acid, and from the reference to *"repairs"* to the ship. There was no evidence that physical damage had actually been caused to the ship by the cargo in question. The judge therefore turned to the questions of whether the debris found in the ship's cargo tanks and pumps had been loaded in the charterers' cargo and if so, whether that debris had a tendency to cause physical damage.

The judge was referred to the SIGTTO guidelines which provide for LNG cargoes to be loaded through filters of a certain size at the ship's manifold. The judge concluded that *"there is no cogent reason to think the industry's standards and practices too lax or that those responsible for them are wrong to disregard particles small enough to pass through...filters."* The judge accepted charterers' evidence that the debris did not have a tendency to harm the vessel. In doing so, he observed that *"it is not unusual for an LNG cargo to include some foreign particles"*. He also found that the evidence strongly suggested that not all of the debris had come from charterers' first cargo.

Traders of LNG will still need to consider liability arising under their sale contracts, which could result from delivery of LNG containing debris, but the position under charters has at least been clarified.

The procedural aspects of this case are discussed in HFW's Dispute Resolution Bulletin, May 2014.

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1 Society of International Gas Tanker and Terminal Operators


Conferences and events

Oil Council 2014 Africa Assembly
Paris
24-25 June 2014
Attending: Tunde Adesokan and Guillaume Mezache

Mining on Top – Africa London Summit
London
24-26 June 2014
Presenting: Robert Follie and James Lewis

Marine Money Geneva
Geneva
26 June 2014
Presenting: Spencer Gold
Attending: Adam Shire and Kathryn Martin

EBOTA/ADN Training with Transafe
London
30 June 2014
Hosting: Judith Prior

Commodity offtake agreements and supporting documents: key issues to get right for your trade
Geneva
3 July 2014
Presenting: Damian Honey

Australian Grains Industry Conference
Melbourne
28-30 July 2014
Presenting: Peter Murphy and Brian Perrott
Attending: Chris Lockwood and Stephen Thompson

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