COMMODITIES | MARCH 2024

GAFTA DEFAULT: DATE OF DEFAULT IN ANTICIPATORY BREACH MAY PRECEDE ACCEPTANCE OF REPUDIATION

GAFTA default clauses continue to cause issues of interpretation. In the recent case of Ayhan Sezer Yag Ve Gida Endustrisi Ticaret Limited Sirket v Agroinvest SA[1], the English Commercial Court considered two issues on appeal from a GAFTA arbitration appeal award, one being the determination of the date of default and the other as to the finality of an advance payment.

Background

Agroinvest SA as seller ("Agroinvest") entered into a contract with Ayhan Sezer Yag Ve Gida Endustrisi Ticaret Limited Sirket as buyer ("Ayhan Sezer"), for the sale of rape meal and soybean meal, (the "Contract"). The Contract incorporated GAFTA Contract No. 100. Before the Contract was concluded, Ayhan Sezer transferred USD 494,500 to the Defendant ("the Advance Payment") but noted that if the Contract was not agreed, it should be returned. Soon after the Contract was signed, Ayhan Sezer indicated it would not perform and requested the return of the Advance Payment. However, two issues arose.

First, Agroinvest refused to return the Advance Payment, stating that it was "not refundable". It was common ground that the Advance Payment had been sent pursuant to a clause in the Contract, as follows: *"a. US$494,500 advance payment/guarantee upon signing of the contract."*

Second, although neither party contested that Ayhan Sezer was in breach, they did not agree on the date of default for the purposes of calculating damages under GAFTA 100 clause 23(c), which reads (emphasis added):

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

Ayhan Sezer argued that its first message to Agroinvest on 4 April, in which it requested the return of the Advance Payment, was the date of default and should be the date at which damages were calculated. Agroinvest, however, argued the true date of default was 16 May, that being the last possible date on which Agroinvest, as seller, could permissibly have performed its obligations under the Contract by shipping the goods. However, on the facts, Agroinvest stated it was willing to accept that the date of damages should be calculated on the day on which the Ayhan Sezer's repudiation was accepted by Agroinvest (7 May), given that there was no material difference in damages between those two dates.

The first-tier tribunal (the "FTT") held that: (i) the Advance Payment was refundable; and (ii) the date of default was the date upon which the repudiation was accepted (i.e. 7 May) - and that Agroinvest had failed to prove any loss by reference to that date.

Agroinvest appealed the decision of the FTT to the GAFTA Board of Appeal (the "Board"), arguing that:

1. The true date of default was 16 May. However, it was content to proceed on the basis that the date of default was 7 May (as found by the FTT) because nothing turned on the difference between 7 May and 16 May in respect of the assessment of damages.
2. The message sent by Ayhan Sezer on 4 April was not a sufficient unequivocal refusal to perform the Contract to amount to repudiation/renunciation.
3. The Advance Payment was non-refundable.

[1] [2024] EWHC 479 (Comm)

The Board agreed with Agroinvest and found that the Advance payment was non-refundable as it was a deposit and/or security. It upheld the FTT decision that the date of default was the date upon which the repudiation was accepted (i.e. 7 May).

Ayhan Sezer appealed the decision to the Commercial Court.

The Court had to decide whether the Board had erred in its interpretation of the true nature of the Advance Payment by finding that it was non-refundable. As to the date of default, the Court had to decide whether the Board had erred in law when it found the date of default to be the date of acceptance of the repudiatory breach (7 May). If so, the next question was whether the correct date of default was the last date for performance, as contended for by Agroinvest (16 May), or the date of the breach itself. If the latter, the Court would have to decide whether this was 4 or 27 April.

Decision

The Court made clear that it would give primacy to the natural meaning of the language used in the Contract in its interpretation and then found that the Board had erred in law on both issues.

In relation to the Advance Payment, if the parties had intended the payment to be treated as a deposit or to provide security, language would have been used to that effect. In the absence of such language, there was no evidence that the parties intended the Advance Payment to be irrecoverable. Therefore, the Advance Payment was refundable.

In relation to the date of default, the Court relied on the decision in *Toprak v Finagrain Compagnie Commerciale*[2], which also concerned a repudiatory breach, to conclude that if there was more than one breach of contract, the earlier date should be used. Significantly, Toprak was a case involving actual rather than anticipatory repudiatory breach. The Court recognised that given it was concerned with "non-fulfilment" for the purposes of deciding on the date of default, in the case of anticipatory breach, this was "less obvious." There were strong arguments on both sides for choosing either the date of the anticipatory breach, or the date of acceptance. Ultimately, the Court found that consistency and a lack of uncertainty were important factors and relied on the decision in *Thai Maparn Trading Company Limited v. Louis Dreyfus Commodities Asia Private Limited* [3] to conclude that the anticipatory nature of the breach did not change the outcome.

The Court then settled on 27 April as the date of breach, being the point at which it found the wording in messages from Ayhan Sezer to be unequivocal in its intention to repudiate the Contract.

The question of the amount of Agroinvest's loss was to be remitted to the Board if the parties were unable to agree.

Discussion

This judgment demonstrates the importance of clear and unambiguous drafting, both in contracts and in pre-and post-contractual communications, particularly given the importance the Court will place on the natural meaning of the words used.

It could also be seen as a departure from the famous judgment of Asquith LJ in *Howard v Pickford Tool Co*[4] that: "*An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind*." In this case, the repudiation was accepted by Agroinvest, thereby bringing the Contract to an end. However, given the commonly understood principle that a repudiation will not be effective and will confer no rights until it is accepted, the decision that the date of default may precede the acceptance of a repudiation may come as a surprise. It matters because the determination of the date of default under GAFTA contracts has a bearing on the date at which damages must be calculated and therefore the amount recoverable. Uncertainty could lead to claimants providing evidence of their loss on a number of different dates where the date of default is in doubt, in order to be sure of recovery. It will be interesting to see whether the judgment will be appealed.

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[2] [1979] 2 Lloyd's Rep 98 as approved by the Court of Appeal under the same citation.

[3] [2011] EWHC 2494

[4] [1951] 1 KB 417

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