



SOFT COMMODITIES: BUYER BEWARE - “AS IS” MEANS “AS IS”. BUT SHOULD SELLER BEWARE, TOO?

This is the next instalment in our series of articles focussing on issues affecting soft commodities traders.

Sale of goods contracts typically feature carefully drafted quality specifications, so that both parties understand clearly what quality of goods is to be delivered. However sometimes, goods are sold on an “as is” basis. This places the risk as to quality on the buyer. What liability, if any, does the seller have in contracts made on this basis? This article will consider the significance and scope of “as is” clauses, by way of case studies focussing on cocoa and coffee.

“The buyer is bound to accept the goods as they are and assumes the risk that they may fail to meet expectations, or may have defects.”

What is “as is”?

“As is”, “with all faults” and “with all faults and imperfections” are common expressions used by parties when they are contracting to sell goods in their current condition. A typical example can be found in the FCC Contract Rules for Cocoa Beans¹:

“For cocoa beans sold under the description ‘all faults’ or ‘tel quel’ the Buyer shall not be entitled to claim arbitration for quality and/or condition”.

The buyer is bound to accept the goods as they are and assumes the risk that they may fail to meet expectations, or may have defects.

In an “as is” transaction, the buyer is typically given the right to inspect the goods before deciding whether to purchase them. If the buyer accepts the goods after inspection (or chooses not to inspect them) and it turns out that the received goods (as they were upon inspection) are unsuitable, the buyer will have no recourse against the seller in respect of quality or condition.

What about implied terms?

Under English law, section 14 of the Sale of Goods Act 1979 (SOGA) implies into sale of goods contracts certain conditions as to the quality of the goods and their fitness for purpose.

It is difficult to exclude conditions implied into a contract by statute. Express language is required in order to do so successfully. The terms “as is” and “with all faults” are intended to fulfil this requirement. However, in our view, it would be prudent for the seller to exclude these implied terms expressly, in order to avoid any doubt.

In a case² concerning the sale of a secondhand ship, the Court heard lengthy argument as to whether “as is” was sufficient to exclude section 14(2) SOGA. The case was eventually decided on another issue but the Court indicated that had it been required to decide the point, it would have found that “as is” was not sufficient to exclude the buyer's right to claim damages, although it would be sufficient to exclude the buyer's right to reject the goods.

Case study

Company B purchases 500MT of discounted and below market price cocoa liquor from Company A. The product is to be delivered and processed in Spain. The contractual specifications as to quality state:

“The cocoa liquor hereunder is sold by the Seller on an “AS IS” basis. All statutory or other conditions or warranties, express or implied, with respect to the merchantability or satisfactory quality of the cocoa liquor,

or its fitness for any particular purpose or otherwise are hereby excluded.”

The FCC Contract Rules for Liquid Cocoa Products³ are not incorporated into the contract.

After receipt and analysis of the cocoa liquor, Company B discovers that it does not comply with EU regulations relating to the sale of foodstuffs. Company B is unable to repurpose the cocoa liquor and will probably have to discard it.

Does Company B have any recourse against Company A?

Company B was aware that the cocoa liquor was being sold on an “as is” basis, with all implied terms relating to the quality or fitness for purpose of the goods expressly excluded. This was not concealed by Company A and the goods were sold on a heavily discounted basis to reflect the inferior quality of the cocoa liquor.

In these circumstances, Company B has no recourse against Company A for the cocoa liquor not meeting EU regulations for the sale of foodstuffs.

Had the contract incorporated the FCC Contract Rules for Liquid Cocoa Products, the position might not have been so clear-cut. These rules provide as follows:

“The product supplied is warranted to be of satisfactory quality, in good

¹ Federation of Cocoa Commerce Contract Rules for Cocoa Beans, 2019 edition

² Dalmare SpA v Union Maritime Ltd and Another (The “Union Power”) [2012] EWHC 3537 (Comm), paras 77-84

³ Federation of Cocoa Commerce Contract Rules for Liquid Cocoa Products by Tankers (Road and Rail) or ISO Tank Containers on Buyer's Call, 2019 edition



condition and to comply with all relevant statutory requirements or regulations relating to the sale of foodstuffs in the country of delivery”.

While expressly agreed terms will typically take precedence over incorporated standard terms, a party wishing to sell goods on an “as is” basis should exercise caution and use language clearly excluding any incorporated terms as to quality.

Limitations of “as is”

Whilst selling goods on an “as is” basis might relieve the seller of obligations as to quality and fitness for purpose, it does not affect the obligation of a seller:

- to sell goods conforming to their contractual description.
- in a sale by sample to supply goods that correspond with the sample.
- to give good title to the goods.

In *Shepherd v Kain*,⁴ a “copper-fastened vessel” was sold “with all faults, without allowance for any defects whatsoever”. This was found not to protect the seller where the vessel sold was only partially copper-fastened and was not what was called in the trade a copper-fastened vessel. This was because “with all faults” must mean “*with all faults*

which it may have consistently with its being the thing described”.

Case study

A buyer and a seller contract for the sale and purchase of Robusta coffee beans on an “as is” basis. The seller in fact supplies 30% Robusta coffee beans mixed with 70% Arabica coffee beans.

In these circumstances, an “as is” provision would not protect the seller from a claim that the goods supplied did not correspond with their contractual description.

What if the buyer had agreed to purchase coffee beans on the basis of samples received from the seller on an “as is” basis? If the samples were 100% Robusta beans and upon receipt, the buyer discovered the bulk of the cargo was 70% Arabica, the seller would be in breach of contract. However, even if the samples had accurately reflected the 70/30 split, section 13(2) SOGA states that this is not sufficient, if the goods do not also correspond with the contractual description.

Key takeaways

Parties usually enter into “as is” contracts at speed, when a seller is looking to liquidate quickly a surplus amount of goods, often of low quality. The buyer, in exchange for purchasing

goods with faults, will often benefit from a lower purchase price.

To avoid being caught out, particularly where a bargain is struck at speed, buyers and sellers must both be cautious and ensure they understand exactly what they have bargained for.

A buyer should ensure that the price paid reflects the risk of receiving goods that may not meet its requirements. Any inspection or sampling should be undertaken with great care.

A seller should ensure that:

- express wording is included in the contract so as to exclude effectively obligations as to quality and fitness for purpose.
- there is no inconsistency between the “as is” term and any incorporated standard terms.
- any sample accurately reflects the quality and condition of the whole cargo.
- the goods conform with their contractual description.
- they are able to give good title to the goods.

For further information,
please contact:



SARAH HUNT

Partner, Geneva

T +41 (0)22 322 4816

M +41 (0)79 281 5875

E sarah.hunt@hfw.com



ANNE-MARIE PEARCE

Associate, Geneva

T +41 (0)22 322 4812

M +41 (0)78 633 2003

E anne-marie.pearce@hfw.com



AMANDA RATHBONE

Professional Support Lawyer
(Commodities), London

T +44 (0)20 7264 8397

M +44 (0)7900 167256

E amanda.rathbone@hfw.com

HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our commodities capabilities, please visit www.hfw.com/Commodities

hfw.com

© 2020 Holman Fenwick Willan LLP. All rights reserved. Ref: 002522

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please email hfwenquiries@hfw.com

Americas | Europe | Middle East | Asia Pacific