

## SOFT COMMODITIES: UNWINDING CERTIFICATES FINAL – QUALITY AND DESCRIPTION

**This is the first instalment in a series of articles focussing on issues affecting soft commodities traders.**

Certificates final play an important role in international trade and are relied on by buyers, sub-buyers and financiers alike. Using a case study, this article will explore an issue in relation to certificates final that can cause confusion: their applicability to matters of description.

# “A quality final and binding certificate will only be final and binding as to the quality of the goods tested. It will not be final and binding as to matters of description where the description does not form part of the quality metrics in the contract.”

## Case study

Company B purchases 40,000 MT (+/- 10%) of durum wheat CIF Rotterdam from Company A. The contractual specifications state that the goods can have a maximum of 13% moisture, 5% damaged kernels and 1.8% foreign matter. Quality and condition is to be final at the time and place of loading as per certificates issued by an independent inspector agreed by the parties.

The loadport quality certificates show the cargo to be on-specification, containing only 0.5% foreign matter. However, Company B carries out further sampling and testing on arrival at the discharge port, which conclusively determines that the product is in fact contaminated with 6.5% corn. The vessel's hold cleanliness certificates show that the holds were clean on loading and that her last three cargoes were also durum wheat. It is evident that the goods were contaminated prior to or during loading.

Is Company B entitled to reject the goods?

## Certificates final

It is well-established law that where parties agree that a certificate is to be final and binding as to the quality

of goods, the buyer will have no recourse against the seller if, contrary to the certificate, they do not meet the contractual quality, even where there has been negligence on the part of the certificate issuer. The leading case is *Alfred C. Toepfer v Continental Grain Co' (Toepfer)*.

Certificates final can only be unwound in limited circumstances, namely fraud or manifest error (where expressly provided in the contract).

## Quality or description?

However, a certificate will only be final and binding as to what has been tested: a quality certificate will only be final and binding as to quality. Where large percentages of a foreign substance are found in a delivered product, the issue becomes one of description rather than quality; it is no longer the product described in the contract. Whilst each case will ultimately rest on the facts, some guidance can be found in case law. For example, the Court of Appeal held that a consignment of onions of which 6-7% were undersized did not comply with the contractual description of “medium” onions<sup>2</sup>. In another case<sup>3</sup>, meal adulterated with an admixture of cocoa husks in the average amount of 3.66% did

not meet its description. A quality certificate final will not be final and binding as to description where the description does not form part of the quality parameters in the contract.

The key case here is *The Bow Cedar*<sup>4</sup>. The buyers contracted to purchase Brazilian crude groundnut oil but instead received groundnut oil mixed with soya bean oil. The sellers denied liability because the certificates given on shipment were final and conclusive. The Court found in favour of the buyers. Whilst the contract provided for quality to be final at loading as per the certificate, the certificate was not conclusive as to description, given that:

- the surveyors were not certifying the goods were Brazilian crude groundnut oil, only the results of their chemical analysis.
- even if the certificates did certify the commodity as well as the chemical analysis, it was clear from the contract that the certificates were to be final as to the type of matters that were covered by the quality clause, such as moisture and impurities, not the commodity itself.

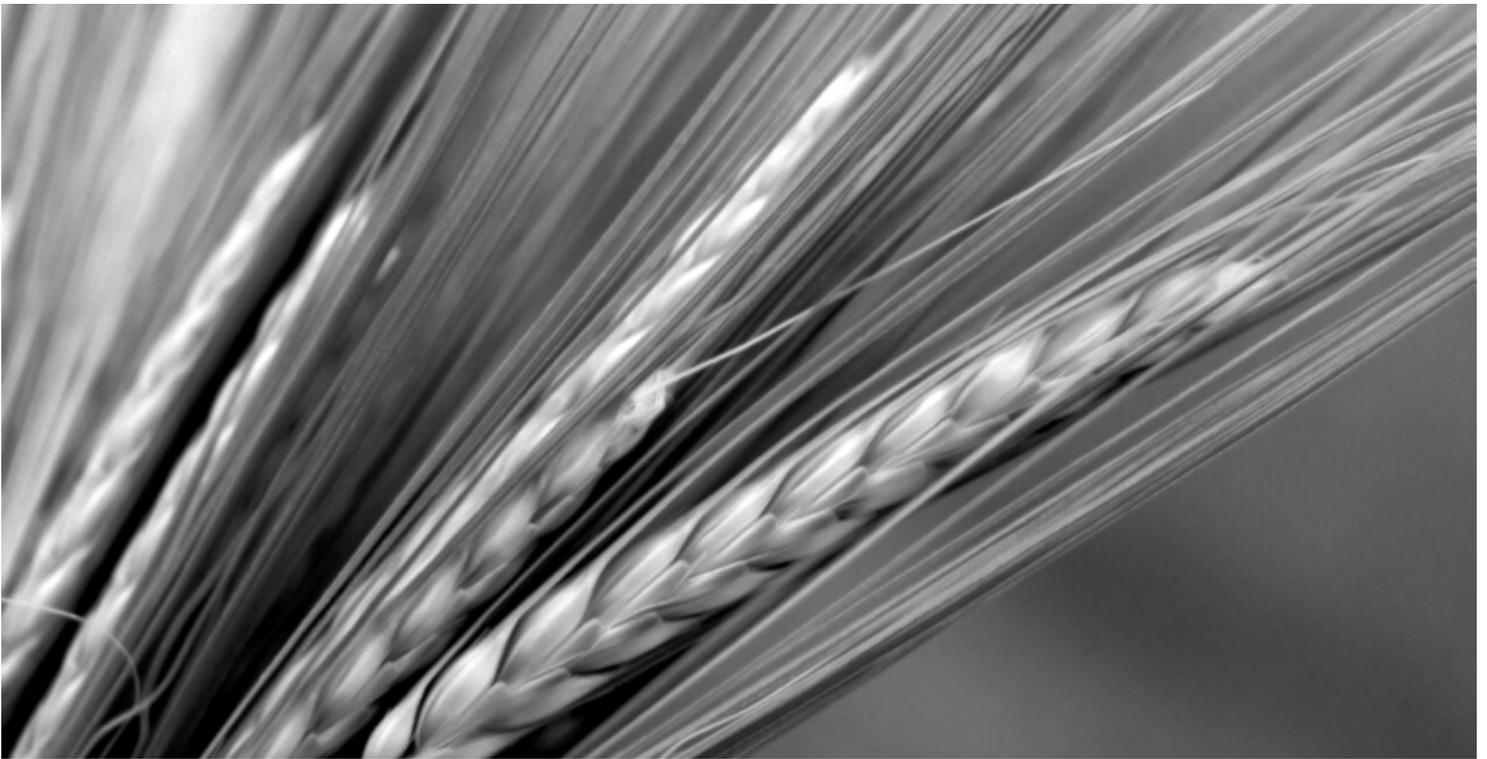
*The Bow Cedar* is to be distinguished from *Toepfer*, where description

1 [1974] 1 Lloyd's Rep. 11

2 *Rapalli v K. L. Take, Ltd.* [1958] 2 Lloyd's Rep. 469

3 *Robert A. Munro & Company Limited v Meyer* [1930] 2 K.B. 312

4 *N.V. Bunge v. Compagnie Noga D'importation Et D'exportation S.A. (The "Bow Cedar")* [1980] 2 Lloyd's Rep. 601



and quality could not be separated. In Toepfer, the quality provision specifically stated: “No. 3 Hard Amber Durum Wheat of U.S. Origin” and the inspector certified the product was such in the final and binding quality certificate. Where a certificate is final and binding as to a quality parameter that forms part of the description, like “hard amber durum wheat,” it will be final and binding as to that element of the description.

### **Is Company B entitled to reject the goods?**

It is presumed for the purposes of this article that durum wheat contaminated with 6.5% corn is no longer marketable as durum wheat.

Company A has sold Company B durum wheat heavily contaminated with corn, rather than the contractual product of durum wheat. Whilst the loadport quality certificates show that the cargo was on-specification at loading, this will not be determinative as to whether the goods supplied are durum wheat, because “durum wheat” does not form part of the quality parameters in the contract.

Evidence can therefore be adduced to establish the true product supplied. The discharge port results show that the cargo is in fact durum wheat contaminated with 6.5% corn, representing a sufficient proportion

of the total quantity of the goods to change their character from what Company A contracted to sell into another product. Company B is therefore entitled to reject the goods and claim damages under section 13 of the Sale of Goods Act 1979.

### **Key takeaway**

A quality final and binding certificate will only be final and binding as to the quality of the goods tested. It will not be final and binding as to matters of description where the description does not form part of the quality metrics in the contract, even where the certificate indicates that the goods are on-specification.

For further information, please contact:



#### **SARAH HUNT**

Partner, Geneva

**T** +41 (0)22 322 4816

**E** sarah.hunt@hfw.com



#### **ANNE-MARIE PEARCE**

Associate, Geneva

**T** +41 (0)22 322 4831

**E** anne-marie.pearce@hfw.com



#### **AMANDA RATHBONE**

Professional Support Lawyer,  
London

**T** +44 (0)20 7264 8397

**E** amanda.rathbone@hfw.com

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