



BE CAREFUL WHEN AND WHY YOU TERMINATE!

TIME OF THE ESSENCE, REPUDIATION AND RENUNCIATION

In *Alegrow S.A v Yayla Agro Gida Ve Nak A.S.*¹, the English Commercial Court varied and then remitted an award back to the GAFTA Appeal Board (the ‘Board’). It concluded that the Board had made an error of law in finding the claimant in repudiatory breach of its contract with the defendant. The Court also provided a helpful analysis of ‘time of the essence’ in commodities contracts and ultimately found that the defendant had renounced the contract.

Facts

The claimant ('Alegrow') entered into a contract with the defendant ('Yayla') for the sale and purchase of 24,000 MT of Russian Paddy Rice, CIF Free Out Meskin, Turkey. Shipment was to be between 1 September and 15 December 2016.

A series of events – including delays and unanswered emails - culminated on 29 March 2017 in Yayla asking Alegrow to provide a schedule for shipment of the remaining rice, to be shipped by 15 April 2017. Yayla stipulated that if the schedule was not sent by the following day (30 March), Alegrow would be in breach of contract as of 31 March 2017 and Yayla would be entitled to bring the contract to an end.

Alegrow did not respond and Yayla sent a notice of arbitration to GAFTA on 7 April 2017.

The First Tier Tribunal ('FTT') concluded that Yayla 'having indulged [Alegrow] for a reasonable period of time' made time of the essence by its email on 29 March 2017. The FTT held that Yayla's notice of arbitration dated 7 April 2017 marked Alegrow's date of default.

Alegrow appealed to the Board, which upheld the FTT's award but concluded that the date of default was in fact 31 March 2017. The Board held that Yayla's email dated 29 March 2017 made time of the essence and Alegrow's failure to respond amounted to a repudiatory breach of contract.

Alegrow appealed to the English Commercial Court on the following questions of law:

- Was Yayla contractually entitled to demand a shipment schedule on 29 March 2017?
- Was Alegrow in repudiatory breach of the contract in failing to provide such a shipment schedule by Yayla's deadline of 30 March 2017?

Findings

In relation to the first question, the Court found that the Board had made no findings as to where any obligation to provide a shipment schedule was to be found in the contract, or why one should be implied. Consequently, Yayla was not

contractually entitled to demand a shipment schedule on 29 March 2017.

In answer to the second question, the Court recalled fundamental principles (supported by case law) setting out when time is of the essence in a contract:

- Where time is originally of the essence, it may cease to be so as a result of election or affirmation.
- Where no time for delivery is specified in the contract, time can be made of the essence by notice, provided that the period fixed by the buyer allows the seller reasonable time for shipping the goods.
- A buyer can waive its right to insist that the goods be delivered within the time fixed by the contract of sale, if it voluntarily accepts a request by the seller for delivery to be postponed. This also applies where the stipulated time has lapsed, but the buyer continues to press for delivery, thus waiving its right to cancel the contract.
- Once the buyer has waived its right to cancel the contract, it still has the right to make time of the essence again through a notice. However, giving such notice does not entitle the buyer to rely retrospectively on breach of contract by the seller during the period of waiver.
- Unreasonable delay in complying with the obligation amounting to repudiation is essential to justify rescission.

Following these principles, the Court found that if the Board intended to conclude that the 29 March email made time of the essence by requiring shipment by 15 April, then:

- it would have needed to find that the period from 29 March to 15 April was a reasonable period for shipment of the balance of the rice; and
- any repudiatory breach would have occurred only on or after 15 April.

Neither conclusion was contained in the Board's findings.

The Court found that it was the failure to respond to the request for a shipment schedule that led the

Board to find Alegrow in default by 31 March. However, since there was no finding of a contractual obligation to provide the shipment schedule, Alegrow was not in repudiatory breach of the contract in failing to provide one.

The Court held that the Board might have considered Alegrow's failure to provide the schedule to be a renunciation of the contract. The correct legal test for renunciation required the Board to find that Alegrow had indicated clearly and unequivocally that it refused to or could not perform. There was no such finding in the award and the Board did not explicitly make any reference to renunciation. Therefore the Court could not uphold the Board's award on that basis.

As a result, the Court varied and remitted the Board's award. It held that Yayla had in fact renounced the contract by its notice of arbitration and was thus in breach, allowing Alegrow to claim for damages.

The Court went even further in arguing that Alegrow might be able to recover the relevant expenditure as wasted expenditure. Alegrow's entitlement to counterclaim on this basis depends on whether or not Yayla can establish that Alegrow was not in a position to perform the contract, and therefore could not have recouped this expenditure even if Yayla had not renounced the contract.

Conclusions

This case is a reminder of the importance of identifying correctly whether, when and why a contractual counterparty is in repudiatory breach of contract. The inadvertent premature termination of a contract could amount to renunciation and repudiatory breach, giving rise to potential liability for wasted expenditure.

It also offers a helpful reminder that notices making time of the essence do not have a retrospective effect on past waivers. Where a stipulation as to time of delivery has been waived but is later reinstated by a notice, the buyer must ensure that the notice period has expired before terminating the contract.

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