

24 January 2023

Commodities in Focus Weekly – issue 14

Sharp v Viterra – Court of Appeal clarifies measure of damages under GAFTA Default Clause

On 11 January 2023 the Court of Appeal handed down judgment in Sharp Corp Limited v Viterra B.V., finding that the words "*actual or estimated value of the goods, on the date of default*" in paragraph (c) of the GAFTA Default Clause mean the value of the goods measured by reference to a notional substitute contract on the same terms as the subject contract, as it exists at the date of default, save as to price.

Facts

By two contracts dated 20 January 2017 Viterra sold to Sharp: (a) 20,000mt of Canadian lentils in bulk at USD600/mt (the "**Lentils Cargo**"); and (b) 45,000mt Canadian yellow peas at USD339/mt (the "**Peas Cargo**"), each C&F free out, Mundra (the "**Goods**") (the "**Contracts**"). The Contracts incorporated GAFTA Contract No. 24, clause 25 of which (the "**GAFTA Default Clause**") stated (in part): "... (c) *The damages payable shall be based on, but not limited to, the difference between the contract price of the goods and ... the actual or estimated value of the goods, on the date of default ...*".

The Contracts required that: (a) payment, if by means of cash against documents, was to be made 5 days prior to the vessel's arrival at the discharge port; and (b) in the event of non-payment, Sharp would fully co-operate to enable Viterra to resell the Goods (the "**Non Payment Clause**").

The vessel arrived at Mundra on 19 June, but no payment had been received. Between 20 and 23 June, the Goods were custom cleared, discharged pursuant to a letter of indemnity (the "**LOI**") issued by Sharp to Viterra, and stored at the discharge port. On 26 September addenda to the Contracts were signed requiring Sharp to pay for the Goods in three instalments, beginning on 15 October (the "**Addenda**").

On 25 October, having failed to pay the first instalment, Sharp refused to authorise the release of the Goods to Viterra. On 8 November the Indian Government imposed an import tariff on peas of 50%. On 9 November Viterra declared default under the Contracts. On 21 December a further import tariff was placed on lentils of 30.9% (together the "**Tariffs**").

Sharp eventually authorised the release of the Goods to Viterra on 2 February 2018, and between 7 and 9 February Viterra sold the Peas Cargo for USD378/mt and the Lentils Cargo for USD431/mt, both basis C&F free out, Mundra, to a third party.

Issue

The key issue (and the question of law for determination by the Court of Appeal) was whether the wording "*the actual or estimated value of the goods on the date of default*" under paragraph 25(c) of GAFTA 24, when measuring Viterra's damages for breach of the Contracts, should be assessed by reference to: (a) the market value of the Goods at Mundra on the date of default; or (b) the theoretical cost on that date of buying the goods FOB at the port of shipment plus the market freight rate of transport to the discharge port, free out.

GAFTA Board of Appeal

Having found that clause 25(c) applied as the appropriate measure of damages, the Board held that the words "*actual or estimated value of the goods on the date of default*" meant the market value of the Goods C&F free out Mundra, in bulk, on 2 February 2018 (being the date on which Sharp agreed to authorise the release of the Goods (the "**Default Date**"). It did not mean the internal domestic market, as argued by Sharp, which had "undoubtedly increased" following imposition of the Tariffs.

Commercial Court

Sharp successfully applied for permission to appeal the Board's decision under s.69 Arbitration Act 1996, including on grounds that the Board's decision was open to serious doubt.

The appeal was rejected by Mrs Justice Cockerill, who nevertheless granted Sharp permission to appeal her decision before the Court of Appeal. (Please click [here](#) for our full analysis of the Commercial Court's decision).

Court of appeal

The Court of Appeal (Lord Justice Popplewell giving the leading decision) overturned Mrs Justice Cockerill's decision, finding that the Appeal Board had erred in treating the notional substitute contract under paragraph 25(c) as one on terms C&F free out Mundra. The correct substitute contract was a contract on the terms as varied by the parties, which on the facts was a notional sale of the Goods ex warehouse Mundra, on instalment payments terms, but with risk having passed on shipment. The Court gave the following reasons in support:

1. Following Bunge v Nidera¹, the measure of loss in paragraph (c) reflected the common law compensatory measure where there is an available market. It was axiomatic to the compensatory principle that the assessment of damages reflects the nature of the bargain which the innocent party has lost. This required an examination of the parties' bargain as it existed on the date of default, including any variation to the terms.
2. The Board's findings inferred that the Goods had been discharged from the vessel, against presentation of the original bills of lading by or on behalf of Viterro, pursuant to the LOI (which was issued under the Contracts and not the charterparty). Accordingly, at the Default Date each Contract was no longer a C&F contract, and the proper measure under paragraph (c) was instead a notional sale of the goods in bulk ex warehouse Mundra, as amended by the Addenda and with risk having already passed.
3. Throughout the appeal process, emphasis had been placed by the parties and judges on the particular features of the case, including the effect of customs clearance on the value of the Goods. The question of law put to the Court, which referred to C&F contracts generically, did not reflect the facts of the case. To enable the Court

to address the question by reference to those facts, the Court was entitled to properly treat the question of law as: what was the proper measure of loss for the Contracts, on the terms which existed at the date of default, *in the circumstances as found by the Appeal Board?*

Comment

Applying the principles set out in Bunge v Nidera, the Court of Appeal's decision in Sharp v Viterro clarifies the need to reflect with precision the terms of the parties' bargain at the date of default, when assessing market value by reference to a notional contract, in order properly to reflect the innocent party's loss (applying the overarching compensatory principle of damages).

As a practical consequence, parties should carefully consider the nature of their contract at the date of default (compared with at its conclusion), as this may significantly alter the quantum of damages recoverable. Strategically, an awareness of this distinction may inform a party's approach to dispute resolution, including as regards: (a) whether to agree a contractual amendment; (b) where damages are sought, which date of default to plead (this being at the election of the non-defaulting party under the GAFTA Default Clause); and (c) whether certain losses could be more successfully claimed as additional expenses outside of the framework of paragraph (c) (as discussed by the Court at [64]).

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Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking [here](#).

¹ Bunge SA v Nidera BV [2015] UKSC 43.