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Ayhan Sezer Yag ve Gida Endustrisi Ticaret Ltd Sirket v Agroinvest SA – London Circuit Commercial Court clarifies meaning of "date of default" under GAFTA Default clause for anticipatory repudiatory breach

On 5 March 2024 the London Circuit Commercial Court handed down judgment in Ayhan Sezer Yag ve Gida Endustrisi Ticaret Ltd Sirket v Agroinvest SA [2024] EWHC 479 (Comm), finding, among other things, that, in the case of an anticipatory repudiatory breach, the "date of default" in clause 23(c) ("*Default*") of Gafta Contract No. 100, was the date of breach by the defaulting party.

Facts

By a contract concluded on 2 April 2018, Agroinvest sold to Ayhan "*About 1,200-2,000 MT +/-10% Sellers' option, EU Non Gmo Soybean Meal in bulk"* and "*About 1,500 MT +/-10% Sellers' option, EU rape meal in bulk*", in two shipments, the first "*prompt*" and the second between 15 April -15 May 2018 (the "**Contract**"). The Contract incorporated GAFTA Contract No. 100, Clause 23 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 and either the default price established under (a) … or upon the actual or estimated value of the goods, on the date of default, established under (b) …"*).

The Contract also required that Ayhan pay Agroinvest "*US$494,500 advance payment /guarantee upon signing of the Contract"* which it did on 23 March (the **"Advance Payment"**).

A dispute arose as to whether Agroinvest should proceed to charter a vessel pending agreement of terms. On 4 April Ayhan wrote to Agroinvest stating (in part): "*It seems we can not agree in this business; therefore we request you to return the paid amount to us …"* (the "**4 April Email**").

On 27 April Agroinvest wrote to Ayhan saying they would advance the chartering of the performing vessel. Ayhan responded on the same day, stating (in part): "*Please definitely not attempt the charter a vessel or any action to send these goods to us … Please return the amount we have paid to your side …"* (the "**27 April Email**").

On 7 May Agroinvest wrote: *"1) The down payment … is not refundable // 2) We kept good notice of your refusal to receive, for your own reasons, the contracted non-gmo soybean meal // 3) We suggest to deliver instead, regular gmo soybean meal at our contract price. // 4) Otherwise, we might wash out our contract for a fee to be agreed."* (the "**7 May Email**").

Ayhan commenced arbitration proceedings seeking repayment of the Advance Payment.

Issue

The key issue (and key question of law for determination by the London Circuit Commercial Court) was what the "date of default" was, properly construed, for the purpose of establishing Ayhan's damages under the GAFTA Default Clause (specifically whether this was: (a) the date of acceptance of Ayhan's anticipatory repudiatory breach of the Contract as per the 7 May Email; (b) the last date on which Ayhan could have performed the Contract; or (c) the date of the repudiatory breach, and if so whether this ought to have been 4 April or 27 April.

GAFTA First Tier Tribunal ("FTT")

The FTT held that the date of default was 7 May, being the date on which Ayhan's repudiation was accepted, pursuant to the 7 May Email.

GAFTA Board of Appeal (the "Board")

The Board found that Ayhan repudiated the Contract by the 27 April Email, that this was accepted by Agroinvest by the 7 May Email, and (upholding the FTT's finding) that the date of default was 7 May.

Permission to Appeal

Ayhan successfully applied for permission to appeal the Board's decision under s.69 Arbitration Act 1996, including on grounds that the Board erred in its finding that the date of default was 7 May.

London Circuit Commercial Court

His Honour Judge Pearce, following the decision of Beatson J in Thai Maparn, and overturning the decision of the FTT and the Board, found that, on its true construction, the date of default in a GAFTA Default Clause is the date of breach, even where that breach is anticipatory (and accordingly the Board erred in law on that issue). Judge Pearce gave the following reasons in support:

1. Nothing in either the terms of the GAFTA Default Clause or the surrounding circumstances of the Contract suggested that the date of default was to be determined by the date on which performance should have taken place (Bunge v Nidera distinguished). In accordance with established principles – that the effect of the acceptance of a repudiatory breach is to terminate the contract and bring to an end the right to call for performance under the contract – the date of default could be no later than the date of acceptance of breach.
2. In a case of actual breach of performance, the natural meaning of "date of default" was clearly the date of the breach (Toprak v Finagrain considered). This was less obviously the case in circumstances of an anticipatory repudiatory breach, and arguments could be identified pointing to either the date of breach or the date of acceptance as being the true date of default.
3. Where the true construction of a clause was arguable, there was a powerful argument for consistency in the law, especially in the case of standard form contracts. In Thai Maparn Beatson J had held that the date of default for the purposes of an anticipatory breach was the date of breach itself. Further, to construe "date of default" differently in cases of: (a) actual repudiatory breach; and (b) anticipatory repudiatory breach would risk inconsistency.
4. The fact that an unaccepted repudiation of a contract did not confer any legal rights did not mean that the date of that unaccepted repudiation could not, on the true construction of a contract, be the date on which losses were calculated, if this was intended by the parties or by commercial common sense, or the surrounding circumstances of the contract.

Judge Pearce further held that: (a) the Board did not err in law in finding that Ayhan's message of 4 April did not meet the threshold of a repudiation (which question was a mixed question of law and fact); and (b) the Advance Payment was repayable to Ayhan, on account of the absence of any evidence of an intention of the parties (in the form of an express statement or the use of the term "deposit") that this should be the case.

Comment

The Commercial Court's decision in Ayhan Sezer and Agroinvest is a welcome clarification of the proper construction of the words "date of default" for the purposes of the GAFTA Default Clause (which is replicated in many GAFTA contracts) in instances of anticipatory repudiatory breach.

Accordingly, a practical consequence of this decision is that, where incorporated, parties will be constrained to adopting the date of breach as the date of default under the sub-clause (c) of the GAFTA Default Clause, which may significantly affect the quantum of damages recoverable, as compared with the date of acceptance of breach, or last date of performance, owing to fluctuating market prices.

Strategically, an awareness of this distinction may inform a party's approach to dispute resolution, including as regards: (1) whether to claim damages by reference to the contract price (under sub-clause (a)); or on the actual or estimated value of goods, on the date of default (under sub-clause (c)); and (2) whether certain losses may be more successfully claimed outside of the framework of sub-clause (c), for example as additional expenses.

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