OON & BAZUL
ASIAN EXPERTISE·GLOBAL REACH

Interpreting The Date of Default Under The Default Clause of GAFTA Contracts

NG GUANG YI
SENIOR ASSOCIATE
LITIGATION & DISPUTE RESOLUTION

PRAKAASH SILVAM
PARTNER
HEAD OF SHIPPING

VEDANTA VISHWAKARMA
FOREIGN LAWYER
LITIGATION & DISPUTE RESOLUTION

INTRODUCTION AND BACKGROUND

- The Grain and Feed Trade Association ("GAFTA") is a London based trade association which develops standard form contracts for traders involved in international commodity trade particularly pertaining to grain and animal feed such as meat and dairy. Over 80 % of the world's trade in Grain is shipped using GAFTA contracts, thus making it one of the most important trade associations in the world. Its members include traders, brokers, superintendents, analysts, fumigators, arbitrators and other professionals.
- Depending upon the commodity and regions involved, as of April 2024, GAFTA provides over 100 different kinds of contracts for its members to use.
- GAFTA Contract No. 100 ("GAFTA 100") is one of the GAFTA contracts which is used for shipment of feedingstuffs in bulk. These feedingstuffs may include corn, soyabean etc., processed, partially processed or unprocessed, intended to be used for oral feeding to animals.
- When either of the parties default in fulfilling their obligations under the contract, the other party can seek damages against the defaulter. If the damages are not mutually agreed, then the settlement of damages is resolved through arbitration. One of the key issues when quantifying damages is the date of default.
- In the case of *Ayhan Sezer v Agroinvest SA [2024] EWHC 479*, the English Commercial Court considered two issues on appeal arising from a GAFTA arbitration appeal award. The first concerned the interpretation of the date of default clause, as found in GAFTA standard form contracts. The second concerned the recoverability of an advance payment made pursuant to the performance of the contract.

BACKGROUND AND FACTS

- On 2 April 2018, Ayhan Sezer (the "Claimant"), entered into a contract ("the Contract") with Agroinvest (the "Defendant"), for the purchase of rapeseed meal and soybean meal. The Contract incorporated the standard terms of the GAFTA 100 contract. Pursuant to the Contract, Ayhan Sezer made an "advance payment / guarantee" of $494,500 ("Advance Payment") to Agroinvest.
- Soon after, on 4 April 2018, Ayhan Sezer indicated that he was no longer willing to perform the Contract and requested a refund of the Advance Payment. The two

issues on appeal principally arose from this request. Agroinvest refused to return the Advance Payment, stating that it was non-refundable. Furthermore, although Ayhan Sezer did not dispute that the contract was breached, the parties disagreed on the date of default for purposes of assessment of damages.

- It is worth noting that Ayhan Sezer's breach did not stem from non-performance of his obligations per se, but rather from his indication that he was unwilling to perform his obligations before it was due. In other words, there was an anticipatory repudiatory breach by Ayhan Sezer.

WHAT IS AN ANTICIPATORY REPUDIATORY BREACH?

- An anticipatory repudiatory breach, also known as a renunciation, occurs when a party evinces an intention not to perform his obligations under a contract. This is to be distinguished from an actual repudiatory breach, whereby a party fails to perform his obligations under a contract when it falls due. It was held in the case of *The Mihalis Angelos [1971] 1 QB 164*, that "In cases of anticipatory repudiatory breach, the breach is not caused by the future breach that will occur from the party's inevitable non-performance. Rather, it occurs from the renunciation itself".

- The renunciation can be expressed via words or conduct. For a renunciation to be valid, the defaulting party's words or conduct must lead a reasonable person to conclude that the defaulting party no longer intends to be bound by the contract. In the present case, the court concluded that Ayhan Sezer's email sent on 4 April did not amount to a valid renunciation as it was "not a sufficient and unequivocal refusal to perform the contract".

- Generally, a contract is only discharged (i.e. neither party is bound to fulfil their respective obligations) when the renunciation is accepted by the innocent party, as is clear from the case of *Howard v Pickford Tool Co [1951] 1 KB 417*.

- As discussed below, the court in the present case appeared to have departed from this general principle.

THE DATE OF DEFAULT

- In relation to the date of default, the court had to decide between (a) the date of the anticipatory repudiatory breach (4 or 27 April), (b) the date of acceptance of said breach (7 May), or (c) the last date which Ayhan Sezer could have performed the contract (15 May).

- The court rejected option (c), citing that the term "date of default" is tied to the non-fulfilment of the Contract. In the case of an acceptance of an anticipatory repudiatory breach, the contract is terminated and there is no remaining fulfilment obligation. Therefore, the "date of default" cannot be later than the date of acceptance of a repudiatory breach.

- In deciding between option (a) or (b), the court followed the decision in *Thai Maparn Trading Co Ltd v Louis Dreyfus Commodities Asia Pte Ltd [2011] 2 Lloyd's Rep 704*, holding that the "date of default" should be option (a) i.e, the date of the anticipatory repudiatory breach. In reaching its decision, the court held that it was desirable that standard form contracts are construed in a consistent manner. The court elaborated that it would foster uncertainty in the law if the "date of default" in cases of actual

repudiatory breach is the date of the breach of a performance obligation, while in cases of an anticipatory repudiatory breach the date of default is to the date of acceptance.

- Notwithstanding the general principle mentioned above that a contract is only discharged when the renunciation is accepted by the innocent party, the court held that an unaccepted renunciation has no legal effect and choose to depart from the general principle.
- The court further held that the date of the anticipatory breach was to be 27 April. As mentioned above, this was because the language used by Ayhan Sezer in his email dated 4 April could not be interpreted as "a sufficient and unequivocal refusal to perform the contract".

ADVANCE PAYMENT

- With regards to the Advance Payment, the court held that the Advance Payment had to be repaid to Ayhan Sezer.
- This was because the Contract did not refer to the Advance Payment as a "deposit". The court emphasized the need for express language of security for performance or the use of language such as "deposit" to demonstrate a contractual intention that the Advance Payment would not be recoverable even if Agroinvest had suffered no loss through non-performance.

KEY TAKEAWAYS

- This decision defines when the relevant date of default is for cases of anticipatory repudiatory breach and is helpful for people entering into contracts based on GAFTA standard forms. It also helps determine any losses that may be incurred under the GAFTA default provision. In order to maintain consistency under English law, the Court chose to adopt the date of acceptance as date of default for cases of anticipatory repudiatory breach.
- Further, parties should clearly specify in the contract any circumstances in which they intend for any down payment toward the purchase price to be non-refundable in the event of a buyer breach. There may be room for disagreement between the parties over the status of any money advanced before contractual performance if it was not specified in the contract clearly.
- The decision signals the court's predominantly textual (as opposed to contextual) approach and reliance on the natural meaning of words in interpreting standard form contracts. As noted by the court, some agreements may be successfully interpreted primarily by textual analysis because of their sophistication and preparation with the assistance of skilled professionals. GAFTA standard form contracts (like the one used in the present case) would be an example of such an agreement; parties should therefore be wary of the legal implications in such contracts and seek professional legal advice in order to make their trade contracts as watertight as possible.
- The predominance of the textual and natural meaning approach is consonant with the outcomes on both issues. With regards to the date of default, insofar as "'default" refers to a repudiatory breach, it would naturally refer to the date of renunciation as opposed to the date of acceptance of renunciation. With regards to the Advance Payment, the court's reasoning directly contrasts the contextual approach of the GAFTA Board, which held that there was no "linguistic distinction[s]…between Deposit and Advance Payment" and that the "commercial reality

of the parties' intentions in agreeing to [the Deposit] was to provide business efficacy to the Contract".

- Furthermore, this decision highlights the importance of using clear and unambiguous language in the context of renunciation. As mentioned above, Ayhan Sezer's email of 4 April did not amount to a valid renunciation. The court noted that language such as "it seems that the parties cannot agree" and "requesting a return of the monies" was tentative and suggested that parties were seeking to negotiate an amicable resolution rather than stating a firm intention not to comply with the contractual obligations.

This client update was authored by our Partner and Member of Grain and Feed Trade Association (GAFTA), Prakaash Silvam, Senior Associate Ng Guang Yi, and Foreign Lawyer Vedanta Vishwakarma. The authors thank Brandon Lim from the University of Cambridge for assisting with the client update.

Oon & Bazul LLP are regularly instructed in matters concerning international commodity trade and have successfully represented several commodity traders based in Singapore, Malaysia, Indonesia, India, and Dubai in numerous GAFTA Arbitrations. Our clientele includes the world's largest trading houses, whom we advise and act for on all aspects of international trade, including disputes relating to the international sale of goods, trade finance, insurance, shipping, and logistics. In addition to GAFTA, we also act for clients in commodities disputes before other trade associations such as FOSFA, RSA and PORAM. We also have substantive experience in representing clients in trade related disputes before the Singapore courts.

You may visit our Commodities & International Trade page to learn more about our practice.