

Gafta Seller's Truly "Golden Victory": Supreme Court Reduces Damages From US\$3 Million To US\$5

Bunge SA v Nidera BV [2015] UKSC 43

"Commercial certainty is undoubtedly important...but it can rarely be thought to justify an award of substantial damages to someone who has not suffered any." On consideration of the GAFTA Form 49 default clause, the Supreme Court unanimously held that the clause was not a complete code covering the entire field of damages. As such, and in accordance with the compensatory principles set out in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha [2007] 2 AC 535 ("The Golden Victory")*, the buyers were not entitled to recover substantial damages for the sellers' breach of contract where no loss had actually been suffered.

This dispute related to the proper construction of the Default Clause in GAFTA Form 49. GAFTA Form 49 is the standard form of FOB sale contract of the Grain and Feed Trade Association for goods delivered from Central or Eastern Europe in bulk or bags. The significance of their lordships unanimous decision, however, is much wider in scope and extends to the interpretation of express damages clauses in any commodities or other commercial contract.

In summary, the Supreme Court held:

1. The GAFTA Default Clause was not a complete code covering the entire field of damages and as such did not exclude the compensatory principles set out in *The Golden Victory*;
2. The principle that damages should be compensatory applied equally to a contract for a one-off sale as it does to an instalment contract; and
3. In obiter, that the GAFTA default clause did not exclude the principles of common law mitigation.

The Background Facts

The buyers contracted with the sellers to buy 25,000 metric tonnes (+/-10%) of Russian milling wheat crop 2010, FOB Novorossiysk. The contract incorporated GAFTA Form 49 and had a contractual shipment period of 23-30 August 2010.

On 5 August 2010, Russia introduced an embargo on exports of wheat from its territory, which was to run from 15 August to 31 December 2010. On 9 August 2010, the sellers notified the buyers of the embargo and purported to declare the contract cancelled.

The date the sellers cancelled the contract, however, was approximately six days before the start of the export embargo. The buyers, capitalising on this six day difference, maintained that sellers were not yet entitled to cancel the contract as it was impossible to say, as at the date when the sellers cancelled, that the shipment would necessarily be prevented by the embargo. Taking this position, the buyers treated the sellers' premature termination as a renunciation of the contract, which they accepted on 11 August 2010.

On 12 August 2010, realising their error, the sellers offered to reinstate the contract on the same terms. The buyers refused to accept this mitigating offer and commenced GAFTA arbitration, claiming damages of over US\$3 million under the GAFTA default clause.

The embargo did in fact come into force and was even extended.

The sellers, relying on *The Golden Victory*, contended that, as the contractual shipment would have been subject to the export ban when the time for shipment came, the buyers, in reality, suffered no loss. Accordingly, buyers' should not be placed in a far better financial position than if the contract had been fully performed. Additionally, the sellers contended that the buyers had failed to mitigate their loss by accepting the sellers offer to reinstate the contract on the same terms.

The Golden Victory

The Golden Victory was a time charterparty dispute. In this dispute, charterer's brought a seven-year time charterparty to an end four years before its contractual conclusion, but only 14 months before it would have been cancelled in any event under a war clause. At the time when charterers' repudiation was accepted, however, war with Iraq was far from inevitable.

The following question therefore arose: in assessing damages, what should be considered the total length of the charterparty if it had not been wrongly terminated on the date that it was?

The House of Lords held by majority that the over-riding principle in assessing the owners' damages was the compensatory principle. This principle requires an injured party "so far as money can do it be placed in the same situation with respect to damages as if the contract had been performed".

The majority of the House of Lords held that an assessment of the owners' damages should therefore take into account events known at the time of the assessment. There was no need to attempt a retrospective assessment of prospective risk by considering what might have happened when what actually happened was already known. As Lord Bingham acknowledged; "you need not gaze into a crystal ball when you can read the book."

Accordingly, damages were limited to those 14 months before the charterparty would have been cancelled in any event.

The Supreme Court Decision

The Supreme Court, overturning the decision of the GAFTA Board of Appeal, re-affirmed the principles of *The Golden Victory* and reduced the level of damages payable by the sellers from US\$3,062,500 to a nominal US\$5.

The Supreme Court clarified that damages clauses, such as the GAFTA default clause, are commonly intended to avoid disputes on the calculation of damages, either by prescribing a fixed measure of loss or a mechanical formula in place of the common law approach. The GAFTA default clause, however, like most damages clauses, was considered not sufficiently comprehensive to be regarded as a complete code covering the entire field of damages.

For example, the GAFTA default clause provides a useful and complete code for determining the market price or value of the goods that either were actually purchased by way of mitigation or might have been purchased under a notional substitute contract. The clause does not, however, deal with the effect of subsequent events inhibiting the entire performance of the original contract, nor does it exclude every other expense that may be relevant in determining the innocent party's actual loss.

Additionally, Lord Toulson, in obiter, rejected the buyers' original argument that the GAFTA default clause precludes the operation of common law mitigation principles.

Conclusion

This judgment serves as a stark reminder that to exclude common law principles in the assessment of damages, express damages clauses require clear and express wording.

Moreover, termination can be a risky remedy to exercise. Where a party wrongfully terminates, the innocent party, as in this case, is likely to argue that the termination was a repudiatory breach of contract entitling them to substantial compensation. It is therefore recommended that legal advice be obtained before exercising the right to terminate. Appropriately protecting your position can save you paying thousands in legal fees and millions in damages.

Contact

Michael Davar

Associate

T +44 207 655 1425

E michael.davar@squirepb.com

Dharmendra Nair

Partner

T +44 207 655 1079

E dharmendra.nair@squirepb.com