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Welcome to Norton White's Commodity Briefcase for June 2008.

2008 is shaping up to be an interesting year in commodities with the deregulation of the industry and the shortly expected changes to the single desk.

Subject to rainfall on the East Coast, we may see a better grain harvest than we have in recent years, which could test the capacity of our grain logistics chain.

We are pleased to have represented GrainCorp in defending the chain of responsibility overloading charges issued by the RTA. A comment on the case is included in the newsletter.

Happy reading,
Geoff Farnsworth

» article

Samantha Mackay | Solicitor

Interpreting Default Clauses

Sanhe Hope Full Grain Oil Foods Production Co Ltd v Toepfer International Asia PTE Ltd [2007] EWHC 2784

The issue in this case was the interpretation and application of a default clause incorporated into the contract, specifically whether a party who had not suffered a loss could claim compensation. The clause stated:

"In default of fulfillment of this contract by either party, the other party at his discretion shall, after giving notice, have the right to either cancel the contract, or to sell or purchase, as the case may be, against the defaulter who shall on demand make good the loss, if any, on such sale or purchase...the damages awarded against the defaulter shall be limited to the difference between the contract price and the actual or estimated market price on the day of default..."

The contract was for the sale and purchase of 55,000 tonnes of Brazilian soya beans, requiring the Buyer (Sanhe) to make two advance payments. The second installment was not paid, as was required before the commencement of futures pricing. This constituted a repudiatory breach of the contract.

The vessel had been loaded when the Seller (Toepfer) called the Buyer in default and "appropriated" the soya beans. The Seller then allocated the shipment to a contract with a third party for more than the sale price to the Buyer and sought damages from the Buyer pursuant to the Default Clause.

The Buyer argued that there was only ever one cargo and as the Seller had not suffered a loss on that cargo, (because the cargo was on sold at a higher price) it was not entitled to damages. The Seller submitted that it would have performed (and presumably made a profit) under both the Sanhe and the third party contracts; but for the repudiation. It was submitted that the seller was therefore entitled to recover the difference between the contract price and the market price of the contract by way of liquidated damages.

The Arbitration Tribunal at first instance held that Sanhe had to "make good the loss" and "if no such loss has been suffered, then there was no call for compensation". The Tribunal considered that the reference to the "difference between the contract price and...market value" was a cap on damages that could be awarded rather than a liquidated damages clause automatically entitling the Seller to damages.

» **Interpreting Default Clauses** continued

The Arbitration Appeal Tribunal considered that this was an incorrect interpretation and that the third party contract has “no impact on the quantification of the Seller’s loss. ” *The Tribunal stated that “damages must be assessed strictly in accordance with the Default Clause of the contract; that is the difference between the Contract Price and the estimated or actual price of the goods on the Date of the Default”* awarding the Seller \$2,778,600.00.

The Buyer appealed to the Commercial Court on the basis that the Appeal Tribunal had incorrectly interpreted the Clause. The Seller submitted that even if the Clause was interpreted incorrectly by the Appeal Tribunal, it was entitled to recover the damages simply because the Buyer had failed to make out its case that the same cargo had been appropriated for the third party contract before the Buyer’s default.

The Court considered that while the Appeal Tribunal had misinterpreted the Clause, the Court could not make an express finding on whether there was only one cargo available at the time. The Court remitted the dispute to the Appeal Tribunal to determine whether the Buyer had established that the Seller would not have earned a profit from the third party but for the Buyer’s repudiatory conduct.

While this judgment is not a comprehensive analysis of the application of the Default Clause, it does indicate that where a clause states “make good the loss, if any” it may well be possible to find that there was no loss to be awarded even if the Buyer had defaulted on the contract. It supports the common sense position that a buyer in default will only be liable to the seller if the seller makes a loss on the sale ◀◀

[Link to Case](#)



International News

» **WTO to Introduce Regions of Disease**

The Sanitary and Phytosanitary Committee agreed on new rules that allow exports to continue from disease-free regions within countries during disease outbreaks. Previously all exports were barred from a country until its disease-free status was reinstated. The new rules means that countries can still engage in trade, whilst barring exports from a disease or pest infected region. *BioRes News* ◀◀

» **US Farm Bill Passed**

The US Farm bill passed both houses of congress with enough support to negate President Bush's right to veto it. The bill primarily retains the current system of farm subsidies for the next five years. This is likely to restrain the US’s negotiating position in the WTO. The bill has been criticised for not reducing subsidies while food prices are high. The main points to note are that 14 percent of the bill is allocated to farm subsidies and the Bill establishes a permanent agriculture disaster programme, allocating almost \$4 billion to the fund. *Bridges Weekly* ◀◀

» **GM News in Brief**

Mexico will allow limited cultivation of GM maize. Farmers will not be allowed to grow GM maize on land where corn strains found only in Mexico are grown.

Brazil is developing a GM cane sugar for use as a biofuel, which could be available within three to five years. Brazilian farmers have resisted the introduction of GM crops, especially for corn, but biotech companies hope that as the cane will not be used for food or animal feed, it will be easier to get approval.

The French State Council has upheld the temporary government ban on the use of MON810 maize, rejecting an injunction by seed makers and farmers.

In Africa, Benin has announced it will renew a moratorium on the import, marketing and use of GM varieties for another five years. Kenya recently suspended the sale of maize from South Africa after lab results indicated that it was contaminated by MON810. *Bridges Weekly* ◀◀

▶ article

Abby Millerd | Graduate

Broken Glass - Where Should the Claim be Brought*Vetzeria Etrusca SRL v Kingston Estate Wines Pty Ltd – [2008] SASC 75*

Choice of law and jurisdiction clauses are common in contracts for the international sale of goods. Disputes relating to their application are just as common.

In *Vetzeria* the parties appealed a District Court decision refusing to stay proceedings for a claim for damages for breach of contract. The Appellant sought to stay the proceedings as it alleged that a jurisdiction clause in the contract stated that any dispute that fell within the prescribed categories was to be determined by an Italian Court.

The Respondent, Kingston Estate Wines, is a winemaking company incorporated in South Australia. The Appellant, *Vetzeria Etrusca*, is a glass manufacturer in Italy. The Appellant contracted to supply the Respondent with glass bottles for the winemaking business, on an “ad hoc” basis.

The parties subsequently entered into a ‘Supply Agreement’ under which the Appellant’s bottles were required to be in accordance with the ‘General Sales Conditions’. The Respondent commenced proceedings in the District Court of South Australia after (it alleged) the bottles failed to meet the requirements of the General Sales Conditions. The Appellant brought an action in the Court of Florence, Italy, for amounts outstanding under unpaid invoices.

The Supply Agreement contained a jurisdiction clause which stated that for any dispute arising from the ‘interpretation, execution or application’ of the contract the competent court was in Florence. The District Court decided not to stay the proceedings on the basis that the claim arose from a breach of the contract and did not fall within the jurisdiction clause.

The Supreme Court, presided over by Justice Duggin, considered how the ‘General Sales Conditions’ were brought into existence. Firstly, the original ‘General Sales Condition’ document, which was written in Italian, was not supplied to the Court nor had the Respondent received a copy. In the second instance, the jurisdiction clause was written in poorly worded English, so it was difficult for the Court to determine whether the current circumstances were ones which gave rise to the issue being tried in an Italian Court.

In examining whether the jurisdiction clause had been triggered in this instance, Justice Duggin gave a general examination of the law regarding jurisdiction and arbitration clauses in contracts.

His Honour held that there was a strong judicial history of parties who enter into special contracts being held to their bargain. The Courts have consistently held that in the absence of ‘countervailing’ or ‘strong’ reasons, the parties would be required to ‘abide by their agreement.’ In these circumstances, the onus is on the Plaintiff to show that there is strong cause for the Courts to exercise their discretion by not granting a stay of proceedings. It is not sufficient to show that the matter could be dealt with more conveniently in a different court.

Despite the position taken by Australian courts towards enforcing these special agreements, His Honour maintained that the Courts still retain their discretion to refuse to stay proceedings if sufficient cause can be shown. In determining when this discretion should be exercised, the scope of the clause must be examined through the construction of the contract.

In the present instance, the Court was concerned over the ambiguous wording of the translated clause and lack of extrinsic material, which may have assisted in the proper construction. The Appellant challenged the District Court’s interpretation of the word ‘execution’, claiming that the term referred to performance of the contract and not the signing or adoption of the contract. However, His Honour held that as the meaning of the term within the jurisdiction clause was ambiguous, the intention of the parties could not be clearly made out. Further, as it had been stipulated that only specific types of disputes would trigger the arbitration clause a liberal approach could not be taken and there was no strong reason for staying proceedings. His Honour referred to the position in *PMT Partners P/L v Australian National Parks and Wildlife Services*: “It may be accepted that contracts will only be construed as limiting the rights of the parties to pursue their remedies in the courts if it clearly appears that that is what was agreed.” Limits of this kind were considered unjustified in the present case.

Given the ambiguity of the jurisdiction clause coupled by the failure to supply extrinsic information, the Court upheld the decision not to stay proceedings.

Vetzeria highlights the importance of drafting clear and unambiguous jurisdiction and arbitration clauses to ensure that they are given effect in the way the parties intended. ◀◀

[Link to Case](#)

» article

Natalia Panchenko | Solicitor

When FOB and LOC are not in sync*Cereal Investments Company (CIC) SA v ED&F Man Sugar Ltd [2007] EWHC 2843 (Comm)*

In this case the Commercial Court of the Queen's Bench Division dismissed the Buyer's appeal against a finding that a Letter of Credit ("LOC") was not in accordance with the terms of the FOB contract.

The FOB contract contained the following Shipment Period clause:

"One vessel only presenting October 2006 Shipment at Buyer's Option, with 10 days pre-advise of vessel arrival..."

The Buyer opened the LOC which required the presentation of a bill of lading dated no later than 31 October 2006. The Seller requested that the LOC be amended so that the bill of lading could be dated in October or November. The Buyer replied that the LOC was in strict compliance with the contract and if shipment would not be completed during October, despite the Seller's compliance with its contractual obligations, the Buyer would extend the LOC shipment period accordingly. The Seller did not withdraw its demand to amend the LOC pointing out that if the Buyer presented its ship at the end of October the bill of lading would be dated for November. The Buyer held the Seller in default and terminated the contract.

An arbitration panel dismissed the Buyer's claim that the Seller's conduct amounted to a repudiation of the contract.

The Buyer appealed to the Commercial Court. The main question raised by the Buyer was what final bill of lading date and expiry date should be provided for in the LOC to comply with the FOB contract; namely whether shipment needed to be completed in October or merely commenced in October.

Justice Walker considered whether the Buyer was right to contend that the contract identified a shipment period under which loading had to be completed by 31 October 2006.

The answer turned on the construction of the words in the Shipment Period clause. The Court considered whether the word "presenting" focused on the preceding words, "One vessel only", with the consequence that the subsequent words "October 2006" referred to "Shipment". Or was it concerned to define what the "One vessel only" must do in October 2006 (i.e. present) with the word "Shipment" to be "at the Buyer's option" but not necessarily in "October 2006".

The Court accepted the Seller's version; that the period within which the Seller must stow the cargo was the period of time needed to stow the cargo onboard a vessel presenting in October, even though the end period had a fixed date that was not specified. Justice Walker went on to say that as a matter of commercial reality a LOC would usually need to specify fixed dates which were to be specified in the bill of lading. If the contract itself does not identify a fixed deadline, *"the Buyer will have to make a reasonable estimate of when shipment will be completed"*.

The Court pointed out that it was not uncommon that an FOB contract required a party "to make a reasonable estimate of the time needed for a particular purpose". Therefore, it was logical and made commercial sense to insert a notional full stop before the word "Shipment", so that the preceding section read "One vessel only presenting October 2006".

The Court distinguished the construction of an FOB contract by the House of Lords in *Compagnie Commerciale Sucres et Denrees v C. Czarnikow Ltd* [1990] 1 WLR 1337, where the contract wording was materially different and the vessel had to present capable of completing loading by the end date specified in the FOB contract. In the present case the words were used to ensure that the date shipment commenced was determined by when the vessel presented herself.

The Court held that the Buyer's interpretation of the final shipment date was incorrect and 31 October 2006 indicated the last date the vessel could present for loading. ◀◀

[Link to Case](#)

» inBrief

GrainCorp not Negligent in Chain of Responsibility

Late last month the Local Court of New South Wales dismissed the 332 charges issued by the RTA against GrainCorp. The notices alleged that GrainCorp had breached the NSW Chain of Responsibility legislation by accepting overloaded vehicles at the start of the 2005 harvest. The Court held that GrainCorp had not acted negligently when accepting the vehicles because its policy of not turning away overloaded vehicles was made in light of the aim of the legislation, a long standing GrainCorp policy not to put overloaded trucks on the road, and the lack of guidance from the RTA as to how to treat overloaded vehicles following the collapse of the proposed Grain Harvest Loading Protocol. ◀◀

**Wheat Legislation**

The Wheat Export Marketing Bill 2008 was tabled in the Senate on 11 March 2008. When passed, the Bill will create the Wheat Exports Australia, which will provide accreditation to organisations wishing to export wheat. It will repeal the single desk in its current form.



The Standing Committee on Rural and Regional Affairs and Transport was asked to review the Bill and report back last month. The Committee called for submissions and held meetings for interested parties to discuss the bill. The Committee issued a detailed report outlining the feedback it received on the Bill. In the report the Committee noted the strong arguments it had received both for and against the passage of the proposed Bill. The Committee considered that careful consideration be given to these issues and amendments made to the Bill before it is tabled in Parliament.

The Committee made three main recommendations. Firstly, the Committee recommended that the Bill should clearly set out the objectives of the Wheat Export Australia, clarify the range of powers and discretions available to it, clarify the process for renewing accreditation, implement a process for review of decisions and make provision for review of the legislation.



The Committee felt that although the above reforms should be made before the Bill is tabled, it felt that the Bill should be introduced to Parliament as soon as possible to ensure it passes prior 30 June 2008.

Finally the Committee recommended that transitional financial education and counselling, particularly in marketing and risk management, should be provided to existing farmer organisations for a period of three to four years to assist with the transition to a new operating environment. ◀◀ [Link to Bill](#)

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This newsletter is a summary of cases and selected issues of interest or concern to clients. It does not cover all aspects of the law on the relevant subject matter. Detailed professional advice should be sought before any action is taken based upon the matters referred to herein.