Marine Masters Maritime Law consultancy

COMMERCIAL SOLUTIONS

Finding a solution for any issue in a Trade- or Shipping contract often requires walking a thin line between what is commercially agreeable and what is legally possible.
It, therefore, requires a proper understanding of both. For this circular letter, I want to highlight a law case that is an example of the risks of relying too much on 'commercial sense', without understanding the legal implications of one's actions when a contract is breached.

Alegrow S.A. v Yayla Agro[1] is originally a GAFTA arbitration and a GAFTA arbitration appeal that ended up in the English High Court as an Appeal *on a point of law* under S69 of the Arbitration Act 1996.

The facts
A Contract of Sale for 24.000MT of Russian origin Paddy Rice was agreed between a Swiss Seller and a Turkish Buyer under CIF terms. The contract had a shipment window (Sept-Dec2016) and a total quantity that could be divided in multiple shipments. 12,614,42*MT* of Paddy Rice was shipped and delivered during the first days of December 2016, but pending some contamination issues and due to a general shortage[2] of available Paddy Rice, the remaining parcel was never shipped and delivered to the Buyer.

At the time of the Seller's non-performance mid December 2016, the Buyer did not end the contract or claim for damages for a breach of contract. There had been no formal extension either. The Buyer had kept the contract 'alive' instead and they granted the Seller some 'trading room' to fulfil the contract by asking for a new shipment program for the remaining 11.385.58*MT* of paddy rice without stipulating a 'hard deadline' and not using a new date for the latest shipment or nomination of shipment.

On the 29th of March 2017 however, the Buyers set (again) a deadline for the sellers, by asking for a shipment programme latest by the 15th of April 2017. Consequently, according to the terms of the contract, the Seller should provide such a programme on the 30th of March 2017. The Sellers failed to provide the nominations, so the buyers commenced Arbitration proceedings on the 7th of April 2017.

The GAFTA arbitrations
Both the GAFTA arbitration awards, the First-Tier Tribunal (FTT) and the Appeal Board, concluded that the Seller was in default and

[1] *Alegrow S.A. v Yayla Agro Gida San Ve Nak A.S.[2020] EWHC 1845 (Comm.)*

[2] *..which had a considerable effect on the commodity pricing as well…*

that it was their obligation to deliver the agreed product to the Buyers. Any risk of not doing so within the agreed time was entirely theirs. The Sellers counterclaim for damages on financing and storage costs failed accordingly, as such claim fell within Seller's risk.
The appeal board and the FTT came to a different conclusion on when exactly Seller's default occurred, but both established that the Seller was in repudiatory (renunciatory) breach because the Seller failed to deliver the balance of the cargo, that the Buyer rightfully could terminate the contract and claim for damages.

The UK High Court decision
This case moved in the opposite direction once the Sellers applied successfully for a UK Commercial Court appeal.
The Judge deciding on the case concluded that both the GAFTA panels were inconsistent in their reasoning when ruling their awards, especially when applying the law to the facts they had established.
For a repudiatory (renunciatory) breach to 'stick', i.e. for the innocent party to be allowed by law to single-sided end the contract and claim damages, both the panels should have applied an amount of 'reasonable time' after the 30th of March 2016 deadline. Because the Sellers, by their actions/communications at an earlier stage, amended the terms of the agreement, from a contractual of view *time was no longer of the essence* until the 29th of March[3] and this had serious implications for granting such *reasonable time*.
The court also held, opposite to the conclusions in Arbitration, that there was no renunciation of the contract by the Seller because they remained silent. [4]

The UK High court then went a step further: Because the Buyer ended the contract by commencing arbitration proceedings on the 7th of April, it was they who had renounced the contract, which made them liable for damages towards the Seller.

The law may not always make sense..
For me, this case, above all, showcases the importance of sufficient Law awareness, when offering commercial solutions to a possible breach of contract.
Some 'purely commercial' solutions can seriously change the terms of the contract. In this particular case, the actions of the Buyer, after the initial breach of the seller, resulted that the element of 'on time' was deleted from the contract. Looking at the actions of the Buyer after the initial breach, they seem to have assumed such 'time element' would still be implied when they *would be patient* with their contractual counterpart.

Conclusion
English Law is based on several all-important doctrines which form the basis of repetitive court decisions over a long period. Such doctrines, or the used legal testing methods/ constructions, have consequences beyond what might be considered 'fair' in the trade itself.

Therefore, even with the best intentions and even when commercially well contemplated, a party's commercial response or a solution to a conflict/dispute emanating from a commodity contract or a Charterparty with English Law may have a seriously unwanted effect on the

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[3] The case refers to some English Law basics; the mere performance itself was not the breach of a Condition but that of a warranty or an innominate term, especially when time is no longer of the essence. Therefore the CONSEQUENCE of the breached warranty, e.g. the reasonable time to perform on behalf of the Seller will set the default. The board did not have such finding.

[4] The buyer unsuccessfully relied in this context on STOCZNIA GDANKSKA V LATVIAN SHIPPING [2002] and the PRO VICTOR (sk shipping v Petroexport) [2009]

outcome if that case escalates at a later stage…

The highlighted case also shows that even when litigation is done by *trade professionals* using Arbitration, it is still subject to a possible correction by *law professionals*, in, for example, the case the law has not been applied properly. Traders may need to keep this in mind with regards to their expectations for litigation outcome.

Another interesting byproduct of this case is its clarification of the position UK Courts have for intervening in Arbitration Awards. Even though the case suggests otherwise, the Court remained in the utmost respect of the value of such awards. The Courts nevertheless will not hesitate to intervene if the law applied is wrong.

I think this particular case also proofs that it is a small investment to check with an expert on available options, in case a commercial or shipping contract is (possibly) breached.
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Best regards,
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