Neutral Citation Number: [2022] EWHC 354 (Comm)

Case No: CL-2021-000128

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996

IN AN ARBITRATION APPLICATION

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 18 February 2022

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

SHARP CORP LIMITED	**Claimant**
- and -	
VITERRA B.V. (PREVIOUSLY KNOWN AS GLENCORE AGRICULTURE B.V.)	**Defendant**

GAFTA Board of Appeal
Amended Awards 4580A & 4581A

- -
- -

Chirag Karia QC (instructed by **Zaiwalla & Co Ltd**) for the **Claimant**
Michael Collett QC (instructed by **Reed Smith LLP**) for the **Defendant**

Hearing date: Tuesday 18 January 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives and Bailii. The date and time for hand-down is deemed to be Friday 18 February 2022 at 10:00am.

Cockerill J:

1. By his Order and Reasons of 13 May 2021, Jacobs J granted the Claimant Buyer leave pursuant to section 69 of the Arbitration Act 1996 to appeal the following question of law arising from the GAFTA Board of Appeal's ("the Tribunal") Amended Award nos. 4580A and 4581A dated 1 April 2021 (collectively, "the Awards"):

> "Where goods sold C&F free out are located at their discharge port on the date of the buyer's default, is "the actual or estimated value of the goods, on the date of default" under sub-clause (c) of the GAFTA Default Clause to be assessed by reference to:
>
> The market value of goods at that discharge port (where they are located on the date of default); or
>
> The theoretical cost on the date of default of (i) buying those goods FOB at the original port of shipment plus (ii) the market freight rate for transporting the goods from that port to the discharge port free out?"

2. The GAFTA default clause ("the default clause") of GAFTA Contract No.24, which is therefore at the centre of this dispute, provided (in part) as follows:

> "25. DEFAULT
>
> In default of fulfilment of contract by either party, the following provisions shall apply:-
>
> [a] The party other than the defaulter shall, at their discretion have the right, after serving a notice on the defaulter to sell or purchase, as the case may be, against the defaulter, and such sale or purchase shall establish the default price.
>
> [b] If either party be dissatisfied with such default price or if the right at [a] is not exercised and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.
>
> [c] The damages payable shall be based on, but not limited to, the difference between the contract price of the goods and either the default price established under [a] above or upon the actual or estimated value of the goods, on the date of default, established under [b] above."

3. The same Default Clause was the subject of dispute in the case of *Bunge SA v Nidera BV* [2015] UKSC 43 [2015] 2 Lloyd's Rep. 469.

4. So much for the issue of law. The economic issue which this masks is this: the goods which Sharp did not pay for fortuitously gained in value after they were customs cleared and before Sharp enabled Viterra to retake possession of them and resell them. If valued on the basis of the contract terms damages are therefore considerably higher than if they

are valued on the basis of the value which they actually had by the time they were sold. Who, Sharp or Viterra, should benefit from that increase in value?

The facts

5. This appeal arises out of two contracts dated 20 January 2017 for the sale of pulses by Viterra to Sharp. Both contracts were on C&F Free Out Mundra terms. In addition to incorporating GAFTA Contract No.24, each contract included bespoke terms addressing the possibility that Sharp might fail to make payment before the goods arrived at the discharge port and enabling Viterra in those circumstances to take possession of the goods and resell them.

6. Award 4580A concerns contract no. 1700808 for the sale of 20,000 mt of Canadian Crimson Lentils at a price of US$ 600 per mt. Award 4581A concerns contract no. 1700806 for the sale of 45,000 mt of Canadian Whole Yellow Peas at a price of US$ 339 per mt.

7. On 10 May 2017, the Lentils and Peas were shipped at Vancouver onto the "R B Leah" ("the Vessel").

8. Each sale contract provided:

> "Payment:
>
> Basis LC At Sight or CAD at buyers option. …
>
> If CAD:
>
> 100% Net cash within 5 days prior to vessel arrival at destination port, against presentation of below mentioned documents, at Buyers bank acceptable for Sellers.…
>
> In case of late payment(s) under this contract, Buyers agree to pay Sellers interest on the invoice value at the rate of 8% per annum until receipt of payment by Sellers."

9. On 18 May 2017, Sharp exercised its option for payment on CAD (Cash Against Documents) terms. Payment was therefore due within 5 days prior to the Vessel's arrival at Mundra.

10. The Vessel arrived at Mundra on 19 June 2017. Sharp filed Bills of Entry for the goods on 20 June 2017. As Sharp had not made payment, the goods were discharged against letters of indemnity.

11. As there was insufficient space to store the goods inside the port, they were customs cleared by the Buyers and put into storage in a warehouse pending payment, with Viterra retaining property in them and the goods held to their order. Any costs incurred by the Buyers in obtaining customs clearance were ultimately ordered to be reimbursed to the Buyers. There was no applicable tariff at the time.

12. Payment remained outstanding. The parties signed a Wash-Out Contract dated 25 September 2017 in respect of 32,250 mt of the Peas. The parties also signed

Addendums No.1 to each contract dated 26 September 2017, which gave Sharp further time to make payment for the remaining goods in instalments.

13. The first instalment under each Addendum was due by 15 October 2017. Payment was not made. On 18 October 2017, Viterra demanded payment by 25 October 2017, stating that time was of the essence.

14. Each of the contracts contained a bespoke Non-Payment Clause which provided as follows:

> "Non Payment Clause:
>
> If buyer fails to make payment of the documents as per contract the seller reserves the right to protect their interest and accordingly this contract acts as implied no objection/confirmation from buyers to seller to transfer / resell to alternate buyer.
>
> This clause also serves as buyers' confirmation for the cargo clearance without any undue distress or financial penalty to sellers.
>
> Under these circumstances, sellers can unconditionally choose to cancel the contract and withdraw or re-direct the documents and sell the cargo as per sellers' choice.
>
> The buyers shall forfeit the advance given (if any) to the sellers under this contract, and shall unconditionally extend full co-operation to the sellers by way of providing documents and/or letters as required by all the authorities concerned to enable change of buyer's details with the shipping line, customs, Bill of Entry, etc."

15. On 25 October 2017, Viterra's local affiliate Glencore India sent Sharp a pro forma letter to be sent by Sharp to Adani Port to authorise release of the goods to Viterra. Sharp replied on 26 October 2017 that they could not give any such letter.

16. On 8 November 2017, the Government of India imposed an import tariff on Yellow Peas of 50% with immediate effect.

17. Viterra held Sharp in default under both contracts on 9 November 2017.

18. Viterra's message holding Sharp in default noted Viterra's intention to sell the goods to a third-party buyer, as it was entitled to do under the Non-Payment Clause, and indicated that Viterra intended to strictly enforce the co-operation undertaking in the Non-Payment Clause to enable a change in the buyer.

19. On 21 December 2017, the Government of India imposed an import tariff on Lentils of 30.9% with immediate effect.

20. Meanwhile the goods were stored by Adani, who refused to release them to Viterra without Sharp's permission. In breach of the Non-Payment Clause of the contracts (as

the Board has found), Sharp refused to co-operate to allow the goods to be released to Viterra. Viterra pursued proceedings in the Gujarat Court against Sharp and Adani Ports in order to obtain possession of the goods. A consent order was granted on 2 February 2018. It is common ground that the goods were not available to Viterra until the date of this order.

21. Because the goods had been customs cleared before the Government of India imposed tariffs in November and December 2017, their value on the domestic market had (as the Board found) "undoubtedly increased".

22. By contracts dated 9 February 2018, Viterra resold the goods to Agricore Commodities Ltd ("Agricore") at US$ 431 per mt (the Lentils) and US$ 378 per mt (the Peas) C&F Free Out Mundra (inclusive of storage charges up to 6 February 2018 and handling and waterfront royalty charges). Agricore was a fellow subsidiary of Viterra. It was legally distinct from Viterra.

The Awards

23. The Appeal Board rejected Sharp's argument that Viterra was in default by taking back the goods and reselling them.

24. The Appeal Board found that Sharp was in default by its failure to pay for the goods in accordance with the terms and conditions of the contract, and liable to pay damages for default in accordance with the GAFTA 24 default clause.

25. The Appeal Board said that, while the date of Viterra's declaration of default on 9 November 2017 was the "apparent date of default", it was impossible for Viterra to re-sell the goods until it was able to obtain possession of the goods on 2 February 2018. It found that Sharp was in breach of the Non-Payment Clause. Sharp did not propose any alternative date of default in respect of its own default (although it alleged that Viterra was in default on 18 December 2017). The Board found [7.31] that as Viterra obtained possession of the goods on 2 February 2018, that was the date of default.

26. Viterra's evidence was of FOB Vancouver price of the goods on 2 February 2018 and the freight rate on that date for carriage from Vancouver to Mundra. The Board accepted Viterra's case that this evidence supported their contended market value of the goods C&F FO Mundra on or about 2 February 2018.

27. The Board rejected Sharp's argument that the value of the goods on the date of default should be assessed by reference to the market value of the goods on the domestic market in India. That was contended to be (i) Lentils: in the region of US$532 p/mt; (ii) Peas: in the region of US$398 p/mt.

28. Sharp did not submit any evidence at all of the C&F FO Mundra in bulk price of the goods. It did not assert that the resale price to Agricore was a true C&F FO Mundra price.

29. For the purposes of assessing the damages payable by Sharp for its default, the Tribunal found that *the "actual or estimated value of the goods, on the date of default"* was the market value of the goods C&F FO Mundra in bulk on or about 2 February 2018 – [7.37].

30. On the basis of Viterra's evidence, the Appeal Board found that "*the estimated value of the goods on or about the date of default*" was US$ 401.75 per mt (Lentils) and US$ 278.00 per mt (Peas). That was composed thus of:

    i) The FOB market price of Lentils in Vancouver (found to be US$375.00 p/mt) "*on or around 2 February 2018*" (i.e. the default date); and

    ii) The market freight rate for the carriage of those Lentils from Vancouver to Mundra for a voyage commencing "*on or around 2 February 2018*" (found to be US$26.75 p/mt).

    iii) The FOB price of Peas in Vancouver (found to be US$252.00 p/mt) "*on or around 2 February 2018*" (i.e. the default date); and

    iv) The market freight rate for the carriage of those Peas from Vancouver to Mundra for a voyage commencing "*on or around 2 February 2018*" (found to be US$26.75 p/mt) "*on or around 2 February 2018*".

31. The damages for default awarded to Viterra were US$ 4,163,250 (Lentils) and US$ 903,750 (Peas).

32. In addition, the Board awarded Viterra its costs of storing the cargo between discharge and 12 February 2018 and legal costs incurred in securing the release of the goods, as damages for breach of the Non-Payment Clause.

33. The damages for breach of the Non-Payment Clause were

    i) Lentils: US$ 433,000 for storage costs and US$ 50,793.61 for legal costs.

    ii) Peas: US$ 305,000 for storage costs and US$ 50,793.61 for legal costs.

34. Sharp (as buyers) claimed reimbursement of its costs incurred in discharging the goods at Mundra. The Board accepted Viterra's submission that Sharp was responsible for these expenses under the terms of the contracts, but they held that Sharp was entitled to recover these expenses from Viterra because "*the goods were returned to Sellers and resold by them*".

35. Viterra was ordered to pay Sharp US$ 259,814.90 (Lentils) and US$ 6,453.00 in respect of costs incurred in discharging the goods.

The appeal

36. Sharp mounted a broadly based challenge to the Awards. It sought permission to appeal on two questions – the one set out above and a further question: *"Where the seller's 'default' on-sale price under sub-clause (a) of the GAFTA Default Clause is higher than the price assessed by the tribunal under sub-clause (b) of the Default Clause, which price is to be used to assess the seller's damages?".*

37. Sharp also sought to challenge the Award under section 68 of the Act on the grounds of procedural irregularity under section 68(2)(a) and/or (d) of the Arbitration Act 1996, namely that the Board of Appeal: (i) failed to give the Claimant a reasonable

opportunity of putting its case and/or dealing with that of its opponent; and/or (ii) failed to deal with an issue that was put to it.

38. Jacobs J dismissed the section 68 challenge on paper and refused permission for the second question. However, he granted permission on the first question. He gave the following reasons for granting permission:

> "7. I grant permission to appeal in respect of Question 1 because I consider that it raises a question of general public importance (see paragraph 6 below) and that the decision of the GAFTA Appeal Board is open to serious doubt (see paragraphs 7 – 8 below). I would also, if I had not taken that view of public importance, have been prepared to grant permission on the basis that the decision of the GAFTA Appeal Board is obviously wrong.
>
> 8. GAFTA form 24 is used extensively in trading grains and feed and the wording of the default clause also appears in many other GAFTA forms. The correct construction of the default clause may, depending on the issue, raise a question of general public importance. I consider that it does so here in relation to Question 1, where the essential question is whether "the actual or estimated value of the goods, on the date of default" should, in a case of non-acceptance of goods which have been shipped to the buyers, be determined by reference to the realisable value of the goods which have been left in the seller's hands in consequence of the non-acceptance. I do not consider that this question is settled by *Bunge SA v Nidera BV* [2015] UKSC 43.
>
> 9. The Board held (§ 7.28 and see too § 7.31) that the date of default (in respect of which there is no appeal) was to be determined by reference to the date when the sellers were able to obtain possession of the goods:
>
> 'The goods were not available to Sellers to resell until 2 February 2018 when a consent order was obtained from the Gujarat High Court. Whilst Sellers' declaration of default of 9 November 2017 is the apparent date of default, it was clearly impossible for Sellers to resell the goods, and thus establish damages in accordance with the Default Clause of Gafta 24, until they were able to obtain possession of the goods on 2 February 2018'.
>
> That passage makes clear the relevance and importance, to the calculation of damages under Gafta 24 in the present case, of the actual goods at the place of discharge and therefore their realisable value upon resale. It follows that, in determining '*the actual or estimated value of the goods, on the date of default*', the Board should have paid regard (as the Claimant contends in paragraph 16 of its opening skeleton) to the market price at the place where the goods were on the date of default. The Board's decision, which is based upon the cost of a new shipment on the

> default date from the original load port, does not do so. If the actual goods, which were released on 2 February 2018, had risen in value by that time (as the Board held at § 7.41), because of the effect of the imposition of import duties, then the damages calculation should have reflected that increased value. The significance of paying regard to the actual goods which were left on the sellers' hands as a result of default is also highlighted by the award of damages for storage costs (§ 7.44) and the legal costs of obtaining their release (§ 7.45)"

The arguments

39. The essence of the argument on appeal is that the Tribunal erred in valuing the goods based on a constructed theoretical cost of (i) buying equivalent goods FOB Vancouver, Canada on the default date and (ii) shipping those goods to Mundra, where they would arrive over a month after that "default date" of 2 February 2018, instead of valuing them on the available market in Mundra as of that date.

40. Sharp says that in so doing, the Tribunal ignored not only the fact that the unaccepted goods were themselves available for resale on the market in Mundra, and hence had a particular market value in Viterra's hands, but its own finding that, as a result of the imposition of import tariffs after a large proportion of the goods had been customs-cleared, the value of the customs-cleared goods left in the Seller's hands "had undoubtedly increased".

41. It contends that the Tribunal's construction and application of sub-clause (c) is inconsistent with: (i) the proper construction of sub-clause (c); (ii) Court of Appeal dicta on that construction and; (iii) the Tribunal's own analysis.

42. Defending the Awards, Viterra submits (in outline) that:

    i) The issue at the heart of Sharp's appeal is which party should have the benefit of the increase in value of customs cleared goods after the imposition of the import tariffs in November and December 2017.

    ii) The Board did not make any error of law unless it purported to determine the wrong "value" of the goods.

    iii) The "value" which the Board was required to determine by sub-clause (c) of the default clause was the value of the goods sold on the relevant terms (non-customs cleared in bulk); and not, as Sharp contends, the value of the goods sold on materially different terms (customs-cleared and sold ex-warehouse in small parcels).

    iv) Assessing value by reference to the realisable value of the goods (customs cleared and available for sale ex warehouse into the domestic Indian market) is wrong in principle, because the contracts were not for the sale of customs cleared goods, and the imposition of the import tariffs after the customs clearance of the goods does not fall within the deemed mitigation covered by sub-clause (c) of the default clause.

Discussion

The Backdrop: Bunge v Nidera

43. Any consideration of this case must be informed by the backdrop offered by the Supreme Court's consideration of the same clause in *Bunge v Nidera* in which both the judgments of Lord Sumption and Lord Toulson were agreed with by the rest of the justices.

44. The decision establishes that the Default Clause:

 i) Addresses *"the usual situation of a non-delivery or non-acceptance of goods for which there was an available market"* and must not be construed so as to place the innocent party *"in a far better position than if the breach had not occurred"* ([61], per Lord Toulson).

 ii) *"Sub-clauses (a) to (c) constitute an elaborate, indeed a complete, code for determining the market price or value of the goods that either were actually purchased [or sold] by way of mitigation or might have been purchased [or sold] under a notional substitute contract"* ([31], per Lord Sumption).

 iii) It is appropriate to add the words "or sold" to the above-quoted passage because the Default Clause applies as much to non-acceptance by the buyer as non-delivery by the seller, as made clear by the terms of sub-clause (a) ("*to sell or purchase, as the case may be*") at [28(2)], per Lord Sumption & [61], per Lord Toulson.

Sub-Clause (a)

45. Sub-Clause (a) of the Default Clause gives the innocent party the right "*to sell or purchase, as the case may be, against the defaulter*". It:

 i) Covers "*the territory occupied by the common law principles concerning the mitigation of losses arising from price movements*" ([32], per Lord Sumption);

 ii) "*[G]ives the injured party the option, at its discretion, of selling or buying (as the case may be) against the defaulter, in which case the sale or purchase price will be the 'default price'*" ([28(2)], per Lord Sumption);

 iii) Provides "*a surrogate for the valuation of the contract goods*" ([59], per Lord Toulson); and

 iv) Is "*premised on there being an available market for identical goods, in the absence of which ordinary common law principles would apply for the assessment of damages*" ([59], per Lord Toulson).

46. In other words, sub-clause (a) gives the innocent party the right to "*replace the lost bargain*" with an equivalent one by way of mitigation. Where the breach is non-delivery by the seller, it entitles the innocent buyer to "*buy[/sell] against the default*". *Novasen SA v Alimenta SA* [2013] EWHC 345 (Comm) 1 Lloyd's Rep. 648 at [23], per Popplewell J (approved in *Bunge* at [34]; *Bunge* at [31] – [32], per Lord Sumption.)

47. Thus, in the case of non-acceptance of the goods by the buyer (as in the present case) the mitigation provided for by sub-clause (a) is for the innocent seller to sell the goods left on its hands by selling "*against the defaulter/buyer*".

48. It follows that the default price set by the seller's mitigation under sub-clause (a) will be the sale price in the market where the unaccepted goods are located on the date of default (here, Mundra).

Sub-Clause (c)

49. Sub-Clause (c) of the Default Clause:

    i) "*[C]overs the same territory as sections 50(3) and 51(3) of the Sales of Goods Act*" by setting the prima facie measure of damages for non-delivery and non-acceptance ([15] & [32], per Lord Sumption).

    ii) Gives the tribunal two alternative methods for valuing the unaccepted/undelivered goods, being either: (i) the "*default price*" fixed under sub-clause (a) if the innocent party carried out a mitigation sale or purchase, notwithstanding the rejection of that price by one of the parties; or (ii) "*the actual or estimated value*" of the contract goods on the "*date of default*" ([28(3)], per Lord Sumption).

    iii) The second alternative ("*the actual or estimated value of the goods, on the date of default*") assumes a sale or purchase by the innocent party "*under a notional substitute contract*" on an available market so as to provide "*a surrogate for the valuation of the contract goods*" ([31], per Lord Sumption & [59], per Lord Toulson).

50. As for the relevant sections of the Sale of Goods Act:

    i) Those sections:

        a) should be taken as reflecting common law principles. (i.e. that the notional substitute contract should be on the same terms save as to price):[16]

        b) are "*concerned with the price of the goods or services which would have been delivered under the contract*": Lord Sumption at [21];

    ii) Section 50(3) of the Sale of Goods Act 1979 reflects common law principles. The section 50(3) measure can be explained in causation terms, as representing the loss which may fairly and reasonably be considered as arising naturally, i.e. according to the ordinary course of things, from the breach; as deemed mitigation; and thirdly as enabling a market valuation to be made of what the innocent party has lost, and a line thereby to be drawn under the transaction: see per Blair J in *The Wren* [2011] 2 Lloyd's Rep. 370 at [18].

The notional substitute contract

51. *Bunge* does contain dicta which suggest that the notional substitute contract must be on the same terms as the contract which has been lost. See Lord Sumption at [14]:

> "14. The fundamental principle of the common law of damages is the compensatory principle, which requires that the injured party is "so far as money can do it to be placed in the same situation with respect to damages as if the contract had been performed": *Robinson v Harman* (1848) 1 Exch 850, page 855 (Parke B). In a contract of sale where there is an available market, this is ordinarily achieved by comparing the contract price with the price that would have been agreed under a notional substitute contract assumed to have been entered into in its place at the market rate but otherwise on the same terms."

52. Lord Toulson's judgment in *Bunge v. Nidera* was to the same effect. After restating at [78]-[80] the explanation for measures of damages based on an available market (which include section 50(3)) in similar terms to Blair J in The Wren, he continued:

> "82. There are three important things to note about measurement of damages by reference to an available market. First it presupposes the existence of an available market in which to obtain a substitute contract. Secondly, it presupposes that the substitute contract is a true substitute. The claimant is not entitled to charge the defendant with the cost of obtaining superior benefits to those which the defendant contracted to provide. Thirdly (and in the present case most importantly), the purpose of the exercise is to measure the extent to which the claimant is (or would be) financially worse off under the substitute contract than under the original contract."

53. Lord Toulson reinforced the importance of the compensatory principle at [85]:

> "The fundamental compensatory principle makes it axiomatic that any method of assessment of damages must reflect the nature of the bargain which the innocent party has lost as a result of the repudiation."

The problem faced by the Board

54. The Board faced a number of problems. The first was that this was not put to it as a sub-clause (a) case. In the arbitrations, neither party contended that damages for Sharp's default ought to be based on the difference between the contract price and the price at which Viterra sold to Agricore. The Board was therefore on a search for "*the actual or estimated value of the goods*". This means that the natural assumption, as highlighted by the passages from *Bunge* is a substitute or surrogate contract.

55. The second was that life had moved on considerably by the time that the date of default was deemed to have happened. In that time two things had happened. The first is that the goods had become customs cleared. The second (and the real issue in this case) was that a tariff had been imposed on goods of this nature, meaning that the sale price of such goods had gone up.

56. The third was that the parties presented it with effectively two imperfect alternatives:

i) Sharp offered it evidence "*of the price of Canadian Red Lentils on the domestic market in India and asserted that, Sellers having sold the goods to their associates, Sellers and/or their associated company would in fact have made very large profit on the resale of the goods in the domestic market in India.*" [7.34]

ii) Viterra based its approach on "*evidence from brokers of FOB Vancouver prices and freight rates for a voyage from Vancouver to Mundra on or around 2 February 2018*" [7.33]

57. That the Board considered these imperfect can be inferred from [7.34] where it says: "*We were not provided with any evidence of independent trades of goods of the contract description C&F FO Mundra*."

58. Faced with these two alternatives, the Board decided that the Sellers' evidence offered the better match:

> "The contract which is the subject of this arbitration was not a contract for the sale of varying quantities of goods ex-warehouse into the domestic market in India over a lengthy period of time but was for the sale of goods in bulk on the international market. Sellers had undertaken to ship the goods in bulk from Vancouver to Mundra and Buyers had undertaken to pay for those goods before arrival …
>
> Buyers have adduced considerable evidence of the market value of the goods on the domestic market in India. In particular, Buyers submitted an undated table from Commodities Control Com, and statements from Maruti Agri Services and Chokadi Brokers dated 21 December 2019. This evidence indicated the price per ton of Canadian Red Lentils traded ex Mundra but gave no detail at all as to the quantities and parity and were likely to have been for small quantities ex warehouse. We therefore considered this evidence to be of no assistance in assessing the market value of the goods on a C&F FO Mundra basis. As discussed above, the relevant market value for the assessment of damages is that of the value of the goods C&F FO Mundra on or about 2 February 2018 and while Buyers' evidence covers the relevant period they have not submitted any evidence at all of the C&F FO Mundra price …
>
> … market value of the goods C&F FO Mundra cannot be assessed by reference to the internal domestic market …"

59. A reading of the Award does therefore leave a question as to whether there is properly speaking a question of law at all – or at least a question of law which was properly posed to the Board. What one sees in the Award is both parties and the Board agreeing that the appropriate exercise is to estimate the value of the goods, and the parties each putting forward a different (imperfect) method of approximating that value. There is no

sign that the issues of principle and the legal authorities which have now been cited to me were in play. The Board then weighed the evidence put forward and based on a composite of factors, in which its concerns about the quality of the evidence of the domestic market seem to have played a part, decided in favour of Viterra.

60. However there is no doubt that the dichotomy offered by the parties via their differing approaches does engage a point of principle (a point effectively accepted by Viterra both at the permission stage and before me). Further, permission to appeal has been given on that point of principle. It is therefore necessary to grapple with it.

Evaluating the arguments

61. Sharp has a number of attractive points available to it. The first is the simple point: the exercise under sub-clause (c) is to arrive at an approximate value for "the goods". It suggests that the obvious answer to this is that this requires one to look at the goods effectively on an "as is where is" basis and that logically and as a matter of language, the right approach when determining "*the actual or estimated value of the goods, on the date of default*" must be to look at the market price at the place where the goods were on the date of default, i.e. Mundra; and that the best evidence of that was the value of the unaccepted goods; albeit that those were customs-cleared goods in Mundra whose value "had undoubtedly increased" as a result of the Indian Government's imposition of import tariffs. The natural attraction of that argument is evident in Jacobs J's reasons for granting permission.

62. Sharp also points out that there is an obvious artificiality in choosing not the usual mitigation sale of the goods wrongfully left on the innocent seller's hands at the time and place of default, but a notional purchase of similar goods from the port of loading (Vancouver) and their notional carriage to the port of discharge (Mundra) to arrive over a month after the date of default. Sharp submits that "*It would be bizarre and commercially nonsensical to construe the second alternative in sub-clause (c) ('the actual or estimated value of the goods, on the date of default') as requiring a notional purchase of additional goods from the original load port plus a notional carriage contract for carriage to the discharge port for delivery over a month after the default date, which is what the Tribunal did."*

63. Put that way, there is obvious force in the point. So too is there force in the point that the Board's approach measures cost, not value, and in real terms on a date over a month later.

64. However, there are a number of problems with Sharp's approach also. One is that there is an oddity if not a fallacy in saying that "*in the case of non-acceptance by the buyer, 'the goods' in sub-clause (c) most naturally refers to the specific goods which the buyer should have accepted, but has wrongfully left on the seller's hands*". That is because this methodology is the methodology of sub-clause (a), not (c). The authorities are clear - in particular it is clear from *Bunge* that (c) assumes not the actual transaction, but a substitute – and that *"This may be assessed by reference to the market price of different but comparable goods, for example goods of different origin or shipment date."*

65. At the heart of the dispute is the question of whether goods here means "*goods of the description sold on the terms on which they were sold*" or "*goods at the market where*

these goods could have been sold". There are authorities which carry suggestions of both of these answers.

66. Sharp's authorities were *Muller, Maclean & Co. v. Leslie & Anderson* (1921) 8 Ll.L.Rep. 328; *Aryeh v. Lawrence Kostoris & Son, Ltd*. [1967] 1 Lloyd's Rep. 63 and *The Selda* [1999] 1 Lloyd's Rep. 729,

67. *Muller* was a case of a C&F contract. Roche J at 331 seems to have taken the market price in India into account, saying: "*I think, although the list price of these goods had apparently not fallen in England, I am satisfied that the market price in India had fallen at least to the extent claimed by the plaintiffs in their amendment….*"

68. I find it hard to see anything which is persuasive or which purports to be deciding a principle here, still less anything authoritative.

69. *Aryeh* was not a non-acceptance case. It was a case concerning measure of damages for breach of warranty of quality in relation to goods "for shipment to" Iran. At p 71 Diplock LJ said:

> "I would accept that where, to the knowledge of both buyer and seller, goods are bought c.i.f. or f.o.b. for shipment to a particular market (in this case Iran), the relevant values to be taken into consideration are the values of the goods upon that market on arrival there."

70. There seems to be nothing significant here. In the case of such a contract (and such a claim in relation to quality) it is natural to buy equivalent goods at the same place and thereby fix the loss. The case is nothing to do with the measure of damages for non-acceptance and produces no principle of general application.

71. The main authority on which reliance was placed by Sharp was *The Selda.* Sharp relies on this case as establishing that the Court of Appeal has held that the sub-clause (c) of the Default Clause requires the goods to be valued in the market at the port of discharge/delivery, and not any other market (the sale in that case being C&F Turkey).

72. In that case the goods in question were tapioca sold C&F FO Turkey. Before shipment, the Turkish authorities prohibited the importation of tapioca into Turkey. The buyers repudiated the contract and the goods were not shipped. There was no claim by the sellers for the damages for non-acceptance under sub-clause (c) of the default clause – so the claim was a different one. The issue was whether the sellers could claim the sum paid to cancel the charterparty upon the buyers' default before shipment began.

73. In the Court of Appeal, the buyers submitted that it was necessary to establish that there was no available market (for the purposes of section 50(3) of the Sale of Goods Act) before the sellers could invoke the more general rule in section 50(2). The Court rejected that submission (732 rhc).

74. On the way to dealing with that argument it held:

> "Miss Ambrose stressed that there was no express finding by the arbitrators that there was no available market for the goods, the

> market in question for present purposes being Turkey this being a c.& f. contract: see *Aryeh v. Lawrence Kostoris & Son Ltd.,* [1967] 1 Lloyd's Rep. 63 per Lord Justice Diplock at p. 71, where he said:
>
> . . .where, to the knowledge of both buyer and seller, goods are bought c.i.f. or f.o.b. for shipment to a particular market (in this case Iran), the relevant values to be taken into consideration are the values of the goods upon that market on arrival there . . .
>
> However to my mind it is abundantly manifest that such a finding is implicit in the arbitrators' award, having regard to their express finding (which was indeed common ground and of which the news originally emanated from the buyers themselves) that importation of tapioca into Turkey was prohibited."

75. It then held at p 733, following the decision that it was not necessary to establish that there was no available market: "*Indeed in the present case it seems to me more than likely that, by limiting the claim to the cancellation expenses, the sellers were in effect mitigating their damages by contrast to any potential claim based on a marketplace comparison if such had in fact been available.*"

76. I was not particularly impressed with this as authority. It appears indeed only to be saying the obvious: that there was no market for sale C&F Turkey when import was prohibited there. Mr Collett submitted that the discussion of whether there was an available market for the goods was *obiter*. Certainly it does not appear to be *ratio*. *The Selda* is not in my judgment authority for the proposition that the "value" of unaccepted goods under sub-clause (c) of the default clause is to be determined by the market price at the port of discharge/delivery. The meaning of "value" in the equivalent provision of the default clause was not in issue in that case. *The Selda* is a decision on the facts of a particular case. It is certainly hard to see that it is inconsistent with Viterra's case in that the focus there was on a substitute contract on the same terms as the unfulfilled contract.

77. Further, none of the cases relied upon concerns an enhancement to the value of the goods at the discharge port which was not obtained by reason of the terms of the unfulfilled contract. The particular issue which confronted the Board in the present case did not feature in any of the cases relied upon by Sharp. References to valuation "in" a particular market or "at" a particular place obscure the fact that the real question in this case is not the physical location of the "market" but rather the terms of sale on which the valuation should be based.

78. On the other hand there is a considerable weight of authority in Viterra's favour. In particular – and most authoritatively, there are the following apparently clear passages from *Bunge v Nidera*:

    a) A "substitute contract" is a contract "*assumed to have been entered into ... at the market rate but otherwise on the same terms*" (Lord Sumption at [14]).

b) It is "*a true substitute. The claimant is not entitled to charge the defendant with the cost of obtaining superior benefits to those which the defendant contracted to provide*" (Lord Toulson at [82]).

79. These passages do in my judgment provide at the very least a strong steer as to the approach which I should take to this point. This is, after all, a decision of the Supreme Court and while not on this exact point, it is on this very clause. This therefore points a *prima facie* conclusion; though I consider below whether there is anything in the other authorities which gives pause for doubt, and whether the other arguments deployed by Sharp encroach on this.

80. Turning then to the other authorities, Viterra also relied upon the *The Eurometal* [1981] 1 Lloyd's Rep. 337 – which led to a certain amount of debate as to whether it did, or did not, assist either side. That case concerned a sale of Spanish barley CIF one safe port west coast Italy. The goods were shipped and arrived at La Spezia. The buyers wrongfully rejected the documents and the sellers declared them to be in default. Default was declared almost a month after the vessel arrived at La Spezia, during which period demurrage had accrued. The default clause provided that the damages "*shall not exceed the difference between the contract price and the market price (or its equivalent as found by the Arbitrators or the Court of Appeal) on the day of default*". The sellers resold the goods, free out La Spezia. There was an option in the resale contract, which the buyer exercised, to take delivery at Venice instead of La Spezia for an additional US$2 per mt. There was a further term that the buyer would pay accrued demurrage plus any further demurrage accruing at Venice. The Board of Appeal found that the effective cost to the buyer was US$126 per mt and that the fair market value of the cargo at La Spezia on the date of default was US$126 per mt.

81. The Board of Appeal awarded the sellers the difference between US$116 (the actual price to buyers based on delivery at Venice) and US$132 per mt, plus certain additional expenses. Lloyd J held that the Board had been wrong to do so. Having noted that in most cases the loss "*would be represented by the difference between the contract price and the resale price*", he said (in the passage upon which Viterra particularly relied): "*In arriving at the 'loss' on resale it is essential to compare like with like*" (p. 344 lhc).

82. His conclusion was that the actual resale price of US$116 per mt was not "like for like" because it included hidden elements, namely (i) the option to take delivery in Venice, and (ii) the accrued demurrage, which would have been irrecoverable under the default clause if claimed as a consequential loss of the sellers.

83. Sharp pointed to the passage where the judge said:

> "can the sellers increase their recoverable loss by transferring the liability for demurrage to [buyers] and reducing the price *pro tanto*? The answer must, I think, be no. The sellers can recover the difference between the contract and market price, but no more".

84. On the basis of the Board's finding that US$126 was the fair market value at La Spezia, the Judge took the difference between the contract and market price to be the difference between US$126 and US$132.

85. Sharp also pointed out that this result meant that, despite the "like for like" analysis, it was clear that the judge had had no difficulty with comparing one free port west coast Italy with La Spezia and used the actual goods sale as a proxy. Here it was submitted there should equally be no problem with comparing customs cleared goods with non-customs cleared; the more so when the wording of the clause is "*actual or estimated value of the goods*" and the real cargo offers the better proxy than a (or this) theoretical exercise.

86. Although all of this can perfectly well be said, I did not consider this case to materially assist Sharp. The La Spezia point is illusory, in circumstances where the contract was "*cif one safe port west coast Italy*", and in the event the effective nomination was La Spezia. The result is that that destination became in effect written into the contract. The case therefore offers no example of valuing on changed terms. Indeed this point is really one in Viterra's favour (reflected in the fact that it was Viterra not Sharp who cited the case). The exercise actually performed by the judge was (consistently with *Bunge v Nidera*) to reject the value sought by sellers because it was based on different terms to the original contract.

87. The final case to which considerable attention was given was another judgment of Lloyd J, *The Caloric* [1981] 2 Lloyd's Rep. 675. This was a case of non-delivery. Maize was sold afloat CIF Beirut at US$119 per mt. Discharge port demurrage was payable at US$5,000 per day. The vessel arrived off Beirut on 2 October 1978. A few days before its arrival, the civil war in Lebanon deteriorated and the port was closed. On 16 October the sellers ordered the vessel to sail to Italy and on 17 October they resold the maize CIF Genoa at US$95 per mt. The sellers were found to have been in default. The default clause was in materially similar terms to the clause in the present case. After the closure of the port, the spot price in Lebanese markets rose as high as US$240 per mt. In the last week of October, the buyers received an offer to sell CIF Beirut at US$149 per mt, with a different shipment date but an identical provision as to demurrage as the repudiated contract.

88. The Board of Appeal found that "*we are unable to give any precise estimate of the value of the goods on 17th October 1978 or thereabouts but we find that such value would have been less than the contract price*". On that basis, the Board awarded nominal damages only (pp. 676-677).

89. Lloyd J upheld that decision. He accepted (in a passage relied on by Viterra) the sellers' submission that the Board had to "*estimate the value of the goods where they lay, subject to all the terms and conditions of the contract*" (p. 677 rhc). He also gave short shrift to an argument that the goods means "*other goods of the same description, which if purchased, would put the buyers, as near as possible in the same position as if the contract had been fulfilled*" (using the proxy of the other CIF Beirut offer). He considered that:

> "the goods … means, in this case, the goods which had been appropriated to the contract, in other words the goods on board Caloric. ….default might have occurred before appropriation… in such a case "the goods" would have to bear a wider meaning, namely goods of the same contract description. But that is no reason for applying the wider meaning where the goods have in fact been appropriated. It seems to me that the natural and

ordinary meaning of "the goods" in the present case means the goods actually on board Caloric."

90. As for how the Board was to arrive at a value, the judge held that they could have done this in several ways. They might have estimated when the goods would have been likely to have been landed, and the amount of the demurrage which would then have accrued, and by deducting the demurrage and any other expenses in landing the goods from their estimate of the landed value, they would have arrived at the value of the goods on board at the date of default. Alternatively, they might have taken the lowest price at which Nidera was willing to sell, and made an appropriate adjustment for the fact that by the time the substitute goods arrived the port would have been open, or, at any rate, the amount of demurrage would have been very much less. Either way, the Board could have arrived at a market value which was less than the contract price, so it was impossible to say that the Board had misconstrued the default clause or adopted the wrong approach in law (p. 678 lhc).

91. Sharp submitted that this case offered its approach considerable support and in particular that it stood authority for the proposition that where goods have been appropriated, "goods" can only mean the goods so appropriated

92. However I am not persuaded of this. That was a case of non-delivery, not of rejection; and the judge is clear that he is reaching a conclusion on the facts of the case before him. But more significantly, when it comes to the approach to principle, I consider that Viterra is right when it says that it demonstrates the judge asking the same question as *Bunge v Nidera* – how to compare like with like, how to find a proxy which reflects all the terms and conditions of the contract. This is very evident in the passage at p. 678 lhc when he iterates various acceptable proxies.

93. I do therefore conclude that the authorities overall support Viterra's argument that the correct approach is to value the goods based on the same terms and conditions. In this case a sale as urged by Buyers was on any analysis not a like for like sale: the goods benefitted from the customs clearance and thence (more significantly) from the absence of tariff.

94. I turn then to consider the main arguments deployed by Sharp in order to stress test the approach indicated by the authorities.

95. As a matter of law perhaps the most powerful point in Sharp's favour is that the Board's approach placed Viterra in a far better position than if the breach had not occurred and that there is considerable authority that this should not happen. The problems with this argument are twofold. First, this leaves the main legal analysis, and the authority of *Bunge v Nidera* as to the correct approach to this clause, unaffected. Secondly, even as a sense check it is deficient. The bottom line is that one way or another one of the parties comes out of this dispute with a windfall. Given that Sharp is responsible for the problem in the first place, it cannot be said to make a nonsense of the analysis for them not to be the party who reaps the benefit of that windfall.

96. One point is to consider whether the "windfall" which is in issue could be taken out of the equation. Interestingly Sharp has never argued that Viterra's ability to realise a higher customs-cleared price for the goods should have been taken into account as a

benefit to Viterra outside the mechanism of the assessment of "value" under sub-clause (c) of the default clause.

97. There may well be a reason for that: Mr Collett QC points out this would be very difficult for Sharp on the facts: the benefit of the goods being customs-cleared arose from the imposition of the import tariffs, which was (so far as the parties were concerned) an entirely fortuitous event which was not caused by Sharp's breach. Thus the benefit which Sharp seeks to annex via this argument (the benefit of the goods being landed and customs cleared) was not a benefit arising from the terms of the contracts which Viterra lost. It was a collateral benefit which arose from the inability to store the goods at the port without clearance pending payment, and the wholly fortuitous imposition of the import tariffs by the Government of India at this precise point in time.

98. Further, in the case of the Lentils (the larger claim), the default date was only later than the imposition of the tariff in December 2017 because of Sharp's wrongful refusal to co-operate in releasing the goods to Viterra, in breach of the Non-Payment Clause. On conventional principles, it seems unlikely that Sharp would be permitted to benefit from its own wrong.

99. This does not of course entirely dispense with the discomfort caused by the windfall argument, but it certainly provides no principled solution. It is hard to say that, in the light of *Bunge v Nidera* and the absence of other authority pointing a clear way round the test it sets, there is an error of law in taking a proxy which is not the sale of the actual goods. Further, while the common law test plainly endeavours to avoid a windfall, it is possible that in some circumstances a default clause designed to simplify the process of assessment may result, as the price of simplicity, in such a windfall.

100. That is a point which the Board seems to have had in mind when it referred to the need for simplicity at [7.37]:

> "… there is nothing in the *Bunge -v- Nidera* judgement which, in the case of a straightforward default such as this, removes the requirement that damages are to be assessed based on market conditions for goods of the contract description and parity on or about the date of default. It does not require the innocent party to prove damages based on efforts to resell the goods under different market conditions thus involving the complications that would necessarily ensue in determining what damages had actually been incurred. The default clause is a mechanism by which the parties have agreed to simplify the assessment of damages."

101. The other point which has concerned me considerably in this appeal (and which obviously concerned Jacobs J also) is the argument that the Board's decision was internally inconsistent.

102. It is said that the Board's value based on an FOB + freight cost is inconsistent with the Board's own analysis, which is predicated on a resale of the unaccepted goods remaining in Mundra. That is said to be demonstrated by the fact that the Board:

i) Fixed the date of default by reference to the date when the Seller was first able to obtain possession of the goods because only then was it possible "*for Sellers to resell the goods, and thus establish damages in accordance with the Default Clause of Gafta 24*" (Awards 7.28 & 7.31). It is said that the Board thereby recognised that damages under sub-clause (c) have to be determined based on the resale of the unaccepted left on the Seller's hands.

ii) Awarded the Seller storage costs and legal costs of obtaining the release of the unaccepted goods, demonstrating the significance of the particular, unaccepted goods.

103. However on reflection I conclude that the difficulty is more apparent than real. The critical question, is the meaning of "*value of the goods, on the date of default*" in sub-clause (c). There is no inconsistency between the date of default being the date on which Viterra was actually able to re-sell the goods, and the "value" being assessed by reference to a notional sale on C&F FO Mundra terms if that provides the best evidence available to the Board of that value.

104. As for the reliance on the award of damages for storage and legal costs of obtaining the release of the goods, this overlooks the fact that these damages were awarded for breach of the bespoke Non-Payment Clause, not under the default clause. It also overlooks the Board's order that Viterra repay Sharp's costs in discharging the goods, which is consistent with the assessment of the default clause damages by reference to C&F FO Mundra values because it implies that if there had been a tariff before clearance the Board would have required that too to be repaid. It is also consistent with Viterra getting the benefit of the goods being custom cleared in the context of assessing consequences of default.

105. There is therefore nothing in this which produces a conclusion that there was an error of law.

106. This then brings one back to what is effectively a "face off" between the two imperfect proxies. Mr Karia argued forcefully that the customs clearance was itself an illusory difference, since there was no evidence that any costs had been incurred in the process (and if they had they had been incurred by Sharp). On that basis the only distinction is the tariff. On this he contended that the domestic market must be seen as the best proxy because it is real world data. He submitted that there could be no suggestion of it as an inadequate proxy because it cannot be contended that such staple products lacked a market in India.

107. There are considerable attractions to this argument. However here we stray in effect into factual matters which are not the province of the court on an appeal (and which do not seem to have been in evidence). I am confined to the bounds of the Board's Award. And that Award (produced, one must recall, by experienced specialist market practitioners of the parties' chosen arbitral institution, with a better understanding of markets than I can have) did not seem to be so happy with this approach. Reading the Award, what one sees is that there was a market for these goods, but the evidence was that value of the goods on the domestic market in India was likely to be for small quantities ex warehouse, whereas the contracts covered goods in bulk.

108. While Mr Karia urged the artificiality of the Board's approach of the replacement "adjusted fob" contract in part because it posited a later delivery date, there were at least similar difficulties with the domestic market evidence. The material gathered seems to have ranged over a period of time (January 2017 to January 2019 – [4.2] summarised at [7.36]). Further a good deal of the evidence seems not to have been very generic - not dealing with parity, location, quantity or quality [5.8].

109. It is not therefore fair to say as Sharp does that the Tribunal did not address Buyer's evidence, but simply said that it was not evidence of value of the goods on the international market. The Board did address that evidence and made clear its dissatisfaction with it.

110. Returning then to the criticism of the Board's use of a purchase measure rather than a sale measure, I do accept that there is a natural sense of discomfort on this. I am not however persuaded that the approach adopted does not take account of reasonable profit for the importer (as is suggested by *The Texaco Melbourne* [1994] 1 Lloyd's Rep. 473 (HL) at 479, col. 2, per Lord Goff). This is because in this context (replacement sale contract) one is looking for a reasonable profit for the seller, which is priced into the FOB price. But even if it were otherwise that can only be one factor in the decision as to the appropriate proxy.

111. Ultimately it appears to me, as I have indicated above, that the Tribunal was faced with a difficult decision based very much on the evidence. *The Caloric* and the judge's approach however does resonate further here. In *The Caloric* it appears that the Board had various routes of getting to the right answer, and instead chose a wrong answer. In this case things were rather different. The Board was essentially faced with two imperfect proxies, with the result of the choice being giving one party the benefit of the later events.

112. Had they had clear evidence of the value of a substitute cargo at Mundra on the date of default there is no reason to think they would not have accepted that. What they did was to form an evaluative view on the evidence of which price best equated to a value of a true substitute transaction. They seem to have formed the view that Viterra's proxy better answered that question than that offered by Sharp. Having formed that view and lacking any evidence of C&F FO Mundra values, they took the evidence which they had. The FOB plus freight approach is fairly conventional as a mechanism of establishing a proxy. The use of the purchase approach and date reflected the evidence they had – further and better alternatives were not provided to them.

113. For the reasons given I consider the argument that the Tribunal erred in law is not made out and I dismiss the appeal.