

Neutral Citation Number: [2015] EWHC 684 (Comm)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice

Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 24/03/2015

Before :

MR JUSTICE HAMBLÉN

Between :

Public Company Rise

Claimant

- and -

Nibulon S.A

Defendant

Christopher Hancock QC and Christopher Newman (instructed by **Clyde & Co LLP**)
for the **Claimant**

John Russell QC (instructed by **Hill Dickinson**) for the **Defendant**

Hearing dates: 6 March 2015

Judgment

Mr Justice Hamblen :

Introduction

1. The Claimants (“Sellers”) appeal under section 69 of the Arbitration Act 1996 against an Award dated 23 April 2014 (“the Award”) made in favour of the Defendants (“Buyers”) by a GAFTA Board of Appeal consisting of Lord Hacking, Mr R. Barber, Mr J. Boerjan, Mr M. Gerrits and Mr B. Clements (“the Appeal Board”).
2. This appeal is concerned with the construction of the GAFTA prohibition clause, its relationship with a clause of the relevant contracts which obliged the Sellers to obtain export licences, and its application in the light of the facts as found by the Appeal Board.

Background

3. The dispute between the parties arises out of three contracts (“the Three Contracts”) relating to the sale and purchase of 158,000 metric tons of Ukrainian Feed Corn. The Three Contracts were on CPT terms (carriage paid) and were for delivery at the Buyers’ Transshipment Terminal. They incorporated Incoterms 2000 (“Incoterms”).
4. The Three Contracts were for 28,000 metric tons with delivery 20 September to 30 October 2010; 30,000 metric tons with delivery 1 October 2010 to 30 November 2010, and 100,000 metric tons with delivery 1 November to 31 December 2010.
5. In each contract:
 - (1) Clause 11.3 provided: “Seller is obliged to obtain at his own risk and expenses any export license or any other official document and to perform, where it is required, all customs formalities for export of the goods.”
 - (2) Clause 12 provided: “General conditions: All other terms, conditions and rules, not in contradiction with the above contained in Form 78 of GAFTA of which the parties admit that they have knowledge and notice, apply to this transaction and the details above given shall be taken as having been written into such form in the appropriate places.”
6. The prohibition clause in GAFTA78 is clause 17 which states:

“PROHIBITION - In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the government of the country of origin or of the territory where the station(s) or private siding(s) of loading named herein is/are situate, restricting export, whether partially or otherwise, any such restriction shall be deemed by both parties to apply to this contract and to the extent of such total or partial restriction to prevent fulfilment whether by shipment or by any other means whatsoever and to that extent this contract or any unfulfilled portion thereof shall be cancelled. Sellers shall advise Buyers without delay with the reasons therefore and, if required, Sellers must produce proof to justify the cancellation.”
7. The Ukrainian Government introduced Grain Export Quota Restrictions under a resolution dated 4 October 2010 which was put into the public domain on 19 October

2010. The Quota Restrictions were put in place because of a poor harvest and the need to preserve sufficient grain for consumption in the home market. They imposed a limit on the total quantity of grain which would be licensed for export in a stated period. By later resolutions, the period was subsequently extended and the amount of the quota was increased.

8. Despite their best endeavours the Sellers were not granted the relevant export licences and purported to cancel the Three Contracts pursuant to clause 17. The Buyers treated this as a repudiation and held the Sellers in default. The Appeal Board found for the Buyers and held that they were entitled to default damages in the sum of US\$17,536,000.

The Award

9. In outline the Appeal Board made the following findings:

- (1) The obligation on the Sellers to obtain export licences under clause 11.3 was an absolute obligation (see paragraphs 15.8 and 15.14 of the Award).
- (2) Once the conclusion was reached that the Sellers were under an absolute obligation, clause 11.3 overrode clause 17 except in the situation of a total ban (see paragraph 15.15 of the Award).
- (3) The only circumstance under which the Sellers could have been relieved of the absolute obligation under clause 11.3 was if there had been a total ban on the export of Ukrainian feed corn from Ukraine (see paragraphs 15.11 and 15.12 of the Award).
- (4) There was no total ban, as “in the period of export restrictions up to 31 December 2010, grain up to the total quantity of 3,000,000 mts could be exported, under export licences, from Ukraine.” (see paragraph 15.11 of the Award).
- (5) The Sellers could not rely on clause 17 as they were not “prevented” but were merely “restricted” in making the shipments to the Buyers (see paragraph 15.19 of the Award).
- (6) The Sellers were operating under extreme difficulties, and had it been necessary to decide whether the Sellers had discharged their duties of best endeavours to obtain an export licence, the Appeal Board would have unhesitatingly decided that they had (see paragraph 15.14 of the Award).

Permission to appeal

10. The Sellers were given permission to appeal in respect of the following 3 questions of law:

- (1) Does clause 11.3 of the Three Contracts override clause 17 of GAFTA78 or does clause 17 operate as a qualification to clause 11.3?

- (2) Does clause 17 of GAFTA78 only relieve sellers of an obligation to obtain an export licence in circumstances where there is a prohibition amounting to a “total ban”?
 - (3) Are sellers not able to rely upon clause 17 of GAFTA78 when they are not “prevented” but merely “restricted” from making shipments?
11. By a Respondent’s Notice dated 26 June 2014 the Buyers contended that the decision of the Appeal Board can be upheld for two reasons not expressed (or fully expressed) in the Award, namely:
- (1) The prohibition clause does not override or qualify clause 11.3 in any circumstances.
 - (2) There was no “prohibition of export...” so that the contract was not cancelled pursuant to the prohibition clause.

Question (1): Does clause 11.3 of the Three Contracts override clause 17 of GAFTA78 or does clause 17 operate as a qualification to clause 11.3?

12. The starting point is that clauses in a contract must be read together where possible and that there is no inconsistency unless that cannot sensibly be done.
13. As stated by Bingham LJ in *Pagnan v Tradax* [1987] 2 Lloyd’s Rep. 342 at p350:
- “...It is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses”
14. *Pagnan v Tradax* is directly in point since it too was concerned with whether a clause imposing an obligation on sellers to provide an export certificate (“sellers to provide for export certificate enabling buyers to obtain import licence.....”) was inconsistent with the GAFTA prohibition clause so as to override it. The Court of Appeal concluded that there was no inconsistency as the GAFTA clause simply provided a qualification to the obligation to provide an export certificate, observing that:
- “...it is a commonplace of documentary construction that an apparently wide and absolute provision is subject to limitation, modification or qualification by other provisions. It does not make the later provisions inconsistent or repugnant.”
15. The Sellers submitted that the present case is on all fours with *Pagnan v Tradax*.
16. The Appeal Board stated that:

“15.8 In the view of the Appeal Board the central issue is what did Clause 11.3 of the Three Contracts state. As cited above it placed a plain obligation on the Appellant Sellers ‘to obtain at [their] own risk and expense any export license...where it is required...’ without any qualification. It seems, therefore, to the Appeal Board that this obligation on the Appellant Sellers was an identical obligation to the one falling on the sellers in Pagnan SpA v Tradax. Indeed it could be said that the obligation contained in these

words in Clause 11.3 was rather stronger than the obligation contained in the words:

“Sellers to provide for export certificate enabling buyers to obtain import licence in E.E.C.....”

which Lord Justice Bingham was construing in Pagnan SpA v Tradax.

....

15.11 In the view of the Appeal Board there was only one circumstance under which the Appellant Sellers could have been relieved of its absolute obligation under Clause 11.3 and that was if there had been a total ban on the export of Ukrainian feed corn from Ukraine. In that case all Three Contracts would have been under English law, ‘frustrated’, relieving both parties from their obligations under them. This was not the case under the Ukraine export quota restrictions. On the contrary, in the period of export restrictions up to 31st December 2010, grain up to the total quantity of 3,000,000 mts could be exported, under export licences, from Ukraine.

15.12 Alternatively, in a situation of a total ban on the export of the goods, which are subject of the contract in question, the seller can invoke the provisions of Clause 17 to entitle him to cancel the contract. This is exactly what happened in Pagnan SpA v Tradax”

17. The Appeal Board laid great stress on the fact that the obligation to obtain an export licence was “absolute”. However, all that means is that the use of best endeavours will not suffice. In *Pagnan v Tradax*, which the Appeal Board considered they were applying, Bingham LJ was describing the obligation as “absolute” in contradistinction to an obligation of best endeavours. As the Court of Appeal went on to find, that did not mean that the clause overrode other clauses which merely qualified the obligation.
18. Indeed the Appeal Board appear to have recognised that clause 17 did qualify the Sellers’ obligation under clause 11.3 since they recognised that it would do so “in a situation of a total ban”. The essential point being made by the Appeal Board would therefore appear to be that clause 17 only qualifies clause 11.3 in limited circumstances, rather than it does not qualify clause 11.3 at all.
19. It was nevertheless the Buyers’ case, as set out in their Respondent’s Notice, that clause 17 does not override or qualify clause 11.3 “in any circumstances” and that on a proper construction of the Three Contracts clause 11.3 was absolute in all circumstances (even in the case of a total ban).
20. The Buyers stressed that clause 12 of the Three Contracts provided that only the GAFTA terms and conditions ‘not in contradiction with the above’ were incorporated and that the prohibition clause is clearly in contradiction with the specially agreed terms of clause 11. However, the essential question remains whether there is “inconsistency” in the sense described above and that is not altered by posing the question as one of incorporation. In any event the argument proves too much since clause 11.3 has no relevance to much of clause 17 (for example, restrictions caused by a blockade or hostilities) and cannot impact on its general incorporation. In any event

no arguably tenable carve out from the general incorporation of the clause was identified.

21. The Buyers further submitted that *Pagnan v Tradax* can be distinguished because of differences in the factual matrix and/or in the wording.
22. As to the factual matrix, the Appeal Board have made no findings as to what they considered to be the relevant factual matrix. The Buyers referred to the reference in paragraph 13.1 to there being two previous occasions on which quota restrictions had been put in place, but in itself that takes matters no further. They also submitted that it is implicit that there was no export licence system in place at the time of the contract (in contrast to the position in *Pagnan v Tradax*). However, the Appeal Board have made no finding on this. Even if they had, it would not justify construing materially similar wording in two contracts differently.
23. For completeness, I should also refer to the argument raised in the Buyers' written skeleton (but not pressed orally) that it is significant that the Sellers were not exporters. This was not an argument raised at the arbitration or in the Respondent's Notice. It raises factual questions and is not now open to the Buyers. As I stated in *Cottonex Anstalt v Patriot Spinning Mills Ltd* [2014] 1 Lloyd's Rep 615 at [35] it is:

“generally impermissible.....to raise a new point of law which requires consideration of factual materials and in relation to which material findings might have been sought and made had the point been raised at the arbitration. Both the appellant and the respondent are confined to the findings made in the award. The respondent can argue new points of law based on those findings. If, however, the failure to argue the point which the respondent wishes to raise has the result that not all potentially relevant findings have been made then it should not be open to it.”
24. As to the wording, the Appeal Board considered the wording in this case to be materially “identical” to that in *Pagnan v Tradax* (see paragraph 15.8). They also pointed out that if anything the wording in this case was “stronger” and the Buyers placed particular emphasis on the words “at their own risk”. Whilst this reinforces the absolute nature of the obligation imposed on the Sellers, in my judgment it does not mean that the clause cannot be qualified by the other terms of the contract, in accordance with normal principles of contractual construction whereby all terms of the contract must be read insofar as possible together. As the Sellers submitted, this is borne out by the commentary on Incoterms, cited at paragraph 15.13 of the Award, which makes clear that the similar clause in Incoterms, providing that the seller must obtain export licences at his own risk and expense is itself to be read as subject to any other terms of the contract which may be invoked by the seller in the event of a contingency such as a prohibition.
25. For all these reasons I conclude that clause 17 of GAFTA78 operates as a qualification to clause 11.3 but is not overridden by it.
26. It follows that I also reject the first Respondent's Notice ground raised by the Buyers. As to the second ground, the case as put in oral argument was that the relevant restriction on export in this case was the export licence system and that this cannot be a relevant restriction or prohibition in the light of clause 11.3. However, the Appeal

Board specifically rejected the argument that this was merely a licensing regime. As they found (at paragraph 15.18): “The whole basis of bringing in the Ukraine quota restrictions was because there was a poor harvest and a need to restrict exports of grain so that sufficient grain remained available on the home market”. One cannot separate the licensing regime from the quota. This was not simply a general licensing regime; it was a regime for granting licences in accordance with and in order to meet the quota imposed. I consider that the Appeal Board were correct to reject this argument.

Question 2 - Does clause 17 of GAFTA78 only relieve sellers of an obligation to obtain an export licence in circumstances where there is a prohibition amounting to a “total ban”?

27. The Board of Appeal stated:

“15.15 Once the conclusion is reached that the Appellant Sellers were under an absolute obligation, Clause 11.3 overrides Clause 17 except in a situation of a total ban. As illustrated above in paragraph 15.12 the seller can then invoke Clause 17 to enable him to cancel the contract. Since there was not, as the Appeal Board finds, a total ban on the export of grain from Ukraine, Clause 17 does not come into play.”

28. It is correct that, as the Appeal Board observed in paragraph 15.12, *Pagnan v Tradax* was a case which involved a total ban, but it is clear that from the wording of the prohibition clause that it is not so limited.

29. The clause states (emphasis added):

“In case of prohibition...restricting export, whether partially or otherwise...to the extent of such total or partial restriction...this contract or any unfulfilled portion thereof shall be cancelled”.

30. In accordance with its wording the clause plainly applies to a qualifying event “partially restricting” export. As such it applies to a partial prohibition or other qualifying event which has a like effect.

31. As the Court of Appeal observed in *Bunge SA v Nidera BV* [2014] 1 Lloyd’s Rep. 404 at [22]:

“The judge, agreeing with the arbitrators and the Board of Appeal on this point, held that the Prohibition clause requires a causal link between the event in question (usually, but not necessarily, a total or partial prohibition of the shipment of goods) and the sellers’ inability to perform their contract and in my view he was right to do so.” (emphasis added).

32. Indeed, the Buyers acknowledged that: “It is obviously right that, assuming the Prohibition Clause does qualify clause 11.3, there are circumstances other than a “total ban” in which it may do so, such as blockade, or hostilities, or a ban above a particular quota.”

33. I accordingly conclude that clause 17 of GAFTA78 does not only relieve sellers of an obligation to obtain an export licence in circumstances where there is a prohibition amounting to a 'total ban'.

Question 3 - Are sellers not able to rely upon clause 17 of GAFTA78 when they are not “prevented” but merely “restricted” from making shipments?

34. The prohibition clause requires proof of a qualifying event. A qualifying event is:
- (1) A “prohibition of export” or “blockade” or “hostilities” or an “executive or legislative act done by or on behalf of the (relevant) government”
 - (2) “restricting export, whether partially or otherwise”.
35. As the authorities make clear, and the Sellers accepted, in order to be able to rely on the clause it is also necessary to prove that the qualifying event caused the relevant inability to perform.
36. It is not sufficient to show an act “restricting export” generally. It is necessary to show that it has that restricting effect in relation to the sellers’ total or partial ability to perform.
37. The need to establish a causal connection is borne out by a number of cases. For example, *Pancommerce v Veechema* [1983] 2 Lloyd’s Rep 304 per Sir John Donaldson MR at p307 (“if and so far as (the restriction) prevents shipment the contract is cancelled”); *Agrokor v Tradigrain* per Longmore J [2000] 1 Lloyd’s Rep 497 at p500 (“in order (to rely on the clause) the sellers must show not merely that there was a ban which restricted the export...but also that the ban had the effect of restricting the performance of the actual contracts”); *Nidera v Bunge* [2014] 1 Lloyd’s Rep 404 per Moore-Bick LJ at [22] (“The words “restricting export” lie at the heart of the clause...it is more natural, in my view, to construe them as describing the practical effect on the seller’s ability to perform the contract”).
38. Indeed *Pagnan v Tradax* clearly sets out the causal test which needs to be satisfied in a case such as the present at p351:

“The natural construction of this contract in my judgment is that the sellers were to provide for the export certificate, but, in case of any executive or legislative act done by, or on behalf of, the government of Thailand (as the country of origin and shipment) restricting export, the unfulfilled portion of the contract was to be cancelled. That construction does not deprive the special condition of effect. The obligation to provide for the export certificate remained on the sellers. If the certificate was not provided for as a result of oversight, error, mishap, bureaucratic inefficiency or delay, and probably also if the certificate was not provided for simply because the Thai authorities failed to issue it, the sellers would remain liable. But, if the sellers were unable to provide for the certificate because of any impediment falling within the carefully-defined ambit of cl. 19, they were relieved of their contractual obligation because that is what cl. 19 says and there is no indication whatever that cl. 9 is not to apply to this as to all other contractual obligations.” (emphasis added)

39. The Sellers accepted that this was the relevant test. It follows that to be able to rely on the clause the Sellers had to establish that the qualifying event caused their inability to obtain the necessary export licence for shipment.
40. It is only once that is established that the deeming provision in the prohibition clause comes into operation. As I said in *Bunge SA v Nidera BV* [2013] 1 Lloyd's Rep. 621 at [35]–[36], this means that it is not necessary for sellers to show that they had or would have had goods available and could have performed but for the event in question.
41. In the Award the Board of Appeal stated as follows:
- “15.17 The Appeal board accept these contentions of Mr Debattista but are caught by the word “*prevent*” in Clause 17. The truth is that the Appellant Sellers were not, in the terms of Clause 17, ‘prevented’ from making shipments to the Respondent Buyers but merely restricted in doing so. Indeed so restricted that they were eventually unable to obtain the export licences.”
42. In so far as the Appeal Board are there saying that it is necessary to establish a qualifying event which prevents export that is not correct. What needs to be established is a qualifying event which restricts export. The word “prevent” appears as part of the deeming provision in the clause. It is not part of the definition of the relevant qualifying event. However, if the Appeal Board are there saying that it is necessary to show that the qualifying event prevented performance in the sense that it caused the inability to perform then that would be a correct approach. However, they have not expressed it that way, nor, if they were so doing, it is necessary or appropriate to rely on the word “prevent” in clause 17.
43. In those circumstances the Sellers submitted that the Board of Appeal have made an error of law and, moreover, that on the findings in the Award the necessary causal connection is made out.
44. In their written skeleton the Sellers relied in relation to causation on paragraph 15.21 in which the Appeal Board stated:
- “15.21 Since the Appeal Board has held that the Appellant Sellers cannot rely on Clause 17 then it is not necessary to decide if they had produced sufficient proof to justify the Three Contracts being deemed to have been cancelled. However if the Appeal Board was to decide this issue they would have held that the Appellant Sellers fully satisfied this requirement under Clause 17.”
45. However, as the Buyers submitted, this paragraph was addressing whether the Sellers had complied with the notification provision set out in the last sentence of the prohibition clause rather than causation. In oral argument, the Sellers’ case centred on the last sentence in 15.17 that the Sellers were “so restricted that they were eventually unable to obtain the export licences”. They submitted that this amounts to a finding of prevention.
46. In this connection the Sellers drew attention to paragraphs 15.36 to 15.38 of the Award, where the Appeal Board were addressing the issue of the relevant default date

for damages. In that context they found that the Buyers had agreed to the Sellers having more time to obtain the export licences beyond the delivery period for the Three Contracts and that performance was kept open for as long as the Sellers had the chance of so obtaining them. They further found that that chance “expired” and the extension period ended “on 11th January when the last export licences were distributed on the quota of 3,000,000 mts, being then the limit for the export of Ukrainian corn”.

47. The Sellers accordingly submitted that as at 11 January 2011 the quota meant that they were unable to obtain export licences because from that time there were no further licences available. Indeed it was the Sellers’ case that the quota had been the cause of their inability to obtain the export licences throughout the period of the quota restrictions in circumstances where, as the Appeal Board found, they had used their best endeavours to do so. The Sellers further submitted that there was, on the Appeal Board’s findings, no other cause established.
48. The Buyers, by contrast, submitted that the Appeal Board had found that the causal connection was not made out. They submitted that this is the proper interpretation of their findings that the Sellers had not been “prevented” from making shipments. They submitted that in paragraph 15.17 the Appeal Board were using the word “restricted” in the sense of making performance more difficult rather than preventing it. They further stressed the references in the Award to bureaucratic inefficiencies (for example, in paragraphs 13.4 and 15.14) and to the statement by Bingham LJ in *Pagan v Tradax* (at p351) that clauses such as clause 11.3 involve acceptance of “responsibility for the possibility of oversight, error, mishap, bureaucratic inefficiency or delay or mere failure to issue”. The Buyers submitted that this was a case where the inability to perform was not caused by the quota but rather by the authorities’ failure to issue licences available under that quota, and that the Board of Appeal had in effect so found.
49. In relation to the Sellers’ reliance on the findings made in relation to the position as from 11 January 2011 it is right to observe that the precise basis upon which extensions may have been agreed is not set out and in the context of liability the Appeal Board appears to have regarded the relevant period as being up to 31 December 2010 (see paragraph 15.11).
50. In my judgment the Board of Appeal have not specifically addressed the critical causation question. Nor do I consider that the court can confidently conclude what the answer to that question is on the basis of the findings in the Award. Causation is a mixed question of fact and law and is a matter for the Appeal Board rather than the court. In those circumstances I consider that the appropriate course must be to remit the matter for further consideration by the Appeal Board in the light of the court’s answers to the Questions of Law.
51. In relation to Question 3, I conclude that:
 - (1) In order to be able to establish a qualifying event under clause 17 of GAFTA 1978 it is sufficient to show a relevant event “restricting” rather than “preventing” export.
 - (2) If a qualifying event is established it is also necessary to show that that event caused the inability to perform.

52. On the facts as found in this case, conclusion (2) involves a determination of whether the Sellers were unable to obtain the necessary export licences for shipment because of the quota restrictions. It is in order to address and determine that issue that I consider that the Award should be remitted to the Board of Appeal.

Conclusion

53. I accordingly answer the Questions of Law as follows:

- (1) Clause 17 of GAFTA78 operates as a qualification to clause 11.3 but is not overridden by it.
- (2) Clause 17 of GAFTA78 does not only relieve sellers of an obligation to obtain an export licence in circumstances where there is a prohibition amounting to a “total ban”.
- (3) (a) In order to be able to establish a qualifying event under clause 17 of GAFTA 1978 it is sufficient to show a relevant event “restricting” rather than “preventing” export.
 - (b) If a qualifying event is established it is also necessary to show that that event caused the inability to perform.

54. In the light of those answers I remit the Award for further consideration by the Appeal Board and for determination of whether the Sellers were unable to obtain the necessary export licences for shipment because of the quota restrictions.