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# GAFTA 49 and FOB sale contract - Court of Appeal construes “readiness to load”

*Soufflet Negoce v Bunge SA*. [2010] EWCA Civ 1102

In a classic FOB sale contract, the risk of loss or damage to the goods passes from the sellers to the buyers on the loading of the goods onto the vessel chartered by the buyers. The sellers will have no real legitimate interest in what happens after that, particularly where the sale contract provides for weight, quality and condition of the cargo to be final at the load port as per surveyors’ certificates.

In this dispute, the sellers argued that they had been entitled to refuse to load the cargo of Ukrainian feed barley onto the buyers’ nominated vessel because the cargo holds were allegedly not fit to receive or carry the cargo due to coal residue. The matter went through the GAFTA arbitration procedure and then to the courts, right up to the Court of Appeal, where the sellers lost.

## Background

The sale contract provided for delivery to be “*between 9th - 22nd October 2006 at Buyers’ call both dates included (no extension)*”. It was also agreed that weight quality and condition were to be final at load port as per surveyor’s certificates “*sellers’ option and costs*”.

All other terms and conditions not inconsistent with the sale contract were to be “*as per GAFTA 49*” (standard form of GAFTA contract for delivery of goods from Eastern Europe in bulk or bags on FOB terms). Clause 6 of GAFTA 49 provides that “*the sellers shall have the goods ready to be delivered to the buyers at any time within the contract period of delivery... provided the vessel is presented at the loading port in readiness to load within the delivery period, sellers shall if necessary complete loading after the delivery period...*”.

The sale contract also contained “*shipping terms*” which included laytime and demurrage provisions expressly requiring a valid tender of a notice of readiness (NOR) and stating “*all other terms and conditions as per relevant c/p*”. The references to a charter party and charter party rates in these shipping terms showed that the buyers had to charter a vessel or buy space in an already chartered ship in order to perform the contract. Accordingly, the buyers nominated, then chartered, a vessel.

The ship-owners did not serve NOR on the buyers / charterers until 0520 hrs on 22 October, which meant that the buyers would (under clause 6, GAFTA 49) have to ask sellers to complete loading after the delivery period had expired. However, the sellers’ surveyors issued a certificate on that same day saying the vessel’s holds were not fit to receive and carry the cargo due to coal residue (the buyers’ surveyors had meanwhile issued a certificate of cleanliness). The next morning, the Master advised the vessel’s holds were ready for re-inspection. By that time, the sellers had already declared the buyers in default of the sale contract on the grounds that the vessel had not been presented ready to load within the delivery period. The buyers sued the sellers for damages for non-delivery of the goods.

## GAFTA arbitration proceedings

The first-tier GAFTA tribunal found in favour of the sellers but that decision was reversed by the GAFTA Board of Appeal. The Appeal Board said it was the buyers’ responsibility to provide a vessel for shipment within the time agreed at the place agreed for shipment but that “*as long as it was physically and legally possible for sellers to load, on the nominated ship, the agreed goods at the agreed place*”.

*within the agreed time, then buyers would have discharged that responsibility and sellers were under a duty to load".* In other words, whether or not the cargo holds were clean and fit to receive the cargo was irrelevant from the sellers' point of view because they were not at risk if the goods were damaged in the ship's holds.

### **On appeal to the court**

Mr Justice David Steel dismissed the sellers' appeal but gave them leave to appeal to the Court of Appeal because GAFTA 49 is commonly used in the grain market and its construction was considered to be of general interest for grain traders.

The Court of Appeal dismissed the appeal. The appeal judges distinguished NOR within a charter party/shipping context from "*readiness to load*" in an FOB sale contract. "*Readiness to load*" did not mean a valid NOR must have been given or must have been capable of being given by the shipowners, because that was not what GAFTA 49 said. Rather, the reference in the shipping terms of the sale contract to an NOR being given was only relevant in relation to the commencement of laytime and that made sense because the buyers were also the charterers and wanted to have terms in the sale contract which reflected the charterparty terms in respect of laytime and demurrage.

According to Lord Justice Longmore, all that had to happen within the delivery period was that the vessel had to be presented in readiness to load at some time between 00.01 hours on 9 and 24.00 hours on 22 October. The fact that the holds may have needed some cleaning on arrival did not mean that the sellers could throw up the sale contract on the basis that no vessel had arrived during the period fixed for delivery. Lord Justice Toulson highlighted the fact that this was not a dispute for demurrage (where, under the sale contract, the sellers would not be liable for demurrage unless a valid NOR had been tendered under the charter party) but rather a simple claim under the contract for failure to load by the shipment date.

### **Comment**

This is another in a number of recent cases which have gone on appeal to the courts from commodity arbitrations but the appeals have been dismissed. Here, the Court of Appeal upheld the GAFTA Board of Appeal's analysis of the "*fundamental commercial dynamic*" of an FOB sale, which meant that if goods were damaged by shipment into unclean holds, the shipment was the buyers' decision and at their risk.

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