Neutral Citation Number: [2013] EWCA Civ 1627

Case No: A3/2013/1466

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
COMMERCIAL COURT
The Hon. Mr Justice Blair
[2013] EWHC 1189 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 12th December 2013

Before :

LORD JUSTICE RIMER
LORD JUSTICE BEATSON
and
LADY JUSTICE GLOSTER

- -

Between :

Seagrain LLC	**Appellant**
- and -	
Glencore Grain BV	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Michael Nolan (instructed by **W Legal Ltd**) made written submissions for the **Appellant** but did not appear at the hearing
Susannah Jones (instructed by **Reed Smith LLP**) for the **Respondent**

- -

Judgment

Lord Justice Beatson:

Introduction:

1. On 3 December 2013 the court heard the first part of an appeal from the Order of Blair J made on 10 May 2013 dismissing Seagrain LLC's ("the sellers") appeal under section 69 of the Arbitration Act 1996 against GAFTA appeal Award 4277 ("the Award"). At the conclusion of the hearing the court dismissed the appeal. I now give my reasons for doing so.

2. My reasons are substantially the same as those given by the judge below. It is therefore not necessary to engage in detailed analysis or to repeat in my own words the process of reasoning set out in his decision. As Mummery LJ stated in *R (Balding) v Secretary of State for Work and Pensions* [2007] EWCA Civ 1327 at [24], reported at [2008] 1 WLR 564, "there is no point in appeal court judges saying things at length simply for the sake of saying something". I am, however, under a duty to provide the reasons for my decision. In order for the reader to understand these reasons, it is also

necessary for me to provide a brief summary of the factual background and to set out the material parts of the sellers' submissions.

3. Before doing so, I make one observation about the hearing. When seeking permission to bring their appeal under section 69 against the Award, the sellers argued that the construction of the Prohibition Clause and the decision of the GAFTA Board of Appeal raised questions of general public importance, a submission which Popplewell J accepted when granting permission. Shortly before the hearing, however, the sellers informed the court that they would not be appearing. They made it clear that this was not because they were abandoning the appeal, and invited the court to allow the appeal on the basis of the submissions in Mr Nolan's replacement skeleton argument. Their decision to pursue the appeal but not to participate in the oral hearing and to rely on Mr Nolan's written submissions is unusual. It is impossible to say whether they took this decision because of a high degree of confidence that the force of those submissions is such as to be unanswerable, a decision to save costs, which a litigant is, of course, entitled to make, or a lack of confidence about the force of the case put. Whatever the reason, the court did not have the assistance of oral submissions from Mr Nolan and had to consider the position on the basis of his written submissions and Miss Jones's written and concise and focussed oral submissions.

The contract:

4. The appeal concerned the proper construction of the GAFTA Prohibition Clause, clause 18 of GAFTA standard form contract No. 48 ("GAFTA 48") for the shipment of goods from Central and Eastern Europe in bulk on CIF terms. Clause 18 of GAFTA 48 provides as follows:

> "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 port or ports of shipment 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 therefor and, if required, Sellers must produce proof to justify the cancellation."

The disputed questions:

5. The dispute raised two main questions:

   i) Is it necessary for an "act" to qualify as an "executive" act "restricting export" within the Prohibition Clause for the "act" itself to be of a nature which purports to impose a restriction on exports, or does it suffice that the effect of the measure is to restrict export of the goods.

   ii) Is it necessary, in order for the Prohibition Clause to have effect, for the sellers to demonstrate that they had made all reasonable efforts either to ship the goods or to try to buy replacement goods, or did it suffice for them to demonstrate that there was a qualifying executive act which had the effect of

restricting the export of goods of the contractual description in the relevant period.

The first question concerns the scope of the term "executive act" in the Prohibition Clause. I shall refer to it as "the executive act" question. The second concerns whether it is necessary to show a causal connection between a prohibition or restriction and the sellers' non-fulfilment of the contract. I shall refer to this as the "causal connection" question. As a result of directions made by Gloster LJ (see [11] below) the hearing was only concerned with the "executive act" question.

The facts:

6. I turn to the facts. By a contract made on 6 July 2010 incorporating the terms of GAFTA 48, the sellers agreed to sell Glencore Grain BV ("the buyers"), 3,000 MT 10% more or less at sellers' option of feed wheat of Ukrainian or Russian origin C & F free-out, one safe port, one safe berth, Haifa or Ashdod. The shipment period was from 15 – 31 August 2010 inclusive at sellers' option.

7. It was common ground (see Award, 6.1) that Russian wheat was subject to an export ban at the material time and that the contract had to be fulfilled by Ukrainian wheat. The sellers' contention was that measures taken by the Ukrainian customs authorities had the effect of restricting the export of wheat within the prohibition clause, that the contract was therefore cancelled, and they were discharged from liability to perform. They relied on a number of actions of the Ukrainian authorities for which (see [17] below) the Board held there was no evidence. Accordingly, their case rested on letters from the Ukraine Customs Control, in a period between 29 April and 2 August 2010, strengthening the controls in relation to the export of cargoes by which customs officers took samples from the goods during loading. The letter dated 29 April related (see Award, 8.6) to sampling and analysis and contained no actual restriction of exports. A letter dated 28 July stated that completion of customs clearance should be made exclusively after receiving the results of research. The letter upon which particular reliance is placed by the sellers is one dated 2 August. It required all customs samples to be sent to the Kyiv Research Forensic Institute Laboratory for analysis.

8. On 2 September, in response to an enquiry by the buyers about correspondence concerning shipment under the contract, the sellers stated (Award, 4.7) that they were unable to "execute" anything from Ukrainian ports which were "fully blocked by local government for any kind of grains". The buyers sent a notice of default dated 21 September and their invoice for default damages on 27 October, and in due course their notice of arbitration in respect of a claim for damages in the sum of US$270,000 representing the difference between the contract price and the market price on 1 September 2010. On 19 October 2010 the Ukrainian authorities put in place an export quota system which, as the GAFTA Board of Appeal stated (Award, 8.7), has no relevance to this dispute.

9. The GAFTA Board of Appeal and the judge rejected the sellers' contention that the measures taken by the Ukrainian customs authorities constituted a restriction of the export of wheat within the prohibition clause and that they were discharged from liability to perform the contract. On the "executive act" question, the Board and the judge found that the measures required by the letters did not constitute a restriction of exports because they did not actually restrict exports *per se.* The fact that the effect of the sampling and testing measures required by the authorities led to delay in obtaining customs clearance did not suffice.

10. It was not therefore necessary for the judge to address the "causal connection" question. He did not do so because of the pending appeal from a decision of Hamblen J in *Bunge SA v Nidera BV* [2013] EWHC 84 (Comm), a case about the requirements of the substantially identical Prohibition Clause in GAFTA 49. Hamblen J had decided the "causal connection" question in favour of the buyers and an appeal against that decision was pending in this court. The judge considered that appeal would probably resolve that question in the present case. He concluded that, given his decision on the "executive act" question, there was nothing he could or should add on the "causal connection" question.

Gloster LJ's directions:

11. In an Order dated 12 August 2013, Gloster LJ directed that the appeal on the "causal connection" question in this case should not be heard until after this court handed down its judgment in *Bunge v Nidera.* My Lady did so because the judge's conclusion on the "executive act" question would, if resolved in the respondent buyers' favour, be determinative of this appeal. She observed that the judge in this case had resolved the first question without any reference to the second.

Bunge v Nidera

12. The appeal in *Bunge v Nidera* was heard by another constitution of this Court on 19 November 2013. Although its circumstances differ, because the question of the relevance of the "effect" of the executive act arises in both cases, it is appropriate to say a little more about it. I should note that the position taken by the sellers in the two cases differed. In *Bunge v Nidera* the sellers argued (see [2013] EWHC 84 (Comm), at [15] and [28]) that, in determining the applicability of the Prohibition Clause, it was unnecessary to inquire whether the prohibition or restriction in fact had any effect. They contended that what was relevant was the description of the "nature" of the executive act, and not its effect or consequences. In the present case, however, the sellers submitted that what is relevant is the effect of the act and not its nature.

13. In *Bunge v Nidera* the sellers purported to cancel the contract pursuant to the Prohibition Clause in GAFTA 49 before the date upon which what was explicitly a prohibition of export by the Russian authorities took effect. Accordingly the "executive act" question which arises in the present case did not arise. The question was whether the purported cancellation before the prohibition took effect fell within the clause or whether it constituted an anticipatory repudiatory breach. Hamblen J held that the clause required proof of a prohibition in fact restricting export and that this involved establishing a causal connection between the prohibition or restriction and the sellers' non-fulfilment of the contract. As it could not be said on the day of the purported cancellation that there would in fact be such a prohibition because the export ban might be revoked or modified, the sellers could not rely on the clause and were in breach.

14. In the present case the sellers' central contention is that the effect of a measure is relevant in determining whether there is a qualifying "executive act" for the purposes of the clause. The judge held that it was necessary for the nature of the act itself to restrict exports. In *Bunge v Nidera* that "necessary" requirement would have been satisfied at the date it became effective because the Russian government's "act" explicitly restricted exports from a future date which was seven days before the commencement of the contractual delivery period. Accordingly, the question in that case, which this Court will decide, is whether it is also necessary to consider the effect in fact of the act on contractual performance. The answer to that question does not affect the question before this court in the present case. This is because, here, the

question is whether, even assuming an effect in fact on contractual performance, the nature of the executive act itself qualifies for the purpose of the Prohibition Clause.

The decision of the GAFTA Board

15. The judge stated (at [14] – [15]) that the key findings of the Board were:

> "8.6 …There was no actual restriction on exports *per se*, in the same context as when an outright ban/prohibition had been implemented. The inspections might well have been a contributory factor in the delay of customs clearance and/or sailing of export cargoes. However, there was no suggestion in the letter [of 29 April 2010] that export cargoes would actually be prevented at any time.
>
> …
>
> 8.16 The burden is on Sellers to show that they were entitled to the protection of the Prohibition Clause. Sellers have to clearly demonstrate that they have tried all avenues and made all reasonable efforts either to ship the goods or to try and buy replacement goods in order to comply with their contractual obligation to ship the goods. This the Sellers, in the Board's view, have failed to do. At no stage was there an official prohibition or ban, enacted by or on behalf of the Ukrainian government, prior to, or during, the shipment position (sic) and evidence shows that goods were loaded by others during 15/31 August. Sellers have stated that the Ukrainian authorities were hindering exports, however no proof had been provided by Sellers to substantiate that any of their cargoes were hindered. There may have been delays and difficulties in loading and/or shipping the goods, but this did not constitute a prohibition and therefore the Sellers were not protected under the contract for their non-shipment. The risk and costs of such a situation are with a seller not a buyer."

16. For these reasons, the Board concluded in 8.16 that the sellers had failed to satisfy it that they had discharged the burden of proving that they could seek protection under the Prohibition Clause. Consequently the Board found that they were in default under the contract and were liable to the buyers in damages.

17. I add only two matters. First, the Award also stated (at 8.6) that the letter dated 29 April related to sampling and analysis and contained no actual restriction on exports *per se*. Secondly, the Award stated (at 8.8) that there was no evidence to support the sellers' contention that various governmental and regional bodies had prevented the rail company from providing wagons to carry the grain and the state inspection service from issuing the certificates necessary for export clearance, and had instructed the police to stop any truck found carrying wheat without the necessary paperwork.

The Sellers' submissions

18. Before the judge, the sellers submitted that the Board of Appeal had erred because, in paragraphs 8.6 and 8.16 of their Award, they approached the Prohibition Clause as if it required the sellers to establish an official or outright ban or prohibition enacted by or on behalf of the Ukrainian government, or something akin to such a ban or prohibition, but that this gave an unduly narrow meaning to the words "act" and

"restricting" which was not justified either by the wording of the Prohibition Clause or by authority.

19. Their case before the judge was, and this court is, that the natural and ordinary meaning of the relevant words in the Prohibition Clause is more than wide enough to encompass any act of the executive carried out on behalf of the government which has the effect of restricting exports, partially or otherwise. The word "act" is a wide one and encompasses any deed or action, and not just a formal prohibition or restriction. That the clause has a wider meaning than that is also, they submitted, supported by the reference to the acts as being "done by or on behalf of the government" because a formal prohibition or restriction is "imposed" or "implemented" and not "done". They also relied on the use of the word "any" as showing that there was no intention to limit the acts concerned to formal restrictions, and on the decision of the ECJ in *Belgium v Spain* [2002] 1 CMLR 26, a decision about the requirements as to bottling and labelling of Rioja, which were held to have an effect equivalent to quantitative restrictions on exports for the purpose of Article 34 of the EC Treaty, now Article 29 TFEU, even though the Rioja could be freely exported in bulk.

20. The sellers criticised the reliance of the judge on *Bremer Handelsgesellschaft MBH v Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109 and *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep 304. Those cases involved a formal act of the executive of the country concerned which had the expressed intention to ban or restrict exports, and consequently the court did not need to consider the applicability of the clause to acts of the executive which did not have this express intent. They did not decide whether the clause could apply to such acts.

21. The judge was also criticised for stating that an argument similar to their argument was rejected in *Agrokor AG v Tradigrain SA* [2000] 1 Lloyd's Rep 497 at 500. The sellers contended that Longmore J did not have to, and did not, consider the meaning of "executive…acts…restricting export". This was because he found that the GAFTA Board of Appeal in that case had not held that it was necessary to show that the prohibition was one "preventing fulfilment" of the contract as opposed to "restricting export whether partially or otherwise", and therefore had not erred.

22. Finally, the sellers contended that their construction was workable and commercial, and indeed that it would be easier to identify what is and what is not an "act of the executive" than what is and what is not "an act in the nature of a formal restriction on exports". Decisions and measures which have the effect of restricting export without being express prohibitions, bans, or restrictions, will usually be the subject of press coverage, as they were in this case.[1] As to the examples canvassed, such as changing a customs form or introducing changes to an IT system, the sellers submitted that it would only be rare that those would "restrict exports". However, they maintained that where they did, it would not be surprising that the Prohibition Clause should protect the sellers. They also suggested that the solution to what are, in effect, *de minimis* arguments is to imply a requirement that the restriction should be substantial or affect performance to an appreciable extent, as was done in *Peter Dixon & Sons Ltd v Henderson Craig & Co* [1919] 2 KB 778 at 786 in relation to the words "hinder" and "hindering" in a *force majeure* clause.

The judgment below

23. The judge gave four reasons for rejecting the sellers' submissions. The first (see [34]) was that the broad construction advanced by the sellers was unworkable and would

[1] See the GAFTA World article dated October 2010 and the statement from Pasternak Baum and Co Inc referred to in the Award at 5.11.

undermine commercial certainty. One could not notionally write the contents of the letter dated 2 August into the contract in the terms of a restriction based on a requirement that samples be tested in a particular laboratory without undermining such clarity.

24. Secondly (see [35]) the term "any executive…act" could not be construed as extending to every action by an official body which has the effect of restricting exports. Its context showed that it meant "an act done by or on behalf of the government which is in the nature of a formal restriction on exports". It did not extend to every action by an official body which has the effect, in practice, of restricting them.

25. Thirdly (see [36]) the Board did not apply the wrong test. They did not find, as the sellers alleged, that only an outright ban on exports could fall within the Clause. What the Board found (see Award, 8.6) was that "there was no actual restriction on exports *per se*, in the same context as when an outright ban/prohibition had been implemented". The Board found (see Award, 8.6) that "the inspections might well have been a contributory factor in the delay of customs clearance and/or sailing of export cargoes", but "there was no suggestion in the letter that export cargoes would actually be prevented at any time". It also found (see Award, 8.16) that "at no stage was there an official prohibition or ban, enacted by or on behalf of the Ukrainian government … There may have been delays or difficulties in loading and/or shipping the goods but this did not constitute a prohibition…".

26. Fourthly (see [37]) it was up to the sellers to "produce proof to justify the cancellation" and the Board was, in the judge's view, on the facts fully entitled to reject the sellers' case that the requirements of the Ukrainian customs authority, in particular that to send samples to a particular laboratory, constituted an executive act within the meaning of the Prohibition Clause. The judge referred to the weight given by the court to the views of the Trade Tribunal on this kind of issue, and stated that whether circumstances such as these could fall within the Prohibition Clause would depend on the particular facts which were for the Trade Tribunal.

Reasons for dismissing the appeal:

27. The criticism that the judge's construction in practice limited "restriction" to formal restrictions on exports when, to do this, a word more specific than "act" would be used does not reflect the flexibility in the passage from [35] of the judgment below. The judge did not require a "formal restriction on exports" but an act "in the nature of" such a formal restriction. He considered that whether particular circumstances could fall within the Prohibition Clause would depend on the particular facts of the case.

28. The Prohibition Clause lists four acts which can trigger its operation; "prohibition of export", blockade", "hostilities" and "an executive or legislative act by or on behalf of the government of the country" from which the goods originate or are to be shipped. The first three triggering acts are acts of a nature which do in themselves expressly or implicitly relate to the restriction of exports. This is certainly so in the case of "prohibition of export" and "blockade". The position of "hostilities" may not be as clear, but I consider that in the context of this clause it is also so.

29. In deciding whether the phrase "any executive … act" by or on behalf of the relevant government is also to be interpreted as relating only to executive acts of such a nature or, as the sellers submit, include all executive acts, my starting points are the nature of the contract and the commercial purpose of the clause. The contract is a C & F contract under which the seller was obliged to ship customs-cleared goods. The

Prohibition Clause in such contracts was described by Lord Wilberforce in the *Bremer Handelsgesellschaft MBH* case, [1978] 2 Lloyd's Rep 109 at 112, as "a contractual frustration clause". In the discussion of prohibition of export clauses in Benjamin's *Sale of Goods* (8th ed.) at 18-386 – 18-395) it is stated that, if anything there may be a tendency to construe such exemption clauses narrowly, and against the party who seeks to rely on such a clause. For these reasons, I have not been assisted by the judgment of the ECJ in *Belgium v Spain* [2002] 1 CMLR 26, relied on by the sellers. The case concerned the meaning of what is now Article 29 of the TFEU. The ECJ was considering the meaning of that Article in the context of the free movement of goods within the Union, one of the fundamental rights under the EU treaties. The fundamental freedoms under the TFEU, however, have to be given a purposive (and, if necessary, wide and possibly strained) construction in order that their effectiveness is not restricted. The case is not of assistance in the construction of an exemption clause in a contract between two experienced commercial traders.

30. The submission on behalf of the sellers that the use of the words "any" and "act" in the clause show that any deed or action qualifies, and not just certain types of executive act, does not, in my view, assist. It is true that it may not be natural to describe a formal restriction as being "done" by or on behalf of the government, but the Clause applies to both executive and legislative acts and the construction for which the sellers contend would, in the context of legislative acts, be a strained construction.

31. The buyers relied on the use of the phrase "restricting export", submitting that the natural meaning of the phrase "any executive…act…restricting export" is an act of the executive which itself restricts exports and not an act which has as a collateral and indirect effect delay to or disruption of exports. If the phrase "restricting export" is considered only in relation to "any executive…act", there is considerable force in this submission. But the clause's use of the word "such" to qualify the word "restriction" and the phrase "total or partial restriction" suggests that the phrase applies to all four of the acts which can trigger its operation, and not only to the fourth. The fact that "restricting export" appears to apply to all four of the acts which can trigger its operation might be seen as a factor supporting the construction for which the seller contends. This is because, if there is a further requirement that the act is one "restricting export", why should the words "any executive … act" be limited in this way. Despite the force of this point, I do not consider it leads to the conclusion that all executive acts of whatever nature necessarily qualify for the purposes of the clause.

32. The revision of the Prohibition Clause when "preventing fulfilment" was replaced by "restricting export"[2] and the deeming provision followed the difficulties resulted from the prohibition on the export of soyabean meal by the United States government in 1973. As the judge stated (at [33]), the revision was not apparently prompted by any doubt as to what was meant by "executive act", i.e. any doubt as to the nature of the executive act itself. The main problems at that time arose from difficulties faced by sellers in proving in relation to an explicit prevention of export that there was such prevention in cases of "string" contracts and in relation to "loophole" goods: see Hamblen J in *Bunge v Nidera* [2013] EWHC 84 (Comm) at [36] referring to Benjamin's *Sale of Goods* (8th ed.) at 18-395 and *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep. 304 at 306. The court was not shown any case where the act was not one which explicitly restricted export, such as the introduction of quotas or licensing requirements. As to *Agrokor AG v Tradigrain SA* [2000] 1 Lloyd's Rep 497, the clear import of what Longmore J (as he then was) stated at 500 was to reject an argument by the sellers in that case that was similar to that advanced by the sellers in this case even if it was not part of the *ratio* of that case.

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[2] The revised clause also requires the "restriction" to "prevent fulfilment".

33. The judge's decision left it open to a GAFTA Board, the trade arbitrator, to find that an act which implicitly restricted export could fall within the Prohibition Clause. But the construction of the clause for which the sellers contend would lead to an uncommercial position because any act adjusting a customs regime which results in delay or disruption would fall within its scope and result in the cancellation of the contract. This is seen from the examples given by the buyers and referred to by the judge (at [31]) of austerity measures which lead to the sacking of experienced customs officials, and difficulties caused by failures of a new computer system (unfortunately not an uncommon aspect of the introduction of new IT systems in public sector contexts). The width and the uncertainty that would result from the sellers' construction is shown by the fact that Mr Nolan submitted that, subject to *de minimis* cases, such effects would mean that the act under consideration would be an executive act restricting export. On this approach, even governmental acts completely unrelated to export activities such as traffic restrictions over a period to facilitate the smooth running of a major international sporting event or during a major construction project would fall within its scope if the result was delay or disruption in a port. The contention that the Prohibition Clause would apply in such cases gives it a very broad reach. The consequence of any adjustment of a customs regime which resulted in delay or disruption to exports or any government act with this effect would be automatic discharge. It is unlikely that commercial parties would agree this for such a broad category of collateral consequences, particularly in the light of the other provisions in the contract dealing with delay (as to which see [36] below).

34. The difficulty in the sellers' position is also shown by their recognition before the judge that the delay or disruption should be "substantial" or should "affect performance to an appreciable extent". This would not only require the implication of additional wording but also conflict with the plain meaning of the clause. As Miss Jones observed, since the effect of delay or disruption in a market generally leads to the market rising, if the Prohibition Clause is construed so that delay or increased difficulty in obtaining customs clearance triggers its operation, sellers would be able to escape from a contract and resell goods on a rising market. I do not consider that the decision in *Peter Dixon and Sons Ltd v Henderson Craig and Co*, on which the sellers relied, assists. The case concerned the proper construction of the words "hinder" and "hindering" in a *force majeure* clause, and did not involve the implication of additional wording.

35. I also agree with the judge (see [34]) that it is difficult to apply the deeming provision in the clause to a requirement such as that in the customs authorities' letters. It cannot, in the words used in *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep 304 at 307, be "notionally written into the contract". Unlike the embargo on export licences after a given date with which that case was concerned, a requirement that samples be tested in a particular laboratory lacks the clarity necessary for it to be notionally written into the contract. It would first be necessary to imply a restriction into the requirement and to write in something like "the contract is cancelled to the extent of the delay", but that would make no sense.

36. The construction for which the sellers contend also does not fit into, and indeed cuts across, other provisions in the contract. GAFTA 49 contains two clauses expressly dealing with delays in shipment. Clause 9 grants the seller an option unilaterally to extend the shipment period by up to 8 days subject to an adjustment in the contract price. Clause 19, the *force majeure* clause, deals with delay in shipment occasioned by the specified causes with provision for the seller to serve notices requiring an extension of the shipping period. It also provides that, if shipment be delayed for more than 30 consecutive days, the buyers shall have the option of cancelling the delayed portion of the contract. Absent exercise of this option by the buyers, there is provision

for the delayed portion to be automatically extended for a further period, after which further extension the contract shall be considered void, but the buyers shall have no claim against the seller for delay or non-shipment provided the sellers have supplied satisfactory evidence justifying the delay or non-fulfilment. So, taking the example of austerity measures that lead to a strike, this would, on the sellers' case, fall within the scope of the Prohibition Clause and lead to the automatic discharge of the contract, although the strike itself falls within the *force majeure* clause with its very different consequences.

37. In summary, an "act" which only makes it more onerous to obtain customs clearance may make the obtaining of clearance slower, and thus delay export, but it does not stop export from taking place eventually. It is thus qualitatively of a different kind to the three other triggering acts. Moreover, just as delay does not stop export from taking place eventually, so it does not "prevent" fulfilment of the contract but merely postpones it. It is true that, where there is a narrow timeframe for contractual performance, a delay which takes the matter outside that timeframe will "prevent" fulfilment, but that is not the consequence of the act. It is the consequence of the extent of the delay.

38. Finally, I consider that because factual situations will differ widely, it was not necessary for either the GAFTA Board of Appeal or the judge to formulate a prescriptive interpretation of the term "executive or legislative act". As the judge stated (at [35] and [37]), whether particular circumstances could fall within the Prohibition Clause would depend on the particular facts of the case and is therefore an issue for the specialist trade bodies to determine in the light of their experience: *Andre et Cie v Cook Industries Inc* [1986] 2 Lloyd's Rep 200 at 204 (Bingham J) and *Thomas P Gonzalez Corp v Muller's Muhle Muller GmbH and Co KG (No. 2)* [1980] 1 Lloyd's Rep 445 at 451 (Robert Goff J). The sellers had alleged that various national and regional controls made it impossible to export wheat from Ukraine in August but (see [17] above) provided no evidence of the specific events relied on to justify why they could not ship the contractual goods. All that was left was the letter dated 2 August 2010. The GAFTA Board of Appeal found (see Award, 8.16) that the Ukrainian customs authorities' letters "may have" led to "delays and difficulties in loading and/or shipping the goods, but this did not constitute a prohibition". It did not find that fulfilment of the contract was prevented. Against this background, the Board's conclusion that the sellers had not shown that there was an act falling within the scope of the Prohibition Clause, and the judge's conclusion to the same effect were, in my judgment, entirely justified.

Lady Justice Gloster:

39. I agree.

Lord Justice Rimer:

40. I also agree.