

Taking Notice of 'Notice Clauses' in International Trade Contracts - The Importance of Getting it Right

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The recent case of *PEC Ltd v Thai Maparn Trading Co Ltd* [2011] EWHC 3306 (Comm) considered the effectiveness of notices presented with the intention of extending the delivery period under an FOB contract.

This client alert highlights the importance of paying close attention to the notice clause incorporated into your contract and taking steps to ensure that a valid notice is given.

We also advise of a recent change to the FOSFA Arbitration Rules which means that claims can only be renewed by notice once.

PEC v Thai Maparn

Facts

The Claimant Buyers purchased 22,000 m.t. Thai Rice from the Sellers on an FOB basis, for shipment "during April - 07 May 2008, with min 10 working days pre-advice of vessel arrival". The contract incorporated **GAFTA 120**, clause 7, which permitted the buyer to claim an extension of the delivery period by an additional 21 days, by giving notice not later than the next business day following the last day of the delivery period. The Buyers did not present a vessel during the contractual delivery period, which expired on 7 May. On 8 May, the Buyers sent the following message to the Sellers:

"As a gesture of goodwill, without prejudice to our rights, we are ready to extend the delivery period by 21 days... The last date of shipment was 7 May 2008 and if we do not receive any reply regarding the cargo readiness for loading from your side within 2 days, we put you in default of the contract."

This message was followed by a further message to the Sellers, sent by the Buyers' solicitors, which stated:

"You have contracted to ship April - 07 May 2008 22000 m.t. of rice... to our clients the Buyers... Despite your clear indication that you are not going to perform your obligation under the Contract and therefore you are in breach of the Contract, our client hereby gives you Notice under Clause 7 of **GAFTA Form No 119** that they require the delivery period to be extended by an additional period of 30 days. In view of the fact that you have not yet completed full shipment of rice under our client's earlier purchase contract No TMT SGT 070108 dated 7 January 2008, we are writing this letter to invite you to confirm to us within 7 days that you do intend to perform the aforesaid contract. We must give you further notice that if you fail to respond to this letter within 7 days our client will take it that it is not your intention to ship the contracted rice cargo under the aforesaid contract. In that event we will hold you in breach and claim the loss suffered by us to your non performance as damages... We await to hear from you within 7 days."

Was one or other of those notices effective to extend the delivery period under the Contract?

GAFTA decision

The Sellers argued that the shipment period had expired and that **neither** of the two messages constituted an effective notice to extend the delivery period. The Buyers argued that one or other of the messages of 8 May **did constitute** a valid extension of the contractual delivery period under clause 7 of GAFTA 120.

The GAFTA Board of Appeal (reversing the finding of the first tier arbitrator) **agreed with the Sellers** and held that the two notices sent by the Buyers on 8 May were **invalid** and **ineffective** to extend the contractual delivery period, because:

- The 'notices' made the granting of an extension subject to conditions which were not fulfilled; and
- It was highly doubtful whether a notice which purported to extend time under GAFTA 119 was a valid notice under clause 7 of GAFTA 120.
- The Buyers appealed to the High Court.

Commercial Court decision

The Court held:

- The contractual delivery period is a fundamental term of an FOB contract. It is therefore essential that the delivery period and any extension should be defined with clarity and certainty.
- The Buyers' own message **did not** validly extend the delivery period under the contract, as it stated that the Buyers were 'ready' to extend the shipment period, not that they were doing so. The contingent nature of the message was further proved by the Buyers' message being a 'gesture of goodwill' and sent 'without prejudice to [their] right'. Reading the message as a whole, the Court held that the Buyers were offering the Sellers a choice - either they advised readiness of the cargo within two days, in which case the Buyers would extend the delivery period, or they did not - in which case the Buyers would put them in default. The message effectively made the extension conditional upon the Sellers confirming the cargo readiness. They did not do so, so there was no valid extension.
- The Buyers' solicitors' message was also held not to have validly extended the delivery period. That message stated that the Buyers 'hereby give you notice under clause 7' that they 'require' the delivery period to be extended. Had the message stopped there, the Court suggested that it would have constituted a claim to an extension (leaving aside the fact that the Buyers referred to the wrong GAFTA contract). However, the message then went on to require the Sellers to confirm that they would ship the cargo within 7 days, failing which the Buyers would put them in default. It was unclear whether the message was claiming an extension regardless of the Sellers' requested response and the Court found that a notice which did not make it clear that an extension was being sought was neither sufficient nor valid.
- The Court ultimately construed the two messages together. Due to the inconsistencies in those messages, they were held to be too equivocal to constitute a unilateral extension. The Court therefore found that the contractual delivery period had not been extended in accordance with clause 7 of GAFTA 120.

- The Judge also found that the GAFTA Board of Appeal were not wrong to find that a notice referring to the wrong contract form (namely GAFTA 119, not GAFTA 120) and the wrong extension period (30 days, not 21) was invalid.

Recommendations

Giving notices under international sale contracts is a tricky area and great care should be taken to ensure that you are doing everything right. Here are some recommendations:

- Because of the contractual importance of the delivery period under international trade contracts and the need for certainty, any notice seeking an extension of that delivery period must be clear and unequivocal in stating (a) that an extension is being claimed; (b) the basis upon which you are entitled to that extension; and (c) if you mention duration at all, you must follow exactly the relevant extension clause.
- Close attention should be paid to the underlying terms incorporated into your contract (e.g. GAFTA or FOSFA clauses), to ensure that you are referring to the correct form. Similarly, pay close attention to the detail of the contract itself - ensure that you are quoting the correct contract number, date and parties, together with any express contractual clauses dealing with delivery periods when claiming any extension, to ensure that both parties' rights and obligations are clear.
- Timing is crucial - a notice given too early may be invalid, as may a notice given too late. Ensure that your operations department are keeping a close watch and, if it looks likely that you will require an extension, ensure that the correct dates are diarised and actioned **early on**. If in any doubt at all, involve your legal team to assist you!
- Do consider whether, by claiming an extension, you may be waiving other rights under your contract - for example the right to accept your counterparty's repudiatory breach, terminate the contract and claim damages (this was the problem the Buyers found themselves in - so they tried to give a notice doing everything, but it did not work).
- If in any doubt, seek legal advice regarding the timing, wording and content of your notice. This is particularly important in a volatile market, to ensure that you are adequately protecting your position.

Important change to FOSFA Arbitration Rules

Finally, FOSFA has introduced new Rules of Arbitration and Appeal. These are **effective from 1 January 2012** and will cover **all contracts made on or after this date**.

In particular, please note that you can now renew any arbitration claim only once (rather than five times, in accordance with the statutory limitation period of six years), giving the claimant a maximum of two years in total from the date of first appointment of an arbitrator to serve its first submissions (assuming the renewal is made at the limit of one year), after which the claim will lapse. (See Rule 3.)

The equivalent GAFTA provision (applicable to contracts dated from 1 September 2010) allows parties to renew an arbitration claim for successive periods of one year, but not to exceed more than six years from the date the first notice of arbitration was given (see Rule 4.10 of GAFTA 125).

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