Neutral Citation Number: [2023] EWHC 1119 (Comm)

Case No: CL-2022-000061

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 May 2023

Before:

MR JUSTICE PICKEN

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IN AN ARBITRATION CLAIM BETWEEN:

MITSUI & CO (USA) INC

Claimant

- and -

(1) ASIA-POTASH INTERNATIONAL INVESTMENT (GUANGZHOU) CO LTD

Defendant

- -
- -

Mr Robert Thomas KC and Mr Jamie Hamblen (instructed by **Clyde & Co LLP**) for the Claimant.
Mr Julian Kenny KC and Ms Angharad Parry (instructed by **Davies Battersby Ltd**) for the Defendant.

Hearing date: 2 May 2023.
Judgment provided in draft: 9 May 2023.

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Picken:

Introduction

1. There are, formally, two matters before the Court: an appeal under section 69 of the Arbitration Act 1996 brought with leave; and an application under section 68 of the same Act. However, the parties have agreed that only the section 69 appeal should be determined at this hearing and, indeed, that only one aspect of that appeal should be determined.

2. The Claimant in relation to both of these matters is Mitsui & Co. (U.S.A.) Inc ('Mitsui'); the Defendant is Asia-Potash International Investment (Guangzhou) Co Ltd (formerly Dongling Grain & Oil Co Ltd/Donlinks Grain and Oil Co Ltd, hence the shorthand 'DGO' used in the arbitration and in this judgment also).

Background

3. The relevant background is uncontroversial. In the circumstances, I take what follows, at least in the main, from the skeleton argument submitted on behalf of Mitsui by Mr Thomas KC and Mr Hamblen when seeking leave to appeal. That is itself taken from the FOSFA Award (no. 1163 dated 20 December 2021) ('the Award') which is under challenge by Mitsui.

4. The underlying dispute arose out of a contract of sale dated 2 May 2012 between Mitsui as Seller and DGO as Buyer for 60,000 MT of Brazilian Soyabeans ('the Cargo') for delivery between 15 and 31 July 2012 FOBST ex Santos, on FOSFA 4 and ANEC 41 forms ('the Contract').

5. Payment was to be by way of an irrevocable letter of credit to be opened by 30 June 2012.

6. The Contract was part of a wider chain of contracts. Thus, the head sellers and shippers of the goods were Intergrain Company Ltd ('Intergrain').

7. Intergrain had agreed to buy the Cargo on FOBST terms from five different suppliers, namely Noble, Louis Dreyfus, Bunge, CHS and Caramuru Alimentos. These, rather than Intergrain, were the shippers of the Cargo.

8. Intergrain sold 60,000 metric tons (10% more or less - 5% declarable at time of vessel's nomination and 5% at vessel's option) of Brazilian Soyabeans (crop 2012 in bulk) to Multigrain AG (now known as Xingu Agri AG) ('Multigrain') for FOBST delivery at Santos between 15 and 31 July 2012 inclusive. The terms of this contract overlapped with those of the Contract but were not identical.

9. Multigrain, in turn, entered a contract of sale dated 2 May 2012 by which they sold 60,000 metric ton (10% +1-) Brazilian soybeans (2011-2012 crop) to Mitsui for delivery FOBST Santos port export corridor. The terms of this contract overlapped with those of the Contract but were not identical. Multigrain and Mitsui are related companies.

10. It was not contended or suggested by DGO before the Board of Appeal that, at the time of contract, DGO were unaware that Mitsui was a sub-buyer in a chain of related contracts.

That said, as Mr Kenny KC noted on DGO's behalf, neither DGO nor Mitsui advanced a case that DGO was aware that Mitsui was a sub-buyer and the Board of Appeal made no findings on the subject.

11. DGO opened a letter of credit in accordance with the Contract ('the Letter of Credit').

12. On 17 July 2012 DGO nominated the MV Yusho Regulus ('the Vessel') to load about 66,000 metric tons with ETA 19-20 July.

13. The Vessel berthed and commenced loading on 13 September 2012. It was common ground that berthing of the Vessel had to be authorised by the Port Authority (CODESP) and was so authorised, prior to berthing. There was a dispute as to the role the parties played in that process.

14. At 01.14 hours on 15 September 2012 the Vessel broke free from its moorings, damaging the Port's ship-loaders. There was 42,973.03 MT of Cargo on board at the time. The Vessel left the berth and was arrested on behalf of various parties.

15. As found by the Board of Appeal, the Vessel could have re-berthed from at least 16 October 2012. Mitsui's position was that DGO needed to apply to the Port Authority to have the Vessel re-berthed, whilst DGO denied the Contract remained in force, either having been terminated pursuant to the force majeure provisions or for breach by Mitsui. The Letter of Credit was extended on various occasions, eventually lapsing on 30 November 2012.

16. Following 30 November 2012, Mitsui continued to press for performance, whilst DGO contended that the Contract had been terminated. This continued until 7 or 8 January 2013, at which time Mitsui accepted DGO's repudiation.

17. In light of the foregoing, Multigrain instigated arbitration proceedings against Intergrain. Mitsui and Multigrain sought to pass Intergrain's claims down the chain to DGO, who in turn raised its claims and defences, which Mitsui and Multigrain then passed up to Intergrain.

18. Mitsui claimed indemnities, alternatively damages from DGO in the arbitration, in relation to its potential liabilities to Multigrain (and, in turn, Intergrain). In particular, Mitsui claimed the following (all subject to a credit of US$16 million regarding the sums paid by the shipowners to Intergrain): (i) a declaration that DGO was liable to Mitsui for all sums awarded to Intergrain in the Intergrain v Multigrain appeal proceedings and that DGO should indemnify Mitsui; (ii) an indemnity for all costs incurred by Mitsui in defending the claim advanced by Multigrain and all costs claimed by Multigrain (who had in turn incurred costs in defending the claim advance by Intergrain); alternatively (iii) damages (and/or an indemnity in the amount of the claims made by Intergrain against Multigrain and for which Mitsui (as Sellers) would have corresponding liability to Multigrain) being: (a) the price of the Loaded Parcel and/or damages in the like amount (less the proceeds of the salvage sale): US$ 22,523,511.32; and (b) the price of the balance quantity of 23,026.97MT being US$603,536.88 or US$1,312,076.75 or US$840,001.71; alternatively (c) damages for failure to present a vessel in the amount set out above plus the difference between the contract and market values of the unshipped balance: US$ 23,835,588.07; alternatively (d) damages in the same amounts set out above for wrongful declaration that the contract was at an end;

alternatively (e) damages in the sum of US$22,523,511.32 in respect of DGO's failure to care for the Loaded Parcel in their position as bailees plus sums claimed at (b) above; (iv) an indemnity for storage costs and circulation charges incurred by Intergrain in the sum of US$2,579,923.61, to the extent that contractual carrying charges in the sum of US$4,418,050.62 were not awarded; and (v) an indemnity in respect of a tax liability in the sum of R$113,770.30.

19. Mitsui claimed these various indemnities on the basis, *inter alia*, that DGO breached the Contract by failing to have the Vessel called back to berth to complete loading, on or soon after 16 October 2012 and that Mitsui's liabilities up the contractual supply chain must thereby inevitably fall at DGO's door.

20. The first tier FOSFA Umpire issued an award dated 24 July 2020 by which she substantially found in Mitsui's favour. DGO appealed.

21. The Board of Appeal issued the Award on 20 December 2021. In it the Board of Appeal, first, dismissed Mitsui's indemnity claims for reasons which were set out in the Award at paragraphs 7.5-7.12 and 7.138-7.154 and to which I will return.

22. Secondly, the Board of Appeal held DGO in breach by failing to have the Vessel called back to berth on or from 16 October 2012 (paragraphs 7.46-7.60), going on to award Mitsui damages pursuant to Clause 29 of the FOSFA 4 form, on the basis that the day of default was *"the first day following the last day on which contractual performance was still possible"* (paragraph 7.43), and that this occurred on 1 December 2012, i.e. the day after the Letter of Credit lapsed.

23. Thirdly, the Board of Appeal dismissed Mitsui's claim for carrying charges pursuant to Clause 10(d) of the Anec 41 form, on the basis that the Port Authority had never called the Vessel to berth (paragraphs 7.134-7.137).

24. The Board of Appeal went on, therefore, to order that: (i) DGO pay the principal sum in damages to Mitsui of US$ 7,007,430,00 (paragraph 8.2); (ii) DGO pay compound interest in respect of paragraph 20(1) at the rate of 3.5% p.a. with quarterly rests from 1 December 2012 to the date of payment pursuant to the award (paragraph 8.2); (iii) Mitsui pay DGO demurrage in the amount of US$ 1,274,110.00 (paragraph 8.1); (iv) Mitsui pay compound interest in respect of demurrage at the rate of 3.5% p.a. with quarterly rests from 16 October 2012 to the date of payment pursuant to the award (paragraph 8.1); (v) each party bear their own costs (paragraph 7.158); and (vi) the costs of the First Tier award and appeal be split 50/50 between the parties (paragraphs 8.3-8.4).

25. Following the Award and the granting of permission to appeal in these proceedings, Mr Thomas KC explains that the Intergrain/Multigrain Board of Appeal handed down their award on 24 January 2023.

26. In that award, which has not been disclosed to DGO on confidentiality grounds, I am told that it was ordered that: (i) in respect of the loaded parcel: (a) Multigrain pay principal sums to Intergrain of US$ 6,523,511.32; (b) Intergrain pay Multigrain demurrage in the amount of US$ 933,972.22 which is to offset against the damages awarded against them; (c) Multigrain pay compound interest at the rate of 4.25% p.a. with quarterly rests from 20 April 2013 until the date of payment pursuant to the

Intergrain/Multigrain award; (ii) Multigrain pay compound interest on the US$ 16,000,000 settlement sum received from ship owners at a rate of 4.25% p.a. with quarterly rests from 20 April 2013 to 19 August 2019; (iii) in respect of the balance parcel: (a) Multigrain pay Intergrain US$ 888,297.02; and (b) Multigrain pay compound interest at the rate of 4.25% p.a. with quarterly rests from 20 April 2013 until the date of payment pursuant to the Intergrain/Multigrain award; (iv) Multigrain pay 75% of the appeal board's costs equating to US$119,805.60; and (v) Multigrain pay 75% of Intergrain's costs, estimated to be substantially in excess of US$119,805.60.

27. Mr Kenny KC makes the point that there are what he described as certain oddities about the award. Whether that is the case cannot, as matters stand, be known; it may be that the award itself will make things clearer. In any event, it does not matter for present purposes since the appeal brought by Mitsui necessarily has as its focus the Board of Appeal's approach at a time before the Intergrain/Multigrain award came into being. It is nonetheless to be noted, as Mr Thomas KC did, that there is apparently some US$6.5 million's worth of differences between the two awards as at 30 April 2023 (with interest continuing to accrue), that being the extent of the losses for which Mitsui sought indemnification from DGO before the Board of Appeal.

The parties' respective positions before the Board of Appeal

28. Mr Thomas KC characterises Mitsui's position before the Board of Appeal as being that its were straightforward contractual claims, in relation to which the Board of Appeal had to consider whether DGO breached the Contract, whether that breach caused the loss in question and whether the loss was too remote. It was (and remains Mitsui's) position that (subject to any appeal in respect of the now-published Intergrain/Multigrain Award) it is liable to Multigrain for these sums, applying the correct principles of causation, mitigation and remoteness, and that, again applying the proper tests for causation, mitigation and remoteness, DGO ought, in turn, to be liable to Mitsui for the additional consequential losses which it has suffered as a result of DGO's breach, namely the difference between the two Awards.

29. Mr Kenny KC begs to differ. As I shall come on to explain, he points out, by reference to the structure of the Award, that this is not how Mitsui put its case or at least the primary way in which it put its case. He submits that, certainly as far as DGO was concerned, the case which Mitsui was advancing entailed its pointing to the string nature of the various contracts rather than a case which alleged breach of contract and sought damages (or an indemnity) on a causation and remoteness basis. That is why, Mr Kenny KC goes on to submit, the Board of Appeal went on to deal with the string/back-to-back issue at the outset of section 7 of the Award (in paragraphs 7.5 to 7.12, as set out below) before addressing (in paragraphs 7.138-7.154, and Mr Kenny KC would say separately) remoteness in the context of the individual indemnity claims.

The Board of Appeal's decision

30. I am somewhat doubtful that Mr Kenny KC can be right about this since it is not at all clear to me how Mitsui could have been advancing the case as simplistically as Mr Kenny KC would have it. That is because I do not follow how the mere fact that there are string/back-to-back contracts would mean, without more, that DGO was liable to indemnify Mitsui. Such liability would come about through breach of contract being

established and, then, application of the usual principles applicable to the entitlement of, and assessment to, damages (or an indemnity).

31. That is how, at least as I see it, Mitsui put its case before the Board of Appeal, judging from the following passages in section 5.0 of the Award which set out the *"Respondent Sellers' Defence Submissions"* under the sub-heading *"The Contractual Supply Chain"*:

"5.6 Buyers have throughout the course of the arbitration, objected to Sellers' claim that, where Sellers are liable for a claim 'in string', Buyers must in turn be liable to Sellers to the extent that Buyers' breach caused the loss. Where losses are suffered by Sellers because of breach(es) of Contract by Buyers, there can only be one conclusion, and that is that Buyers must be held liable. As will be shown, Sellers did all that a party in their position could to satisfy their contract obligations but the events in question were not happening in a contractual vacuum and it is submitted that, to properly assess this matter, one must look at the wider picture in the context of a string of sales. It was the Umpire's view that the contracts were materially back-to-back.

5.7 Quite separate to this are the losses that Sellers have suffered directly because of Buyers' breaches, for example, carrying charges and futures losses. Sellers are entitled to recover such sums from Buyers regardless of the findings in any other arbitration proceedings.

5.8 Buyers have sought to argue that they cannot plead to the situation between Intergrain and Multigrain. In arguing this, they have missed the nuance of the claim: Sellers are claiming damages and/or an indemnity for claims that Intergrain successfully make against Multigrain and which, logically, Multigrain make against Sellers. This is because such claims would arise from breach of Contract by Buyers. This is how an indemnity works — within the 'string' set-up or otherwise. What is more, Buyers' persistent objection to any reference to other proceedings fails to acknowledge that to the extent Sellers are successful in defending claims received in string, Buyers' liability to Sellers will be reduced in an equivalent sum (with the exception, of course, of Buyers' liability for Sellers' standalone claims)."

32. I consider that this makes it clear that Mitsui was not merely asserting that it was sufficient that there be string/back-to-back contracts. Indeed, later on, at paragraph 5.107, this submission is recorded as having been made on behalf of Mitsui:

*"The losses occurring up the chain are not too remote and were the kind or type of losses which were in the reasonable contemplation of the parties at the time they entered the Contract. It is established English law that it is not the precise circumstances that occur that must be foreseeable, but the type or kind of loss (**Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd** [1977] 2 LLR 522). That Sellers would suffer loss in string when Buyers refused to perform the Contract was entirely foreseeable."*

33. I acknowledge that earlier in the Award, in section 4.0, the Board of Appeal described the submissions which DGO made, as follows, under the heading *"The Alleged String of Contracts"*:

"4.4 There was no agreed string of contracts. Buyers do not recognise the suggestion that Buyers' Contract with Sellers was back-to-back with any other contract. There was a series of individual trades between principals. Whereas some of the terms are similar, there are variations in specifications, loading terms, give-up, payment terms, identity of superintendents, to name just five. In addition, Buyers' Contract with Sellers contains a 'Safe Port/Safe Berth' provision and a guarantee of a draft of 43' SWAD. Crucially, none of the other contracts do …

…

4.6 Sellers claim that they were in string with back-to-back contracts, so that they were entitled simply to pass messages up and down the string. Sellers did not even do that: it was only on receipt of their claim submissions at First Tier that Buyers learnt that the Sellers/Multigrain contract was terminated in April 2013, in line with the Intergrain/Multigrain contract but several months after termination of the Sellers/Buyers Contract.

4.7 Sellers' intention is to avoid liability. However, the contracts were not back-to-back and they did not pass messages up and down the string. Sellers were principals to their contract with Buyers, and not a broker between Buyers and their pre-sellers. Although Buyers know that other parties were the shippers, contractually the only party Buyers know is Sellers."

This does not mean, however, that Mitsui was putting its case in the way which Mr Kenny KC now suggests, namely on the basis that it was sufficient, in and of itself and without more, that Mitsui established that there were string/back-to-back contracts. On the contrary, it seems to me obvious that the references to string/back-to-back contracts in the Award represented shorthand for the case which Mitsui was actually advancing, namely a case which entailed establishing breach of contract and an entitlement to damages/indemnity through the application of conventional principles which included remoteness. The fact that, as Mr Kenny KC suggests, DGO advanced no positive case on remoteness (if that is the position, which is not altogether clear) does not change matters.

34. The parties' submissions on the string/back-to-back contracts issue were summarised by the Board of Appeal as follows at paragraphs 7.5 to 7.7:

"7.5 Sellers have argued in their substantive submissions in this Appeal that the Contract (between Sellers and Buyers) was 'in string' or at least 'in a chain of materially back-to-back contracts' and that Sellers were an innocent party in the middle of that string or chain (passing on messages up and down the string or chain) and that they were therefore entitled to pass on indemnity claims coming from their sellers or pre-sellers.

7.6 Buyers have argued that the Contract between Sellers and Buyers was on substantially different terms from the contract between Sellers and their sellers Multigrain and from the contract between Multigrain and Intergrain and any contract with any further pre-sellers.

7.7 Buyers have evidenced a number of differences between the Contract and the contract(s) between Sellers and their (pre-)sellers: targeted specifications in the

Contract versus ANEC 41 specifications in the other contracts; loading terms excluding partial shipment in the Contract versus partial shipments accepted in the other contracts; futures give-up by Buyers in the Contract versus futures give-up by Sellers in the other contracts; payment terms by L/C in the Contract versus unidentified (but presumably cash against documents as per ANEC 41) in the other contracts; different identity of contractual superintendents in the Contract versus in the other contracts; a 'Safe Port/Safe Berth' provision in the Contract versus none in the other contracts; and a guarantee of a draft of 43' SWAD in the Contract versus none in the other contracts."

35. The Board of Appeal went on to express their conclusions on this issue at paragraphs 7.8 to 7.12, as follows:

"*7.8. We agree with Buyers that these differences in contract terms between the Sellers/Buyers Contract and the other Sellers/pre-sellers contracts are so substantial, that we definitely cannot consider that there is a string.*

7.9 *We further agree with Buyers that these differences in contract terms between the Sellers/Buyers Contract and the other Sellers/pre-sellers contracts are so substantial, that we cannot consider that there is a chain of contracts on materially back-to-back terms (contrary to what the Umpire has found).*

7.10 We accept Buyers' argument that the chain of materially back-to-back contracts (on apparently Brazilian standard terms) ends at Sellers and that Sellers have sold a stand-alone contract (on so-called Chinese terms).

7.11 WE THEREFORE FIND AND HOLD THAT Sellers have broken the chain of materially back-to-back contracts and have entered knowingly into the Contract with very distinct terms.

7.12 WE THEREFORE FURTHER FIND AND HOLD THAT, as the Contract with very distinct terms has to be considered as a stand-alone Contract, Sellers' claim for an indemnity in the amount of the claims made by Intergrain against Multigrain, on an unrelated contract, and in another arbitration, FAILS."

Contrary to the submission made before me by Mr Kenny KC, I am clear that the Board of Appeal were here dealing with the string/back-to-back contracts issue in the context of remoteness.

36. That this is the case is reinforced by the Board of Appeal's later repeated references back to what they had had to say concerning the string/back-to-back contracts issue when explaining the basis upon which they dismissed each of the specific indemnities as being too remote.

37. Thus, at paragraphs 7.138 to 7.140, when dealing with Mitsui's claim for an indemnity for storage and circulation charges, the Board of Appeal said this:

"7.138 Sellers claimed, as alternative, an indemnity for liability to storage and circulation charges as claimed by the shipper.

7.139 As we have found above that this Contract is a stand-alone Contract and is not in string or even 'chain' with contracts between Sellers and pre-sellers, the claim for storage and circulation charges, coming from Sellers pre-pre-pre-seller is too remote.

7.140 WE THEREFORE FURTHER FIND AND HOLD THAT Sellers' claim for an indemnity for liability to storage and circulation charges in the amount of US$2,579,923.61, FAILS."

38. Similarly, at paragraphs 7.141 to 7.143, when addressing Mitsui's claim for an indemnity in relation to tax liability, this was stated:

"7.141 Sellers argued that they are entitled to an indemnity for which Sellers pre-pre-sellers are liable to one of their suppliers.

7.142 As we have found above that this Contract is a stand-alone Contract and is not in string or even 'chain' with contracts between Sellers and pre-sellers, the claim for an indemnity for which Sellers' pre-pre-sellers are liable to one of their suppliers is too remote.

7.143 WE THEREFORE FURTHER FIND AND HOLD THAT Sellers' claim for an indemnity on tax liability in the amount of R$ 113,770.30, FAILS."

39. Then, at paragraphs 7.148 to 7.150, as to Mitsui's claim for an indemnity in relation to the price or market damages of the loaded and unloaded parcels, the Board of Appeal stated:

"7.148 Sellers claimed damages (and/or an indemnity in the amount of the claims made by Intergrain against Multigrain and for which Sellers will have corresponding liability to Multigrain). The amounts claimed in damages (and/or claimed by Intergrain) are:

i. The price of the Loaded Parcel and/or damages in the like amount (less the proceeds of the salvage sale): US$22,523,511.32; and

ii. The price of the balance quantity of 23,026.97 metric tons being US$603,536.88 or US$1,312,076.75 or US$840,001.71; or

iii. Further or alternatively, damages for failure to present a vessel in the amount set out above plus the difference between the contract and market values of the unshipped balance: US$23,835,588.07; or

iv. Alternatively, damages in the same amounts set out above for wrongful declaration that the Contract was at an end.

7.149 As we have found above that this Contract is a stand-alone Contract and is not in a string or even 'chain' with contracts between Sellers and pre-sellers, all these additional claims that originate at Sellers' pre-pre-sellers are too remote to consider as damages under the Contract.

7.150 WE THEREFORE FURTHER FIND AND HOLD THAT Sellers' claim for other damages, as described in 7.148 above, FAILS."

40. Lastly, dealing with Mitsui's claim for an indemnity for the legal costs incurred in relation to Multigrain, paragraphs 7.151 to 7.154 say this:

"7.151 Sellers claimed an indemnity for all costs incurred by Sellers in defending the claim advanced by Multigrain and all costs claimed by Multigrain (who have in turn incurred costs in defending the claim advance by Intergrain).

7.152 Buyers have argued that this arbitration is a stand-alone arbitration, which has no links with any other arbitration Sellers and/or their pre-sellers are involved in; and that, therefore, Buyers cannot be held liable for any costs in such other arbitration.

7.153 We agree with Buyers, and as we have found above that this Contract is a stand-alone Contract and is not in string or even 'chain' with contracts between Sellers and pre-sellers, none of the arbitrations between Sellers and pre-sellers or between pre-sellers and pre-pre-sellers have any bearing under the Contract, and the costs of defending any claim in such other arbitrations is way too remote to be recoverable as damages in this Contract dispute.

7.154 WE THEREFORE FURTHER FIND AND HOLD THAT Sellers' claim for an indemnity for costs incurred in defending the claim in other arbitrations, FAILS."

The parties' respective positions on this appeal (in outline)

41. Mr Thomas KC submits that the Board of Appeal misdirected themselves as to the legal test for remoteness, alternatively that they reached a conclusion that no reasonable tribunal would have reached (see ***Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema (No.2)*** [1982] AC 724 (HL) at 744), in dismissing Mitsui's indemnity claims on the grounds that they were too remote.

42. For DGO, Mr Kenny KC submits that it should not be inferred that the Board of Appeal applied the wrong test of remoteness. On the contrary, he submits, it seems likely that the right test was applied, but, even if the matter were doubtful, the Board of Appeal are entitled to the benefit of the doubt: see ***MRI Trading AG v Erdenet Mining Corporation LLC*** [2013] EWCA Civ 156, [2013] 1 Lloyd's Rep. 638 at [23] per Tomlinson LJ.

43. If he is wrong about this, Mr Kenny KC alternatively seeks to advance an argument which was not deployed before the Board of Appeal through re-amendment of DGO's Respondent's Notice, namely that the Board of Appeal had a discretion whether to award Mitsui the indemnities sought by virtue of Clause 29 of the Contract, the default position being that damages will be limited as set out in Clause 29 (and so not including an entitlement to any indemnity), and that, the Board of Appeal not having exercised that discretion in Mitsui's favour, so the case should now be remitted to the Board of Appeal to enable Mitsui to seek to persuade the Board of Appeal that the discretion should be exercised in its favour through the award of the indemnities sought.

Discussion

44. For reasons which I will now explain, I am quite clear that this is an appeal which should be allowed since the Board of Appeal did not do what they should have done, which was to consider whether the losses were of a 'type' or 'kind' which would have been in the parties' reasonable or specific contemplation at the time of contracting as not unlikely to result from the breach. The case will, therefore, need to be remitted to enable the Board of Appeal to do this.

45. I should add that I am not persuaded that it would be appropriate also to remit the Clause 29 issue to which I have referred. This is not an argument which DGO put forward before the Board of Appeal and it would be wrong, in my view, for reasons which I set out in more detail later, if DGO were now to be permitted to advance such a case.

Remoteness

46. As previously mentioned, there is no issue in this case as to the correct approach to the issue of remoteness.

47. As Hamblen J (as he then was) put it in ***Sylvia Shipping Co Limited v Progress Bulk Carriers Limited*** [2010] 2 Lloyd's Rep. 81, [2010] EWHC 542 (Comm) at [20], the law on remoteness of damages in contract has long been based on the judgment of the Court of Exchequer in ***Hadley v Baxendale*** (1854) 9 Ex 341, specifically what Alderson B had to say in that case pages 354-55, namely:

"… where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the claimants to the defendants and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under this special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, would only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

48. As Hamblen J went on to explain at [22], in ***Czarnikow v Koufos (The 'Heron II')*** [1969] 1 AC 350 at pages 382G-383A Lord Reid described the proper test as being whether the loss in question is:

"of a kind which the defendant, when he made the contract, ought to have realised was not unlikely to result from the breach … the words "not unlikely" … denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable."

Accordingly, Hamblen J stated that *"the generally accepted test for remoteness has been whether the loss claimed was of a kind or type which it would have been within the reasonable contemplation of the parties at the time that the contract was made as being not unlikely to result"*.

49. He, then, went on, however, to consider whether the House of Lords decision in ***The 'Achilleas'*** [2009] 1 AC 61 had changed things, distinguishing in doing so between what he labelled 'the orthodox approach' and 'the broader approach'. Hamblen J concluded as to this at [40], as follows:

*"In my judgment, the decision in **The Achilleas** results in an amalgam of the orthodox and the broader approach. The orthodox approach remains the general test of remoteness applicable in the great majority of cases. However, there may be 'unusual' cases, such as **The Achilleas** itself, in which the context, surrounding circumstances or general understanding in the relevant market make it necessary specifically to consider whether there has been an assumption of responsibility. This is most likely to be in those relatively rare cases where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations."*

Hamblen J added at [41] that:

"In the great majority of cases it will not be necessary specifically to address the issue of assumption of responsibility. Usually the fact that the type of loss arises in the ordinary course of things or out of special known circumstances will carry with it the necessary assumption of responsibility."

50. It is common ground that this is not a case which requires application of 'the broader approach' rather than the 'orthodox approach'. It follows, as Mr Thomas KC submits, that what the Board of Appeal in the present case had to do was consider: first, what was the general 'type' or 'kind' of losses for which Mitsui was claiming; and secondly, whether such losses have been in the parties' reasonable or specific contemplation at the time of contracting as not unlikely to result from the breach in question.

51. To repeat, Mr Kenny KC submits that what the Board of Appeal had to say at paragraphs 7.3 to 7.13 of the Award was not concerned with remoteness but with a freestanding case advanced by Mitsui that all that had to be established in order for a recovery to be made was that the three sale contracts (Intergrain-Multigrain, Multigrain-Mitsui and Mitsui-DGO) were materially back-to-back. Remoteness, he observes, was addressed only in paragraphs 7.138 to 7.140, 7.141 to 7.143, 7.148 to 7.150 and 7.151 to 7.154.

52. The difficulty with Mr Kenny KC's submission, however, is that not only am I clear, as previously explained, that Mitsui did not advance such a freestanding case but, moreover, in each of those paragraphs the Board of Appeal explicitly referred back to what they had had to say in the earlier paragraphs concerning the string or back-to-back nature of the various contracts.

53. Mr Kenny KC submits, nonetheless, that this does not mean that the Board of Appeal were deciding as they did as regards remoteness merely because of what might be

described, by way of shorthand, as the stand-alone character of the Contract. He submits, rather, that there is, as he puts it, merely an ellipsis because the Board of Appeal did not explain why this means that Mitsui's liability for the relevant charges is too remote.

54. The question, Mr Kenny KC asks, is how that gap should be filled. He suggests that the effect of Mitsui's argument is that the gap is filled by assuming that the Board of Appeal misdirected themselves as to the test of remoteness, so that, to take an example, paragraph 7.139 should be read as though it said this:

"*As … this Contract is a stand-alone Contract and is not in string or even 'chain' with contracts between Sellers and pre-sellers, the claim for storage and circulation charges, coming from Sellers pre-pre-pre-seller is too remote <u>because the mere fact that there is no string is enough to satisfy the test of remoteness and so the parties' contemplation about the likelihood of this kind of loss is irrelevant</u>.*"

55. On DGO's argument, Mr Kenny KC submits, the gap should be filled by assuming that the Board of Appeal correctly understood the test of remoteness, so that paragraph 7.139 reads like this:

"*As … this Contract is a stand-alone Contract and is not in string or even 'chain' with contracts between Sellers and pre-sellers, the claim for storage and circulation charges, coming from Sellers pre-pre-pre-seller is too remote <u>because the parties would not contemplated that liability for storage charges incurred by a pre-pre-pre-seller in a chain of contracts that are not back-to-back was a kind of loss that was 'not unlikely' to result from a breach of the Contract</u>.*"

56. The same point arises in relation to the three other paragraphs in which the Board of Appeal held that Mitsui's indemnity claims were too remote; it is unnecessary to set these out in the same way as I have done in relation to paragraph 7.139. In each case, Mr Kenny KC's argument is that there is merely an ellipsis, in that the Board of Appeal have not said why the absence of a string or a chain means that the losses were too remote, and there is no reason to assume that the Board of Appeal got the law wrong in deciding as they did.

57. In the circumstances, Mr Kenny KC submits that it ought not to be inferred that the Board of Appeal applied the wrong test as regards remoteness, and so that Mitsui cannot succeed with its argument that the Board of Appeal went wrong as a matter of law. He submits, specifically, that it is plausible that the Board of Appeal concluded that, as a matter of fact, the parties would not have contemplated that losses such as the supplier liabilities would be likely to result from a breach of the Contract (in other words, that the conclusions which the Board of Appeal reached were ones that a properly directed tribunal could reasonably have reached). Conversely, he submits that it is not plausible that the Board of Appeal (made up of a highly experienced group of trade arbitrators) applied the wrong test.

58. Mr Kenny KC suggests in this context that Board of Appeal are entitled to the benefit of the doubt, particularly given that Mitsui has not made an application under section 57 of the 1996 Act seeking clarification of the Board of Appeal's reasoning.

59. Mr Kenny KC submits that the supplier liabilities relate to losses suffered by third parties operating under different contract terms and, not only that, but that they all relate to losses originally suffered by third parties at several removes from the parties to the Contract. This is demonstrated, he observes, by the Board of Appeal's repeated emphasis in paragraph 7.139 that *"the claim for storage and circulation charges, coming from Sellers pre-pre-pre-seller is too remote"*, in paragraph 7.142 that *"the claim for an indemnity for which Sellers' pre-pre-sellers are liable to one of their suppliers is too remote"*, in paragraph 7.149 that *"all these additional claims that originate at Sellers' pre-pre-sellers are too remote to consider as damages under the Contract"* and in paragraph 7.153 that *"none of the arbitrations between Sellers and pre-sellers or between pre-sellers and pre-pre-sellers have any bearing under the Contract, and the costs of defending any claim in such other arbitrations is way too remote to be recoverable as damages in this Contract dispute"*.

60. Mr Kenny KC observes that these facts (different parties, different terms, several removes) are relevant (indeed, important) when applying the correct test of remoteness because, whilst it may be obvious to a party that a breach of contract is likely to cause his innocent counterparty to incur a liability to a sub-contractor who is performing a contract on materially the same terms, a party may be less likely to foresee that a breach of his contract will cause his counterparty to incur liability for losses suffered by a third party who is performing a different contract on quite different terms – particularly where that third party has no direct dealings with either of the parties to the contract.

61. Mr Kenny KC goes further, submitting that each of the relevant supplier liabilities entails a kind of loss that might have seemed somewhat far-fetched at the time of making the Contract. Thus, as to the carrying/storage charges, Mr Kenny KC points out that, given that under the terms of the Contract, DGO promised to pay carrying charges in accordance with Clause 10 of ANEC 41, it is difficult to see why DGO would have thought that there was any real possibility of Mitsui being liable for storage charges in circumstances where DGO was not liable for carrying charges. The more so, in circumstances where the majority of the charges for which Intergrain was liable were in respect of the period from November 2012-April 2013, which was after DGO had repudiated its contract with Mitsui.

62. Similarly, as to the tax liability in respect of which Mitsui seeks an indemnity (and which the first tier arbitrator had refused on remoteness grounds), Mr Kenny KC submits that the Tribunal was entitled to conclude that the parties would not have contemplated that the buyer's repudiation of an FOB sale was likely to cause the seller's pre-pre-pre-seller to incur a liability for tax.

63. As to the price of goods/default damages, Mr Kenny KC submits that the first limb of the relevant indemnity claim requires it to be assumed that the parties would have foreseen that, even though DGO was not liable to pay Mitsui the price of the goods, nonetheless Mitsui might still incur liability to pay its suppliers the price of the goods (or to pay its suppliers in respect of its liability for the price to its own suppliers), when DGO would rather more naturally have contemplated that Mitsui would not be liable to pay its suppliers unless DGO was liable to pay Mitsui. Likewise, Mr Kenny KC notes, since the claim for an indemnity against default damages assessed as at the date of a default which occurred under one of the supply contracts months after the date of default under the Contract, it is not easy to see why DGO would foresee that Mitsui

would be liable to its suppliers for a default that occurs on as different and much later date.

64. As to the costs liability claim, Mr Kenny KC's submission is that the Board of Appeal are entitled to decide that, where a seller's supply contract is on materially different terms, a buyer cannot be expected to know whether his breach of contract under one set of terms is not unlikely to give rise to legal disputes between different parties contracting under different terms.

65. The difficulty with all this, however, is that nowhere in the Award is there any hint that the Board of Appeal were engaging in the analysis which was required for remoteness purposes. None of the points which Mr Kenny KC advances in support of DGO's opposition to the appeal, as set out in paragraphs 59 to 64, was canvassed by the Board of Appeal, still less relied upon as a reason for their conclusions that Mitsui's various claims failed for remoteness reasons.

66. This may not be altogether surprising if, as Mr Kenny KC suggests, DGO advanced no positive case on remoteness but instead focused exclusively on the string/back-to-back contracts issue without elaboration. That, however, does not assist DGO since, on the contrary, if anything, it rather underlines the impression that, in considering remoteness, the Board of Appeal focused exclusively on the string/back-to-back issue when they ought to have asked themselves whether the indemnities which Mitsui was claiming were of a type or kind which would have been in the parties' contemplation.

67. Instead, as the Award makes clear, the Board of Appeal plainly took the view that the string/back-to-back issue was what mattered (and all that mattered) for remoteness purposes.

68. As Mr Thomas KC submitted, what was called for, applying the correct remoteness approach, even if differences in the terms between the various contracts were relevant, was an analysis which entailed the Board of Appeal asking: first, whether, due to the nature of DGO's breach, the types/kinds of loss claimed were foreseeable irrespective of any difference of terms between the contracts; secondly, which terms in each contract were relevant to those types/kinds of loss and whether such terms, in fact, differed between the contracts; and, thirdly, whether, in any event, the same or greater losses would have flowed had the contracts been 100% back-to-back. The Board of Appeal did not engage in any such analysis or, indeed, anything which even approximated to such an analysis.

69. In such circumstances and albeit with some reluctance given the experience held by the members of the Board of Appeal, the conclusion that the Board of Appeal must have misdirected themselves as to the right approach to adopt when considering the question of remoteness is inescapable. It follows that I do not have to reach a decision as to whether the Board of Appeal arrived at conclusions that no reasonable tribunal would reach.

DGO's alternative case based on Clause 29

70. I turn, next, to DGO's alternative case based on Clause 29 of the Contract, which was first raised in DGO's draft Re-Amended Respondent's Notice served as recently as 24 April 2023.

71. The proposed re-amendment entails the addition of a paragraph in these terms:

"Under clause 29 of the FOSFA form, in a case of default (such as the present case) the damages to be awarded against the default are limited to the difference between the contract and the market price on the date of default, unless the Tribunal in its absolute discretion decides to also to award additional damages. In this case, the Tribunal did not exercise its discretion to award additional damages and, absent any allegation of bad faith or irrationality, it does not matter why it did not do so, its decision is final."

72. Clause 29 provides (in relevant part) as follows:

"*29. DEFAULT: In default of fulfilment of this contract by either party, the other party at his discretion shall, after giving notice, have the right either to cancel the contract or the right to sell or purchase, as the case may be, against the defaulter who shall on demand make good the loss, if any, on such sale or purchase. If the party liable to pay shall be dissatisfied with the price of such sale or purchase, or if neither of the above rights is exercised, the damages, if any, shall, failing amicable settlement, be determined by arbitration. The damages awarded against the defaulter shall be limited to the difference between the contract price and the actual or estimated market price on the day of default. Damages to be computed on the mean contract quantity. If the arbitrators consider the circumstances of the default justify it, they may, at their absolute discretion, award damages on a different quantity and/or award additional damages…"*.

73. Mr Kenny KC submits that the effect of this provision is that, other things being equal, the damages to be awarded against the defaulter are limited to damages measured as the difference between contract and market on the mean contract quantity on the day of default, but that, if the arbitrators consider that the circumstances of the default justify doing so, they may, in their absolute discretion, award additional damages over and above damages at that level and type.

74. In the present case, at least in the lead-up to the hearing before me, Mr Kenny KC submitted that, looking at the Award, it is evident, as he put it, that the Board of Appeal decided that an award of additional damages was *not* justified. Accordingly, he went on to submit (and to repeat at the hearing), Clause 29 bars the claim: the Board of Appeal did not exercise their discretion in Mitsui's favour and it is not now open to Mitsui to complain about the exercise of that discretion.

75. In this respect, Mr Kenny KC prayed in aid ***Al Hadha Trading Co v Tradigrain SA*** [2002] 2 Lloyd's Rep. 512, in which HHJ Havelock-Allan QC considered a GAFTA tribunal's "*absolute discretion*" under the GAFTA rules in deciding whether to admit a claim that was *prima facie* time-barred, holding at [32] that:

"*[T]he grounds upon which the exercise of an absolute discretion can be challenged are very strictly circumscribed. They are limited to bad faith and the taking into account of wholly extraneous matters. In my judgment, if and insofar as this is not already covered by the concept of bad faith, the grounds would also extend to cover a case in which there had been a complete failure of the tribunal to exercise its discretion on any identifiable grounds at all, in other words, a case where the tribunal had abdicated its responsibility of making a rational decision and, in effect, had simply tossed a coin. I* *do not think that it helps to give examples. Necessarily the circumstances would be extreme and the instances rare.*"

76. It follows, Mr Kenny KC submitted, that Clause 29 bars the relevant claims, even if the Board of Appeal are to be regarded as having *"grasped the wrong end of the remoteness stick"*.

77. Mr Kenny KC accepted, again coming into the hearing, that DGO must obtain the Court's permission to amend its Respondent's Notice in order for this alternative case to be advanced. That remains his position, although Mr Kenny KC sought to row back somewhat during the course of the hearing by making it clear that he wished to delete the words *"and, absent any allegation of bad faith or irrationality, it does not matter why it did not do so, its decision is final"*.

78. His rationale for this change of position is that, whilst this is an appropriate case for giving permission to re-amend since the point raised is (as he frames it at least) a short point of law, nonetheless he accepts that fairness dictates that Mitsui has the opportunity to persuade the Board of Appeal at any remitted hearing that they should exercise their discretion in Mitsui's favour. This, in circumstances where Mr Kenny KC accepts that, the point not having been raised before them, the Board of Appeal did not purport to decline (and did not decline) to award the indemnities sought by Mitsui on the grounds that they were exercising or were not exercising a discretion pursuant to Clause 29.

79. There are a number of difficulties with this from DGO's perspective and why, accordingly, I am satisfied that leave to re-amend ought not to be given.

80. First, I agree with Mr Thomas KC when he submits that there is no procedural basis for the Court to provide DGO the relief it now seeks.

81. Specifically, CPR 62 PD §12.6, the provision on which DGO relies in support of its contention that it is entitled to raise this issue, provides as follows:

"*A respondent who wishes to oppose an application for permission to appeal must file a respondent's notice which –*

(1) sets out the grounds (but not the argument) on which the respondent opposes the application; and

(2) states whether the respondent wishes to contend that the award should be upheld for reasons not expressed (or not fully expressed) in the award and, if so, states those reasons (but not the argument)."

82. This, therefore, contemplates a respondent to an arbitration appeal resisting an appellant's appeal either on the basis of the grounds contained in the award under appeal or on the basis of grounds not set out in the award upon which it invites the Court to uphold the award. The provision does not provide a mechanism for the Court to vary, remit or set aside the award. If a party wishes to seek any of those remedies, it must itself apply pursuant to sections 67, 68 or 69 of the 1996 Act – in the case of section 69, seeking permission in relation to a point of law that the arbitral tribunal was asked to determine.

83. It follows that, whilst DGO could rely on the provision to raise grounds not expressed in the award in order to invite the Court to dismiss Mitsui's application, it cannot do so in order to invite the Court to remit a distinct issue to the Board of Appeal. The latter, however, is what DGO is now seeking to do. For this reason alone, it would be inappropriate to give DGO leave to re-amend.

84. Secondly, as Mr Kenny KC acknowledges, if a respondent wishes to contend that an award should be upheld on different grounds by the Court, it must raise it at the permission stage in a respondent's notice, and late amendments will only rarely be granted. As Hamblen J put it in ***Cottonex Anstalt v Patriot Spinning Mills*** [2014] EWHC 236 (Comm), [2016] 1 CLC 28 at [41-42]:

> *"41. If a respondent wishes to contend that the award should be upheld on other grounds, it should do so at the permission to appeal stage, as required by PD62 12.6. It is important that this is done so as to ensure that decisions on permission to appeal are made on an informed basis - **Acada Chemicals v Empresa** [1994] 1 Lloyd's Rep 428 at 432. Whilst the Court does have jurisdiction to permit grounds to be raised later, 'appropriate cases are likely to be rare' (per Judge Havelock-Allan in **The Intan 6** [2003] 2 Lloyd's Rep 700 at 708).*
>
> *42. In the present case permission should not be granted because the notice relies on inadmissible documents and inadmissible arguments. In any event, this is not one of those rare cases in which further grounds raised after the permission stage should be permitted. The notice is very late, being seven months after the PD62 12.6 deadline and no adequate explanation for such delay has been provided. The only explanation for their late emergence is a last minute decision to instruct lawyers, but that is not a satisfactory explanation for a delay of this magnitude."*

85. Although in ***Ramburs Inc v Agrifert SA*** [2015] EWHC 3548 (Comm), [2016] Bus. L.R. 135, at [10], Andrew Smith J pointed out that a respondent did not have to oppose the application for leave to appeal (in which event there would be no opportunity to submit a respondent's notice), in ***MUR Shipping v RTI*** [2022] EWHC 467 (Comm), [2022] 1 Lloyd's Rep Plus 69, at [49], Jacobs J agreed with what Hamblen J had to say:

> *"It seems to me that the position is not wholly clear on the terms of paragraph 12.6. I favour the view taken by Hamblen J: where – as is invariably the case on applications for permission to appeal under section 69 – a respondent has in fact opposed the application for permission, then it is indeed necessary for any reasons for upholding the award on different grounds to be set out in a Respondent's Notice. It is possible for those reasons to be supplemented, but (unless consented to) the court's permission to make an amendment to the Respondent's Notice is required. This approach is consistent with the overriding objective, and will enable the appellant to know, in advance of the appeal, the case that the respondent will advance in relation to upholding the award for reasons not expressed or not fully expressed in the award. The alternative approach results in a respondent being wholly unconstrained by any need to give notice to the appellant, with the consequence that new arguments can be raised at the hearing itself or indeed (as has happened to some extent in the present case) subsequent to the hearing."*

There is, in short, no scope in the present case to apply a less stringent test to that identified by Hamblen J in the ***Cottonex*** case.

86. No explanation has been given in the present case as to why it is that only now Clause 29 is being relied upon. This is wholly unsatisfactory and represents another reason why leave to amend would not be appropriate in this case.

87. Thirdly, whilst the authorities (including the ***Cottonex*** case at [24]-[35]) are clear that a respondent can rely on a point of pure law not argued before the arbitral tribunal in providing grounds for resisting an appellant's appeal, it cannot be the case that a respondent can raise a point of law which was not determined by the arbitral tribunal in support of its own application for distinct relief over and above the dismissal of the (appellant's) appeal. CPR PD 62 §12.6, in short, is concerned with resisting an appeal rather than with the seeking of relief which a respondent itself wishes to obtain – in this case remission in order to address a new case based on Clause 29 which DGO has not previously sought to advance.

Conclusion

88. For these various reasons: (i) the appeal is allowed and the question of whether Mitsui's indemnity claims are irrecoverable because they are too remote is remitted to the Board of Appeal, to be considered on the correct legal basis as described in this judgment; and (ii) the application to re-amend the Respondent's Notice is refused.

89. I would like to end by thanking all counsel, and the solicitors instructing them, for the assistance which they gave me during the course of the hearing.