JUDGMENT : Mr Justice Cresswell : Commercial Court. 20th March 2003

1. Fleming & Wendeln GMBH & Co ("Buyers") challenge Appeal Award Number 3860A published by the GAFTA Board of Appeal on 25 May 2001, re-published with amendments (following remission) on 27 May 2002. By the Award the Board of Appeal reversed in part an Award of GAFTA first-tier arbitrators in an arbitration between the Buyers as respondents and Sanofi SA/AG ("Sellers") as claimants.

2. On 29 October 2002 Thomas J granted the Buyers' application for permission to appeal under section 69 of the Arbitration Act 1996 in respect of the following questions of law:-
   (1) "Whether in the event that the seller is in breach of successive obligations, including a failure to deliver goods, contained in a contract incorporating the GAFTA default clause as exemplified by clause 28 of GAFTA form 78, the buyer having held the seller in default and terminated the contract, the buyer is entitled to damages assessed as the difference between the contract price and the market price of the cargo at the end of the delivery period.
   (2) If so, whether on the facts of the present case the contract price is to be assessed as at 1 March 1998 or (as the Board held) 27 March 1998."

3. The Buyers further seek an order pursuant to section 67 of the 1996 Act declaring the Board's Award of 27 May 2002 to be of no effect in so far as it concludes that it follows from clause 28 of the contract that the damages payable to the Buyers for the Sellers' breach in respect of the undelivered balance are to be the difference between the contract price and the market price as at the date of the Sellers' failure to nominate silos.

4. The Buyers realistically accepted that the questions of law set out above represent the heart of the dispute. I will accordingly consider the questions of law before the application under section 67.

5. On 15 October 1997 the parties concluded a contract for the sale and purchase of 20,000MT up to 30,000MT at Sellers' option Russian/Ukrainian black sunseed crop 1997. The price was to *"be fixed for each shipment latest 15 days prior delivery period FCA (Free Carrier) Russian/Ukrainian Region in railcars on a calculated parity to the FOB Black Sea market or CIF Rotterdam market on proposal of brokers involved in [the] contract. In case Buyers/Sellers don't find an agreement Sellers keep the right to re-sell part or totality of the mensuality on the free market and this contract will confirm[ed] by the broker as a proof of the fulfilment of the contractual obligations for the mensuality concerned."* As to delivery, the contract provided:- *"November 1997/March 1998 for quantity equally spread for each delivery but with possibility to cumulate part or totality of one mensuality to the next one if both Buyers and Sellers agreed upon."*

6. The contract contained further provisions as to Quality, Payment, Loading Rate, Special Conditions and Brokerage. The contract further provided "All Other terms conditions as per ctr GAFTA 78 Arbitration London 125". Thus the contract incorporated GAFTA form 78 (Contract for Bulk Grain and Pulses by Rail effective 1.1.95) and the arbitration rules set out in GAFTA form 125.

7. Certain deliveries were made under the contract. By early 1998 a substantial quantity (12,250/22, 250 tonnes Sellers' option) remained undelivered.

8. Disputes arose concerning the delivered parcels and the undelivered balance. A GAFTA first-tier arbitration tribunal was appointed.

9. The first-tier arbitrators published their Award on 6 September 1999. The Sellers appealed to the Board of Appeal. The applications before the Court are only concerned with the Board of Appeal's decision in relation to the undelivered balance.

10. On 25 May 2001 the Board published Appeal Award number 3860A (the "Original Award").

11. As to the undelivered balance, the Board held in the Original Award:-
   (i) there was a tacit agreement by the parties that the earlier unfixed quantities would be rolled forward to March delivery (at which point the delivery period could be deferred no more). It was a requirement of the contract that the price be fixed latest 15 days prior to the delivery period; thus the ultimate deadline for price fixing became 14 February. Hence this also became the deadline for declaring loading places and silos. The Sellers were in breach of their obligation to declare loading places and silos by 14 February.
   (ii) there was never any prospect of deliveries being made to railway wagons when wagons had not, and could not, be ordered because of Sellers' failure to nominate loading places and silos due to lack of goods, all of which the Buyers well knew. The Sellers' failure to declare loading places and silos was a breach of a condition of the contract going to its root as a result of which Sellers were in default of fulfilment, the date of default being 14 February.
   (iii) As the date of default was the same as the date for price fixing, it followed that the default price and the contract price were identical and there were no damages.

12. By an arbitration application issued on 21 June 2001 Buyers applied under section 69(2)(b) of the 1996 Act for leave to appeal against the Original Award.

13. Prior to any determination by the court, the parties agreed a consent order dated 5 December 2001. By that order the proceedings were stayed pending an agreed remission to the Board of Appeal of GAFTA upon the terms set out below:-
   "IT IS ORDERED BY CONSENT THAT;

1. The Award be remitted to the Board of Appeal for them to reconsider and/or give supplemental reasons for the findings set out at paragraphs 6:22–6:25 of the Award, and to vary or affirm their ultimate award (as appropriate) in the light of such reconsideration and/or additional reasons.

2. The Board of Appeal be invited to consider and address in any supplemental reasons only the following questions (in each case as regards the undelivered balance of the subject contract to which paragraphs 6:22-6:25 of the Award relate):

(a) whether Buyers were entitled not to treat the contract as discharged upon Sellers' failure to declare loading places;

(b) whether Buyers by their words or conduct did clearly and unequivocally accept the repudiation and treat the contract as discharged upon or following Sellers' failure to declare loading places;

(c) if so, when and how;

(d) what would be the quantum of Buyers' damages and interest if (as Buyers claim) the date of default for the purposes of assessing damages was the end of the delivery period;

(e) if Buyers are awarded substantial damages, what costs award should be made?"

14. The Board of Appeal published the second Appeal Award ("the Award" or the "(second Appeal) Award") on 27 May 2002.

15. At paragraph 3 of the Award the Board of Appeal set out the four issues. The applications before the Court are only concerned with the fourth issue:- *"The size of the undelivered balance of the Contract; whether Sellers were in default for failure to deliver; and if so, the damages."*

16. The Board addressed Issue 4 (the undelivered balance) at paragraph 7.

17. The Board held:-

(i) In contrast to the previous season, the parties did not enter into a series of individual contracts for the 1997/8 season, but a single contract for Sellers' expected availabilities during the season, namely 20/30,000 tonnes. The price was not fixed at time of contract, but a mechanism was incorporated whereby the prices of individual shipment periods would be fixed latest 15 days beforehand at the FCA equivalent of the current market value CIF Rotterdam/FOB Black Sea. Thus until such time as the price was fixed for a particular delivery its prospective value day by day was always identical to the market. (Paragraph 7:16).

(ii) The conclusion in the Original Award that the date when Sellers were in breach of their obligation to declare loading places and silos was the date of default for the purposes of assessing damages under clause 28 of GAFTA 78, was reached on the basis of certain of the principles set out in the judgment of Robert Goff J. in ***Toprak v Finagrain*** *[1979] 2 Lloyd's Rep 98. (Paragraphs 7:26 and 7:27).*

(iii) In the Original Award the Board found that Sellers' failure to declare loading places and silos by reason of the fact that they had no goods to deliver, amounted to a default of fulfilment of the contract on their part and that, thereafter, there was no prospect of their delivering goods under the contract. It was not open to Buyers to determine the date of the default themselves by relying upon Sellers' later failure to deliver goods by the end of March, when there had already been a default of fulfilment on 14 February. (Paragraph 7:32).

(iv) The contract was fluid as to the actual quantities that would be delivered, the origin of the goods, the price of the goods and the point or points of delivery. The trigger that would crystallise these matters was the declaration of loading places and silos by Sellers because such declaration would fix the loading places, fix the origin of the goods, provide the essential and indispensable ingredient for the fixing of the price and start the process whereby ultimately it would become apparent whether goods would be delivered to Buyers at all (depending on whether a price could be agreed or not). (Paragraph 7:54). The obligation to declare loading places and silos was a main obligation that was fundamental to the performance of the contract. (Paragraph 7:55).

(v) Sellers' declaration of loading places and silos was the essence of further performance of the contract. Accordingly it was right to approach the present case in the same way that Goff J approached the issue in Toprak. As at the date of their failure to nominate loading places and silos, Sellers were in default of fulfilment of the contract and it was at that date that they failed to carry out the contract. Thereafter, Buyers were not obliged immediately to treat Sellers as being in default. They had the choice to keep the contract open and hold Sellers in default at a later date, but as Goff J found in Toprak, that did not mean that the date of default was changed; that date remained the day when time for performance came and went without due performance, namely when Sellers were obliged, but failed, to nominate load places and silos. (Paragraph 7:57). Once Sellers were in default of their obligation to declare loading places, further defaults inevitably followed, as Goff J found in Toprak. (Paragraph 7:58).

(vi) Buyers terminated the contract not on the grounds that Sellers had failed to load or deliver the unfixed quantities, but on the grounds that Sellers had failed to provide price proposals for those unfixed quantities. In their message of 26 March Buyers stated "Please let us have your price proposal for not yet fixed quantity of the contract (12,250MT-22,250MT) by return." On 6 April Buyers referred to the message of 26 March and stated:- "As we did not receive an answer concerning left balance/availability of fixed quantities we consider you in default of fulfilment of...contract". (Paragraph 7:59). Buyers terminated the contract on the ground that Sellers had failed to declare loading places for unfixed quantities. This was an indication that Buyers considered

the declaration of loading places and pricing as a fundamental part of Sellers' delivery obligations. (Paragraphs 7:60 and 7:61).

(vii) Buyers did not "stay their hand" until the delivery period expired either in the sense that there was an agreement between the parties to postpone performance or that there was any express or implied request by Sellers to Buyers to stay their hand, with which Buyers complied. (paragraph 7:64).

(viii) It was appropriate to reconsider one part of the findings set out in the Original Award. Mr Gammel made it clear in his written statement that throughout January and February, Mr Köhntopp on behalf of Buyers pressurised him to persuade Sellers to price more seeds. By reason of the way in which pricing was to be done, these requests carried with them an implied request for a declaration of loading places to be made. There was no response to these requests such as to give rise to an agreed postponement of contractual performance, but by making the requests, Buyers represented that they would not exercise their strict legal right to performance on the contractual date. It would be inequitable to allow Buyers to treat the contractual date for performance (14 February) as the date of default for the purposes of assessing damages under the default clause. According to Mr Gammel's statement, these requests were made in January and February. There was no mention of them continuing thereafter. Accordingly the date of default for the purpose of assessing damages was 1 March rather than 14 February (as found in the Original Award). This made no difference to the finding that no damages flowed from the Sellers' breach. If there was a postponement of the date for declaring loading places as a result of Buyers' requests, then it followed that there was a corresponding postponement of the date for fixing the price (which could not have taken place without a declaration being made). The date for fixing the contract price and the date of default continued to coincide, although they fell on 1 March rather than 14 February. It followed that no damages arose. (Paragraphs 7:66 to 7:68).

(ix) Buyers were entitled not to treat the contract as discharged upon Sellers' failure to declare loading places, but that did not mean that, for the purposes of the default clause, the date of default was thereby changed. It remained the day when the time for performance came and went without due performance. This was 1 March. (Paragraph 7:72).

(x) Buyers accepted Sellers' repudiation in their message of 7 April. (Paragraph 7:76).

(xi) On the basis of a contract price fixed on 27 March and on the basis that the date of default was the end of the delivery period, the quantum of Buyers' damages would have been US$25, 875. (Paragraph 7:88). On the basis that the date of default was the end of the delivery period and on the basis of a contract price fixed on 14 February, the quantum of Buyers' damages would have been US$974,625. On the basis that the date of default was the end of the delivery period and on the basis of a contract price fixed on 1 March, the quantum of Buyers' damages would have been US$828,000. (Paragraph 7:90).

The respective cases of the parties

18. The Buyers contend for 1 April 1998 as the date of default. The Sellers seek to support the finding in the Award that the date of default was 1 March 1998.

GAFTA No. 78 Clause 28

19. Clause 28 of GAFTA No. 78 (effective 1.1.1995) was in the following terms:-

"DEFAULT – In default of fulfilment of contract by either party, the following provisions shall apply:-

(a) The party other than the defaulter shall, at their discretion have the right, after giving notice by letter, telegram or telex to the defaulter to sell or purchase, as the case may be, against the defaulter, and such sale or purchase shall establish the default price.

(b) If either party be dissatisfied with such default price or if the right at (a) above is not exercised and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.

(c) The damages payable shall be based on the difference between the contract price and either the default price established under (a) above or upon the actual or estimated value of the goods, on the date of default, established under (b) above.

(d) In no case shall damages include loss of profit on any sub-contracts made by the party defaulted against or others unless the arbitrator(s) or board of appeal, having regard to special circumstances, shall in his/their sole and absolute discretion think fit.

(e) Damages, if any, shall be computed on the quantity appropriated if any but, if no such quantity has been appropriated then on the mean contract quantity, and any option available to either party shall be deemed to have been exercised accordingly in favour of the mean contract quantity.

(f) Default may be declared by Sellers at any time after expiry of the contract period, and the default date shall then be the first business day after the date of Sellers' advice to their Buyers.

If default has not already been declared then (notwithstanding the provisions stated in the Despatch clause) if notice of advice is not passed by the 10th consecutive day after the last day for the advice of despatch laid down in the contract, the Sellers shall be deemed to be in default, and the default date shall then be the first business day thereafter".

The Buyers' Submissions

20. Mr Nicholas Hamblen QC for the Buyers submitted as follows.

21. At common law, where an innocent party has been the victim of a repudiatory breach of contract, he is entitled to terminate the contract, or to keep it alive and continue to press for performance. He is also entitled to time to

make up his mind whether or not to terminate. If, before the contract is terminated, a further repudiatory breach is committed by the guilty party, the innocent party acquires an additional right to terminate for that second breach, and to claim damages by reference to it.

22. In the context of sale of goods, a buyer faced with a repudiatory breach followed by a failure to deliver, is entitled to keep the contract alive following the first breach, and to terminate following the second. His damages will ordinarily be the difference between the contract price and the market price at the date when the goods should have been delivered.

23. The GAFTA default clause (clause 28 of GAFTA 78 (1995), and clause 27 of GAFTA 78 (2000)) is intended to reflect common law. This is borne out by *The Selda* [1998] 1 Lloyd's Rep. 416; [1999] 1 Lloyd's Rep 799.

24. At common law the buyer's remedy for failure to perform a contract of sale of goods is to claim damages for non-delivery (s.51 of the Sale of Goods Act). Where, as here, there is an available market, "the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered...".

25. The time when the goods ought to have been delivered/accepted will be the last date for delivery/acceptance – in the present context, that means the end of the delivery period.

26. If the seller is in repudiatory breach prior to the date for delivery the buyer can choose not to accept that breach. If he does not accept the breach then the contract continues to bind both parties, the buyer can await the date fixed for delivery, and the seller will commit a breach of contract if he then fails to deliver.

27. Even if the buyer does accept a repudiatory breach the relevant date for taking the market price prima facie remains the due date for delivery. However, because the breach has been accepted and the contract brought to an end the duty of mitigation arises and that may require him to buy in substitute goods at an earlier date – see, for example, ***Kaines (UK) Ltd. v Osterreichische Warrenhandelgesellschaf*** [1993] 2 Lloyd's Rep. 1.

28. The GAFTA default clause reflects these principles and the clause operates in a similar way. In relation to claims by a buyer, if the seller fails to deliver by the end of the delivery period then there is a "default". The buyer then has the right to buy in and thereby establish the default price (a). If the seller is dissatisfied with that price then he can have that price established by arbitration (b). If the buyer fails to declare default then at any time after the end of the delivery period the seller may do so (f). If nobody declares default then default is deemed to have occurred 10 days after the last day for advice of despatch (f) (i.e. 13 days after the end of the delivery period).

29. As with the position at common law, the clause focuses on the end of the delivery period – i.e. the last day for acceptance/delivery. Like the common law it recognises that thereafter the seller/buyer is bound to mitigate by going into the market and the default price will be the price which he does or should have obtained.

30. The primary sense in which "default" is used in the clause is therefore to denote non-delivery or non-acceptance. "Default" may also cover an earlier repudiatory breach which is accepted. However, it is not apt to describe an earlier repudiatory breach which is not accepted. The clause pre-supposes the innocent party being under a duty to mitigate by going out into the market. It is this which enables a default price to be fixed by reference to what he did or should have done. In relation to an earlier repudiatory breach this duty to mitigate can only arise if the contract is at an end, and it will only be at an end if the earlier repudiatory breach has been accepted.

31. The Board in this case have construed "default" as covering any repudiatory breach of contract, whether accepted or not, or whether there is a duty to mitigate or not. It is submitted that this is incorrect.

32. The Board's conclusion effectively means treating a buyer as being obliged to accept a repudiatory breach as and when it occurs. Whatever happens thereafter his damages will be assessed by reference to the date of that first breach and he will not be able to rely on any subsequent repudiatory breach which may occur.

33. Even if "default" is apt to encompass an unaccepted breach, there is nothing in the clause which requires damages to be the difference between the contract price and the market price on the date of the first breach, even when the contract is not terminated at that time. In the event of a breach, the clause provides for the assessment of damages for that breach. It says nothing about any claim for a subsequent breach. In assessing the damages payable for the second breach, it is the date of the second default which is relevant. Just as there may be more than one repudiatory breach at common law, there may be more than one default under the default clause.

34. If the Buyers had not declared the Sellers in default, but had instead waited for 12 days (see clauses 25 and 28(f)) after the end of the despatch period, the thirteenth day would have been deemed by clause 28(f) to have been the default date. It would not have been open to the Buyers to argue that the default date was the date of the earlier breach. It cannot be right that Buyers should be better off under the clause if they do not give notice of default, than if they do.

35. The default clause should be construed consistently with common law principles. That means that the innocent buyer is entitled to have damages assessed by reference to the date of delivery if, as is his entitlement, he chooses not to accept any earlier repudiatory breach. Much clearer language would be required for the radical departure from common law principles espoused by the Board to be effected.

36. The Board adopted certain obiter comments of Robert Goff J in ***Toprak***. Those comments are not binding on this Court, and in any event concerned an earlier and differently worded version of the default clause. But in any event there are a number of different reasons why ***Toprak*** should not be followed in the present context:

(a) An unaccepted repudiatory breach which does not give rise to an obligation to mitigate by making a substitute contract is not a "default" within the meaning of the clause;

(b) If it is, there is no reason why damages cannot be claimed by reference to any later repudiatory breach which occurs, which must equally be a "default".

(c) If, as Robert Goff J accepted, the "day of default" means the "day on which they failed to perform the obligation which entitled the [buyers] to determine the contract", that embraces the failure to deliver by the end of the delivery period.

(d) No authority or principle is cited by Robert Goff J. in support of his view that an innocent party cannot "obtain the benefit of a later date by pointing to a later default which has occurred before the acceptance of the repudiation". This is precisely what he is entitled to do at common law and with good reason – that is his choice (and risk).

(e) In so far as it is suggested that such an approach is justified where "one default is followed inevitably by a number of others" that is to introduce unnecessary and undesirable factual uncertainties.

(f) In so far as it is suggested that such an approach is justified if the first default is the "main obligation under the contract" (see Staughton J.'s attempted explanation of ***Toprak*** *in* ***Lusograin v Bunge*** [1986] 2 Lloyds Rep 654) that too is to introduce uncertainty. In any event the seller's main obligation under a sale of goods contract is delivery.

(g) There are clear arguments of commercial certainty in favour of the Buyers' submissions. Buyers are entitled "to opt for clarity and certainty if they choose, by waiting until the end of the shipment period", when it is absolutely plain that the sellers are in default, rather than being put in the position of having to declare default following an earlier and possibly curable breach (see Kerr J in ***Phoebus D Kyprianou Coy v Wm H Pim Jnr & Co*** Ltd [1977] 2 Lloyds Rep 570 (approved by the Court of Appeal and followed in Lusograin)). The Board's answer that the parties knew by 14 February that 14 February was the final date for declaration of loading places (Award para 7:62), misses the point. The construction of the default clause cannot depend upon whether in any particular case the earlier breach is obvious to the parties. In fact, at the time neither party treated the date as at all significant. Earlier shipments had involved late declarations, and it was the Sellers' case that there was in fact no contract at all at that stage.

The Sellers' Submissions

37. Mr Timothy Young QC for the Sellers submitted as follows.

38. For over 20 years, the GAFTA Default Clause has been construed in the light of Toprak and, more importantly perhaps, it has been amended since Toprak. If those amending the clause thought that Toprak was wrong or did not represent their intention as parties or draftsmen, the simple and obvious solution would have been to use another term or to provide a definition making it plain that the Toprak view was being departed from. In that event, the question for the court is whether this established meaning, stated by one of the most eminent commercial judges of the last 50 years, and as apparently accepted by the grain trade and contemplated when the GAFTA Default Clause is used, was nonetheless wrong and should be overturned. It was not wrong and, in any event, should not be overturned now even if it were questionable. If grain traders want a different clause they can agree one, but commercial certainty as to the meaning of a well-known standard form is paramount.

39. The Board of Appeal were correct to apply the Toprak construction to the words "date of default" in the Default Clause. To do otherwise would have been itself an error of law on their part. The case is not about whether the Board of Appeal made an error of law, for they clearly did not, but whether the court in ***Toprak*** had made one 23 years earlier. Given the form of Robert Goff J's judgment, on one view of the determination of a ratio decidendi, the meaning of the Default Clause was part of the ratio of his decision since he would not otherwise have had to investigate the question of agreement or waiver, as he did; it was an intentional and considered part of his reasoning process in arriving at the conclusion he did. Even if it was in truth only obiter, the Court of Appeal in **Toprak** clearly did not think Robert Goff J had made an error, since they accepted his approach and reasoning, although they proceeded straight to the second question; if they had thought that "*date of default*" meant other than as stated by Robert Goff J, they would have said so and eschewed any analysis of agreement or waiver, but they did not. There is not a hint of criticism or even reservation in any of the judgments and indeed the terms of the Court of Appeal's agreement with Robert Goff J were fulsome: see e.g. pp.116 and 117. That appellate acceptance should carry considerable weight. These were no doubt among the reasons why the Buyers did not submit to the Board of Appeal that what Robert Goff J said in ***Toprak*** was wrong, only that this case was distinguishable on its facts, like the ***Lusograin*** case.

40. The judgment of Staughton J in ***Lusograin v Bunge*** [1986] 2 Lloyd's Rep. 654 at pp.661-662 does not cast doubt upon the construction of the Default Clause as embraced by the court in ***Toprak;*** he distinguished the case on its facts. If he had thought that Robert Goff J had been wrong, he would have said he was wrong and he would not have engaged in an exercise of distinction. ***Lusograin*** casts no doubt on the correctness of Toprak and indeed reinforces it at p.661. Staughton J distinguished principal obligations and antecedent obligations (breach of which does not necessarily lead to a breach of a principal obligation), but the Board of Appeal concluded that in the present case the nomination provision was a principal obligation under the contract, and not a mere antecedent obligation, a conclusion which is not challenged on this appeal.

41. The Buyers' reliance on ***The Selda*** [1999] 1 Lloyd's Rep. 729 for the proposition that the Default Clause reflects the common law and in effect that Toprak is wrong is misplaced for at least three reasons. (1) ***Toprak*** was not

cited in or by the Court of Appeal in that case; (2) that case was concerned solely with the very different question of whether the Default Clause excluded certain heads of recoverable loss under the common law, not here in issue, and (3) the common law is s.51 of the Sale of Goods Act and it is only the prima facie position, capable of being departed from if the facts or the contract so direct. ***The Selda*** is not a good foundation for saying that a well-established and understood effect of a well-known clause should be overturned.

42. The Board of Appeal were therefore right to apply **Toprak** and not to distinguish it, as Staughton J had in ***Lusograin.*** At p.658, Staughton J referred to the possible argument that the innocent party had a duty in certain cases to determine the contract, but did not take it further since he was precluded by the order giving leave to appeal. The Board of Appeal have here found that the Buyers were well aware that there was no possibility of performance by the Sellers since they had no goods or possibility of obtaining goods. The only effect, therefore, of the Buyers not determining the contract was to seek to extend the date of default and thus manipulate recoverable damages. There was no other, legitimate, reason for keeping the contract alive and thus every reason for construing the Default Clause as dictated by ***Toprak.***

43. The particular combination of circumstances that led to an award of nominal damages in this case was that the relevant default occurred at the time when price-fixing ought to have been taking place and price-fixing was to be at market rates at the time of price-fixing. In any event, paragraphs (a) and (b) of the Default Clause permit buying/selling against the defaulter as a means of fixing the default price and it is only if there is no such buying/selling that the mechanism of default-price fixing in the Default Clause comes into play. The Buyers' problem in the present case was therefore of their own making in that they did not buy against the Sellers and put in evidence such a purchase. It was the Buyers' own decision which led to the Board of Appeal applying the "date of default" as established by the courts.

44. Mr Young referred to a note (prepared by Mr Baker) on 'Evolution of GAFTA Default Clauses'.

Analysis and Conclusions

45. The remedies of the buyer by way of damages for non-delivery are considered in Benjamin's Sale of Goods, 6th edition, at paragraph 17-001 and following. As to the time for taking the market price, paragraph 17-007 (relevant time for the market price) refers to section 51(3) of the Sale of Goods Act 1979. Section 51(3) specifies the time at which the market price is to be taken in assessing damages as "the time or times when [the goods] ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver." The seller's anticipatory repudiation is considered at paragraph 17-012 and following. Paragraph 17-015 states:-

"Seller's anticipatory repudiation not accepted. If the buyer...does not accept the seller's anticipatory repudiation, it is treated as a "nullity" and the contract continues to bind both parties: the buyer will then await the date fixed for delivery, and the seller will commit a breach of contract only if he then fails to deliver. ...The "duty" on the buyer to mitigate his loss by taking reasonable steps arises only upon the seller's breach: thus, in the case of an unaccepted anticipatory repudiation by the seller, the buyer is bound to seek substitute goods in an available market immediately when the breach actually occurs, but not earlier, and his damages are assessed with reference to the market price at the date of the breach."

46. In ***The Selda*** [1998] 1 Lloyd's Rep. 416 Clarke J said (at page 420) in relation to clause 28(c) of GAFTA form 100 (in identical terms to clause 28(c) in GAFTA No. 78 (effective 1.1.95)):- *"It lays down a scheme, which is in some respects different from the position at common law, but which is primarily concerned with the case in which the claim is put as the difference between the contract price and the default price or market price..."*.

47. It is of course open to the parties to a contract to make express provision as to what is to happen in the event of a default in terms other than those which would apply (in the absence of express agreement) under ordinary common law principles.

48. I turn to consider some relevant authorities.

49. In ***Phoebus D. Kyprianou Coy v Wm. H. Pim Jnr. & Co Ltd*** [1977] 2 Lloyd's Rep. 570 (judgment delivered on 30.6.77) Kerr J considered GAFTA 79A clause 17 (as set out in part at page 572 of the judgment). He held that the sellers were entitled to damages in the ordinary way i.e. based on the difference between the contract prices and the appropriate market price because clause 17(a) contained no option in the sense of an irrevocable election but merely a choice of remedies. While the buyers were in breach before the end of each shipment period they were not entitled to have damages assessed by reference to such earlier dates because (i) the breaches were not breaches of condition and even if they were the sellers were entitled to treat the contract as subsisting; and (ii) the sellers were entitled to wait until the end of each shipment period when the buyers were certainly and irretrievably in default and have damages assessed by reference to that date.

50. At page 579 Kerr J said:-

"This brings me to the next issue: what are the appropriate dates for ascertaining the market prices? The Board of Appeal has in each case taken the last day of the respective shipment periods, Mar. 15, Mar. 31 and Apr. 15. I have already mentioned the market prices which they found for those dates, on which they based their awards of damages. They ask that the case be remitted to them in the event of the Court being of the opinion that these are not the right dates.

The buyers challenge these dates on two grounds. First, they say that they were under an obligation to spread the shipments evenly over the shipment periods. They contend that this became a requirement of all the contracts by

reason of the sellers' telex of Mar. 12, which I have quoted. But this is clearly untenable, since this telex could not vary the contracts unilaterally. They then point out, correctly, that this was an express term of the third and largest contract, and that this also provided that there was to be a minimum of five days' spread between each shipment. They also rely on a finding that at Lowestoft no ships larger than 1900 tons could load, that it would take three days to load each of them, and that only one ship could be loaded at any time. The buyers accordingly contend that, at any rate in relation to the third contract, they were already in default on dates earlier than the final shipment date, and that the damages should be assessed on the basis of such earlier defaults by deciding by what dates the buyers should reasonably have lifted what quantities.

In my judgment this argument is wholly fallacious, quite apart from the fact that it comes ill from the party in default. Under the third contract the buyers were no doubt already in breach substantially before the end of the shipment period by having failed to lift parts of the contract quantity as required. But it by no means follows that the buyers are entitled to have the damages assessed by reference to such earlier dates, whatever these might be and whatever might be considered reasonable part shipments for each of them. There are at least two reasons, apart from the difficulty of computing the damages with any precision on this basis. First, I do not think that these breaches were breaches of condition. Even if they were, it was open to the sellers to keep the contract alive, as they did. Secondly, the argument fails to take account of the reasoning, which underlies the conventional measure of damages for non-acceptance or non-delivery, i.e. the difference between the contract and market prices. This reasoning is that on a certain date there is a clear default, with the result that the innocent party can resort to the market to sell the unaccepted goods or to buy the undelivered goods. It is on this date that the market price becomes the appropriate basis for the damages to be awarded. But the date of default must be certain. In the present case, however, the sellers could never safely resort to the market until the end of the respective shipment periods. They could not safely treat the buyers as having repudiated their obligations before these dates. There were no fixed quantities to be lifted on or before fixed dates. It would have been tantamount to buying litigation if the sellers had taken it upon themselves, in effect, to seek to prescribe to the buyers the quantities, which they should have lifted by certain dates. The sellers were certainly under no obligation to take this risk. They were entitled to wait until the end of the shipment period, when the buyers were certainly and irretrievably in default, and to have the damages assessed on that date. I do not accept the buyers' submission that this approach conflicts with ss. 50(3) and 51(3) of the Sale of Goods Act, 1893. These provide that in the case of an available market the measure of damages is prima facie to be ascertained by the difference between the contract price and the market price "at the time or times when the goods ought to have been accepted" or "ought to have been delivered". If the contract is properly kept alive by the innocent party until the end of the period allowed for delivery or acceptance, as in the present case, then it does no violence to these words to apply them at the end of the period."

51. The buyers appealed to the Court of Appeal, but their appeal was summarily dismissed (see ***Lusograin v Bunge*** [1986] 2 Lloyd's Rep. 654 at 660).

52. The decision of Mr Justice Kerr at first instance in ***Kyprianou v Pim*** was drawn to the attention of the Court of Appeal in ***Toprak v Finagrain***.

53. In ***Toprak v Finagrain*** supra the sellers sold to the buyers a quantity of wheat C & F named Turkish ports. Shipment was to start on 10.5.75 and to be continued through June and July in various shipments. The contract incorporated the provisions of GAFTA 27 and 30 and provided that the letter of credit should be opened by 31.3.75 at latest. The import licence was to be guaranteed by the buyer. Clause 28 of GAFTA 27 is set out below. There was no evidence that the buyers had taken any steps to obtain any foreign currency until 12.3.75, when the buyers applied for such allocation to the Ministry of Finance. On 26.3.75 the buyers wrote to the Ministry of Finance explaining the need to import the quantities contracted for. In early April 1975 inquiries about the absence of the letter of credit were made of the buyers, and the sellers were assured that the letter of credit would be opened shortly. On 11.4.75 the Ministry of Finance instructed the buyers to arrange for the importation of a smaller quantity at the current price on FOB terms as the price of wheat had fallen heavily since the contract date of 1.11.74. The sellers rejected the buyers' request and on 23.4.75 sent a telex to the buyers stating "...the letter of credit must be opened immediately. We are unable to consider the transformation from C & F to FOB..." No letter of credit was opened and on 30.4.75 the sellers sent the buyers a telex message "As... no letter of credit has been opened...we hereby treat you in default under the contract...".

54. The dispute was referred to arbitration. The buyers argued that they had a defence to the claim since at all times in 1974 and 1975 it would have been illegal for the buyers to have procured the opening of a letter of credit to pay a foreign seller of wheat in foreign currency without first obtaining exchange control permission from the Ministry of Finance. The arbitrators found in favour of the sellers. The buyers appealed to the Board of Appeal. The Board found in favour of the sellers but stated their award in the form of a special case.

55. Robert Goff J delivered judgment on 4.11.77. At page 108 he set out clause 28 (the default clause) in GAFTA form 27 which was as follows:- *"In Default of fulfilment of contract by either party, the other, at his discretion, shall, after giving notice in writing, have the right to sell or purchase, as the case may be, against the defaulter, who shall 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 the above right is not exercised, the damages, if any, payable by the party in default shall be settled by arbitration and such damages in the absence of special circumstances shall not exceed the difference between the contract price and the market price (or its equivalent as found by the Arbitrators or the Court of Appeal) on the day of default, and nothing contained in or implied under this contract shall entitle the Buyer to any damages in respect of any loss of profit suffered or liability incurred by him upon any subcontract. Where, however, any*

special circumstances, in the opinion of the Arbitrators or Court of Appeal, exist, the latter may, in their or its sole and absolute discretion, award to the Buyer such sum in respect of loss of profit so suffered or liability so incurred as they or it shall think fit. In the event of default in shipment or delivery, any damages shall be computed upon the mean contract quantity."

56. Robert Goff J continued at page 108:-

"The clause provides, therefore, that (in the absence of special circumstances) the damages shall not exceed the difference between the contract price and the market price "on the day of default". The buyers' submission was that these words meant, quite simply, the day on which they failed to perform the obligation which entitled the sellers to determine the contract, and that was, of course, Mar. 31. In answer to this simple submission, the sellers advanced a number of arguments. They submitted first that, having regard to the opening words of the clause, "In Default of fulfilment" here must mean a default in fulfilment of the contract; and that there is no default in fulfilment of the contract until there is an acceptance of the repudiation, because until that point of time the contract is still open. I cannot accept that argument; the words "in default of fulfilment of contract" mean precisely what they say - a failure to carry out the contract on the due date. The sellers then submitted that there were two breaches by the buyers in this case - first, on Mar. 31, a failure to open the letter of credit, and second, on Apr. 30, an anticipatory (and possibly an actual) breach of the buyers' obligation to secure an import licence; and that they could treat the buyers as in default on the second ground, in which event the date of default was Apr. 30. I do not however think that it is open to the sellers to pick and choose in this way for present purposes. In many cases, one default by a contracting party is followed inevitably by a number of others; and the innocent party cannot, I think, simply obtain the benefit of a later date by pointing to a later default which has occurred before the acceptance of the repudiation.

In truth, the clause is in this respect perfectly clear, and means just what the buyers submit it does mean. Of course, the subsequent actions of the parties may have some effect upon their respective rights. If, for example, there is an agreed postponement of the contractual date for performance, then there may be a variation of the contract resulting in a new date for performance, in which event there can be no default until that date has passed; a similar result may be achieved if, though there is no variation to the contract, there has been a representation by the innocent party that he will not exercise his strict legal right to performance on the contractual date, and the circumstances are such that it would be inequitable for him thereafter to treat that date as the date of default for the purposes of assessing damages under the clause. But here one has to be careful. If the contractual date for performance comes and goes, the innocent party may not immediately treat the other party as in default. He has an election whether to do so or not; he may, for a variety of reasons, decide to wait for a time, and while he waits the contract remains open to performance. But the mere fact that he waits, and does not treat the other party as in default until a later date, does not mean that, for the purposes of the clause, the "date of default" is changed; that date remains the day when the time for performance came and went without due performance.

There is however another possibility which I must refer to. After the date of default has occurred, the party in default may request the innocent party to stay his hand, and in response to that request the innocent party, possibly convinced by some assurance from the party in default that performance may yet take place, may wait for a time; then he may, losing patience, subsequently treat the contract as at an end. Between the two dates - the date of default and the date of termination of the contract - the market may have moved, and may have moved adversely to the innocent party. In such circumstances, where the contract contains a clause such as the present, is the innocent party only entitled to damages on the adverse basis of the market price of the date of default? The answer, I think, is no. In Benjamin on Sale of Goods, 13th ed., par. 640 at p. 450 the law is stated as follows:

Where the time fixed for acceptance has been postponed at the buyer's request and he ultimately fails to accept in the extended period, the point in time at which breach takes place is deferred and the damages will be calculated at the market price of the last day to which the contract was extended and the date was fixed, or the date when the plaintiff refused to grant further indulgence, or at a reasonable period after his last grant of indulgence.

See also par. 561 at p. 406 of the same edition, and the authorities there cited.

In such circumstances, there is no variation of the terms of the contract, nor is there any waiver or estoppel; but the innocent party has forborne to act at the request of the party in default, and it is a general principle of English law that, where one party acts at the request of another party, then, in the absence of circumstances indicating a contrary intention, the party who so acted is entitled to be indemnified by the party who requested him so to act against the consequences of so doing. It is for this reason that the innocent party, in the example posed by Benjamin, is entitled to recover any further damages flowing from delay in treating the party in default. (I add in parenthesis that I doubt whether Benjamin is right in saying that the delay in treating a party as in default, as a result of his request, has the effect of postponing the date of the breach; but that is immaterial for the purposes of the present case.)

The sellers sought to invoke this principle in the present case. It was submitted that they had indeed postponed at the request of the buyers the date when they had treated the buyers as in default and accordingly, the market having weakened in the meanwhile, they were entitled to have the damages assessed on the basis of the market on Apr. 30. Now before they can invoke this principle, the sellers have to show that they acted at the request of the buyers. In the present case, the relevant facts as found by the Board of Appeal are to be found in pars. 30-35 (inclusive), and in par. 51, of the special case. I read the finding of fact in par. 51 as meaning that the sellers treated the contract as remaining open for performance because of the assurances given by the buyers that the letter of credit would shortly be opened. The sellers submitted that, in the circumstances of the present case, such assurances involved a request by the buyers to the sellers to stay their hand and not treat them as in default; this submission I accept, because that was clearly the purpose of the assurances. True, the sellers may have thought it to be in their interest to stay their hand,

but the fact remains that, on the finding in par. 51 of the special case, they did in fact respond to the buyers' implied request to do so. It follows, in my judgment, that, having regard to the findings of fact, the sellers are entitled to have the damages fixed by reference to the market price on the date until which, in the words of Benjamin, they granted indulgence to the buyers, viz. Apr. 30, 1975.

57. The buyers appealed to the Court of Appeal (the hearing took place in January 1979). The appeal was dismissed. At page 115 Lord Denning MR said:-

"The first point is this. What is the day of default? The letter of credit had to be issued by Mar. 31, 1975. The Board of Appeal seem to me to have taken that date as being the day of default on which the damages were to be assessed. But in truth the parties, by their conduct, led each other to believe that the time would be extended during which the buyers could provide the letters of credit: and the sellers would supply the goods accordingly. There are two or three sentences in the award which are important in this regard. Paragraph 31 says:

> *In early April 1975 enquiries about the absence of the letter of credit were made of the Buyers by and through the Sellers' representatives in Turkey, and assurances were given that the letter of credit would shortly be opened.*

In other words, the state enterprise wanted the letter of credit to go forward. The buyers also sent a telex to the sellers on Apr. 18, 1975, in which they said:

> *. . . We await the decision of the concerned authorities for opening a letter of credit as per our agreement dated November 1st 1974. We are closely following this matter and will later advise you of the result.*
>
> *In view of that the sellers were holding their hand. They asked for the letter of credit to be opened immediately: but, as it did not come, they sent a telex on Apr. 30 in which they said:*
>
> *. . . no letter of credit has been opened kindly note that we hereby treat you as in default under the contract between us dated 1 Nov. 74 stop we hold you responsible.*

Then, in par. 51, the Board of Appeal said:

> *Between the 31st March 1975 and the 30th April 1975, because of the communications transmitted from the Buyers as aforesaid the sellers treated the contract as remaining open for performance. In particular, they took no steps to cancel the charterparty before they declared the Buyers in default on the 30th April 1975.*

As I have said, the Board of Appeal took the date as Mar. 31: but it seems to me - and here I would agree with the Judge - that it was extended by the conduct of the parties. On the one hand the buyers led the sellers to believe the matter was being kept open and they were hoping to provide the letter of credit if only they could get permission. Equally the sellers were hoping to fulfil the contract. They held their hands, and did not close the contract or terminate it at that time. The Judge found that there was an implied request by the buyers to the sellers to keep the matter open. I would be quite prepared to put it that way if need be. But it seems to me that it is not necessary to go into it or into the technicalities about an implied request. There is no doubt that the conduct of the buyers led the sellers to believe that the contract was still open for performance and that they were hoping all the time to get the letter of credit issued. On that conduct on their part, it seems to me there is ample ground to infer that there was an extension of time until such time as the sellers - as they did - determined the contract."

58. In ***Lusograin v Bunge*** [1986] 2 Lloyd's Rep. 654, the buyers agreed to buy from the sellers a quantity of Argentine bread wheat FOB, delivery to take place as to 25,000 tonnes in March 1983. The March instalment was extended so as to allow shipment up to May 30. The contract incorporated the provisions of the Centro Exportadores contract, GAFTA 64 and GAFTA 125. The carrying charges clause in the Centro form and the GAFTA 64 default clause 23 are set out at pages 656 and 657 of the judgment. On 11.5.83 the buyers gave a fourth nomination. As they were only entitled to declare up to three vessels the fourth nomination was cancelled and the buyers on 13.5.83 declared themselves in default for the balance of the contractual quantity. The first tier arbitrators and on appeal the Board of Appeal of GAFTA held that in accordance with the Centro terms the date of default was May 31 1983. Staughton J held that the buyers were in breach of their antecedent obligation to give at least 15 days notice of readiness of the ship or ships to load after May 13, but not necessarily of their main obligations to provide a ship or up to three ships at the ports nominated by the sellers, arrange for the goods to be received on board and to pay for them. The carrying charges clause of the Centro terms was applicable and the date of default was the day after the last day for performance of the buyers' main obligations, taking into account the 60 day extension. At page 661 Staughton J referred to the decisions of Robert Goff J and the Court of Appeal in ***Toprak v Finagrain*** and said:-

"There can be no doubt that the Court of Appeal endorsed the conclusion of Mr Justice Robert Goff that April 30 was the correct date and his reasons for reaching that conclusion. They did not expressly approve the passage in his judgment (which may be said to be obiter) in which he held that March 31 would have been the correct date but for the request by Toprak for forbearance. But I think that that passage must have had their implicit approval, albeit again perhaps obiter."

59. At page 662 Staughton J continued:-

"The Kyprianou case was cited to the Court of Appeal, but, to judge from what Lord Denning M.R. said at p. 115, only in connection with another point. It does not appear to have been relied on in relation to the date for assessment of damages, although Mr. Justice Kerr had there held that damages should be measured at the end of the shipment period and the Court of Appeal had said that this judgment was wholly unassailable. But nobody was contending for the end of the shipment period in the Toprak case; the argument was as to whether the default clause in a GAFTA

contract pointed to the last day for opening a letter of credit or whether the measurement of damages was postponed until Finagrain sent their telex treating the contract as at an end.

Clearly it would be right for me to look for guidance first in the Toprak case, since that was concerned with an express provision of the contract as to default, as this case is. But in my judgment the facts there were significantly different. Toprak were c. & f. buyers who had contracted to provide a letter of credit by a given date: that obligation was their main duty under the contract. Once they had performed it, Finagrain could ship the goods and obtain payment by tendering documents to the bank, without any assistance from the buyers. There was nothing left for Toprak to do except obtain an import licence, and it is not clear to me how an import licence would be any concern of the c. & f. sellers. So Toprak had by Mar. 31 failed to perform their main if not their only obligation under the contract. It followed that default occurred on that date.

By contrast in the present case the buyers were in breach of an antecedent obligation after May 13, but not necessarily of their main obligation. Consequently I consider myself entitled to hold that the carrying charges clause of the Centro terms provides, as to my mind it plainly does provide, that the date of default is the day after the last day for performance of the buyers' main obligations, taking into account the 60 day extension."

60. It is important to note in considering this decision that the carrying charge clause provided that the sellers might wait, if they chose, until the end of the extended period at May 31.

61. In ***Concordia Trading B.V. v Richco International Ltd*** [1991] 1 Lloyd's Rep. 475, under a FOB contract the sellers sold to the buyers a quantity of Argentine soya beans. The contract incorporated the provisions of GAFTA 64 (General Contract FOB Terms for Grain in Bulk) which included clause 24 default (set out in part at page 480 of the judgment). The contract was part of a string. The sellers failed to present documents. In the event the documents were tendered to the end buyer and receiver of the cargo and were accepted and paid for on 28.9.87. On 29.9.87 the vessel had carried the goods to Odessa and discharge began. The buyers claimed damages in respect of the sellers' default in not tendering documents, contending that the date of default was 29.9.87. The sellers argued (i) that the date of their (undisputed) default in failing to tender the documents to the buyers took place on or shortly after 5 August when the documents would normally have become available to the buyers and (ii) that on 5 August the market price of the goods (or the documents representing the goods) was substantially lower than the contract price and the buyers were only entitled to nominal damages. The dispute was referred to arbitration. The Board of Appeal accepted the buyers' contention that the sellers' default took place on 29 September. In their award they stated that the sellers were not in default until the day it was no longer possible for them to purchase the documents for the goods in order to fulfil the contract, which was 28 September. The basis for the award was that as the contract was silent as to the time for performance of the sellers' obligation to tender the documents to the buyers, this was by legal implication a reasonable time, and such time continued until it became impossible for the sellers to obtain the documents. The sellers appealed, the question of law for decision being whether the Board were wrong in law in holding that the date of default was 29 September, and if so by reference to what criteria should the date of default be established? Evans J held that there was on the FOB seller who was obliged by his contract to obtain and tender the shipping documents, a duty to perform that obligation forthwith i.e. with all reasonable despatch, subject to there being no express provision or time limit to the contrary in the contract. The sellers' duty to send forward the documents forthwith remained the same as in the general case even though a string, circle or insolvency was involved. Since the sellers' obligation was to tender the shipping documents forthwith and they were in breach of contract if they failed to do so, it seemed likely that that duty should have been performed on or shortly after 5 August, but that was for the Board of Appeal to decide. At page 481 Evans J said:-

*"...the question raised is the "date of default" for the purposes of the present contract. In **Toprak Mansulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière S.A.**, [1979] 2 Lloyd's Rep. 98 Mr Justice Robert Goff (as he then was) held at p. 109 that the same words "in default of fulfilment of contract" in cl. 28 of GAFTA 27 –*

...meant, quite simply, the day on which [the buyers] failed to perform the obligation which entitled the sellers to determine the contract...

and his decision was upheld by the Court of Appeal. In Toepfer v Lenersan Poortman N.V. [1980] 1 Lloyd's Rep. 143 the Court of Appeal held that the seller's obligation under a c.i.f. contract to tender the documents in time for the buyers to pay for them by the due date, which was expressly stated in the contract, was a condition, and that the buyer was entitled to reject the documents when they were presented late. Lord Justice Brandon, (at p. 147) expressly reserved the question whether "in default of fulfilment of this contract" was equivalent to "in event of a breach of this contract going to the root of it", a point which had not been raised in the Court below."

62. I analyse the position in the present case as follows.

(1) The Buyers contend for 1 April 1998 as the date of default. The Sellers seek to support the finding in the Award that the date of default was 1 March 1998. The chronology was as follows:-

14/2/98	Date by which, under primary contract terms, Sellers were obliged to nominate loading places and silos for (March delivery) balance of contract (15 days before start of delivery period). Date of default found in Original Award
1/3/98	Date up to which, in light of parties' conduct, Buyers bound to treat Sellers as entitled to nominate loading places and silos. Date of default found in (second Appeal) Award

26/3/98	Buyers ask Sellers to make a price proposal for the unfixed balance, amounting to 12,250-22,250 mt. There was no reply
27/3/98	Deadline imposed by Buyers on 26/3 for declaration of loading places. Date by reference to which in (second Appeal) Award Board said contract price should be assessed if date of default was 1/4/98
31/3/98	Last date for any delivery under the contract
1/4/98	Date of default contended for by Buyers
6/4/98	Buyers telex through brokers, holding Sellers in default and stating that they will buy in against them
7/4/98	Buyers purchase substitute goods – 2,026 mt shipment 7/30 April at $320/mt FCA any Russian railway station.

(2) This case is concerned with the terms of the contract of 15.10.97 and in particular with the true construction of the special provisions contained in clause 28 default GAFTA No. 78 (effective 1.1.95) in so far as they apply to the contract.

(3) Clause 28 is a standard form clause which has been changed in certain respects over the years no doubt to reflect the commercial concerns, problems, needs and experience of the Grain and Feed Trade.

(4) The material terms of clause 28 are similar to the terms of the clause considered by Robert Goff J and the Court of Appeal in Toprak v Finagrain. The material terms of clause 28 are identical to the terms of the clause considered by Evans J in Concordia v Richco. Clause 28(c) provided that the damages should be based on the difference between the contract price and the actual or estimated value of the goods (i.e. the market price) "on the date of default". These words meant the day on which the Sellers failed to perform the obligation, which entitled the Buyers to determine the contract (in the present case the obligation to declare loading places and silos, a main obligation fundamental to performance of the contract). "In default of fulfilment of contract" meant a failure to carry out the contract on the due date. The commercial purpose of clause 28(c) was to provide certainty as to the relevant date (not to allow picking and choosing of dates). In the present case, as the Board pointed out at paragraph 7:54 of the Award, the contract was fluid as to the actual quantities that would be delivered, the origin of the goods, the price of the goods and the point or points of delivery. The trigger that would crystallise these matters was the declaration of loading places and silos by Sellers because such declaration would fix the loading places, fix the origin of the goods, provide the essential and indispensable ingredient for the fixing of the price and start the process whereby ultimately it would become apparent whether goods would be delivered to Buyers at all (depending on whether a price could be agreed or not).

(5) In the present case on 14 February the Sellers were certainly and irretrievably in default, with the result that the innocent party (the Buyers) could resort to the market to buy the undelivered goods.

(6) As to why the date of default became 1 March instead of 14 February, the Board in the Award held as follows. Throughout January and February, Mr Köhntopp on behalf of Buyers pressurised Mr Gammel to persuade Sellers to price more seeds. These requests carried with them an implied request for a declaration of loading places to be made. By making the requests, Buyers represented that they would not exercise their strict legal right to performance on the contractual date. It would be inequitable to allow Buyers to treat the contractual date for performance (14 February) as the date of default for the purposes of assessing damages under the default clause. According to Mr Gammel's statement, these requests were made in January and February. There was no mention of them continuing thereafter. Accordingly the date of default for the purpose of assessing damages was 1 March rather than 14 February (as found in the Original Award). This made no difference to the finding that no damages flowed from the Sellers' breach. If there was a postponement of the date for declaring loading places as a result of Buyers' requests, then it followed that there was a corresponding postponement of the date for fixing the price (which could not have taken place without a declaration being made). The date for fixing the contract price and the date of default continued to coincide, although both dates fell on 1 March rather than 14 February. It followed that no damages arose. In finding that the date of default for the purpose of assessing damages was 1 March rather than 14 February, the Board founded on the principles set out by Goff J in Toprak v Finagrain and in particular the statement "a similar result may be achieved if, though there is no variation to the contract, there has been a representation by the innocent party that he will not exercise his strict legal right to performance on the contractual date, and the circumstances are such that it would be inequitable for him thereafter to treat that date as the date of default for the purposes of assessing damages under the clause".

(7) Clause 28(f) has no application in the present case. This was not a case where the Sellers declared default "after expiry of the contract period".

(8) The Sellers' duty to declare loading places and silos was a main obligation under the contract. The contract in the present case was in most unusual terms and markedly different from the terms of contracts frequently

encountered in international trade (including for example the terms of the various contracts considered in the authorities referred to above). This was not a case where:-
i) a quantity was agreed;
ii) the origin of the goods was agreed;
iii) the price of the goods was agreed;
iv) the point of delivery was agreed.

As the Board explained the trigger that would crystallise these matters was the declaration of loading places and silos by Sellers because such declaration would fix the loading places, fix the origin of the goods, provide the essential and indispensable ingredient for the fixing of the price and start the process whereby ultimately it would become apparent whether goods would be delivered to Buyers at all (depending on whether a price could be agreed or not). On 14 February the Sellers were certainly and irretrievably in default. For the reasons set out in (6) above the date of default became 1 March.

(9) I would answer question (1) by saying that for the reasons set out above the Board were right to conclude that the date of default was 1 March 1998.

63. In the light of my conclusions as to the first question of law, the second question of law does not arise.

The section 67 application

64. The Buyers submitted that the purpose of the remission was to clarify whether the Board had intended to make or had made the findings, which the Sellers were contending that they had made, and which the Sellers recognised that the Board needed to make for their conclusion to be supportable in law. According to the Buyers the limited purpose of the remission was stressed in the consent order by the use of the word "only" in paragraph 2. The Buyers argued that by the terms of the consent order, the Board were not entitled to provide any additional justification for their original views, but were instead restricted to addressing in any supplemental reasons only the specific questions posed. The Buyers submitted that the Board exceeded its jurisdiction and contended that the appropriate way forward would be to address the first question of law solely by reference to the reasons given in the Original Award, together with the answers given to the only questions remitted to them.

65. Section 67(1) of the 1996 Act provides that a party to arbitral proceedings may apply to the court (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

66. I reject the Buyers' submissions under this head. In my view it is important to have regard to both paragraphs 1 and 2 of the consent order and not to confine attention to paragraph 2. On its true construction the consent order provided for remission in sufficiently wide terms to justify the (second Appeal) Award. I do not consider that the Award was in excess of jurisdiction.

Mr Nicholas Hamblen QC and Mr Lawrence Akka (instructed by Richards Butler) for the Applicants/Buyers.
Mr Timothy Young QC and Mr Andrew Baker (instructed by Middleton Potts) for the Respondents/Sellers.